COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 11-16 September 23, 2013

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

I. INTRODUCTION

The Department of Telecommunications and Cable ("Department") addresses a petition from "family members, loved ones, legal counsel, and others residing in Massachusetts who receive and pay for telephone calls from prisoners who live in the Commonwealth's prisons, jails, and houses of correction" ("Petitioners") for relief from allegedly unjust and unreasonable costs of inmate calling services ("ICS"), together with responses to the petition from ICS providers at correctional facilities[1] in the Commonwealth who have requested that the Department close this docket without opening an investigation.

For the reasons discussed below, the Department denies in part the request of Global Tel*Link Corporation ("GTL") and Securus Technologies, Inc. ("Securus" together with GTL, the "Respondents") to close the docket without an investigation. The Department, pursuant to G. L. c. 159, §§ 14, 16 and 17, opens an investigation into: the per-call surcharge assessed by 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

[1] The term "correctional facilities" as used in this ruling refers to the prisons managed by the Massachusetts Department of Corrections and jails and houses of corrections managed by county Sheriffs in the Commonwealth that are served by the ICS providers identified herein.

noise; and Respondents' billing practices. The Department dismisses 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.

II. BACKGROUND AND PROCEDURAL HISTORY

In 1998, the Department[2] issued an order on payphone barriers to entry and exit, in which it established an Operator Service Provider ("OSP") rate cap and addressed ICS rates. *See Investigation by the Dep't of Telecomms. & Energy on its own motion regarding (1) implementation of § 276 of the Telecomms. Act of 1996 relative to Pub. Interest Payphones, (2) Entry & Exit Barriers for the Payphone Marketplace, (3) New England Tel. & Tel. Co. d/b/a NYNEX's Pub. Access Smart-pay Line Service, & (4) the rate policy for operator servs. providers*, D.P.U./D.T.E. 97-88/97-18 (Phase II) *Order on Payphone Barriers to Entry & Exit, & OSP Rate Cap* (Apr. 17, 1998) ("1998 Order"). Specifically, in the 1998 Order, the Department retained its regulatory oversight of ICS rates. 1998 Order at 9. The Department determined that it would continue to treat ICS providers as dominant carriers, because inmates had to use presubscribed OSPs at a prison payphone without competitive alternatives. *Id.*

The Department found that capping ICS rates at the ICS usage rates then charged by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts (now Verizon New England Inc. d/b/a Verizon Massachusetts) ("Verizon MA"),[3] or AT&T Communications of New England, Inc. ("AT&T"), precluded independent ICS providers from recovering

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[2] The Department of Telecommunications and Energy ("DTE") was the predecessor agency to the Department of Telecommunications and Cable ("DTC") and addressed the issue of ICS rates in 1998. Pursuant to Governor Deval Patrick's Reorganization Plan, Chapter 19 of the Acts of 2007, the DTE ceased to exist, and the DTC was created, effective April 11, 2007. For the purpose of this Order, "Department" shall refer to both agencies.

[3] For ease of reference, the Department will refer to New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts and Verizon New England Inc. d/b/a Verizon Massachusetts as "Verizon MA" throughout this ruling.

legitimate additional costs associated with the provision of ICS. *Id*. The record showed that the unique characteristics[4] of ICS produced higher costs per call than those for conventional OSP calls. *Id*. As a result, the Department permitted ICS providers to assess a per-call surcharge in addition to the usage rate. *Id*. at 10. The per-call surcharge was set at a maximum of $3.00 per call, using as a reasonable proxy the prevailing $3.00 per-call surcharges assessed by AT&T, MCI Telecommunications Corporation, and Sprint Communications Company in 33 states at the time to cover all additional costs. *Id.* The Department also found it reasonable and administratively efficient to cap usage rates at the rates set by Verizon MA, the Incumbent Local Exchange Carrier ("ILEC").[5] *Id*.

On July 21, 2004, the Department approved revisions to Verizon MA's ICS rates. *See Dep't of Telecomms. & Energy Industry Notice, Collect Inmate Calls – Rate Cap* at 1 (rel. Sept. 3, 2004) ("2004 Industry Notice"). Verizon MA requested to replace its multiple-component usage rates with a flat usage rate of $0.10 per minute for ICS calls. *Id.* at 1-2. In the 2004 Industry Notice, the Department clarified that ICS providers were not required to adopt a flat usage rate, but were required to maintain usage rates that would not exceed the usage rate for a corresponding "average call." *Id*. at 2. The Department defined an "average call" for purposes of complying with the rate cap as a 15-minute collect ICS call. *Id.* Thus, ICS providers may not charge usage rates that exceed $1.50 for a 15-minute collect call. The Department made clear,

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[4] The Department included a non-exhaustive list of additional costs incurred by ICS providers including "(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." 1998 Order at 9-10.

[5] In a subsequent order responding to a motion for clarification, the Department also corrected a past inadvertent act of detariffing Verizon MA's ICS rates and clarified the surcharge rate cap approved in the 1998 Order applied to Verizon MA. *Investigation by the Dep't of Telecomms. & Energy on its own motion regarding (1) implementation of Section 276 of the Telecomms. Act of 1996 relative to Pub. Interest Payphones, (2) Entry & Exit Barriers for the Payphone Marketplace, (3) New England Tel. & Tel. Co. d/b/a NYNEX's Public Access Smart-pay Line Serv., & (4) the rate policy for operator servs. providers*, D.P.U./D.T.E. 97-88/97-18 (Phase II-A) *Order on Motion for Reconsideration of NEPCC, Motion for Reconsideration of AT&T, & Motions for Reconsideration, Clarification, & Extension of Appeal Period of Bell Atlantic* at 12 (Oct. 8, 1999).

however, that the cap on the usage rate is separate and distinct from the per-call surcharge, which remains capped at $3.00 per call. *Id*.

On August 29, 2009, Petitioners filed with the Department a petition requesting relief from allegedly unjust and unreasonable rates for ICS, pursuant to G. L. c. 159, §§ 14, 17 and 24. *Pet. of Recipients of Collect Calls from Prisoners at Correctional Inst. in Mass. Seeking Relief from the Unjust & Unreasonable Cost of such Calls* ("In re Inmate Calls"), D.T.C. 11-16 at 1 ("Initial Petition").

The Department was unable to determine whether the Initial Petition provided legally and factually sufficient bases to support an investigation or other action, and thus, the Department's then Competition Division Director, requested additional information from Petitioners on September 29, 2009. *Letter from Michael Isenberg to Bradley W. Brockmann, Esq.* at 1-2 (Sept. 29, 2009). Specifically, the Petitioners' counsel was asked to clarify the status of each petitioner; identify the ICS providers providing service to each petitioner; explain the method of payment for the calls if the inmates listed are responsible for the charges; and supplement the scope and nature of their quality of service allegations. *Id.*

Petitioners amended their Initial Petition in response to the Department's request and further clarified that they were asking the Department to "investigate the pervasive quality of service issues Petitioners encounter in connection with prisoner telephone calls." *In re Inmate Calls*, Amendment 1 & Supplement on Quality of Service, at 1 (May 18, 2010) ("First Amendment"). Petitioners' alleged quality of service issues with the service providers Evercom Systems Inc., now doing business as Securus, and GTL. First Amendment at 5. Subsequently, Petitioners filed a second amendment to the Initial Petition on April 27, 2011, increasing the number of petitioners to 56. *In re Inmate Calls*, Amendment 2, Additional

Petitioners, at 1 (Apr. 27, 2011) ("Second Amendment" together with the Initial Petition and the First Amendment, the "Complaint").

