

November 8, 2013

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BY FEDERAL EXPRESS

Catrice C. Williams, Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118-6500

Re: 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”) – Docket No. 11-16

Dear Secretary Williams:

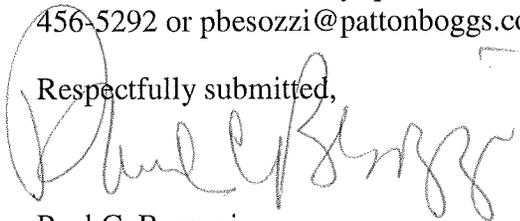
In accordance with 220 CMR Section 1.06:(d)3 and the Hearing Officer’s Electronic Message Ruling of October 23, 2013, enclosed for filing in the referenced Docket are an original and three (3) copies of Securus Technologies, Inc.’s Response To Petitioners’ Appeal (“Response”).

Copies of the Response are simultaneously being served on all parties listed on the official Service List issued by the Department.

An extra copy of the Response is enclosed to be stamped “received” or “filed” and returned in the enclosed envelope.

Please direct any questions concerning this filing to the undersigned at 202-456-5292 or pbsozzi@pattonboggs.com.

Respectfully submitted,



Paul C. Besozzi
Counsel for Securus Technologies, Inc.

4818-6088-9105

by the Hearing Officer.³ Instead, Petitioners merely contend that the Hearing Officer “misconstrued” or “misinterpreted” their original Petition,⁴ pointing to the Federal Communications Commission’s (“FCC” or “Commission”) Order in its ongoing rulemaking *In the Matter of Rates for Interstate Inmate Calling Services*⁵ – released three days *after* the Ruling. It is on this sole basis that Petitioners claim that the Hearing Officer’s decision not to investigate the current usage charge rate cap should be reversed.⁶ Petitioners’ arguments and assertions wholly fail to satisfy the long-standing requirement that to reverse a Hearing Officer’s ruling of this nature there must be evidence that there was an abuse of discretion. Petitioners present no such evidence and there is none.

Furthermore, the Petitioners’ effort to justify a reversal of the Hearing Officer’s Ruling regarding usage rates only serves to further emphasize that the FCC is considering identical issues regarding intrastate ICS that the Ruling noted for investigation and on which the Petitioners, and their expert, have urged the FCC to act. These include the usage charge issue which the Ruling declined to investigate, but is the subject of the Petitioners’ Appeal.⁷ The Petitioners seek to have that issue added to this proceeding so that they can, in effect, have two simultaneous bites at the apple.

³ Securus notes that the Ruling explicitly directed that “a copy of this Ruling must accompany any appeal.” Ruling, at p 33. The Petitioners’ Appeal was accompanied by three exhibits, none of which was a copy of the Ruling. Therefore, the Appeal does not comply with the Ruling’s directive and is on that score procedurally defective.

⁴ D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust & Unreasonable Cost of Such Calls*, August 31, 2009 (“Initial Petition”).

⁵ *In the Matter of Rates for Interstate Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking*, FCC 13-113, WC Docket No. 12-375 (released September 26, 2013)

⁶ Petitioners’ Appeal, at pp. 1, 2.

⁷ Again, Securus respectfully submits that there is ample Department precedent, some of which was cited in the Ruling itself, for granting its Abeyance Motion. The Department should not be required to expend resources addressing the same issues being considered by the FCC, creating the prospect that the Department would have to “redo” whatever decision the Department might render.

1. The Hearing Officer Did Not Abuse His Discretion In The Ruling On Usage Charges.

The applicable standard of review by the Commissioner on appeal of the Hearing Officer's ruling is well established – there must be a showing that the Hearing Officer abused his discretion in excluding the usage charge issue from this investigation.⁸ Hearing Officers have substantial discretion in determining procedural issues and conducting adjudicatory proceedings.⁹ Where there is no evidence that the presiding officer abused his discretion in ruling, the decision of the presiding officer must be affirmed.¹⁰

Despite this clear standard Petitioners in their Appeal put forth no evidence of an abuse of discretion, nor do they even make the claim that the Hearing Officer abused his discretion. Indeed, the Appeal is completely devoid of any reference to the term “abuse of discretion.”

Rather the Petitioners' Appeal is based solely on the claims that the Hearing Officer should be reversed with respect to the usage charge issue because he “misconstrued” or “misinterpreted” the Initial Petition. The Appeal then proceeds to argue the merits, relying on the FCC's ICS Order, as to why its “corrected” interpretation of its own Petition is grounds for reversing the Hearing Officer's decision.

