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Taggart R. Mosholder

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# CAPTIVE CALLERS: HOW REGULATORS CAN ADDRESS PARADOXICAL PRICING IN THE ICS INDUSTRY AFTER *GLOBAL\*TEL LINK*

Taggart R. Mosholder\*

*“In my 16 years as a regulator, this is the clearest, most egregious case of market failure I have seen. Instead of getting better, rates and fees for consumers are more onerous. Thus, it is imperative for us to move quickly to adopt an Order for total reform.”*

— Former FCC Commissioner Mignon Clyburn<sup>1</sup>

## I. INTRODUCTION

Inmate Communication Services (ICS) are telephone services provided to correctional facilities in the United States for use by inmates.<sup>2</sup> In 2013, the Federal Communications Commission (FCC) set per-minute rate caps on interstate phone rates for ICS nationwide.<sup>3</sup> Whether the FCC had this authority was not seriously in dispute. But in 2015, the FCC issued another order (the “2015 Order”) that was a vast, if not unprecedented, expansion of its previously asserted authority.<sup>4</sup>

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\* Juris Doctor, 2018, University of Colorado Law School; Production Editor, *University of Colorado Law Review*, Volume 89. I thank Martha Wright-Reed, for her resilience; Former FCC Chairman Mignon Clyburn, for her courage; the formidable hearts in the *Colorado Law Review* for their patience; and most importantly, my family and friends, for always being just a phone call away.

1. *Rates for Interstate Inmate Calling Services*, WC Dkt. No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd. 13170, 13242 (2014) (Statement of Commissioner Mignon Clyburn).

2. *See, e.g., Inmate Telephone Service*, FED. COMM’N. COMM’N, <https://www.fcc.gov/consumers/guides/inmate-telephone-service> (last visited Aug. 1, 2018) [<https://perma.cc/Q7KK-SJSL>].

3. *See Rates for Interstate Inmate Calling Services*, WC Dkt. No. 12-375, Second Report and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd. 12763 (2015) [hereinafter *2015 Order*].

4. *See id.*

Among other directives, the FCC extended its rate-cap regulation to include intrastate and local prison-phone rates. The 2015 Order addressed the pervasive issue of overcharging inmates and their loved ones for prison-phone calls,<sup>5</sup> a practice designed to help ICS providers pay site commissions to prison facilities.<sup>6</sup> Site commissions are profit-sharing provisions in which ICS providers agree to share a portion of their revenue with prisons in exchange for exclusive long-term contracts over ICS phone service.<sup>7</sup>

Three major ICS providers, Global Tel\*Link, Securus Technologies, and Telmate LLC, who control nearly 85 percent of the ICS market, separately challenged the 2015 Order's constitutionality.<sup>8</sup> Based on those challenges, the D.C. Circuit issued a stay on the 2015 Order until it decided the case in June 2017. In agreeing with the ICS petitioners, the majority held the FCC indeed lacked authority over intrastate and local ICS rates based on the Communications Act of 1934 and the Telecommunications Act of 1996.<sup>9</sup>

This Comment proceeds in five parts: First, by describing the reality of the ICS market for prisoners and their loved ones, followed by an overview of current FCC regulation. Second, by examining the Telecommunications Act of 1996 and its grant of authority to the FCC over intrastate and local rates. Third, by chronicling the FCC's regulation of ICS rates up until the 2015 Order, and then under the 2015 Order itself. Fourth, this Comment evaluates both the majority and dissenting view of the FCC's intrastate and local authority in *Global Tel\*Link v. Federal Communications Commission*. And finally, this Comment concludes by explaining why it would likely take an act of Congress to address deficiencies in the ICS market.

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5. For the sake of space, the author will refer collectively to jails and prisons as "prisons."

6. *Rates for Interstate Inmate Calling Services*, WC Dkt. No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 14107 (2013) [hereinafter *2013 Order*].

7. See *infra* Section I.A.

8. *Glob. Tel\*Link v. Fed. Commc'ns Comm'n*, 859 F.3d 39, 44 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017).

9. *Id.* at 45.

A. *The Reality of the ICS Industry and the “Pricing Paradox”*

In 2015, Anthony Kofalt was arrested for stealing twenty-one boxes of Crest Whitestrips from a Wal-Mart in Franklin, Pennsylvania.<sup>10</sup> Anthony paid a price for his crime: a prison sentence he served in an institution a few hours away from his home. But his wife, as the couple soon discovered, would also pay a price. Heather Kofalt does not drive. And the cost of a fifteen-minute phone call to speak with her husband is \$12.95—nearly a dollar a minute.<sup>11</sup> The cost of a similar non-prison call in Pennsylvania is about sixty cents.<sup>12</sup> Additionally, because Heather must pay for these calls through an account she set up with the prison’s ICS provider, she is charged an extra \$6.95 for every \$25 she deposits.<sup>13</sup> “The people in jail did wrong,” Heather mused, “but the only people being punished are the families.”<sup>14</sup>

When it comes to expensive prison-phone calls, the Kofalts’ case is nothing new. In 2000, a group called the Wright Petitioners unsuccessfully filed a class-action suit in federal court to try and address the issue.<sup>15</sup> The group was led by Martha Wright-Reed, a blind, eighty-year-old grandmother who was paying almost “\$1,000 per year on phone calls that were fifteen minutes or less” to talk to her grandson incarcerated in another state.<sup>16</sup> Today, ICS per-minute rates and fees are extraordinarily high in many areas, with some rates “as high as \$56.00 for a four-minute call.”<sup>17</sup> In 2014, some

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10. Timothy Williams, *The High Cost of Calling the Imprisoned*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html> [<http://perma.cc/89W5-MRZV>].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. See *Glob. Tel\*Link*, 859 F.3d at 47 (In the *Global\*Tel Link* opinion, the court discussed the lawsuit from 2000, when the Wright Petitioners filed a putative class action against ICS providers. Their argument was simple: a change in regulation was needed to prohibit ICS providers from charging sky-high phone rates. *Id.*)

16. Brittnei Downs, Note, *A Decade-Long Cry for Help Answered: The FCC Lowers the Rates of Interstate Prison Phone Calls*, 22 COMM'LAW CONSP'CTUS 131, 135 (2014).

