Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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

RESPONSE OF GLOBAL TEL*LINK CORPORATION TO PETITIONERS' APPEAL

Global Tel*Link Corporation ("GTL"), by its attorneys and pursuant to 220 C.M.R. § 1.06(6)(d)(2), (3), respectfully submits this response to Petitioners'[1] appeal of the Hearing Officer Interlocutory Ruling, issued September 23, 2013, in the above-referenced matter.[2] The *Interlocutory Ruling* determined that an investigation should be opened to review: the per-call surcharge assessed by inmate calling service ("ICS") providers; the tariffed service and other fees assessed by ICS providers; the telephone service quality provided by Respondents, including the frequency of dropped calls and line noise; and Respondents' billing practices. The *Interlocutory Ruling*, however, dismissed Petitioners' request to investigate: the usage rate component of the ICS rate-setting mechanism; the frequency and content of recorded warning messages; and the availability and upkeep of telecommunications equipment at correctional facilities.

Petitioners' seek to reverse the portion of the *Interlocutory Ruling* that dismisses Petitioners' request to open an investigation into the usage rate component of the ICS rate-setting

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[1] Petitioners are Prisoners' Legal Services of Massachusetts ("PLS") and several "family members, loved ones, legal counsel, and others residing in Massachusetts who receive and pay for telephone calls from prisoners" (collectively, "Petitioners").

[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*, Hearing Officer Interlocutory Ruling (Sept. 23, 2013) ("*Interlocutory Ruling*"). On October 23, 2013, the Hearing Officer granted the requests made by GTL and Securus Technologies, Inc. (collectively, "Respondents") to extend the response date to Petitioners' appeal to November 8, 2013.

mechanism. Petitioners' appeal should be denied because they have failed to meet the burden required to reverse the *Interlocutory Ruling.*

STANDARD OF REVIEW

Under the Department's rules, a presiding officer has the authority to "make all decisions regarding the admission or exclusion of evidence or any other procedural matters which may arise in the course of the hearing."[3] In light of this "wide latitude," a hearing officer's ruling "should not be overturned unless it results in a denial of substantial justice" or there is "evidence that the hearing officer abused his or her discretion."[4] Accordingly, the Department should overturn a presiding officer's decision only when the presiding officer acts contrary to law or in an arbitrary manner or otherwise abuses his or her discretion.[5]

The Hearing Officer's determination that investigation of ICS usage rates was unnecessary "rests upon a reasonable foundation" and "is consistent with the delegation of authority [the Department has] vested in hearing officers."[6] The Hearing Officer found that Petitioners' allegations regarding existing ICS usage rates, even when taken as true, provided no basis for relief.[7] In their appeal, Petitioners do not attempt to show this finding was unreasonable or an abuse of the Hearing Officer's discretion. Rather, they attempt to support their appeal with

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[3] 220 C.M.R. § 1.06(6)(a).

[4] D.P.U. 07-30, *Investigation by the Department of Public Utilities on the Petition of the Attorney General of the Commonwealth of Massachusetts into the National Grid plc and KeySpan Corporation Merger, pursuant to G.L. c. 164, §§ 76, 76A*, 40 (June 9, 2010); *see also* D.T.E. 01-56, *Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 280 through 305, filed with the Department on July 17, 2001 by the Berkshire Gas Company*, 6 (Jan. 31, 2002).

[5] M.G.L. c. 30A § 14(7).

[6] D.T.E. 01-20, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, Interlocutory Order on CLEC Coalition's Appeal of Hearing Officers' May 18, 2001 Ruling (June 12, 2001).

[7] *Interlocutory Ruling* at 19.

new evidence and argument, which should be rejected for the reasons explained below. Petitioners have not met their burden to reverse the *Interlocutory Ruling*.

ARGUMENT

Petitioners make two basic arguments in support of their appeal. Neither provides a basis for overturning the Hearing Officer's decision that investigation of ICS usage rates is unnecessary.[8]

First, Petitioners claim the Hearing Officer "misconstrued" their Petition "as accepting a usage rate of $0.102 per minute as reasonable."[9] This is not the case. The *Interlocutory Ruling* quotes nearly verbatim from the Petition,[10] which supports the findings of the *Interlocutory Ruling*:

> The per minute cost of prisoner initiated collect calls is obviously also falling as various rate components decline. In Massachusetts, a truer per minute cost of prisoner payphone rates emerges when commissions - the shared profit element of the rates according to the FCC - are backed out of the per minute rate. A collect call from a DOC facility costs 10.2¢ per minute after backing out the 35% commission payments. Similarly, the cost of a collect call from a Hampden County jail facility costs less than 8.3¢ per minute after backing out the 52% commission. These all indicate that in Massachusetts, charges to collect call customers of 10.2¢ per minute or less cover the actual costs of providing collect telephone service for prisoners, including adequate profit margins for the providers *with no per call surcharges or other additional costs.*[11]

Petitioners' retreat from their prior statements should be rejected.

