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**Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

**Petition of Recipients of Collect Calls from)
Prisoners at Correctional Institutions in) D.T.C. 11-16
Massachusetts Seeking Relief from the)
Unjust and Unreasonable Cost of such Calls)**

REPLY BRIEF OF GLOBAL TEL*LINK CORPORATION

Global Tel*Link Corporation (“GTL”),¹ by its attorneys and pursuant to the *Notice of Briefing Schedule* issued by the Massachusetts Department of Telecommunications and Cable (the “Department”),² hereby submits its Reply Brief with respect to the status of the above-captioned proceeding.

I. THIS PROCEEDING SHOULD BE CLOSED OR STAYED

There is unanimous agreement among the inmate calling service (“ICS”) providers that this proceeding should be closed in light of the recent Federal Communications Commission (“FCC”) decisions on ICS matters,³ the resulting court appeals,⁴ and the lack of “sufficient” and

¹ Although not specifically included as a named party, some of Petitioners’ claims concern DSI-ITI, LLC (“DSI”), which serves the Norfolk County Correctional Center in Massachusetts. DSI is a wholly owned subsidiary of GTL. Thus, to the extent necessary, GTL submits this Reply Brief on behalf of DSI as well.

² D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Notice of Briefing Schedule (Mar. 18, 2016) (“*Notice*”). The Hearing Officer subsequently extended the time for filing briefs to April 25, 2016, and reply briefs to May 23, 2016. See D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Hearing Officer Ruling Securus Technologies Inc. Motion for Extension of Time (Mar. 28, 2016).

³ *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (“*First ICS Order*”), *pets. for stay granted in part sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280, Order (D.C. Cir. Jan.13, 2014), *pets. for review pending sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases); *Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (2015) (“*Second ICS Order*”), *pets. for stay granted in part sub nom. Global Tel*Link Corporation v. FCC*, No. 15-1461, Order (D.C. Cir. Mar. 7, 2016), Order (D.C. Cir. Mar. 23, 2016), *pets. for review pending sub nom. Global Tel*Link Corporation v. FCC*, No. 15-1461 (D.C. Cir. filed Dec. 18, 2015) (and consolidated cases).

⁴ *Securus Tech., Inc. v. FCC*, No. 13-1280, Petition for Review (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases); *Global Tel*Link Corporation v. FCC*, No. 15-1461, Petition for Review (D.C. Cir. filed Dec. 18, 2015) (and consolidated cases).

“reasonable”⁵ information to support Petitioners’ claims.⁶ In the alternative, the Department should stay this proceeding pending judicial review of the FCC’s ICS rules.⁷ It would be premature and a waste of resources for both the Department and the participants to move forward with this proceeding given the pending court review of the FCC’s ICS rules. Even the Petitioners recognize the future of ICS regulation is unclear.⁸

The Department previously has “stayed proceedings pending the outcome of FCC proceedings when it would be unreasonably onerous for the Department to issue a decision without preceding action by the” FCC.⁹ If the Department moves forward with this proceeding, it runs the risk of adopting rules governing ICS that subsequently will be preempted or deemed to be inconsistent with the FCC’s final rules, which would require the Department to conduct additional proceedings. While the FCC’s most recent ICS action provides some indication of the “general approach contemplated by the FCC,” the Department cannot be certain the FCC’s *Second ICS Order* rules will not be altered on appeal.¹⁰ The Department also has stayed proceedings when possible action by the FCC or the courts could affect a pending Department proceeding, preferring instead to let those “[e]vents . . . inform [its] course of action.”¹¹

⁵ D.T.C. 09-1, *Investigation by the Department of Telecommunications & Cable on its own Motion, pursuant to General Law Chapter 159, Section 16, of the Telephone Service Quality of Verizon New England, Inc. d/b/a Verizon Massachusetts, in Berkshire, Hampden, Hampshire, and Franklin Counties*, Order to Open Investigation (June 1, 2009).

⁶ GTL Initial Brief at 1-2; Securus Initial Brief at 2; ICSolutions Initial Brief at 7.