17. *Glob. Tel\*Link v. Fed. Comm'ns Comm'n*, 859 F.3d 39, 47 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017).

500-million calls were placed from prisons, adding up to more than six-billion minutes.<sup>18</sup> That volume makes the ICS industry worth \$1.2 billion annually.<sup>19</sup>

Despite those numbers, cost-prohibitive pricing prevents communication that would otherwise take place under a normal pricing regime. This results in real difficulties for prisoners. They cannot consult with their attorneys or contact their families, which ultimately can lead to increased recidivism—the exact consequence the justice system aims to prevent.<sup>20</sup> Moreover, the effect on children of incarcerated parents—nearly 2.7 million of them nationwide—includes higher rates of truancy, depression, and poor school performance.<sup>21</sup>

An ICS call made from a prison is undoubtedly different than a normal phone call. Costly infrastructure must be installed.<sup>22</sup> For instance, real-time monitoring is often used for security or prosecutorial reasons and ICS providers regularly respond to law enforcement requests for records and recordings.<sup>23</sup> But the primary reason for such high prices is a key profit-sharing tool called a “site commission.” Site commissions amount to monopoly rents charged as premiums by the owner of an exclusive location for exclusive access.<sup>24</sup> In context, an ICS provider agrees to share a percentage of its revenue with a prison in exchange for an exclusive long-term contract. Typically, the ICS provider that is willing to share the largest percentage of its revenue with the prison wins the contract.<sup>25</sup>

Because of this arrangement, the competitive bidding process in the ICS industry works paradoxically. Instead of facilitating cheaper calls and better technology for inmates through market pressures, the emergence of long-term

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18. Williams, *supra* note 10.

19. *Id.*

20. *See Glob. Tel\*Link*, 859 F.3d at 47.

21. *Id.*

22. DREW KUKOROWSKI ET AL., PLEASE DEPOSIT ALL OF YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY 9 (2013).

23. *See, e.g., Rates for Interstate Inmate Calling Services*, WC Dkt. No. 12-375, Order on Reconsideration, 31 FCC Red. 9300, 9304 (2016).

24. *See* Peter Forsyth, *Locational and Monopoly Rents at Airports: Creating Them and Shifting Them*, 10 J. AIR TRANSPORT MGMT. 10, 51–60 (2004).

25. *See Glob.Tel\*Link*, 859 F.3d at 47.

contracts on the backs of exorbitant site commissions has had the opposite effect.<sup>26</sup>

Paradoxical pricing also persists because of a key deficiency in ICS markets: prisons, not prisoners, are responsible for negotiating ICS contracts. That is, the two institutions that stand to profit from the rates—prisons and ICS providers—exercise sole discretion in setting the rates. Without any oversight of the transaction, the market behavior of each bargainer is predictable. ICS providers, on the one hand, are incentivized to pay a premium for exclusive access to a profitable market; prison facilities, on the other hand, are incentivized to lease that exclusive access for as much as possible. Neither party is under an obligation to consider the fairness to callers who will pay the rates.<sup>27</sup> Rate-payers are merely the inelastic demand for the service.<sup>28</sup>

## II. THE BABY BELLS & THE TELECOMMUNICATIONS ACT OF 1996

Without FCC authority over intrastate and local rates, ICS providers can evade regulation simply by shifting charges from interstate rates, which are under FCC rate-cap protection, to intrastate and local rates, which are not. Thus, such authority is imperative to holistic regulation. But finding a basis for the FCC's intrastate authority, if any is available, is more difficult. The explanation starts with a slew of local-phone monopolies that took root in the 1980s.

### A. *The Boom of the Payphone Industry and the Emergence of the Natural Monopoly*

In the time leading up to the 1970s, AT&T became entrenched in the telecommunications industry and owned much of the infrastructure interconnecting payphones.<sup>29</sup> AT&T

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26. Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUD. MEDIA COMM. 263, 269 (2005).

27. Downs, *supra* note 16, at 153.

28. *Id.*

29. ROBERT W. CRANDALL, COMPETITION AND CHAOS: U.S. TELECOMMUNICATIONS SINCE THE 1996 TELECOM ACT 7–8 (2005); Christian Berg, *Pay Phones Reached Their Peak in '95*, MORNING CALL (Mar. 18, 2001),

used this ownership to its advantage by limiting access to non-Bell payphones.<sup>30</sup> By the early 1980s, antitrust lawsuits against AT&T increased in frequency and became more successful.<sup>31</sup> When the federal government ultimately brought a Sherman Act antitrust claim against AT&T, it was clear the industry was headed for a change.<sup>32</sup>

In 1982, AT&T agreed to decentralize its local exchange carriers—forming a series of individual Bell Operating Companies (“Baby Bells”). Though the Baby Bells were technically decentralized from their parent corporation, the AT&T antitrust agreement did not contemplate the unbundling of Baby Bell services.<sup>33</sup> As a result, each Baby Bell maintained a local monopoly through its ownership of most or all of the local infrastructure, such as the transmission and distribution systems, in addition to providing payphone service.<sup>34</sup> As local monopolization of the payphone market persisted, so did the discrimination against non-Bell providers. Non-Bell providers were compensated unfairly—or not at all—for calls made on Baby Bell lines.<sup>35</sup> Local-payphone competition was ultimately eliminated, leaving each Baby Bell to reign as king over its respective dominion.<sup>36</sup>

The FCC was powerless to remedy the Baby Bell issue because of federalism concerns. The Communications Act of 1934 (“1934 Act”), which both established the FCC and served as the source of its authority, established clear jurisdictional boundaries for the agency in its ability to set rates. The FCC had the authority to ensure that *interstate* rates were “just and reasonable” but left *intrastate and local* rate regulation to the

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[http://articles.mcall.com/2001-03-18/news/3340885\\_1\\_telephone-company-office-pay-bell-telephone](http://articles.mcall.com/2001-03-18/news/3340885_1_telephone-company-office-pay-bell-telephone) [<https://perma.cc/8XWA-P8JJ>].