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8 Nor can Petitioners use the discovery process to meet their burden. *See, e.g.*, *Alphas Co., Inc. v. Kilduff*, 888 N.E.2d 1003, 1012 (Mass Ct. App. 2008) (affirming summary judgment in regard to claims that "were far too speculative to meet even the minimal threshold to warrant further discovery under" Mass. R. Civ. P. 56(f), and noting that "[p]arties may not 'fish' for evidence on which to base their complaint in hopes of somehow finding something helpful to their case in the course of the discovery procedure") (internal quotation marks omitted).

9 Petitioners' Appeal at 1.

10 *Interlocutory Ruling* at 19.

11 Petitioners' Initial Petition at 29 (emphasis in original).

Moreover, the *Interlocutory Ruling* denied Petitioners' request to investigate the ICS usage rate on grounds other than Petitioners' own statements. Relying on the *1998 Rate Cap Order*, the Hearing Officer determined that the existing ICS usage rate is intended for "ICS providers to recover the traditional cost of providing conventional collect calling services," not the "additional costs associated with ICS" as alleged by Petitioners.[12] As explained in the *Interlocutory Ruling,* the additional costs associated with ICS are governed by the per-call surcharge rate element.[13] Petitioners provided no basis for reconsideration of the usage rates cap during the course of the proceedings before the Hearing Officer, and have provided no justification for reversing the *Interlocutory Ruling* on this issue on appeal. The Hearing Officer "has wide latitude in ruling on evidence,"[14] and correctly determined that Petitioners' allegations "provide no basis for relief."[15]

Second, Petitioners contend there is "substantial evidence" that ICS can be provided at rates lower than the current Massachusetts rate.[16] In support, Petitioners submit expert declarations and point to statements by the Federal Communications Commission ("FCC") in its recent interstate ICS rates Order.[17] As an initial matter, "[p]resenting new argument on appeal generally contravenes the Department's standard of review for appeal of a Hearing Officer

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12 *Interlocutory Ruling* at 19 (citing 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, 9-10 (April 17, 1998) ("*1998 Rate Cap Order*") and Petitioners' Initial Petition at 15-22).

13 *Interlocutory Ruling* at 19.

14 D.P.U. 07-30, *Investigation by the Department of Public Utilities on the Petition of the Attorney General of the Commonwealth of Massachusetts into the National Grid plc and KeySpan Corporation Merger, pursuant to G.L. c. 164, §§ 76, 76A*, 40 (June 9, 2010).

15 *Interlocutory Ruling* at 19.

16 Petitioners' Appeal at 4.

17 WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113 (rel. Sept. 26, 2013) ("*FCC Order and FNPRM*").

ruling."[18] The Department routinely has "decline[ed] to consider new arguments on appeal from a hearing officer ruling, except under extraordinary circumstances not present here."[19] As the Department has said:

> Administrative efficiency requires that a party appealing a hearing officer's ruling not be routinely allowed to raise new arguments or factual allegations not presented below but rather injected for the first time on appeal. Administrative efficiency also requires that a moving party state his or her claim fully to the hearing officer and, if dissatisfied with the hearing officer's ruling, appeal that ruling on the petition as presented below.[20]

Petitioners cannot raise new arguments or facts for the first time on appeal. There is no reason Petitioners could not have submitted Mr. Bazelon's declaration or Mr. Dawson's views on the Bazelon declaration prior to the issuance of the *Interlocutory Ruling*. Mr. Bazelon's declaration was submitted to the FCC on March 25, 2013. PLS was an active participant in that FCC proceeding.[21] In the time between the filing of Mr. Bazelon's declaration at the FCC and the issuance of the *Interlocutory Ruling*, Petitioners filed an amended affidavit for Mr. Dawson (on March 26, 2013) and a letter urging the Department to follow the lead of the FCC (on April 26, 2013). Under the Department's procedural rules, Petitioners could have amended their prior pleadings to reference the information provided by Mr. Bazelon to the FCC (and Mr. Dawson's

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[18] D.P.U. 08-50, *Investigation by the Department of Public Utilities on its own Motion into Updating its Energy Efficiency Guidelines Consistent with an Act Relative to Green Communities*, Interlocutory Order on Appeal from Hearing Officer Ruling, n.3 (Sept. 15, 2008).

[19] D.P.U. 10-170, *Joint Petition for Approval of Merger between NSTAR and Northeast Utilities, pursuant to G.L. c. 164, § 96*, Interlocutory Order on Motion of Mary O'Donnell for Appeal to Intervene (Mar. 21, 2011); *see also Boston Neighborhood Taxi Association v. Department of Public Utilities*, 410 Mass. 686, 693 (1991).

[20] D.T.E. 01-31-Phase I, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' Intrastate Retail Telecommunications Services in the Commonwealth of Massachusetts*, Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment (Aug. 29, 2001).

[21] WC Docket No. 12-375, Comments of Prisoners Legal Services of Massachusetts (filed Mar. 25, 2013).

views on that filing), or asked the Hearing Officer to take administrative notice of the filing.[22] Petitioners had ample opportunity to bring these documents to the attention of the Hearing Officer, and failed to do so. Petitioners' reliance on the declarations as a basis for their appeal should be rejected on this procedural basis alone.