⁷ ICSolutions Initial Brief at 4.

⁸ Petitioners’ Initial Brief at 1.

⁹ D.T.E. 01-20, *Investigation by the Department of Telecommunications & Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements & Combinations of Unbundled Network Elements, & the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Mass. Resale Services in the Commonwealth of Massachusetts*, Interlocutory Order on Part B Motions (Apr. 4, 2001) (“01-20 Interlocutory Order”).

¹⁰ *01-20 Interlocutory Order* at 8.

¹¹ D.T.E. 03-60, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission Triennial Review Order Regarding*

Accordingly, the Department should close this proceeding for the reasons set forth in the ICS providers' Initial Briefs and below or, in the alternative, suspend any further action in this proceeding until the court completes its review of the FCC's ICS rules.

II. REPLIES ON ISSUES RAISED BY THE NOTICE

As the Initial Briefs demonstrate, the four (4) issues identified for investigation in the *September 2013 Ruling*¹² have been resolved by the FCC or the issues are no longer ripe for review based on existing law and the record. The Initial Briefs support closing this proceeding.

1. Whether the elimination of the per-call surcharge resolves all concerns regarding the just and reasonableness of the per-call surcharge rate and warrants the Department closing that portion of its Investigation.

All parties agree that the per-call surcharge established as reasonable by the Department¹³ is no longer permissible under the FCC's *Second ICS Order*.¹⁴ The FCC's action to prohibit per-call surcharges moots Petitioners' request that the Department revisit the \$3.00 surcharge, and eliminates the need for the Department to "consider Petitioners' allegations and examine the changes to the ICS industry and whether to maintain the per-call surcharge and/or adjust the maximum rate permitted per call."¹⁵ Therefore, this portion of the Department's investigation should be closed.

Switching for Mass Market Customers, Interlocutory Order on Motion to Stay of Verizon New England, Inc. d/b/a Verizon Massachusetts, 15, 17 (Apr. 4, 2004).

¹² D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Hearing Officer Interlocutory Ruling, at 1-2 (Sept. 23, 2013) ("*September 2013 Ruling*").

¹³ D.P.U./D.T.E. 97-88/97-18 (Phase II), *Investigation by the Department of Telecommunications and Energy on Its Own Motion regarding (1) Implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the Rate Policy for Operator Services Providers*, Order on Payphone Barriers to Entry and Exit, and OSP Rate Cap, at 9-10 (April 17, 1998) ("*1998 Rate Cap Order*").

¹⁴ *Second ICS Order* at p.162 (setting forth new rule 47 C.F.R. § 64.6080); Petitioners' Initial Brief at 3; Securus Initial Brief at 5-6; ICSolutions Initial Brief at 6; GTL Initial Brief at 5-6.

¹⁵ *September 2013 Ruling* at 26.

There is no support for Petitioners' request that the Department "adopt the FCC's analysis and prohibit per-call surcharges."¹⁶ The Department's per-call surcharge is the result of its determination that ICS providers have "legitimate additional costs" due to "the unique characteristics of inmate calling services."¹⁷ These unique characteristics of inmate calling services produce per-call costs that are higher than costs for traditional operator services.¹⁸ In light of these "additional costs," the Department determined it was necessary to modify the rate cap mechanism for inmate calling services to provide for rate recovery of the legitimate additional costs incurred in providing inmate calling services¹⁹ and adopted a maximum surcharge of \$3.00 per call in addition to the per-minute usage rates.²⁰ As the Department recently reiterated, the per-minute usage rates were intended only to reflect "traditional cost recovery, not the unique additional costs associated with ICS."²¹ There is nothing in the current record that supports a prohibition on per-call surcharges if the FCC's ban on such charges were overturned on appeal. However, there is no reason for the Department to expend valuable resources reviewing this issue while the appeal is pending. This type of "administrative inefficiency would not benefit the Department, the parties, or the public interest."²²

¹⁶ Petitioners' Initial Brief at 3.