30. See CRANDALL, *supra* note 29, at 7–8.

31. *Id.* at 8.

32. Admittedly, for the purposes of clarity and efficiency, this is a somewhat simplified summary of this historical event.

33. *Id.*

34. *Id.* at 9–10.

35. *Id.*

36. *Id.* at 8 (“More importantly, the decree established a vertically fragmented and inefficient structure for the telecommunications sector, which is now disappearing. No other country has attempted to balkanize its telecommunications sector in the manner of the decree, separating ‘local’ markets from ‘long distance markets.’”).

states.<sup>37</sup>

Congress ultimately responded to the jurisdictional issue by amending the 1934 Act with the Telecommunications Act of 1996 (“1996 Act”).<sup>38</sup> Significantly, the 1996 Act expanded the FCC’s power to include authority over *intrastate* rates, but only in narrow circumstances. Section 276(b)(1) of the 1996 Act permitted the FCC to establish a per-call compensation plan to ensure only that “all payphone service providers [were] fairly compensated for . . . *intrastate and interstate* call[s] using their payphone.”<sup>39</sup> In the ensuing decades, courts confined the FCC’s regulation of section 276(b)(1) of the 1996 Act to a single purpose: ensuring non-Bell payphone providers were fairly reimbursed by Baby Bells.<sup>40</sup>

### *B. Increase Regulation, Increase Competition*

When combined with the word “regulation,” the phrase “pro-competitive” typically contemplates decreasing regulation to facilitate market competition.<sup>41</sup> But the 1996 Act aimed to do the opposite. While industries like airline, air cargo, trucking, and railroad became more competitive without increasing regulation during the same time period,<sup>42</sup> the government saw the telecommunications industry as a natural monopoly.<sup>43</sup> Natural monopolies transpire due to factors like barriers to entry and economies of scale.<sup>44</sup> Because there is typically no regulation to deregulate with a natural monopoly, competition is facilitated through affirmative regulation. Thus, in regulation of the payphone industry, “the 1996 Act instructed regulators to determine which incumbent-carrier facilities

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37. See *Glob. Tel\*Link v. Fed. Commc’ns Comm’n*, 859 F.3d 39, 43–44 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017); Telecommunications Act of 1996, 47 U.S.C. § 201(b) (2012).

38. 47 U.S.C. § 276 (1996).

39. *Id.* (emphasis added).

40. See discussion *infra* Part IV.

41. Olivier Blanchard & Fransesco Giavazzi, *Macroeconomic Effect of Regulation and Deregulation in Goods and Labor Markets*, 118 Q. J. ECON. 3, 879–07 (2003).

42. CRANDALL, *supra* note 29, at 2–3.

43. *Id.*

44. These artificial regulatory monopolies are often called *de facto* monopolies. See, e.g., WILLIAM J. BAUMOL & ALAN S. BINDER, *MICROECONOMICS: PRINCIPLES AND POLICY* 214–15 (13th ed. 2016).



should be made available to entrants and to establish the cost basis for wholesale rates for such facilities . . . .”<sup>45</sup> The FCC also required Baby Bells to connect to non-Bell payphones at “any feasible point,” lease their infrastructure to entrants at a price determined by regulators, and offer services for discounted rates.<sup>46</sup>

### III. ICS AND THE TELECOMMUNICATIONS ACT OF 1996

After the 1996 Act’s passage, the price of a payphone call dropped dramatically nationwide while the price of an ICS call experienced a precipitous climb.<sup>47</sup> This phenomenon is partly explained by the FCC’s general lack of oversight over ICS rates under the 1996 Act.<sup>48</sup> The FCC reasoned that compensation rates should be left to the discretion of corrections officials, governed by their contract terms with ICS providers.<sup>49</sup> Meanwhile, the ICS industry became a billion-dollar market by the late 1990s.<sup>50</sup> Site commission revenues funneled into prisons and in many places exceeded \$100 million annually.<sup>51</sup> By 1995, nearly 90 percent of correctional systems nationwide were receiving some percentage of ICS profits.<sup>52</sup> In a 1998 investigative report, the FCC concluded that the ICS market was

a rare example of competition leading to *higher* prices for consumers. When more . . . compete for the right to serve a particular location, they must pay higher commissions to the location’s owner . . . [and] recover those higher commissions from consumers in the form of higher calling

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45. CRANDALL, *supra* note 29, at 3.

46. *Id.* at 9–10.

47. *See* Jackson, *supra* note 26, at 264, 269–70.

48. *Id.* at 270.

49. *Id.*

50. Human Rights Defense Center, Comment in the Matter of Rates for Inmate Calling Services, WC Dkt. No. 12-375 (Second Further Notice of Proposed Rulemaking) (Jan. 12, 2015), <https://www.humanrightsdefensecenter.org/media/publications/HRDC%20Comment%20to%20FCC%20Second%20Further%20Notice%20of%20Proposed%20Rulemaking%20FINAL%2012-15.pdf> [https://perma.cc/4TWR-5NA7] [hereinafter HRDC 2015 Letter]; Jackson, *supra* note 26, at 267.

51. Jackson, *supra* note 26, at 269 (discussing the 1994 data).

52. *Id.*

charges.<sup>53</sup>

The FCC responded to the pricing issue noted in the report by requiring that ICS providers disclose prices to callers before they placed the call. It assumed, and wrongly so, that prices would be driven downward if ICS providers were required to disclose their rates to “informed consumers.”<sup>54</sup> But prices did not decrease as a result of the measures; the FCC’s “buyer beware” scheme was impractical in captive settings like prisons and ignored the core issue of pricing.<sup>55</sup> The problem persisted, albeit out in the open.