However, as the Ruling makes clear, the Hearing Officer based his decision on specific references in the Initial Petition, including the assertion that the existing per-minute rate cap of

⁸ 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 Officer's May 18, 2001 Ruling, 2001 Mass. PUC Lexis 3, June 12, 2001, at p. 5 (“Verizon Order”); *see generally* *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 813 N.E. 2d 476, 483 (Sup. Jud. Ct 2004).

⁹ D.P.U. 07-30, *Investigation of the Department of Public Utilities on the Petition of the Attorney General of the Commonwealth of Massachusetts into the National Grid plc and Key Span Corporation merger, pursuant to G.L. c. 164, §§76, 76A*, June 9, 2010, at p.40.

¹⁰ 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.C. Nos. 280 through 305, filed with the Department on July 17, 2001 by the Berkshire Gas Company*, January 31, 2002, at p. 7.

\$0.102 cents per minute or less “covers the actual costs for providing collect telephone services for prisoners, including adequate profit margins for providers *with no per call surcharges or other additional costs.*”¹¹ Further, the Ruling notes that the Petition did not request that the Department reconsider its decision to cap usage rates at that level.¹²

The Petitioners’ Appeal does not contest that conclusion. Rather, based on the FCC ICS Order, wherein, as the Petitioners note, the FCC is considering a per-minute rate of \$0.07 to be applied to both inter and intrastate calls, the Petitioners have now decided that they do not like their original position on usage rates in Massachusetts. By their Appeal they seek to, in effect, change that position by claiming that the Hearing Officer has “misinterpreted” their Initial Petition and that they actually meant that a lower intrastate usage rate cap would be more appropriate.¹³ They seek to add information from the FCC proceeding relating to interstate rates to support this change in tune.¹⁴

As a result, the Petitioners fail to articulate any lawful basis on which to sustain their Appeal. The Hearing Officer’s decision rests on a reasonable foundation and is consistent with the delegation of authority vested in him by the Department’s precedent and rules.¹⁵ There is no evidence of abuse of discretion – indeed none has been alleged – and therefore the Petitioners’ Appeal must be denied.

¹¹ Initial Petition, at p. 29 (emphasis in the original); Ruling, at p. 19.

¹² Ruling, at p. 30.

¹³ It is interesting to note that the Massachusetts intrastate rate cap of \$0.102 per minute is substantially below the rate cap set by the FCC’s ICS Order (\$0.25 per minute) for interstate collect calls and also substantially below the “safe harbor” rate (\$0.14 per minute) for such calls. Indeed, it is below the rate cap and “safe harbor” rate set for debit card and prepaid calls. ICS Order, ¶5. Contrary to Petitioners characterization, Securus respectfully submits that these differences are hardly “slight.”

¹⁴ The Exhibits to the Petitioners’ Appeal include the ICS Order and Declarations by Mr. Dawson and Mr. Coleman Bazelon before the FCC.

¹⁵ Verizon Order, at p. 5.

2. The Appeal Seeks To Add Back Issues Already Being Considered By The FCC

As noted in its Abeyance Motion, on September 26, 2013 – three days after the Ruling - the FCC released its ICS Order, broadly addressing the rates and practices for interstate ICS, while opening a Further Notice of Proposed Rulemaking (“FNPRM”) to examine “reforming intrastate ICS rates and practices.”¹⁶

The FCC established a detailed regime for regulating rates for interstate ICS, including addressing per-call and per-minute charges, ancillary non-call-related charges/fees and site commissions. The Order imposed per-minute rate caps and, within those caps, established “safe harbor” levels which are presumptively compliant with the cost-based rate requirements that the FCC approved. Those requirements also were applied to ancillary charges/fees. The FCC examined and analyzed ICS costs and directed the filing of additional cost data.

Petitioners were active participants in the ICS proceeding before the FCC, asking the FCC in its rulemaking to address some of the very same issues being considered by the Department herein.¹⁷ For example, the Petitioners urged the FCC to eliminate per-call surcharges.¹⁸ They also raised service quality issues with the FCC.¹⁹

The FNPRM undertakes to reform both local rates and intrastate long distance rates for ICS. Specifically, the FCC asserts that it believes that “intrastate reform is necessary and that the Commission has the authority to reform intrastate ICS rates.”²⁰ Further, the Commission claims that

¹⁶ ICS Order, ¶128. As noted by Global Tel* Link in a similar motion filed in this proceeding on October 17, 2013, the FCC’s ICS Order resulted from a lengthy record developed over a decade involving comments on rates, cost and revenue data, commission payments and rate cap proposals, and included filings by representatives of inmate families and interested groups and by the PLS’s expert, Mr. Dawson. Motion To Hold Proceeding In Abeyance, Global Tel*Link Corporation, D.T.C. 11-16, October 17, 2013, at p. 2.