In their Complaint, Petitioners ask the Department to open an investigation pursuant to G. L. c. 159, §§ 14, 17, and 24, and to determine just and reasonable rates for ICS. Initial Petition at 3. In support of their request, Petitioners assert that: (1) the per-call surcharge of up to $3.00 assessed is excessive, unnecessary, and should be eliminated; (2) the per-minute usage rate must be lowered to reflect just and reasonable rates; and (3) all fees including service, maintenance, and prepaid accounts should be included in the calculation of just and reasonable per-minute usage rates. *Id*. at 3-4.

On November 10, 2011, the Department opened a docket for Petitioners' Complaint and set a deadline of November 21, 2011, for Answers. *Letter from Hearing Officer Kalun Lee to Parties Re: Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Mass. Seeking Relief from the Unjust & Unreasonable Cost of such Calls*, D.T.C. 11-16, (Nov. 10, 2011). Securus submitted a motion for extension of time on November 14, 2011. Also on November 14, 2011, GTL submitted its consent motion for extension of answer.[6] On November 18, 2011, the Department granted the motions for extension of time, extending the answer submission deadline for all parties until January 20, 2012. *In re Inmate Calls*, D.T.C. 11-16, *Order on Motions to Extend Time for Responses* (Nov. 18, 2011).

GTL filed with the Department its *Global Tel*Link Corporation Response to Petition* ("GTL Answer") on January 20, 2012. According to GTL, Petitioners' claims against GTL should be dismissed pursuant to 220 C.M.R. § 1.06(6)(e) for failure to state a claim upon which relief may be granted because Petitioners can prove no set of facts in support of their claims.

[6] On November 16, 2012, Inmate Calling Solutions, LLC ("ICSolutions") separately contacted the Department requesting to receive the same extension, if any, granted to GTL and Securus.

GTL Answer at 2 n.5. Specially, GTL claims that GTL's rates and practices for ICS are consistent with state-mandated requirements, Petitioners have made no showing that GTL's ICS rates or practices violate Massachusetts law, and have not provided sufficient evidence to support an investigation into service quality claims. *Id*. at 2. On January 20, 2012, Securus filed a *Response of Securus Technologies Inc.* ("Securus Answer"). Securus asserts Petitioners have failed to meet their burden of proof. Securus Answer at 11. Securus claims that pursuant to G. L. c. 159, § 17 its ICS rates are deemed *prima facie* lawful unless and until the Department finds the rate to be unjust and unreasonable. *Id.* at 12. Securus claims that the Department should measure the reasonableness of the rate by an ICS provider's ability to recover legitimate additional costs incurred in providing ICS. *Id.* at 13. In addition, in determining the reasonableness of the rate, Securus suggests comparing the rates for ICS to those assessed to the general public for like services. *Id*. Securus claims automated collect calls in Massachusetts from a public payphone is the appropriate like service. *Id.* at 14. The current tariffed rate for automated collect calls from a public payphone includes a $4.99 per-call surcharge plus an $0.89 per minute usage rate. *Id*. Securus also claims that Petitioners failed to justify further investigation into issues involving Securus's service quality and customer service. *Id*. at 38.

On January 18, 2012, Inmate Calling Solutions, LLC d/b/a ICSolutions ("ICSolutions") also responded to the Complaint. *See Response of Inmate Calling Solutions, LLC* ("ICSolutions Answer"). ICSolutions states it only serves one county facility, it is minimally referenced in the Complaint, it has not received any complaints concerning rates or quality of service in at least five years, it has been in compliance with all applicable regulations and in accordance with its tariff filed with the Department, and participation would be expensive and

burdensome. ICSolutions Answer at 1-2. For the reasons listed above, ICSolutions declined to participate further in the proceeding. *Id.* at 2.

Although contained in the answers of Respondents, the Hearing Officer found these assertions sufficient to qualify as motions to dismiss. On January 27, 2012, the Hearing Officer directed Petitioners to respond to Respondents' assertions that the Complaint did not contain sufficient allegations of fact to support an investigation. *Hearing Officer Kalun Lee E-mail to Parties* (Jan. 27, 2012). On March 23, 2012, Petitioners filed a *Memorandum Opposing Dismissal* ("Petitioners Response"). On April 12, 2012, GTL submitted to the Department a *Motion for Leave to File Response and a Brief Response to Petitioners' March 23 Memorandum* ("GTL Reply"). Securus also submitted a *Motion to File Reply to Petitioners' Memorandum and Reply to Petitioners' Memorandum* ("Securus Reply") on April 12, 2012. On April 20, 2012, Petitioners submitted a *Motion for Leave to Surreply and Surreply* ("Petitioners' Surreply").

On May 18, 2012, the Hearing Officer notified parties that the Department, in accordance with G. L. c. 159, § 24 and 200 C.M.R. § 1.06, would hold a public hearing regarding the issues identified in the Complaint. That is, the Department sought public comments regarding the rates charged and service quality provided by the ICS providers. The Department released a Notice of Public Hearing on June 12, 2012, setting July 19, 2012, as the date for the public hearing. Docket at 1.

At the July 19, 2012, public hearing ("Hearing"), the Department received oral testimony from members of the public and more than 200 pieces of written testimony. Docket at 1; *see also*, Public Comments, *available at* http://www.mass.gov/ocabr/government/oca-agencies/dtc-lp/dtc-11-16.html (last accessed Sept. 23, 2013). Among other things, customers of GTL and Securus testified about a pattern of: (1) poor service quality and dropped calls; (2) being charged

a connection fee each time a dropped call was redialed; (3) difficulties receiving refunds or credits for dropped calls; and (4) a variety of surcharges in addition to the connection and per-minute fees. *See, e.g.*, Tr. of Public Hearing at 48, 59, 62, 63, 66, 70, 72, & 127, *In re Inmate Calls*, D.T.C. 11-16 (July 19, 2013).

On October 25, 2012, Securus filed with the Department its *Response of Securus Technologies, Inc., to Public Comments* ("Securus Public Comment Response"). Docket at 1. Also on October 25, 2012, GTL filed its *GTL Response to Public Comments* with the Department. Docket at 1. On November 5, 2012, Petitioners filed their *Proposed Reply of Petitioners Regarding Public Comments* ("Petitioners Public Comments Reply") with the Department. On March 27, 2013, Petitioners submitted an *Amended Affidavit of Douglas A. Dawson* to the Department, amending the *Affidavit of Douglas A. Dawson* attached to Petitioners' Surreply.