*A. The 2013 Order Was Under-Inclusive and the Regulation Ineffective*

After a decade of pleading from Martha Wright-Reed and the other petitioners, the FCC issued the 2013 Order.<sup>56</sup> The 2013 Order placed interstate rate caps on prison-phone rates in an effort to prevent at least some recovery of site commissions through end users.<sup>57</sup> Unsure of its authority under the 1996 Act,<sup>58</sup> however, the FCC continued to leave intrastate and local rate regulation to states.<sup>59</sup>

While the 2013 Order was a victory for prison-rate reform, it was a small, if not merely symbolic one. Eighty-five percent of the total phone traffic still fell exclusively within the

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53. *Billed Party Preference for InterLATA 0+ Calls*, CC Dkt. No. 92-77, Second Report and Order and Order on Reconsideration, 13 FCC 1, 39 (1998) (Separate Statement of Commissioner Gloria Tristani).

54. *Id.*

55. Jackson, *supra* note 26, at 271.

56. *See, e.g., 2013 Order*, *supra* note 6, at 14108–09.

57. Twenty-one cents per minute and twenty-five cents per minute for intrastate and interstate calls respectively. Press Release, Fed. Comm’n Comm’n, FCC Bars High Rates for Long Distance Phone Calls in Jails and Prisons Nationwide (Aug. 9, 2013), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-322749A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-322749A1.pdf) [<https://perma.cc/R9K9-HF6M>] (noting that the FCC “took long-overdue steps to ensure that the rates for interstate long-distance calls made by prison inmates are just, reasonable and fair”).

58. *See 2013 Order*, *supra* note 6, at 14177 (requesting comments on statutory limitations on FCC authority and authority to regulate rates of intrastate end users), 14178 (requesting comments on state encroachment), 14189 (requesting comments on intrastate billing-related call blocking).

59. *Id.* at 14111.

purview of the state.<sup>60</sup> And the rate caps themselves were still incredibly high compared to a normal call.<sup>61</sup>

Leaving intrastate regulation of ICS services to states was largely unsuccessful. Some states permitted intrastate rates well above the interstate rate caps; others decided not to regulate ICS rates at all.<sup>62</sup> In a report on the 2013 Order, the Human Rights Defense Center reported that nearly half of states charged ICS rates *above* the interstate rate cap<sup>63</sup> and that some states' ICS rates were either "wholly or partly unregulated."<sup>64</sup> In essence, the lack of holistic regulation in the 2013 Order allowed ICS providers to simply reallocate those expenses formerly recovered from interstate rates.<sup>65</sup> As former Commissioner Mignon Clyburn pointed out, further reform would be needed to make more than a nominal impact.<sup>66</sup> That reform would come two years later.

#### IV. *GLOBAL TEL\*LINK V. FEDERAL COMMUNICATIONS COMMISSION*

In November 2015, the FCC released the 2015 Order.<sup>67</sup> In the 2015 Order, the FCC asserted jurisdiction over intrastate and local ICS rates, and placed rate caps on *all* ICS rates.<sup>68</sup>

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60. *Glob. Tel\*Link v. Fed. Commc'ns Comm'n*, 859 F.3d 39, 44 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017).

61. *See 2015 Order*, *supra* note 3, at 12767, 12776.

62. *See id.* at 12774; Human Rights Defense Center, Comment in the Matter of Rates for Inmate Calling Services, WC Dkt. No. 12-375 (Further Notice of Proposed Rulemaking) (Dec. 20, 2013) [hereinafter HRDC 2013 Letter].

63. HRDC 2013 Letter, *supra* note 62.

64. *Id.*

65. *See Rates for Interstate Inmate Calling Services*, WC Dkt. No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd. 13170, 13174 (2014); *see also* KUKOROWSKI ET AL., *supra* note 22, at 9. For example, just after the 2013 Order was released, Securus raised its processing fee for credit card payments by phone from \$7.95 to \$9.95, its Wireless Administration fee from \$2.99 to \$3.99 and added a State Cost Recovery fee which applied a per-call surcharge of up to five percent, along with associated applicable taxes, and a Location Validation fee which applied a per-call surcharge of up to four percent. HRDC 2013 Letter, *supra* note 62, at 9.

66. *See Rates for Interstate Inmate Calling Services*, WC Dkt. No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd. 13170, 13241–42 (2014) (Statement of Commissioner Mignon Clyburn).

67. *See 2015 Order*, *supra* note 3.

68. *Id.*

Soon thereafter, three major ICS providers, Global Tel\*Link, Securus Technologies, and Telmate LLC, who collectively represent nearly 85 percent of the United States ICS market, separately challenged the 2015 Order's constitutionality. The D.C. Circuit consolidated those challenges in *Global Tel\*Link v. Federal Communications Commission*.

At ultimate issue in *Global Tel\*Link* was the meaning of section 276(b)(1)(A) of the 1996 Act, the "fair compensation" mandate, which was the basis for the FCC's intrastate authority in the 2015 Order.<sup>69</sup> Section 276(b)(1)(A) provides in relevant part that

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public . . . the [FCC] shall take all actions necessary to prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."<sup>70</sup>

In interpreting this "fair compensation" mandate, the *Global Tel\*Link* majority agreed with the ICS petitioners, holding that section 276(b)(1)(A) was an improper basis to regulate intrastate and local phone rates in the 2015 Order. The majority's decision was based on (1) congressional intent based on the history surrounding the 1996 Act, (2) case law interpreting the 1996 Act and in particular section 276(b)(1), and (3) whether the ICS industry was sufficiently competitive without FCC intervention.<sup>71</sup> The *Global Tel\*Link* dissent criticized the majority's failure to analyze the plain meaning of section 276(b)(1)(A) itself.<sup>72</sup>

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69. *Glob. Tel\*Link v. Fed. Commc'ns Comm'n*, 859 F.3d 39, 51 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017).

70. 47 U.S.C. § 276(b)(1)(a) (2012).