¹⁷ See, e.g., Comments of Prisoner’s Legal Services of Massachusetts, filed March 25 2013, Docket No. WC 12-375, including the Amended Affidavit of Douglas A. Dawson, the same such Amended Affidavit filed in this proceeding (“PLS FCC Comments”).

¹⁸ PLS FCC Comments, at pp. 14-15.

¹⁹ ICS Order, ¶85, n. 320, ¶158, n. 500.

²⁰ ICS Order, ¶129.

“section 276 [of the Communications Act of 1934, as amended, (47 U.S.C. § 276)] affords the Commission broad discretion to regulate intrastate ICS rates and practices... and to preempt inconsistent state requirements.”²¹ Therefore, the FCC seeks comment on “reforming intrastate rates and practices.”²²

The FCC relies on this statutory authority and judicial precedent to conclude that it can regulate intrastate “end-user rates.”²³ It also tentatively precludes recovery of “site commissions” through intrastate rates and seeks comment on that conclusion.²⁴ The Commission seeks comment on “per-call charges” and whether there are “any costs that are uniquely incurred” that could not be recovered through a per-minute charge alone.²⁵ It raises the prospect of minimum quality of service standards for ICS services.²⁶ It seeks to ensure that “ancillary charges” are just and reasonable.²⁷ Finally, it seeks comment on per-minute rate structure (\$0.07 per minute) which would be distance insensitive and apply to both interstate and intrastate calling.²⁸

The Petitioners’ Appeal only further highlights the overlap between the FCC proceeding and what the Petitioners urge the Department to add to the investigation. The Petitioners make constant reference to the ICS Order, include it as an Exhibit with their Appeal, attach materials and information submitted by their expert Mr. Dawson with the FCC in an effort to have the

²¹ ICS Order, ¶135.

²² ICS Order, ¶129.

²³ ICS Order, ¶137.

²⁴ ICS Order, ¶133.

²⁵ ICS Order, ¶¶161-162.

²⁶ ICS Order, ¶178.

²⁷ ICS Order, ¶168.

²⁸ ICS Order, ¶155.

Department follow the FCC's path with respect to per-minute rates and "unique costs", including the FCC's consideration of a distance and jurisdictionally insensitive per-minute rate of \$0.07.²⁹

Securus strongly disagrees with many of the conclusions in the ICS Order, including the proposals regarding intrastate rates and practices in the FNPRM. However, the FCC has given no indication of a change in plans to proceed. Securus respectfully submits that the Petitioners' Appeal itself demonstrates in compelling fashion how the Petitioners seek to take advantage of that fact, while now attempting to have the same intrastate rate issues simultaneously adjudicated in both federal and state forums.

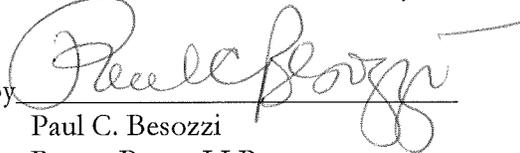
3. Conclusion

The Petitioners' Appeal fails to show that the Hearing Officer in any way abused his discretion in deciding not to include the usage rate issue as part of the investigation initiated by the Ruling. Moreover, the FCC is already considering this issue as part of the FNPRM, a proceeding that involved issues that are relevant to the investigation initiated by the Ruling.

WHEREFORE, for all of the foregoing reasons, Securus respectfully moves that the Department deny the Petitioners' Appeal or, in the alternative, grant the Abeyance Motion and thereby suspend any action on the Appeal pending final resolution of the FCC's ICS Rate Order.

Respectfully submitted

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Dated: November 8, 2013

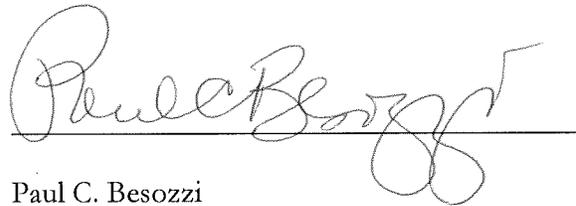
²⁹ Petitioners' Appeal, at pp. 2, 3, 6-8.

CERTIFICATE OF SERVICE

I, Paul C. Besozzi, hereby certify that on this 8th day of November, 2013, the foregoing "Response To Petitioners' Appeal" was served on the parties listed on the Service List below issued by the Department by the method listed under each such party:

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