

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

**No. 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**

---

**PETITIONERS' OPPOSITION TO RESPONDENTS' MOTIONS  
TO HOLD FURTHER RULEMAKING PROCEEDINGS IN ABEYANCE**

Respondents Securus Technologies, Inc. ("Securus") and Global Tel\*Link Corporation (GTL) in separate motions ask the Department to hold in abeyance its investigation of Inmate Calling Services pending rulemaking by the Federal Communications Commission (FCC), arguing that FCC regulation of intrastate rates will invalidate any action taken by the Department. At the same time, the telephone companies have asked the FCC to hold its rulemaking in abeyance and to stay its interim rules while they challenge the FCC's jurisdiction to regulate intrastate rates in federal court.<sup>1</sup>

Regardless of whether and how the FCC proceeds, the DTC has jurisdiction over intrastate ICS rates in Massachusetts and, indeed, a duty to set just and reasonable rates. *See* G.L. c. 159 §§ 14, 17. The companies' justification for stalling the DTC's investigation is sheer

---

<sup>1</sup> *See* Exh. 1, Securus Petition to FCC to Hold Further Rulemaking Proceedings in Abeyance; Exh. 2, Securus' Petition to FCC for Stay of Report and Order Pending Final Appeal; Exh. 3, Petition of GTL to FCC for Stay Pending Judicial Review; Exh. 4, Comments of GTL submitted to FCC, March 25, 2013. Securus states that the FCC's Report and Order and Further Notice of Proposed rulemaking "and indeed their entire underpinning... are likely to be remanded, if not vacated. *See* Exh. 1, p. 3. GTL cites court decisions limiting the authority of the FCC to regulate intrastate ICS, Exh. 4 pp. 31-32, and cites previous FCC rulings in which the agency declined to preempt state rate caps. Exh. 4 pp. 32-33. Citing a number of states that have eliminated commissions and reformed commission payment systems, GTL concludes, "regulation of ICS is more appropriate at the state level." *Id.* at 36.

speculation: the notion that the FCC *may* eventually seek to regulate intrastate rates, which regulations *may* conflict with future DTC regulations, and *may* be upheld against the appeals of ICS providers. Furthermore, the companies make no claim that the FCC action creates any conflict with the DTC investigation into ICS service quality and billing practices.

Every day, week, month and year that the investigation is delayed, family ties are frayed by the calls that loved ones cannot afford to accept, as eloquently described at the July 2012 public hearings. Should the Department nevertheless hold proceedings in abeyance, the Petitioners request that their appeal be decided now, so that the scope of further proceedings will be determined. This will enable all parties to better prepare for future proceedings.

**I. There is No Reason to Believe that Future FCC Regulation Will Conflict with Future DTC Regulation of ICS.**

Securus and GTL posit that possible FCC regulation of intrastate ICS rates could run the risk of precluding rules that the DTC may adopt as a result of its investigation. At the same time, the providers insist that the FCC has no jurisdiction to regulate intrastate rates, and will do their utmost in federal court to prevent it from doing so.<sup>2</sup> It is impossible to know (1) whether, after receiving comment, the FCC will ultimately seek to regulate intrastate rates, and (2) if it does so regulate, whether its authority to do so will eventually be upheld.<sup>3</sup> Further, even if all this came to pass, it is impossible to know whether hypothetical DTC regulations would conflict with these hypothetical federal regulations.

---

<sup>2</sup> See n. 1, *supra*.

<sup>3</sup> The National Association of Regulatory Utility Commissioners (NARUC) would likely appeal any intrastate rate regulation emerging from the FNPRM. It commented to the FCC that its authority to regulate intrastate calls is not clear, and requested an opportunity to respond to any proffered rationale for regulating in this area. See *In the Matter of Rates for Interstate Inmate Calling Service*, FCC 12-167, Reply Comments of NARUC, p. 4, available at <http://apps.fcc.gov/ecfs/document/view?id=7022289729> (last visited on November 1, 2013).

Ironically, while any conflict between future FCC and DTC regulations is pure speculation, right now Massachusetts ICS rates are out of line with the interim interstate rates adopted by the FCC. If the FCC does not stay its interim rules, Massachusetts will have an anomalous situation where in-state rates are substantially higher than out-of state rates. When ICS providers seek to justify interstate rates above the FCC's safe harbor they will no longer be allowed to count site commissions as a cost of providing service, but they could still seek to recover these commissions through intrastate rates, possibly driving intrastate rates up even higher.