71. *See infra* Sections IV.A, B, & C.

72. *See infra* Section IV.D.

*A. Legislative History and Congressional Intent*

First, the majority based their holding on the assertion that the FCC's intrastate authority was narrowly limited to its historical underpinnings. Section 276 was enacted to ensure Non-Bell payphone providers were fairly compensated by Baby Bells.<sup>73</sup> Under that view, Congress intended that the FCC set only rate floors, and not rate caps.<sup>74</sup> In its oral argument before the D.C. Circuit, petitioner Global Tel\*Link claimed that section 276 was "nothing but a 'no free calls' provision."<sup>75</sup>

However, in her dissent, Judge Cornelia Pillard argued that the majority's legislative history argument is undermined by a broader purpose-based argument. In Judge Pillard's estimation, the majority focused only on the particular circumstances necessitating the passage of the 1996 Act, as opposed to the kinds of events it was meant to address in the future.<sup>76</sup> While Judge Pillard acknowledged that the "malfunction confronting Congress at the time was that certain payphone providers were, under certain circumstances, under-compensated,"<sup>77</sup> the central aim of the 1996 Act was to advance competition to the benefit of end users of payphone services.<sup>78</sup> In support of her interpretation, she offers the words of then-Senator John Kerry, who explained that his goal in introducing section 276 was "to establish a level playing field for independent phone providers," thereby enabling competition "on the basis of price, quality and service, rather than marketshare and subsidies."<sup>79</sup>

*B. Case Law Interpreting the FCC's Intrastate Authority*

In her dissent, Judge Pillard also suggested that the majority's interpretation of the 1996 Act based on its reliance on relevant case law was incorrect, or at least overly rigid.<sup>80</sup>

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73. CRANDALL, *supra* note 29, at 9–10; *see also* Glob. Tel\*Link, 859 F.3d at 44, 52–55.

74. Glob. Tel\*Link, 859 F.3d at 44, 54, 65.

75. *See id.* at 61 (Pillard, J., dissenting).

76. *See id.*

77. *Id.* at 63.

78. *See id.*

79. *Id.* (citation omitted).

80. *See id.*

For instance, the majority relied on *Illinois Public Telecommunications Ass'n v. FCC*<sup>81</sup> to demonstrate why the FCC's intrastate power was limited to ensuring Baby Bells fairly compensated non-Bell companies.<sup>82</sup> In *Illinois Public Telecommunications Ass'n*, a Baby Bell challenged the authority of the FCC to set reimbursement rates for non-Bell providers using Baby Bell transmissions to send and receive calls.<sup>83</sup> The *Illinois Public Telecommunications Ass'n* court held that the FCC did in fact have such power.<sup>84</sup>

But the court in *Illinois Public Telecommunications Ass'n* did not stop there. The Baby Bell petitioner also argued that the FCC was underinclusive in its regulation. According to the petitioner, the FCC singled out only monopolies held by Baby Bells and had failed to address another kind of monopoly, called a locational monopoly.<sup>85</sup> As opposed to natural monopolies, which arise purely from market forces, locational monopolies transpire in situations where a payphone provider “obtains an exclusive contract for the provision of all pay phones in an isolated location, such as an airport, stadium, or mall, and are thereby able to charge an inflated rate for local calls made from that location.”<sup>86</sup>

Although the court did not address the locational monopoly issue, it did contemplate circumstances where locational monopolies could become an issue.<sup>87</sup> In its analysis, the court noted the FCC had “suggested some ways in which it might deal with them: a State might be permitted to require competitive bidding for locational contracts, or to mandate that additional [providers] be allowed to provide payphones at the location; and if these remedies fail, the *Commission may*

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81. 117 F.3d 555, 562 (D.C. Cir 1997).

82. See *Glob. Tel\*Link*, 859 F.3d at 54 (majority opinion).

83. 117 F.3d 555.

84. *Id.* at 570.

85. *Id.* at 562.

86. See *Glob. Tel\*Link*, 859 F.3d at 64 (Pillard, J., dissenting) (“[I]n *Illinois*, the state petitioners argued that the FCC had unlawfully ignored the problem of ‘locational monopolies’, that is, situations in which a payphone provider ‘obtains an exclusive contract for the provision of all payphones at an isolated location, such as an airport, stadium, or mall, and is thereby able to charge an inflated rate for local calls made from that location.’”); see also Forsyth, *supra* note 24, at 51–60.

87. *Ill. Pub. Telecomms. Ass'n*, 117 F.3d at 562.

*consider the matter further.*"<sup>88</sup>

By noting this in the opinion, the *Illinois Public Telecommunications Ass'n* majority appeared deferential to the FCC's suggestion: If a locational monopoly becomes a "problem," then the states have the first shot at regulating them. For example, the FCC recommended that states could address locational monopolies by requiring competitive bidding for locational contracts. But, in the event that state regulation failed, or if states failed to regulate locational monopolies altogether, the FCC could then take action.

### C. Competition in the ICS Market

The 1996 Act was only an amendment to the Communications Act of 1934, the source of FCC authority over phone rates. Thus, in its analysis, the *Global Tel\*Link* majority applied section 152(b) of the Communications Act,<sup>89</sup> which creates a presumption that any federal regulation of intrastate rates is an invalid exercise of authority.<sup>90</sup> Based in part on this presumption, the majority argued the bidding process for long-term contracts created sufficient competition in the ICS industry, undermining the need for intervention.<sup>91</sup> This is consistent with the *Illinois Public Telecommunications Ass'n* majority's suggestion that competitive bidding for locational contracts might address problems inherent in locational monopolies.<sup>92</sup>

Ironically, this suggestion was the very anti-competitive conduct the 2015 Order sought to address. And while the majority in *Illinois Public Telecommunications Ass'n* theorized that such a process might facilitate competitive pricing, it certainly would not consider the ICS market to have achieved

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88. *Id.* at 562–63 (emphasis added).

89. *Glob. Tel\*Link*, 859 F.3d at 51 (majority opinion).