The declarations of Mr. Dawson and Mr. Bazelon also provide no substantive evidentiary support for Petitioners' appeal. While Petitioners claim ICS can be "profitably offered" for less than $0.10 per minute,[23] they make no attempt to address the Department's previous findings that the existing ICS rate caps establish the "reasonable" rate for inmate calling in Massachusetts.[24] GTL's rates, as previously established and set out in a tariff filed with the Department, "shall be deemed prima facie lawful until changed or modified" by the Department.[25] Thus, any rates approved by the Department, such as GTL's rates for inmate calling, "must be reasonable as determined by the [Department] in the first instance."[26] GTL's inmate calling rates "were examined and approved by the Department," and thus they are "ipso facto just and reasonable."[27] As the *Interlocutory Ruling* stated, "Petitioners will need to overcome the presumption that rates adopted pursuant to the Department's ICS rate structure adopted by the Department in the 1998

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22 220 C.M.R. §§ 1.04(3) (allowing for amendments to pleadings); 1.10(2) (allowing the Department to take "official notice" of "matters as might be judicially noticed" by federal or Massachusetts state courts).

23 Petitioners' Appeal at 5.

24 *1998 Rate Cap Order* at 11.

25 M.G.L. ch. 159 § 17.

26 *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 M.G.L. ch. 159 § 17).

27 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 M.G.L. ch. 159 § 17).

Order and properly tariffed are just and reasonable."[28] Petitioners have made no such showing here.

Petitioners also attempt to discredit the current ICS usage rate in Massachusetts by claiming those rates are "pegged to ordinary payphone rates."[29] This is not accurate. The ICS usage rates established by the Department in 1998 and updated in 2004 are based on "the ICS usage rates then charged" by Verizon.[30] The Department's 1998 decision is clear that Verizon's "inmate calling services usage rates" would serve as a cap on the "usage rates of all other inmate calling services providers."[31] The Department once again confirmed this in 2004 when it informed ICS providers of changes to "Verizon rates for collect inmate calls" and ordered other ICS providers to modify their ICS rates accordingly.[32] Petitioners' claims that ICS usage rates must be modified because they were based on "ordinary payphone rates" should be rejected.

Petitioners' citation to statements by the FCC also do not provide the requisite support for their appeal.[33] There is nothing in the *FCC Order and FNPRM* that provides "a sufficient basis upon which to open an inquiry or investigation" into Massachusetts' current ICS usage rates.[34] Petitioners concede that the FCC is continuing to collect data in order to develop a permanent rate structure,[35] but ask the Department to rely on the FCC's interim analysis and tentative

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28 *Interlocutory Ruling* at 17.

29 Petitioners' Appeal at 4; Petitioners' Appeal at Dawson Second Affidavit ¶ 8.

30 *Interlocutory Ruling* at 2.

31 *1998 Rate Cap Order* at n.11.

32 Industry Notice, *Collect Inmate Calls - Rate Cap* (Sept. 3, 2004).

33 Petitioners' Appeal at 6-8.

34 *Interlocutory Ruling* at 9.

35 Petitioners' Appeal at 7. As FCC Commissioner Pai recognized, the "interim" designation does not "bridge the evidentiary gap" in the *FCC Order and FNPRM*. *FCC Order and FNPRM* at 122. He notes that the "record evidence does not support the Commission's approach . . . .which underscores that the cart is before the horse." *Id.* at 112.

conclusions, which are still being formulated in the FCC's ongoing proceeding.[36] Further, the FCC statements cited by Petitioners are applicable *only* to interstate ICS rates; the FCC has requested comment on how its findings on interstate ICS rates should be applied in the context of intrastate ICS rates.[37] Statements by the FCC regarding interstate ICS rates and tentative conclusions regarding the potential applicability to intrastate ICS rates simply do not "provide a basis of fact that would justify the Department investigating ICS usage rates or the cap imposed on those rates."[38]

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36 Petitioners' Appeal at 8.

37 *FCC Order and FNPRM* ¶¶ 130-134. It is for this reason that GTL has requested that the Department hold this proceeding in abeyance given the interplay between the FCC's ongoing ICS proceeding and the issues set for investigation here.

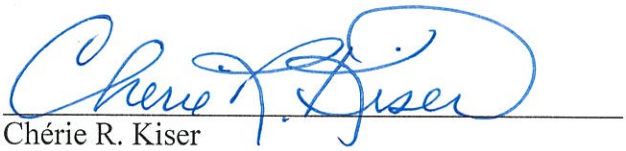
38 *Interlocutory Ruling* at 14.

CONCLUSION

Accordingly, GTL respectfully requests that Petitioners' appeal be denied. Petitioners have not demonstrated that the *Interlocutory Ruling*'s determination regarding per-minute ICS usage rates is unreasonable or that the Hearing Officer abused his discretion in making the decision.

Respectfully submitted,

GLOBAL TEL*LINK CORPORATION



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I, Angela F. Collins, certify that on this 8th day of November 2013, I served a copy of the foregoing Response of Global Tel*Link Corporation to Petitioners' Appeal on the following via the method indicated:

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