¹⁷ *1998 Rate Cap Order* at 9. The Department determined that inmate service providers' "additional costs" include "(1) costs associated with call processing systems, automated operators, call recording and monitoring equipment, and fraud control programs that are required to ensure security and to deter abuses; (2) higher levels of uncollectibles; and (3) higher personnel costs." *See id.* at 9-10.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *1998 Rate Cap Order* at 10.

²¹ *September 2013 Ruling* at 19.

²² *01-20 Interlocutory Order* at 8.

2. Whether the elimination of the per-call surcharges and the establishment of interim and final rate caps for ICS service necessitates that the Department investigate whether the \$0.10 per-minute rate cap for all intrastate ICS in Massachusetts remains just and reasonable.

As both GTL and Securus explain, matters concerning the per-minute usage rate cap are not under review in this proceeding.²³ This issue has not been “re-opened” in this proceeding by GTL and Securus as Petitioners’ suggest.²⁴ The Department has ruled on two separate occasions that the per-minute usage rate is not part of this proceeding.²⁵ While GTL agrees with Securus and ICSolutions that there needs to be adjustments to Massachusetts’ per-minute usage cap in light of the elimination of the per-call surcharge,²⁶ any such adjustment should occur as part of a generic rulemaking proceeding, through a waiver request, or during the tariff approval process.²⁷ Even ICSolutions, which requests that the Department implement an interim adjustment in the per-minute usage cap, admits that there is insufficient evidence in the record to establish a permanent rate cap, and that it would be a waste of Department resources to undertake the process in light of the *Second ICS Order*.²⁸ Accordingly, there are no legal grounds to support the review of the per-minute usage rate in this adjudicatory proceeding.²⁹

²³ GTL Initial Brief at 6-7; Securus Initial Brief at 6-7.

²⁴ Petitioners’ Initial Brief at 2.

²⁵ *September 2013 Ruling* at 19-20; D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Order on Appeal of Hearing Officer’s Ruling (Feb. 26, 2014).

²⁶ Securus Initial Brief at 6-7; ICSolutions Initial Brief at 7-8.

²⁷ GTL Initial Brief at 7.

²⁸ ICSolutions Initial Brief at 12.

²⁹ *See, e.g., Arthurs v. Bd. of Registration in Medicine*, 418 N.E.2d 1236, 1246 (Mass. 1981) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)); *Cambridge Elec. Light Co. v. Dep’t of Pub. Utils.*, 295 N.E.2d 876, 883-84 (Mass. 1973) (internal quotation marks omitted). In addition, “the application of new principles or standards announced in a decision may be so unfair as to amount to an abuse of discretion.” *Town of Brookline v. Comm’r of Dep’t of Environmental Quality Eng’g*, 439 N.E.2d 792, 799 (Mass. 1982); *accord Bell Aerospace Co.*, 416 U.S. at 294. Policy adoption via adjudication will not be upheld in instances where it “suffers from any constitutional defect or statutory bar” or is not “rationally related to furthering the [agency’s] purpose.” *Anusavice v. Bd. of Registration in Dentistry*, 889 N.E.2d 953, 961 (Mass. 2008); *see also Attorney Gen. v. Dep’t of Pub. Utils.*, 900 N.E.2d 862, 864 (Mass. 2009) (“although the department

3. Whether the FCC’s establishment of specific taxes and ancillary service charges with price caps sufficiently resolved all concerns regarding the service and other fees contained in ICS providers’ tariffs and warrants the Department closing that portion of its Investigation.

All parties agree that the FCC’s *Second ICS Order* addresses the ancillary fees that may be charged by ICS providers.³⁰ The FCC’s determination of the permissible ancillary fees, taxes, and regulatory surcharges that ICS providers may assess eliminates the need for the Department to address Petitioners’ concerns regarding ICS provider fees. This portion of the Department’s investigation should be closed.