90. *See* 47 U.S.C. §152(b) (2012); *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 373 (1986).

91. *See* *Glob. Tel\*Link v. Fed. Commc'ns Comm'n*, 859 F.3d 39, 53 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017) ("[T]he FCC had determined that 'whenever a [payphone provider] is able to negotiate for itself the terms of compensation for the calls its payphones originate, then [its] statutory obligation to provide fair compensation is satisfied.'" (citation omitted)).

92. *See supra* Section IV.B.

the intended effect. This is because long-term locational contracts in the ICS market have had the effect of increasing, rather than decreasing, per-minute rates for consumers. Thus, if Judge Pillard's dissent in *Global Tel\*Link* is correct in asserting the central aim of the 1996 Act was to advance competition for the benefit of end users, then the intrastate rate caps in the 2015 Order were in direct advancement of that goal.

*D. Plain Meaning of the Phrase "Fairly Compensated"*

The majority's interpretation of the 1996 Act's "fair compensation" mandate—that the FCC's intrastate authority was limited to ensuring Baby Bells fairly compensated non-Bell providers—was based primarily on the historical application of section 276.<sup>93</sup> However, in the *Global Tel\*Link* dissent, Judge Pillard questioned the majority's failure to consider the obvious textual implications of the phrase "fairly compensated." She argued that the words "fairly compensated," and in particular, "fair," show Congress's clear intent for section 276(b)(1)(A) to be interpreted as a requirement that the FCC consider fairness to both payphone providers *and* the consumer: "I cannot agree that a company is 'fairly compensated' . . . when it charges inmates exorbitant prices to use payphones inside prisons and jails, shielded from competition by a contract granting it a facility-wide payphone monopoly."<sup>94</sup>

Judge Pillard reasoned that "the only dispute is whether the word 'fairly' implies an ability *to reduce excesses, as well as bolster deficiencies*, in the compensation that payphone providers would otherwise receive."<sup>95</sup> Simply put: does the term "fairly," as used in section 276(b), allow the FCC to *lower* the cost of phone rates to ensure payphone providers are compensated fairly? The semantics, Judge Pillard argues, are revealing. Had Congress substituted the word "fairly" for "adequately," "sufficiently," or "amply," the majority's narrow interpretation of section 276(b)(1)(A) might have been correct.<sup>96</sup> She provides a succinct example of the impact of the word

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93. See *Glob. Tel\*Link*, 859 F.3d at 52–53 (majority opinion).

94. See *Glob. Tel\*Link*, 859 F.3d at 61 (Pillard, J., dissenting).

95. *Id.* at 62 (emphasis added).

96. See *id.*



choice: If a customer pays a grocer \$20 for a banana, it would be reasonable to say that the grocer was compensated “amply” or “sufficiently”; but no reasonable person would agree that he was compensated “fairly.”<sup>97</sup>

Based on the congressional history of the 1996 Act, the case law interpreting the FCC’s intrastate authority, the nature of the ICS industry itself, and the plain meaning of the phrase “fairly compensated,” the 2015 Order was a permissible construction of section 276(b)(1)(A), and its regulations were wholly consistent with the 1996 Act’s central aim. The *Global Tel\*Link* dissent got it right. And the *Global Tel\*Link* majority got it wrong.

## VI. THE PROBLEM PERSISTS: ASSESSING PROPOSED SOLUTIONS

Even if the *Global Tel\*Link* majority had agreed with the dissent, there is little reason to believe the FCC would regulate intrastate and local ICS rates based on a ruling by the D.C. Circuit in favor of its jurisdiction to do so. When the FCC changed hands in 2017, departing Chairman Tom Wheeler left his former colleagues with a message: “Upon my @FCC departure, I would like to sign off with 3 words of wisdom that guided me well: competition, competition, competition.”<sup>98</sup> And while the FCC’s new leadership still aims to facilitate competition, it believes that competition is best accomplished by restricting, rather than expanding, FCC authority over intrastate matters. Chairman Wheeler’s departure from the FCC enabled the FCC’s new leadership to move to dismiss *Global Tel\*Link* before the D.C. Circuit ever reached the merits.<sup>99</sup> Based on the FCC’s current position, it would likely take congressional action to force the FCC’s hand. Without a congressional solution, we are left with (1) *a la carte* state regulation and (2) the innovation of the private sector.

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97. *Id.*

98. Tom Wheeler (@TomWheelerFCC), TWITTER (Jan. 20, 2017, 6:55 AM), <https://twitter.com/TomWheelerFCC> [<https://perma.cc/T7DT-V93U>].

99. *Glob. Tel\*Link*, 859 F.3d at 44; Ann E. Marimow, *FCC Made a Case for Limiting Cost of Prison Phone Calls. Not Anymore.*, WASH. POST (Feb. 5, 2017), [https://www.washingtonpost.com/local/public-safety/fcc-made-a-case-for-limiting-cost-of-prison-phone-calls-not-anymore/2017/02/04/9306fbf8-e97c-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.f499e414ae1c](https://www.washingtonpost.com/local/public-safety/fcc-made-a-case-for-limiting-cost-of-prison-phone-calls-not-anymore/2017/02/04/9306fbf8-e97c-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.f499e414ae1c) [<https://perma.cc/PVE2-PXKH>].

A. *Why FCC Intrastate Authority Is a Good Option for Regulating ICS Rates*

Whatever the ICS market is today, it is not competitive. There are few competitors in the ICS industry to begin with, and those competitors eliminate competition entirely through contracting. With those contracts, ICS providers more closely resemble the decentralized Baby Bells reigning supreme over their respective localities than market competitors vying for market share through competition. Given the nature of ICS services, consumers are left with little choice but to pay the quoted rates. What is left, then, is a vulnerable consumer base at the mercy of those who profit at their expense. And prisoners in the ICS market are particularly vulnerable. Prisoners are both confined and stigmatized—they face collateral consequences even after they have served their time. In many states, convicted felons cannot vote.<sup>100</sup> With dim prospects, family, friends, and presumably regulatory agencies are left to fight their battles by proxy.<sup>101</sup>

Thus, if the ultimate goal of ICS regulation is to ensure fair prices to ICS consumers, the FCC must achieve reform through regulation. It was true when the FCC reformed the payphone market in the 1990s with the Baby Bells. And it is true now.