The Petitioners have argued that the principles of cost-based regulation articulated in the FCC's Report and Order and NPRM, and the data the FCC has gathered, support the need for state regulation and should inform the DTC's own investigation.<sup>4</sup> Securus and GTL attempt to turn this into a reason for DTC inaction pending final federal rules.<sup>5</sup> It is ironic – or perhaps just convenient -- that the companies urge state deference to the FCC while at the same contesting federal jurisdiction over intrastate rates.<sup>6</sup> The Petitioners nowhere suggest that the DTC is bound by the FCC's analysis, only that it is persuasive.<sup>7</sup>

There is indeed an “overlap<sup>8</sup>” and an “interplay<sup>9</sup>” between the state and federal proceedings, as the companies suggest. But it does not go one way, with the FCC merely dictating to the DTC. While the FCC seeks comment on its own authority to regulate intrastate

---

<sup>4</sup> See Petitioners' Appeal pp. 6-8,

<sup>5</sup> See Securus Motion to Hold Proceedings in Abeyance at p. 4; GTL Motion to Hold Proceedings in Abeyance at 3-4.

<sup>6</sup> See n. 1, *supra*.

<sup>7</sup> Referring to the FCC's consideration of a distance-insensitive rate of \$0.07 in the FNPRM, the petitioners urged only that “[t]he DTC should not foreclose such a rate for Massachusetts before discovery has even begun.” Appeal p. 8.

<sup>8</sup> Securus Motion to Hold Proceedings in Abeyance at p. 4

<sup>9</sup> GTL Motion to Hold Proceedings in Abeyance at 4.

rates, the agency has at the same time encouraged states “to eliminate site commissions, adopt rate caps, disallow or reduce per-call charges, or take other steps to reform ICS rates.”<sup>10</sup> If the DTC were to hold its investigation in abeyance, it would thwart the FCC’s express wishes. Data resulting from a DTC investigation undoubtedly would be relevant to the FCC’s own deliberations, perhaps most saliently to its consideration of whether to seek to regulate intrastate rates. It would be a cruel irony indeed if the FCC’s first step toward ICS rate regulation resulted in a step backward for this petition before the DTC.

## **II. The FCC Proceeding Will Not Conflict With a DTC Investigation into Service Quality and Billing Problems.**

Neither Securus nor GTL has articulated even a hypothetical conflict arising from the DTC’s investigation into service quality and billing problems.<sup>11</sup> No possible future action by the FCC undermines the DTC’s authority and, indeed, duty to determine the extent to which dropped calls, poor voice quality, and inadequate billing detail plague Massachusetts consumers.

Massachusetts ICS consumers deserve relief from these problems. Even if the DTC decides to hold intrastate rate setting in abeyance, investigation into these problems should continue.

## **III. It Will Be Years Before the FCC Issues Final Rules.**

In the FCC proceedings, even an interim rulemaking process will have taken over a year to complete. It was noticed in the Federal Register on January 22, 2013, the resulting Report and Order was released on September 26, 2013, and even without abeyance it will not take effect before early 2014 (90 days after publication in the Federal Register, which has not yet

---

<sup>10</sup> See Exh. 1 to Petitioners’ Appeal, FCC Report and Order and NPRM, ¶ 130.

<sup>11</sup> See Hearing Officer Interlocutory Ruling at 28-31.

occurred).<sup>12</sup> Permanent rules are likely to take longer, especially given the range of issues under consideration -- including permanent interstate rates, possible intrastate rate reform, ICS for the deaf and hard of hearing, regulation of ancillary charges, prohibition of call blocking, exclusive ICS contracts, and quality of service – as well as the time needed for mandatory data collection.<sup>13</sup> A near-certain appeal of any rules issued, with months of briefing and time for argument and the issuance of a decision, will add further delay, likely well into 2016.