III. MOTIONS FOR LEAVE TO FILE REPLY AND SURREPLY

As an initial matter, the Department grants leave for GTL and Securus to reply and Petitioners to surreply and accepts GTL's Reply, Securus's Reply, and Petitioners' Surreply into the record. The Department's procedural regulations allows a party to motion for leave to file response documents (220 C.M.R. § 1.04(5)) and it is within the Department's discretion whether to accept such motions (220 C.M.R. § 1.06 (6)). While the Department has discretion in granting motions for leave to file reply, the Department will typically balance the potential for additional insight against the need for conducting an efficient hearing. *See Investigation by the Dep't of Telecomms.& Energy on its own motion as to the propriety of the rates & charges set forth in the following tariff: M.D.T.E. No. 14, filed with the Dep't on June 16, 2006, to become effective*

July 16, 2006, by Verizon New England Inc. d/b/a Verizon Mass., D.T.C. 06-61, *Order on Clarification & Partial Reconsideration* at 7 (May 11, 2012).

GTL's and Securus's motions for leave to file reply and Petitioners' motion for leave to file surreply are uncontested. As the replies and surreply are uncontested and add to the requested discussion of whether to grant the motions to close the investigation and dismiss Petitioners' claims, the Department in its discretion grants Securus's and GTL's motions for leave to file replies and Petitioners' motion for leave to file surreply. 220 C.M.R. § 1.06(6). The Department accepts GTL's Reply, Securus's Reply, and Petitioners' Surreply into the record.

IV. ANALYSIS AND FINDINGS

The Department, in considering whether to open an investigation upon complaint, where dismissal of the complaint is also sought, conducts a two-part analysis. First, the Department considers whether it should dismiss any issues raised in the complaint under its motion to dismiss standard. *See Pet. of Verizon New England, Inc. MCImetro Access Transmission Servs. of Mass., Inc., d/b/a Verizon Access Transmission Servs., MCI Comm'ns Servs., Inc., d/b/a Verizon Business Servs., Bell Atlantic Comm'ns, Inc., d/b/a Verizon Long Distance, & Verizon Select Servs., Inc. for Investigation under Ch.159, § 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers* ("Intrastate Access Rates"), D.T.C. 07-9, *Hearing Officer Ruling on Motions to Dismiss* at 2-3 (June 18, 2008). Second, when determining whether to exercise its investigative authority, the Department considers whether it has a sufficient basis upon which to open an inquiry or investigation into the remaining issues of the complaint. *See Investigation by the Dep't of Telecomms. & Cable on its own motion, pursuant to G. L. c. 159, § 16, of the tel. serv. quality of Verizon New England Inc., d/b/a Verizon Mass., in Berkshire, Hampden, Hampshire, & Franklin Counties* ("Serv. Quality Investigation"), D.T.C. 09-1, *Order*

to Open Investigation at 11-12 (June 1, 2009). Under the Department's procedural rules, "[a] party may move at any time after the submission of an initial filing for dismissal [ ] as to all issues or any issue in the case." 220 C.M.R. § 1.06(6)(e). "Procedures for dismissal and summary judgment properly can be applied by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision." *See Intrastate Access Rates*, D.T.C. 07-9 at 3 n.4 (citing *Mass. Outdoor Advertising Counsel v. Outdoor Advertising Bd.*, 9 Mass. App. Ct. 775, 783-786 (1980); *Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Admin.*, 495 F. 2d 975, 985 (D.C. Cir. 1974)).

The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted was articulated in *Riverside Steam & Electric Company* ("Riverside"), D.P.U. 88-123, *Interlocutory Order on Motion to Dismiss* at 26-27 (Oct. 6, 1988). In *Riverside*, the Department denied the respondent's motion to dismiss, finding the petitioner could prove no set of facts in support of its petition. *Id*. at 26-27. In determining whether to grant a motion to dismiss, the Department takes the assertions of fact as true and construes them in favor of the non-moving party. *Id.* The Department will grant dismissal if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. *Id.*

In *Riverside*, the Department referenced case law applying Massachusetts Rule of Civil Procedure Rule 12(b)(6), although it did not formally adopt the procedural rule as its basis for dismissal. *Id*. (citing *Nader v. Citron*, 372 Mass. 96, 98 (1977)). The Rules of Civil Procedure do not govern executive agency proceedings. Instead, they apply to judicial proceedings. *See Attorney General v. DPU*, 390 Mass. 208, 212-213 (1983). Nevertheless, the Department has long utilized the Massachusetts Supreme Judicial Court's standard for considering Rule 12(b)(6)

motions to dismiss adopted in *Nader*. *See, e.g.*, *Intrastate Access Rates*, D.T.C. 07-9 at 2-3; *Pet. for investigation & complaint of Gaslantic Co. pursuant to G.L. c. 164, §§ 76 & 94 against Fall River Gas Co. regarding the assessment & collection of transportation rates contrary to the filed tariff & applicable requirements of the law*, D.P.U/D.T.E. 96-101, *Order on Motion to Dismiss by Fall River Gas Co. & Motions for Summary Judgment by Fall River Gas Co. & Gaslantic Co.* at 7 (May 6, 1999); *Riverside*, D.P.U. 88-123 at 26-27. In 2008, the Massachusetts Supreme Judicial Court revisited the standard for Rule 12(b)(6) motions to dismiss, adopting the United States Supreme Court's refinement of the standard as articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-636 (2008).

Under the *Twombly/Iannacchino* standard, a petitioner must make factual allegations that plausibly suggest entitlement to relief, not just allegations that are merely consistent with relief. *Id.* at 636. While the rules of court do not govern Department procedure, they may nevertheless provide guidance to the Department on ruling on motions to dismiss. *Attorney General v. DPU*, 390 Mass. 208, 212-213; *Pet. of New England Tel. & Tel. Co. d/b/a NYNEX for an Alternative Regulatory Plan for the Co.'s Mass. Intrastate Telecomms. Servs.*, D.P.U. 94-50, *Interlocutory Order on Motion to Dismiss of the New England Cable Television Ass'n* at 33 n. 24. Thus, under the *Twombly/Innacchino* standard that the Department now adopts, the Department, in determining whether to order dismissal, reviews whether a party, in its initial pleading, provided factual allegations sufficient to raise a right to relief above the speculative level based on the assumption that the allegations in the initial pleading were true. *Iannacchino*, 451 Mass. at 636. While refining its motion to dismiss standard in a manner consistent with *Twombly/Iannacchino*, the Department notes that its ruling in this proceeding would be the same under both *Twombly/Iannacchino* and the standard it replaced.

While a petitioner may make a claim or claims that survives a motion to dismiss, the claim or claims may be an insufficient basis for the Department to open an inquiry or investigation. *See Serv. Quality Investigation*, D.T.C. 09-1 at 11-12 (finding a sufficient and reasonable basis for the Department to open a quality of service investigation pursuant to G. L. c. 159, § 16); *Petition of Mass. Oilheat Council, Inc. & the Mass. Alliance for Fair Competition regarding the VPI Plus 2000 Program of Boston Gas Co., Colonial Gas Co., & Essex Gas Co.*, D.T.E. 00-57 at 8-12 (Sept. 12, 2001) (granting a Motion to Dismiss finding Petitioners' allegations an insufficient basis upon which to open a Department investigation). The Department has broad supervisory and regulatory oversight over the provision of common carrier telecommunications services. G. L. c. 159, § 12. The Department's explicit authority includes the ability to inquire into and investigate rates, charges, regulations, practices, equipment, and services of common carriers rendering service subject to the Department's jurisdiction. G. L. c. 159, §§ 13, 14, 16, 17, 20, & 24.