Despite doubts that might arise from the historical efficacy of such regulation, the FCC can increase competition in the industry by increasing regulation. For one, the ICS phone market is relatively small in comparison to the entire U.S. intrastate and local market.<sup>102</sup> By the late 1990s, for example, the intrastate phone market was worth twenty billion dollars a year while the ICS market was worth only a billion dollars a

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100. *Voting as an Ex-Offender*, NONPROFIT VOTE, <http://www.nonprofitvote.org/voting-in-your-state/special-circumstances/voting-as-an-ex-offender/> (last visited Apr. 4, 2018) [<https://perma.cc/6ND3-YYP3>] (“In all but two states, voting-age citizens convicted of a felony are barred from voting for some period of time.”).

101. See discussion *supra* Section III.A.

102. See FED. COMM’N COMM’N, STATISTICS OF THE LONG DISTANCE TELECOMMUNICATIONS INDUSTRY 8 (2001), [https://transition.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/ldrpt101.pdf](https://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/ldrpt101.pdf) [<https://perma.cc/N3NU-28B8>]; Jackson, *supra* note 26, at 267.

year.<sup>103</sup> The relative size of the ICS market would make regulation and enforcement easier than with the historical example of the Baby Bells.

The 2015 Order's regulation was calibrated to remedy the issue. It was informed by a series of previous FCC orders and rules, by statistical studies, and by previous cases in the federal circuit. States would not need to be concerned about the FCC using the rules to assert additional intrastate authority. The 2015 Order was a narrow assertion of intrastate power, to remedy a unique deficiency present only in ICS markets. Indeed, several states would be totally unaffected by such regulation because they failed to regulate ICS services *at all*.<sup>104</sup>

There is also less uncertainty about the type of regulation needed to achieve the desired effect of lowering rates for ICS callers. ICS regulation has been dictated by a series of FCC orders. Each new order was issued as a reaction to the perceived flaws of the last. By establishing rate caps on *all* phone rates, and banning the funding of site commissions, the 2015 Order was a direct response to the perceived flaws of the 2013 Order, and it would have effectively lowered ICS rates across the board.

If the FCC cannot gain jurisdiction over intrastate rates, why not simply ban the use of site commissions outright? The answer, quite simply, is that the FCC already tried.<sup>105</sup> Part of the 2015 Order was also a wholesale prohibition by the FCC on site commissions.<sup>106</sup> And the *Global Tel\*Link* majority invalidated that part of the 2015 Order too.<sup>107</sup> They held that the outright ban on site commissions amounted to arbitrary and capricious rulemaking by the FCC.<sup>108</sup> But with the protection afforded by regulation of all rates, site-commission regulation is of less concern. Commissions would be reduced as a by-product of rate regulation.<sup>109</sup>

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103. Jackson, *supra* note 26, at 267.

104. See Wright, *supra* note 60, at 1, 7.

105. See 2015 Order, *supra* note 3.

106. *Id.*

107. See *Glob. Tel\*Link v. Fed. Commc'ns Comm'n*, 859 F.3d 39, 45 (D.C. Cir. 2017), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017).

108. See *id.*

109. Additional prohibition on ancillary fees may be necessary. One way to address all costs to prevent rent-shifting by prisons would be to use an overall revenue cap, instead of merely per-minute rate caps. This is

*B. Congress Would Likely Need to Force the FCC's Hand*

If the Supreme Court were to hear the case on appeal, it could reverse the D.C. Circuit's ruling in *Global Tel\*Link* and restore the intrastate authority asserted in the 2015 Order. But Supreme Court reversal alone would not solve the problem. The holding would dictate that the FCC *can* act; not that it *must* act. Based on the request of the FCC's new regime to dismiss the *Global Tel\*Link* case for lack of authority, it seems unlikely that the current FCC would act unless prodded.<sup>110</sup> It could escape regulation merely by rescinding the 2015 Order, or by modifying it through issuing a new iteration.

Under the current administration, then, the only panacea would be an act of Congress. First, Congress could amend the 1996 Act in a number of different ways. The simplest amendment would be the addition of a subsection in section 276(d) defining the phrase "fairly compensated" in a manner consistent with the *Global Tel\*Link* dissent, which would settle any interpretive disputes by making the mandate clear. For those concerned about granting the FCC broad power over intrastate authority simply to solve a narrow issue, Congress could narrowly amend the 1996 Act to prohibit payphone providers from using site commissions to obtain contracts from correctional institutions. Congress could also remove ICS services from the list of "payphone services" defined in section 276(d), and instead, create an entirely different subsection where ICS-specific regulation would uniquely apply. This would prevent the FCC from using its authority over intrastate and local ICS rates over other phone services.

Second, Congress can unilaterally invalidate any agency order through the Congressional Review Act (CRA). The CRA created a congressional review-and-remedy process for federal-agency action.<sup>111</sup> Under it, Congress can invalidate or repeal an agency rule through a joint resolution of disapproval.<sup>112</sup> The resolution prohibits an agency from reissuing a similar or "substantially similar" rule in the future.<sup>113</sup> For example,

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commonly used in the airport industry. See Forsyth, *supra* note 24, at 57.

110. See *Glob. Tel\*Link*, 859 F.3d at 48–49.

111. See 5 U.S.C. § 801 (2012).

112. *Id.* at § 801(b)(1).

113. *Id.* at § 801(b)(2).