If the FCC's Further Notice of Proposed Rulemaking (FNPRM) is held in abeyance, many additional months or even years must be added to this equation, and final rules might easily wait until 2018. Any appeal of the FNPRM is unlikely to be decided before early 2015. At that point, months might be needed to craft a new FNPRM (to the extent the appeal had succeeded), and then a year or longer for the rulemaking process (as noted above), putting final rules into 2016 or 2017 and the appeal of those rules very likely into 2018.

#### **IV. Delay Will Cause Severe and Irreparable Hardship to ICS Consumers and to the Public Interest.**

While the Securus and GTL spin speculative scenarios in which moving forward with the DTC's investigation could cause inefficiency,<sup>14</sup> the harm caused by further delay in this case is a concrete reality. Since their 2009 Petition, the Petitioners have documented the hardship to consumers from unjust ICS rates and ancillary fees, dropped calls, and poor quality of service.<sup>15</sup> The July 19, 2012 public hearing also provided ample evidence of the severity of these

---

<sup>12</sup> See Exh. 1 to Petitioners' Appeal, FCC Report and Order and Further Notice of Proposed Rulemaking (FNPRM), ¶ 187.

<sup>13</sup> See *Id.*, ¶¶ 124, 125.

<sup>14</sup> See Hearing Officer Interlocutory Ruling at 12-13 and cases cited (Department may stay a proceeding where moving forward is an inefficient use of the Department's and parties' resources).

<sup>15</sup> See Petition pp. 4- 6; see also Exhs. A-1 to A-32 to Amendment #1 to Petition (affidavits of petitioners).

problems.<sup>16</sup> Current telephone company practices force the family and friends of prisoners to forgo or ration conversations with their loved ones, at great cost to family ties and to the welfare of children of incarcerated individuals.

The Petitioners have also presented a wealth of evidence showing that barriers to communication between prisoners and their loved ones harm prisoners' reentry prospects and damage public safety in the communities to which prisoners return.<sup>17</sup> These harms were validated by the FCC, which stated that high ICS rates "discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent, contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system."<sup>18</sup> It also noted that the National Association of Regulatory Utility Commissioners has endorsed "lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons."<sup>19</sup>

The Department should not delay fulfillment of its statutory duty to ensure that rates are just and reasonable.<sup>20</sup> At stake are the emotional lifeline and hopes for reentry of thousands of Massachusetts families. Once lost, these cannot be regained.

---

<sup>16</sup> See Hearing Officer Interlocutory Ruling at 7-8, citing oral testimony and more than 200 pieces of written testimony, and referencing the hearing transcript. See also Public Comments, available at <http://www.mas.gov/ocabr/government/oca-agencies/dtc-lp/dtc-11-16.html>.

<sup>17</sup> See Appendix III to Petition, "Public and Penological Policy."

<sup>18</sup> See Exh. 1 to Petitioners' Appeal, FCC Report and Order and NPRM, ¶ 42. The FCC concluded that "[j]ust reasonable and fair ICS rates provide benefits to society by helping to reduce recidivism," *id.* ¶ 43, and cited studies to this effect. *Id.* ¶ 43 n. 172.

<sup>19</sup> *Id.* ¶ 43.

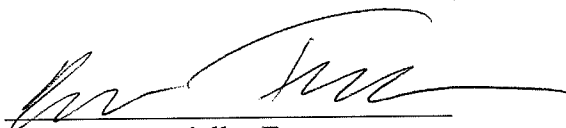
<sup>20</sup> G.L. c. 159 §§ 14, 17.

### CONCLUSION

For the above-stated reasons, the motions of Securus Technologies, Inc. and Global Tel\*Link Corporation to hold proceedings in abeyance should be denied, and a procedural conference to advance the proceedings should be convened at the earliest possible date.

Date: *November 8, 2013*

Respectfully submitted:



Bonita Tenneriello, Esq.

Elizabeth Matos, Esq.

James Pingeon, Esq.

10 Winthrop Square, 3<sup>rd</sup> Floor

Boston, Massachusetts 02110

(617) 482-2773 (telephone)

(617) 451-6383 (facsimile)

[btenneriello@plsma.org](mailto:btenneriello@plsma.org)

[ematos@plsma.org](mailto:ematos@plsma.org)

[jpingeon@plsma.org](mailto:jpingeon@plsma.org)

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail ~~(by hand)~~

on *11/8/13*

sig. 