The Department's broad investigatory authority does not permit or require the Department to conduct an investigation upon every complaint or petition received. The Department has limited resources and must be judicious in its exercise of investigatory authority. For example, the Department will dismiss without prejudice or stay a proceeding where moving forward with a proceeding is an inefficient use of the Department's and parties' resources. *See Pet. for Arbitration of an Interconnection Agreement between Intrado Commc'ns Inc. & Verizon New England Inc. d/b/a Verizon Mass.*, D.T.C. 08-9, *Arbitration Order* at 10 (May 8, 2009); *Proceeding by the Dep't of Telecomms. & Energy on Its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60 Track A and Track B, *Interlocutory Order on Motion to Stay of*

Verizon New England, Inc. d/b/a Verizon Mass., at 16-17 (Apr. 2, 2004); *Investigation by the Dep't of Telecomms. & 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 Servs. in the Commw. of Mass.*, D.T.E. 01-20, *Interlocutory Order on Part B Motions* at 8 (Apr. 4, 2001). *See also, Pet. of Safari Commc'ns, Inc. for Designation as an Eligible Telecomms. Carrier on a Wireless Basis*, D.T.C. 11-4, *Order of Dismissal without Prejudice* (May 1, 2012) (dismissing petition in light of FCC order reforming the eligible telecommunications carrier designation process requiring FCC approval of a compliance plan before refiling) ("11-14 *Order of Dismissal*"). The Department has also dismissed or 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 Federal Communications Commission ("FCC"). *Investigation by the Dep't of Telecomms. & 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 Servs. in the Commw. of Mass.*, D.T.E. 01-20, *Interlocutory Order on Part B Motions*, at 8 (Apr. 4, 2001) (staying a proceeding to review Verizon's proposed avoided cost study until the FCC promulgated new pricing rules for state commissions to follow). *See also,* 11-14 *Order of Dismissal*, D.T.C. 11-4 (dismissing petition in light of FCC order reforming the eligible telecommunications carrier designation process and requiring FCC approval of a compliance plan before refiling). The Department may also decline to grant a hearing for an alleged violation of the Department's Billing and Termination Rules where the Department has

previously investigated the matter. *See Rules & Practices Relating to Tel. Serv. to Residential Customers*, D.P.U. 18448, Rule 6.3 (1977).

After review and consideration of the pleadings, the Department determines that Petitioners may seek relief through an adjudicatory proceeding via complaint and concludes that Petitioners need not overcome the statutory presumption that tariffed rates are *prima facie* just and reasonable in their Complaint. Turning to the substance of Petitioners' ICS rate allegations, the Department determines that Petitioners have failed to provide a basis of fact that would justify the Department investigating ICS usage rates or the cap imposed on those rates. However, the facts alleged in Petitioners' and Respondents' pleadings, along with the public testimony and written comments received in this proceeding, provide a sufficient basis for the Department to investigate: (1) the per-call surcharge; (2) the per-call surcharge cap; and (3) the tariffed service and other fees assessed by ICS providers. With regard to Petitioners' quality of service allegations, the Petitioners' allegations, the public testimony, and the written comments submitted in this processing provide a sufficient basis for the Department to open an investigation into the allegations of frequent call disconnections, heavy static, and poor voice quality as well as the billing and customer service practices of GTL and Securus. However, the Department declines to investigate Petitioners' allegations concerning the frequency of recorded warning messages and the availability and upkeep of phone equipment within correction facilities.

A. Petitioners May Seek the Relief Requested Through an Adjudicatory Proceeding via Complaint.

Petitioner filed a broad, multi-document Complaint with the Department pursuant to G. L. c. 159, §§ 14, 17, and 24, seeking relief from rates for ICS that they claim are unjust and unreasonable. Initial Petition at 3. Petitioners direct their Complaint at GTL's and Securus's

rates and service quality. Petitioners' Complaint also raises concerns about the Department's ICS rate setting mechanism adopted in the 1998 Order. Thus, the Complaint seeks relief not only against the parties named in the Complaint, but also through a revision to the Department's rate setting mechanism that would affect the entire ICS industry in Massachusetts.

GTL argues that because Petitioners are, *inter alia*, requesting a Department review of the ICS rates, an adjudicatory proceeding is not the appropriate vehicle for granting the relief Petitioners seek. GTL Answer at 25. GTL asserts that while administrative agencies may adopt policies through adjudication as well as rulemaking, boundaries exist between the two. *Id.* Petitioners seek relief that would apply to all current and potential ICS providers and so would best be addressed through a notice-and-comment proceeding, the process through which the current ICS rates were adopted. *Id.* at 26. Securus did not address this issue in its Answer or Reply.

According to Petitioners, the Department may address their Complaint through an adjudicatory proceeding pursuant to G. L. c. 159, § 24. Petitioners' Response at 4. Petitioners contend that even if the Department did not have explicit statutory authority to adjust its rate-setting mechanism through adjudication, it is free to choose either adjudication or rulemaking to adopt policies. *Id.* at 5. Petitioners note that the Department has previously considered broad rate-setting policies through adjudications. *Id.* at 5-6 (citing *Re Colonial Gas*, D.P.U. 93-78 (1993); *Re Cambridge Elec. Light Co.*, D.P.U. 94-101/95-35 (1995)).

That Petitioners seek an adjudicatory proceeding in their Complaint does not warrant its dismissal. It is within the Department's discretion to conduct an adjudication in which it considers rate-setting mechanisms for ICS. *See* G. L. c. 159, §§ 14, 24; *Arthurs v. Bd. of Registration in Med.*, 383 Mass. 299, 313 (1981) (citing *SEC v. Chenery Corp*., 332 U.S. 194,

203 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)). Administrative agencies may adopt policies through both adjudication and rulemaking. *Maine Pub. Serv. Co. v. Fed. Power Comm'n*, 579 F.2d 659, 669 n.14 (1st Cir. 1978); *Arthurs*, 383 Mass. at 312-13 (citing *SEC v. Chenery Corp*., 332 U.S. at 201-203; *NLRB v. Bell Aerospace Co.*, 416 U.S. at 291-294). Proceedings regarding rates for services often have both adjudicatory and rulemaking qualities because the proceeding may establish rules with general applicability or affect the legal rights, duties, or privileges of a specifically named individual. *See Cambridge Elec. Light Co. v. Dep't of Pub. Utils.*, 363 Mass. 474, 486-87 (1974).

In addition, Petitioners brought their claims pursuant to G. L. c. 159, §§ 14 and 24, both of which allow for complaints that may have an industry-wide affect. G. L. c. 159, § 24 is essentially a procedural statute providing aggrieved persons with an opportunity to be heard on matters concerning service quality and charges for services. *City of Newton v. Dep't of Pub. Utils.*, 367 Mass. 667, 671 n.4 (1975). Thus, Petitioners may request a hearing pursuant to G. L. c. 159, § 24 that may encompass matters set out in G. L. c. 159, §14. *Id*. Under G. L. c. 159, § 14, the Department may apply rate-setting adjudicatory determinations on an industry-wide basis if appropriate. G. L. c. 159, § 14 ("the department shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. Every such common carrier shall obey every requirement of every such order served upon it"); *Intrastate Access Rates*, D.T.C. 07-9 at 6. If Petitioners prevail on the merits of any or all of their assertions, the Department has the authority to apply its findings to all ICS providers in Massachusetts. G. L. c. 159, § 14;

Intrastate Access Rates, D.T.C. 07-9 at 6. Accordingly, Petitioners may pursue their requested relief in an adjudicatory proceeding via complaint.