Congress recently moved to invalidate the FCC's repeal of net neutrality under the CRA.<sup>114</sup> Invalidating a previous rule would create a regulatory gap, which might require the FCC to issue a new rule clarifying its intrastate authority over rates. And invalidating the previous rule would also prohibit the FCC from issuing a new rule leaving intrastate authority to states, because such a rule would be "substantially similar" to the provision that was invalidated. Not only would the FCC be prohibited from acting contrary to congressional intent, but the Supreme Court would also be prohibited from invalidating the congressional joint resolution, and resolutions passed under the Act are not reviewable by the courts.<sup>115</sup>

Without an act of Congress, we are nevertheless left with a few, less effective solutions. The first is *a la carte* state regulation. Certainly, states like New York have used intrastate and local rate caps to effectively address the issue.<sup>116</sup> But there are several issues with leaving such regulation entirely with states. First, nationwide change takes longer at the state level because the change must occur at each statehouse instead of just once on a federal level. Second, the 2015 Order was issued only after the FCC repeatedly pled for states to take their own action.<sup>117</sup> Third, leaving regulation to states can have an adverse effect. For example, Texas *requires* site commissions to be paid by ICS providers to prisons.<sup>118</sup> Finally, and most importantly, the fact that prisoners are often inshored—shipped out-of-state to private prisons—creates unpredictability for prisoners.<sup>119</sup> In one state, a family might pay far less to call an interstate prisoner. In their home state, they might pay far more.

### C. *Regulatory Gridlock in ICS Markets Paves the Way for*

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114. David Shepardson, *Senate Democrats to Force Vote on FCC Net Neutrality Repeal*, REUTERS (Dec. 15, 2017), <https://www.reuters.com/article/uk-usa-internet-vote/u-s-senate-democrats-to-force-vote-on-fcc-net-neutrality-repeal-idUKKBN1E92U8> [<http://perma.cc/4EYW-K6CM>].

115. 5 U.S.C. § 805 (2012).

116. See, e.g., *2013 Order*, *supra* note 6, at 14110.

117. See *2015 Order*, *supra* note 3, at 12769.

118. *Glob. Tel\*Link v. Fed. Comm'ns Comm'n*, 859 F.3d 39, 65 (D.C. Cir. 2017) (Pillard, J., dissenting), *amended and superseded by* 866 F.3d 397 (D.C. Cir. 2017).

119. "Inshoring" refers to the correlative increase in prisoner deportations as private prisons emerged in rural areas. See Jackson, *supra* note 26, at 267.

*Private Sector Entry*

Finally, without *any* regulatory solution at all, there remains hope in the private sector.<sup>120</sup> Recently, one act of ingenuity has already helped some prisoners avoid the high cost of making phone calls. Unsurprisingly, it came from a former prisoner named Frederick.

Frederick was always an entrepreneur.<sup>121</sup> In fact, his incarceration can be partly attributed to his entrepreneurial spirit.<sup>122</sup> Frederick served almost five years in federal prison for his involvement in running a mail center that delivered marijuana all over the country through UPS and FedEx.<sup>123</sup> When he arrived in prison, Frederick noticed a problem—*everything* in prison was overpriced. But nothing even compared to the price of a phone call. When Frederick first arrived, he frequently called his girlfriend, Tanya. But eventually, Tanya told him to stop calling. Every time he called, it would cost Tanya fifty dollars.<sup>124</sup> The price floored Frederick, who estimated the average length of their calls was no more than fifteen minutes.<sup>125</sup> Frederick noticed that because calls were so expensive, other prisoners and their families either communicated primarily by mail, or did not communicate at all.<sup>126</sup>

Upon his release from prison, Frederick created Picturegram—a prisoner mail-delivery service that made it easy to send pictures to prisoners.<sup>127</sup> Recently, Picturegram has evolved into Pigeonly, his new idea. Pigeonly sells a telephone service that gives families local phone numbers in the area where a prisoner is located.<sup>128</sup> This allows prisoners and families to pay lower prices because local rates are usually much cheaper than those they would pay for intrastate or even

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120. See *The Prisoner's Solution*, NAT'L PUB. RADIO: PLANET MONEY (Aug. 14, 2015), <http://wwno.org/post/episode-610-prisoners-solution> [<https://perma.cc/DN6Z-RXEV>].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

interstate rates.<sup>129</sup>

When asked why he chose Pigeonly as his company's new name, Frederick likened the life of pigeons to the prisoner's underrepresentation in society:

No matter where I go, there's pigeons. And I notice how pigeons are so common that we never pay attention to them, even though they're all around us all the time. And that's kind of how I see our market a lot of times is that . . . there's this market that's here and it's present, but nobody's really paying attention to it.<sup>130</sup>

#### IV. CONCLUSION

In the aftermath of the *Global Tel\*Link* decision, there are still opportunities for reforming prison-phone rates lurking beneath the regulatory rubble. From a federal perspective, the Supreme Court could reverse the D.C. Circuit Court's decision in *Global Tel\*Link*; Congress could amend the Telecommunications Act of 1996; and, while unlikely, the FCC could try again to pass its own regulatory reform. From a state perspective, state legislatures could reform existing laws or make new ones. And of course, there is always room for private innovation. At a minimum, the desired outcome would require parties to an ICS contract to consider the affordability of ICS rates in their intrastate ratemaking calculus. But ideally, the FCC would take a step further by enacting regulations that would deprive ICS providers and facilities of the right to exercise absolute discretion over ICS rates.

In his official statement on the 2015 Order, Former Chairman Wheeler cited the words of Dr. Martin Luther King: "Injustice anywhere is a threat to justice everywhere."<sup>131</sup> Fittingly, Dr. King wrote those words from the confines of a Birmingham jail cell.<sup>132</sup> Now, with the 2015 Order in the rear view, injustice caused by the ICS industry persists. Regardless of where we choose to go from here—whether we regulate, or

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129. *Id.*

130. *Id.*

131. 2015 Order, *supra* note 3, at 12955 (Statement of Chairman Tom Wheeler).

132. *Id.*

whether we refrain from regulation—our society's views on punishment are going to be implicated. What is the *true* cost we expect the incarcerated to pay for their crimes?