There is no support for Petitioners’ request that the investigation on this issue remain open due to the pending court appeal of the FCC’s ICS rules.³¹ As GTL explained in its Initial Brief, Petitioners will continue to have recourse if the FCC’s ancillary fee rules are modified and issues arise regarding ICS providers’ intrastate tariffed rates and fees.³² GTL and other ICS providers are required to maintain and file schedules and tariffs with the Department for intrastate telecommunications services, and those tariffs are subject to Department review and approval to ensure they are just and reasonable,³³ as required by Massachusetts law.³⁴ Any rates approved by the Department, “must be reasonable as determined by the [Department] in the first

may establish a policy in an adjudicatory proceeding, the application of that policy to other parties may, depending on the nature of the policy at issue, require an additional process, as it does here”).

³⁰ Petitioners’ Initial Brief at 4; Securus Initial Brief at 7-8; ICSolutions Initial Brief at 6-7; GTL Initial Brief at 8-9.

³¹ Petitioners’ Initial Brief at 4.

³² GTL Initial Brief at 9.

³³ Mass. Gen. Laws c.159, § 19 (“Unless the department otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this chapter, except after thirty days from the date of filing a statement with the department setting forth the changes proposed to be made in the schedule then in force and the time when such changes shall take effect.”).

³⁴ Mass. Gen. Laws c.159, § 17.

instance.”³⁵ Once a provider’s rates are “examined and approved by the Department,” they are “ipso facto just and reasonable.”³⁶ There is no need for the Department to take any further action in this proceeding with respect to ICS provider fees in light of the FCC’s *Second ICS Order* and the Department’s ability to monitor rates and fees via the tariff review process.

4. Whether the FCC’s Order resolves concerns about dropped calls and other service quality issues and warrants the Department closing all or part of that portion of its Investigation.

Petitioners recognize that the FCC’s prohibition on per-call surcharges “prevents substantial overcharges from dropped calls,”³⁷ which was Petitioners’ primary concern regarding dropped calls - the requirement to “pay an additional connection surcharge of up to \$3.00 when the call is reconnected.”³⁸ Yet, Petitioners claim this issue must remain open because Prisoners’ Legal Services has received “complaints” from “petitioners” regarding quality of service issues.³⁹ As both Securus and GTL point out, Petitioners have never provided the necessary evidence to support their service quality allegations after numerous opportunities to do so.⁴⁰ Petitioners’ new claim based on unnamed “petitioners” and unexplained “complaints” does not

³⁵ See, e.g., *Am. Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 246 (D. Mass. 1995) (“Any rate approved by the DPU is considered to be *prima facie* lawful until it has been changed or modified by the DPU. . . . It is thus clear that the requirement of Section 17 that rates be reasonable means that they must be reasonable as determined by the DPU in the first instance.”) (citing Mass. Gen. Laws c.159, § 17).

³⁶ Mass. Gen. Laws c.159, § 17; D.T.E. 04-33, *Verizon New England, Inc. dba Verizon Massachusetts*, Arbitration Order (July 14, 2005) (“Because those rates were examined and approved by the Department in our last TELRIC case, D.T.E. 01-20, which was not appealed, those rates are ipso facto just and reasonable and do not provide double recovery; as such, Verizon may charge those rates when it begins performing the associated [routine network modification] activities for CLECs.”) (citing Mass. Gen. Laws c.159, § 17).

³⁷ Petitioners’ Initial Brief at 5.

³⁸ D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of Such Calls, at 5 (filed Aug. 31, 2009).

³⁹ Petitioners’ Initial Brief at 4-5, Kamanzi Affidavit.

⁴⁰ Securus Initial Brief at 9-10; GTL Initial Brief at 12-13.

provide a reasonable and sufficient basis for continuing with this portion of the investigation.⁴¹ To the extent Petitioners can identify any ICS service quality issues with specificity, those concerns should be addressed through the normal complaint channels, not through this adjudicatory proceeding. Petitioners consistently have ignored the Department's long-favored complaint policy, which is to first contact the telephone provider to resolve any problem,⁴² and then file a complaint with the Department only if the telephone provider is unable to resolve the problem in the first instance.⁴³ Without sufficient and credible evidence,⁴⁴ there is no reason for the Department to take any further action in this proceeding with respect to service quality issues.