B. Tariffed Rates May be Found Unjust and Unreasonable Even If Consistent with the Rate Cap Mechanism Adopted by the Department in the 1998 Order.

GTL asserts Petitioners offer no basis for their claims that GTL's rates are unjust and unreasonable; that GTL's rates are well within the existing Department established rate caps, which the Department found reasonable to reflect the unique costs associated with ICS; and that GTL's rates are offered pursuant to a filed and approved tariff, which is deemed *prima facie* lawful pursuant to G. L. c. 159, § 17. GTL Answer at 11. Securus similarly asserts that the burden is on Petitioners to overcome the *prima facie* presumption that the ICS rate structure the Department adopted in the 1998 Order is just and reasonable. Securus Answer at 13.

GTL and Securus are correct that 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 Order and properly tariffed are just and reasonable. This presumption is rebuttable, however, and is not an insurmountable barrier that prevents customers of ICS providers from bringing a complaint. *See* G. L. c. 159, § 17 (tariffed rates presumed reasonable, but not given "greater weight as evidence of the reasonableness of other rates than they would otherwise have"). Petitioners are not required to overcome the presumption in their pleading. *See Intrastate Access Rates*, D.T.C. 07-9 at 7. Rather, Petitioners need only identify questions of fact and law that can only be resolved through a full hearing on the merits of Petitioners' claims. *Id.* If Petitioners are able to prove their assertions, then the Department could find the rate-setting mechanism for ICS or one or more of its elements unjust and unreasonable under G. L. c. 159, § 14. If the Department determines any rate to be unjust and unreasonable, it is obligated to

determine and fix just and reasonable rates, wherein the Department could deem ICS providers tariffed rates no longer lawful, overcoming the presumption. *See* G. L. c. 159, §§ 14, 17; *Intrastate Access Rates*, D.T.C. 07-9 at 7.

In finding that Petitioners may seek the requested relief through an adjudicatory proceeding via complaint, the Department has determined the form of the pleading sufficient for the request relief. In finding that Petitioners need not overcome the presumption that tariffed rates are *prima facie* just and reasonable in their pleadings, but, rather, need only plead sufficient allegations that if true could constitute unjust and unreasonable rates, the Department has determined that Petitioners are not statutorily preempted from the requested relief. Having made these determinations, the Department next considers the substance of Petitioners' rate and service quality allegations under its two-part analysis.

C. Petitioners Assertions Provide No Basis for Investigating the Usage Rate Component of the Rate-Setting Mechanism for ICS.

In the 1998 Order, the Department adopted usage rates for ICS calls and found it reasonable to cap all carriers' rates at those set by the ILEC, Verizon MA. 1998 Order at 10. In setting the usage rate rates at Verizon MA's usage rates for ICS calls, the Department found that the record did not demonstrate a sufficient need for an increase in usage rates and that capping the usage rates at Verizon MA's rates was an administratively efficient way to ensure the rates would remain reasonable. *Id.* at 10-11. In 2004, Verizon MA requested an adjustment of its usage rates to one flat $0.10 per minute rate for all ICS calls. In noticing that rate change to the industry, the Department stated that ICS providers were not obligated to conform their rates to $0.10 per minute for all calls, but could instead maintain varying rates so long as they did not exceed $1.50 for a 15-minute collect call. 2004 Industry Notice at 1-2.

Petitioners do not challenge the reasonableness of capping usage rates for all carriers at the tariffed rates of the ILEC. Instead, they assert that the per-minute cost of prisoner-initiated collect calls is falling, and that maintaining a $0.102 or less per minute usage rate with no per-call surcharge or other additional costs covers the costs of providing ICS and generates an adequate profit for ICS providers. Initial Petition at 29. Petitioners arrive at this amount by calculating the current cost of a 15-minute ICS collect call assessed by a service provider, divided by the commission percentage rate assessed in the jurisdiction, and then dividing that cost by 15 minutes. *Id*. at 29; Appendix VI. Petitioners do not consider revenues received from other fees currently assessed, the cost of ICS debit account calls, or interstate collect calls. Thus, Petitioners do not dispute the appropriateness of usage rate based costs for ICS, but recommend that a single per-minute usage rate capture all costs plus a reasonable rate of return. Initial Petition at 29.

Petitioners' allegations regarding existing usage rates, taken as true, provide no basis for relief because the current usage rate cap is equivalent to the per-minute cost accepted by Petitioners as just and reasonable. Petitioners' assertions concerning usage rates are also consistent with the Department's determination in the 1998 Order. The existing usage rates were sufficient for ICS providers to recover the traditional cost of providing conventional collect calling services. 1998 Order at 9-10. The Department added the per-call surcharge rate element to allow ICS providers the ability to recover legitimate additional costs associated with ICS. *Id*. at 9. When Petitioners assert that the legitimate additional costs associated with ICS have fallen or been eliminated (Initial Petition at 15-22), Petitioners are not providing a basis for the Department to reconsider the usage rates cap. The usage rates concern only traditional cost recovery, not the unique additional costs associated with ICS. Although Petitioners allege that

some traditional costs for telecommunications services, such as transport costs, switching costs, access charges, and regulatory costs, which are not unique to ICS, have decreased (*Id*. at 17), they do not assert that such changes in those traditional costs are sufficient to justify a reduction in the usage rates cap. Moreover, Petitioners do not request that the Department reconsider its decision to cap usage rates at those set by the ILEC.

Accordingly, the Department declines to investigate the appropriateness of allowing ICS providers to recover traditional cost of providing conventional collect call services through usage rates or its determination to cap usage rates at the ILEC's tariffed rates.

D. The Department Opens an Investigation Into the Per-Call Surcharge.

In the 1998 Order, the Department adopted a per-call surcharge to allow independent ICS providers a mechanism to recover legitimate additional costs associated with ICS. 1998 Order at 9. The Department found that the unique characteristics of ICS produce higher cost per call than for conventional OSP costs per calls. *Id.* In arriving at the appropriate cap for the per-call surcharge, the Department found that because the costs of providers did not differ significantly from state to state, it could reasonably rely on the $3.00 per-call surcharges assessed by AT&T, MCI Telecommunications Corporation, and Sprint Communications Company in 33 states as a proxy for the costs of ICS in Massachusetts. *Id.* at 10.

Petitioners assert that the per-call surcharge is no longer necessary and inappropriately used to cover the cost of, and increase the total value of, commissions paid by ICS providers to the contracting correctional facilities. Initial Petition at 12-13. Specifically, Petitioners claim the FCC and other state regulators have determined that commissions are not a cost of providing telecommunications service. *Id.* at 9-11. Petitioners further argue that the Department was aware of this treatment of commissions when it issued the 1998 Order and explicitly excluded

commissions from the list of legitimate additional costs associated with ICS. Petitioners Response at 14. Petitioners do not request that the Department ban commissions, rather they ask the Department to clarify that commissions are not a legitimate additional cost associated with providing ICS, and therefore the Department should conform the per-call surcharge rate maximum accordingly. *Id.* at 17-18.

According to Petitioners, the legitimate additional costs associated with ICS as identified in the 1998 Order have either fallen or been eliminated, and are no longer a valid basis for imposing the surcharge. Initial Petition at 15-22. Petitioners allege that for the three cost categories identified in the 1998 Order,[7] costs have decreased considerably as a result of advances in communications technologies, stronger payment safeguards, and industry consolidation leading to significant economies of scale. *Id. at* 16. In addition, Petitioners allege that costs for telecommunications services, such as transport costs, switching costs, access charges, and regulatory costs, which are not unique to ICS, have also decreased. *Id.* at 17. Moreover, Petitioners state that the growing use of prepaid accounts for ICS is a further driver in reducing costs. *Id.* 19-20. Petitioners question the continued use of the proxy adopted by the Department when it established the surcharge cap maximum at $3.00 per-call, claiming that as of 2008, only two states continue to permit $3.00 per-call surcharges, and 28 states assess either no surcharge or have a surcharge rate of $1.50 or lower. *Id.* at 21. Petitioners, in discussing quality of service, also question the reasonableness of the per-call surcharge in light of frequent dropped ICS calls resulting in the assessment of the per-call surcharge to each reconnected call. Initial Petition at 5.

GTL asserts in response that commissions were not one of the legitimate additional costs of ICS identified by the Department and thus, the rate cap for the per-call surcharge is separate

[7] *See* discussion, *supra* note 4.

from any commissions GTL pays to a correctional facility. GTL Reply at 2. GTL claims that any commissions it pays come out of its profits, it does not pass through commission costs, and it only assesses charges in accordance with the rates cap adopted by the Department in the 1998 Order. *Id*. at 2. GTL disputes Petitioners' claims that the costs for Inmate Calling Service have decreased, claiming that there are still legitimate additional costs unique to ICS. GTL Answer at 14. According to GTL, ICS systems continue to carry costs associated with security and fraud prevention equipment, call recording and monitoring systems, automated operators, and additional personnel. *Id.* at 14. GTL also disputes Petitioners' assertion that only two states[8] continue to permit $3.00 per-call surcharges and that 28 states maintain a surcharge maximum at or below $1.50. *Id.* GTL notes that its own rates are included in Petitioners' documentation and that the documentation shows that GTL's rates are lower than those in most other states. *Id.* (citing Initial Petition at Appendix IV). With regard to dropped calls, GTL does not address the claim that customers are charged multiple per-call surcharges during a call because of dropped calls, but notes that it is required to disconnect a call if its system detects three-way call attempts, call forward, conference calling, or other prohibited activities, and that its system is designed to minimize false disconnects. *Id.* at 23. GTL also suggests that some dropped calls may be caused by correctional facility personnel as they have the discretion to monitor and disconnect an inmate's call. *Id.*

Unlike GTL, Securus claims commission payments are a legitimate additional cost associated with ICS. Securus Answer at 14. According to Securus, the practice of charging commissions was known to the Department when it issued the 1998 Order, that commissions are similar to fees paid to government agencies, and the Department is not bound by determinations

[8] Petitioners allege that only Arkansas and Minnesota charge similar surcharge rates to Massachusetts. Initial Petition at 28.

made by the FCC or other state regulators in considering whether commissions are a legitimate additional cost. Securus Answer at 14-17. Securus disputes the accuracy of Petitioners' analysis and data concerning the elimination or reduction of costs related to the unique characteristic of ICS asserting that the data relied upon are at least four years old and are not sufficiently detailed as to the degree or extent of the decline in costs. *Id.* at 18-19. Securus states that since 2008, its per-call costs have increased approximately 16.3% and its per minute costs have increased approximately 16.5%. *Id.* at 19. Securus further claims it continues to incur higher costs related to the uniqueness of ICS, including security and fraud management, personnel costs, uncollectibles, regulatory compliance, data storage, billing and collections, and customized facility equipments. *Id.* at 20-24. Advances in technology, centralization of service facilities and functions, and reductions in transport and access costs do not offset the higher costs unique to ICS. Securus Answer at 20-24. Finally, Securus asserts that, in the 1998 Order, the Department adopted an alternative to cost-based rate setting and that variation in costs and changes in contracts between providers and correctional facilities do not warrant adjusting the current rate cap structure. *Id.* at 25.

Petitioners' assertions concerning commissions, reduced costs, and changes to the rates for ICS in other states, if taken as true, still do not entitle Petitioners to their requested relief. Petitioners' arguments center on the concept that the capped per-call surcharge was not determined using the definition of reasonable compensation under rate of return regulation. *See* Initial Petition at 7-8, 14. However, the rate-setting mechanism adopted for ICS in the 1998 Order is an incentive regulatory scheme. "Any definition of reasonable compensation under an incentive regulatory scheme must be broad enough to allow a utility that is achieving above-average efficiencies to earn more than has been defined as a 'fair return' under [rate of return]

regulation." *Pet. of New England Tel. & Tel. Co. d/b/a NYNEX for an Alternative Regulatory Plan for the Co.'s Mass. Intrastate Telecomms. Servs.*, (NYNEX Alternative Regulatory Plan) D.P.U. 94-50, *Order* at 192 (May 12, 1995). The Department designed the surcharge to allow ICS providers recovery of legitimate additional costs associated with ICS and to encourage ICS providers to improve productivity and reduce costs through advances in technology similar to the benefit a service provider may receive in a competitive marketplace. 1998 Order at 9. Whether an ICS provider treats those extra earnings as profit, or utilizes them to improve its bidding position to provide ICS through offering lower rates or more generous commissions to a correctional facility, is at the discretion of the provider. *NYNEX Alternative Regulatory Plan*, D.P.U. 94-50 at 192 (Nothing precludes a provider from harnessing incentives to improve service and profitability).

However, when the Department establishes rate-setting mechanisms for regulated service providers, it does not adopt such rates permanently. *See, e.g., NYNEX Alternative Regulatory Plan*, D.P.U. 94-50 at 272 (determining to review the price cap after six years). In setting price-capped rates, the Department must set a term of sufficient duration to give service providers appropriate economic incentives and enough confidence to make medium and long-term business decisions. *Id*. But, that term must not be so long that the price caps are maintained on assumptions that become invalid or fail to account for changes in the industry. *Id.*

It is important for the Department to review periodically its rate-setting mechanisms to determine if rates continue to be just and reasonable for both the service provider and the consumer. It is a well-established principle that just and reasonable ratemaking involves balancing the consumer interest and the interest of utility investor in a fair return. *See, e.g., Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944) ("the fixing of 'just

and reasonable' rates, involves a balancing of the investor and [the] consumer interests"); *Cambridge Elec. Light Co. v. Dep't of Pub. Utils*., 333 Mass. 536, 539 (1956) ("[R]ates are regulated and may be expected to be generally fair in the future *but not oppressive to the consumer*."); *NYNEX Alternative Regulatory Plan*, D.P.U. 94-50 at 188 (May 12, 1995) (citing *Donham v. Pub. Serv. Comm'rs*, 232 Mass. 309, 326 (1919) ("the public service commissioners may make such changes therein as in its judgment are required by the public interests and the rights of the owners of invested capital").