5. Whether the FCC's Order resolves concerns about the adequacy of billing details and warrants the Department closing that portion of its Investigation.

As explained by GTL in its Initial Brief, the FCC's truth-in-billing rules, the Department's billing rules, and the FCC's new disclosure requirements resolve Petitioners' concerns about the adequacy of billing detail and warrant the Department closing this portion of its investigation.⁴⁵ Securus agrees, stating that the existence of these factors "warrant the closing of this portion of the proceeding."⁴⁶ Petitioners' attempt to keep this portion of the investigation

⁴¹ D.T.C. 09-1, *Investigation by the Department of Telecommunications & Cable on its own Motion, pursuant to General Law Chapter 159, Section 16, of the Telephone Service Quality of Verizon New England, Inc. d/b/a Verizon Massachusetts, in Berkshire, Hampden, Hampshire, and Franklin Counties*, Order to Open Investigation (June 1, 2009).

⁴² These instructions are found at: <http://www.mass.gov/ocabr/government/oca-agencies/dtc-lp/consumer-dtc/file-a-complaint.html>.

⁴³ *See id.*; *see also* D.P.U. 18448, Rules and Practices Relating to Telephone Service to Residential Customers (for residential telephone complaints, requiring the customer to first notify the provider and then contact the Department if the customer is not satisfied with the resolution).

⁴⁴ D.T.E./D.P.U. 06-53, *Investigation as to the propriety of the rates and charges set forth in M.D.T.E. No. 5* (Apr. 30, 2007 ("the Company would be expected to present to the Department credible evidence and explanation"); D.P.U. 15576, *Maynard Lender v. New England Telephone & Telegraph Company* (Sept. 7, 1967) (finding there was not "sufficient evidence" to make a finding).

⁴⁵ GTL Initial Brief at 13-14.

⁴⁶ Securus Initial Brief at 11.

open based on new claims by unnamed “petitioners” regarding unexplained “complaints”⁴⁷ is not a “reasonable” or “sufficient” basis for continuing with this portion of the investigation.⁴⁸ Petitioners have never provided the necessary evidence to support their billing practice allegations after numerous opportunities to do so.⁴⁹ This portion of the Department’s investigation should be closed.

6. Whether any changes to the scope of the proceeding would moot any of the pending discovery requests.

Review of the pending discovery motions is no longer necessary given that the four issues identified for investigation have been resolved.⁵⁰ As Securus notes, Petitioners’ pending discovery requests relate to the per-call surcharge (now resolved), fees (now resolved), per-minute usage charges (not part of this proceeding), quality of service (now resolved), and other requests that are “totally outside the scope of this proceeding.”⁵¹ Therefore, review of the pending discovery motions is no longer necessary.

⁴⁷ Petitioners’ Initial Brief at 5, Kamanzi Affidavit.

⁴⁸ D.T.C. 09-1, *Investigation by the Department of Telecommunications & Cable on its own Motion, pursuant to General Law Chapter 159, Section 16, of the Telephone Service Quality of Verizon New England, Inc. d/b/a Verizon Massachusetts, in Berkshire, Hampden, Hampshire, and Franklin Counties*, Order to Open Investigation (June 1, 2009).

⁴⁹ Securus Initial Brief at 11-12.

⁵⁰ GTL Initial Brief at 15; Securus Initial Brief at 12.

⁵¹ Securus Initial Brief at 13.

CONCLUSION

For the foregoing reasons and those set forth in GTL’s Initial Brief, the Department should close this proceeding. The issues identified for investigation in the *September 2013 Ruling* have been addressed by the FCC or are no longer ripe for review based on existing law and record. In the alternative, the Department should stay this proceeding pending resolution of the ongoing court review of the FCC’s ICS rules.

Respectfully submitted,

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Dated: May 23, 2016

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