It has been 15 years since the Department adopted the per-call surcharge with a maximum surcharge of $3.00 per call. In those 15 years, ICS providers have implemented methods for consumers to prepay for collect ICS calls with separate tariffed rates, not contemplated in the 1998 Order. *See* GTL Answer at 9; Securus Answer at 24. In addition, both Petitioners and Securus assert that the costs associated with ICS have changed. Securus asserts that since 2008 its per-call and per-minute costs have increased by approximately 16% and that it has made significant expenditures on its ICS systems. Securus Answer at 19-24. Petitioners allege that for the three cost categories identified in the 1998 Order,[9] costs have decreased due to considerable cost savings resulting from advances in communications technologies, stronger payment safeguards, and industry consolidation leading to significant economies of scale. Initial Petition at 16. Plainly, there is a dispute about what has happened to the costs associated with ICS, but there is agreement that the costs have changed. This suggests that the Department should at least revisit the reasonableness of the $3.00 maximum surcharge.

In addition, GTL and Securus have differing positions as to whether commissions are a unique cost of providing ICS. GTL claims that its commissions come out of its profits, that it does not pass through commission costs, and that it only assesses charges in accordance with the

[9] *See* discussion *supra* note 4.

rate cap adopted by the Department in the 1998 Order. GTL Reply at 2. Securus claims that commission payments are a legitimate additional cost associated with ICS. Securus Answer at 14. Further, Petitioners question the reasonableness of the per-call surcharge in light of alleged frequent dropped ICS calls resulting in the assessment of the per-call surcharge to each reconnected call. Initial Petition at 5. The Department has also received public testimony and written comments about the burden that ICS costs have placed on the customers of ICS providers. *See* Tr. of Public Hearing, *In re Inmate Calls*, D.T.C. 11-16 (July 19, 2013); Public Comments available at http://www.mass.gov/ocabr/government/oca-agencies/dtc-lp/dtc-11-16.html (last accessed September 23, 2013).

The Petitioners' assertions, if proven true, could lead the Department to determine the current per-call surcharge or its cap maximum is unjust and unreasonable. The assertions of the parties and the public comments, together with the lengthy time period since the rate-setting mechanism was adopted and the creation of prepaid collect ICS service, provide a sufficient basis for the Department to open an investigation into the reasonableness of the per-call surcharge and its cap maximum of $3.00. *See Serv. Quality Investigation*, D.T.C. 09-1 at 11-12. Therefore, the Department opens an investigation 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.

E. The Department Open an Investigation into the Tariffed Service and Other Fees of ICS Providers.

Petitioners claim that GTL and Securus impose unregulated service fees to set up and maintain their prepaid accounts. Initial Petition at 22-23. In response, GTL asserts that any service fees assessed are included in its Massachusetts tariff filed with the Department, subject to review and approval. GTL Answer at 15. Further, GTL's tariffed rates, including its service

fees, must comply with the rate cap policy the Department adopted in the 1998 Order. *Id*. According to GTL, ICS providers are not obligated to conform to a particular rate structure for ICS, and that its charges only need to fall within the Department's rate caps. *Id*. (citing 2004 Industry Notice). Securus responds that it only applies charges and fees that are contained in its tariff filed with the Department. Securus Answer at 29-30. In addition, Securus disputes the characterization of its service fees, claiming that it does not assess a fee to set up a prepaid account, but rather, imposes a card-processing fee if a customer funds a prepaid account via a credit or debit card. *Id.* at 29.

Undisputed by GTL and Securus are Petitioners' allegations that most of the additional services or other fees assessed are related to the provision of prepaid collect ICS calls. Initial Petition at 22-23; GTL Answer at 15; Securus Answer at 29-30. The addition of fees related to the cost of prepaid collect ICS calls was not contemplated in the 1998 Order. As the fees are assessed variably and require unique action from an end user, such as a credit card transaction to add money to an account, it is unclear whether such fees could always be within the rate caps of the 1998 Order. While the ICS providers have tariffed the fees, they are still obligated to ensure that charges for Inmate Calling are consistent with the 1998 Order.

The Department draws no conclusions as to merits of Petitioners' claims, but their allegations are sufficient to raise a right to relief above the speculative level and, considering the prior standard for a motion to dismiss, there appears to be at least some statement of facts upon which Petitioners could support their claim and would be entitled to relief. Further, as discussed above, the Department determined to investigate the per-call surcharge and its maximum charge of $3.00 per call partly because of prepaid collect ICS calls service developed after the 1998 Order. Accordingly, the Department also finds it appropriate to consider whether it is just and

reasonable to allow ICS providers to assess service or other fees in addition to the per-call surcharge and per-minute usage rate.

F. Complaints of Dropped Calls and Other Service Quality Problems Warrants Department Investigation.

The Department has broad statutory authority to investigate service quality complaints against providers of telecommunications services in Massachusetts. Specifically, the Department may investigate the "regulations, practices, equipment, appliances, or service" of any common carrier and order remedial measures if it finds any of these to be unjust, unreasonable, unsafe, improper, or inadequate. G. L. c. 159, § 16. No specific factual findings are necessary for the Department to open a service quality investigation. *See, e.g., Serv. Quality Investigation*, D.T.C. 09-1 at 10 (complaint from municipality and comments from forty-nine towns and residents sufficient to open a service quality investigation). The Department has opened service quality investigations where "[t]he evidence … shows that the types of complaints from customers are similar throughout the region, and include such issues as repeated service outages, poor signal quality, delays in repairing or restoring service and generally in responding to troubles, and deficiencies in network maintenance and replacement of aged facilities." *Id.* at 11.

Petitioners allege the phone calls that they receive and pay for from correctional facilities are frequently and inexplicably disconnected. Petitioners presented the affidavits of thirty-two prisoners, family, friends, and attorneys, many of whom complain about frequent call disconnections. Second Amendment, Exhibit A. According to Petitioners, Securus's and GTL's networks frequently disconnect their phone calls because of ostensible attempts to connect the call with a third party. Petitioners, however, claim that no attempt to connect with a third party had been made when they were disconnected. First Amendment at 12-14. At the Hearing, the Department received testimony echoing the allegations in the Complaint of frequently

disconnected calls and the additional expenses incurred to reconnect after a call is dropped. Tr. of Public Hearing at 54-55, 72, 124. One customer testified that her calls to an inmate "got cut off because of the wind." *Id*. at 55. Many customers emphasized that phone calls to wireless phones were frequently disconnected. *Id*. at 49, 66, 126-127, 132-133, and 137. A Securus customer testified about having to pay multiple reconnection fees on one telephone call: "Well, because [the inmate] tapped the phone it will say 'no third-party calls' [and] hang up. Every time he hangs up and calls me back, it costs me $3.00[.]" *Id*. at 134. The customer said that because of the frequent disconnections and reconnection fees, "for that 30-minute call, 40-minute call, it now costs me $8.00 and $9.00." *Id.*

Securus states that its systems are carefully calibrated to accurately detect attempts to add a third party to a call and that it cannot be responsible for any dropped calls made to wireless phones. Securus Answer at 36. GTL replies that it was not aware of customers' complaints regarding disconnections and therefore has not investigated the issue. GTL Answer at 17-20.

Petitioners also complained of heavy static and poor voice quality on the phone calls provided by GTL and Securus. First Amendment at 6-11. One attorney representing prisoners testified that the "fees and the cost of making a call are exacerbated by the fact that the quality of the service is poor. Calls are frequently dropped. And a twenty-minute call, which may take multiple calls to complete soon racks [up a] bill of $30 or more." Tr. of Public Hearing at 8-9. Another attorney representing inmates in state facilities served by GTL testified that "in some prisons you cannot hear the calls at all." *Id*. at 48. A representative of a third law firm testified that: "[s]ometimes our clients sound impossibly quiet and other times there is constant static on the line." *Id*. at 130. As with the disconnections, GTL and Securus state that they have not

received complaints from customers regarding service quality problems and have therefore not investigated the service quality they provide. GTL Answer at 18; Securus Answer at 36.

As discussed above, the inquiry in a motion to dismiss is whether Petitioners provided factual allegations sufficient to raise a right to relief above the speculative level based on the assumption that the allegations are true (*See Iannacchino*, 451 Mass. at 636) or, under the prior standard, whether there is any basis of facts that could be proven to support Petitioners claims for relief. *See Riverside*, D.P.U. 88-123 at 26-27. Under either standard, the complaints regarding unjust disconnections, heavy static, and poor voice quality, if true, may entitle Petitioners to relief under G. L. c. 159, § 16. Further, the number and consistency of the service quality complaints in the Complaint, and the public hearing are a sufficient basis to open a service quality investigation on the Department's own motion under G. L. c. 159, § 16.

G. Allegations of Poor Billing Details Warrant Department Investigation.

Petitioners also complain about inadequate billing details. According to Petitioners, GTL customers do not receive adequate billing details. First Amendment at 17-19. Instead, the billing details are only available upon request of the customer and difficult to obtain. *Id*. According to Petitioners, Securus only makes its billing details available online, leaving customers who lack internet access without any access to their billing details.[10] Petitioners further complain that obtaining billing details is made even more difficult by inadequate customer service. *Id*. at 20-22. GTL and Securus respond that billing details are available online. GTL Answer at 22; Securus Answer at 37.

[10] Broadband adoption rates for low-income households are significantly lower than adoption rates for other households. *See generally* DHARMA DAILEY ET. AL., BROADBAND ADOPTION IN LOW-INCOME COMMUNITIES (Version 1.1, Social Science Research Council) (March 2010), *available at* http://www.ssrc.org/publications/view/broadband-adoption-in-low-income-communities.

Taking Petitioners' allegations as true, not providing written billing details to customers may violate G. L. c. 159, § 16 and entitle them to Department-ordered remedial relief. Further, Petitioners' complaints regarding the difficulty in receiving billing details from GTL and Securus is sufficient for the Department to open an investigation on its own motion into GTL's and Securus's billing practices.

H. The Department Defers to Department of Corrections and County Sheriffs Policies with Regard to Frequency of Recorded Warnings.

The Department of Corrections ("DOC") has broad statutory authority to establish and maintain the prison facilities in Massachusetts. G. L. c. 124, § 1(a). Likewise, Sheriffs have broad control over the maintenance of county jails and houses of corrections in Massachusetts. G. L. c. 126, § 16; *Brackett v. Civil Serv. Comm'n*, 850 N.E.2d 533, 552 (Mass. 2006) (Administrative agencies receive considerable deference when interpreting statutes they are charged with enforcing, and the regulations promulgated by those agencies receive a presumption of validity) (citing *Student No. 9 v. Bd. of Educ.*, 802 N.E.2d 105 (Mass. 2004)).

Petitioners complain that recorded warning messages frequently interrupt calls from DOC facilities.[11] First Amendment at 27-28. The frequency and content of these warnings are governed by DOC regulations and by the terms of the contract between the DOC and GTL. In this instance, the Department defers to the DOC's regulations concerning recorded warnings. The DOC has broad statutory authority to establish and maintain the prison facilities in Massachusetts. G. L. c. 124, § 1(a). And it is entitled to broad deference in its interpretation of its statutory authority. *Brackett*, 850 N.E.2d at 552 (Administrative agencies receive considerable deference when interpreting statutes they are charged with enforcing, and the regulations promulgated by those agencies receive a presumption of validity) (citing *Student*

[11] Petitioners only raise the recorded warning messages at DOC facilities; however, the same analysis would apply to recorded warning message at jails and houses of correction maintained by Massachusetts Sheriffs.

No. 9, 802 N.E.2d 105). Thus, even taking the Petitioners' assertions as true, the factual allegations are insufficient to raise a right to relief (*Iannacchino*, 451 Mass. at 636) and, under the prior motion to dismiss standard, the Department could not grant the requested relief under any statement of fact. *Riverside*, D.P.U. 88-123 at 26-27. Accordingly, Petitioners' request for an investigation into the use of recorded warnings at payphones in DOC facilities is dismissed. 220 C.M.R. § 1.06(6)(e).

I. The Department Defers to the Department of Corrections and County Sheriffs Policies with Regard to the Number of Available Payphones and Equipment Upkeep.

Petitioners also complain that the GTL payphones in DOC facilities are poorly maintained and that there is an inadequate amount of GTL payphones for the demand.[12] First Amendment at 24-27. According to Petitioners, the GTL payphones sometimes do not work and that customers are plagued by service quality problems because of poor payphone upkeep. *Id*.

The number of payphones in DOC facilities is determined by the DOC and the maintenance of these payphones through its contract with GTL. As with the frequency and content of the recorded warning messages, the DOC has broad statutory authority to establish and maintain the prison facilities and the Department defers to the DOC's regulations and its contractual terms with GTL concerning the number and condition of payphones in its facilities. G. L. c. 124, § 1(a); *Brackett*, 850 N.E.2d at 552. Thus, even taking the Petitioners' assertions as true, the factual allegations are insufficient to raise a right to relief (*Iannacchino*, 451 Mass. at 636) and, under the prior motion to dismiss standard, the Department could not grant the requested relief under any statement of fact. *Riverside*, D.P.U. 88-123 at 26-27. Accordingly,

[12] Petitioners only raise the number and quality of payphones at DOC facilities; however, the same analysis would apply to payphones at the jails and houses of correction maintained by Massachusetts Sheriffs.

Petitioners' request for an investigation into the number and quality of payphones in DOC facilities is dismissed. 220 C.M.R. § 1.06(6)(e).

V. RULING

The Department GRANTS leave for GTL and Securus to reply and Petitioners to surreply and accepts GTL's Reply, Securus's Reply, and Petitioners' Surreply into the record. The Department DETERMINES that Petitioners may seek the requested relief through a Complaint and that they need only allege facts in their pleadings in their Complaint that, if proven true, could overcome the presumption that rates offered pursuant to a filed and approved tariff are *prima facie* lawful. The Department DISMISSES Petitioners' requests to open an investigation into: the usage rate component of the rate setting mechanism for ICS; the frequencies of recorded warning messages; and the availability and upkeep of telecommunications equipment at correctional facilities. The Department OPENS an investigation into: the per-call surcharge; the tariffed service and other fees of ICS providers; the frequency of dropped ICS calls; the quality of connected ICS calls; and the billing practices of GTL and Securus.

/s/ *Kalun Lee*
Kalun Lee
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.