COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 11-16 February 26, 2014

Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls.

ORDER ON APPEAL OF HEARING OFFICER'S RULING

I. INTRODUCTION

The Department of Telecommunications and Cable ("Department") addresses an appeal, pursuant to 220 C.M.R. § 1.06(6)(d), by "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" ("Appellants") of the Hearing Officer's Ruling of September 23, 2013. *Pet. of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls* ("*In re Inmate Calls*"), Hearing Officer Interlocutory Ruling at 1-2 (Sept. 23, 2013) ("Ruling"). Appellants assert that the Hearing Officer committed an error when he declined to open an investigation as to the usage rate component of the inmate calling services ("ICS") rate-setting mechanism ("usage rate"), and requests that the Department reverse the Hearing Officer Ruling as to this claim. *In re Inmate Calls*, Petitioner's Appeal at 1-2 (Oct. 16, 2013) ("Appeal"). For the reasons discussed below, the Department denies Appellants' appeal.

II. PROCEDURAL HISTORY

Appellants filed their first petition with the Department on August 29, 2009. *In re Inmate Calls*, D.T.C. 11-16 ("Initial Petition"). Appellants amended their petition on May 18, 2010, and again on April 27, 2011, before the Department had sufficient bases to open a docket on November 10, 2011. *In re Inmate Calls*, Amendment 1 & Supplement on Quality of Service (May 18, 2010) ("First Amendment"); *In re Inmate Calls*, Amendment 2: Additional Petitioners (Apr. 27, 2011) ("Second Amendment").

Global Tel*Link Corporation ("GTL") and Securus Technologies, Inc. ("Securus" together with GTL, "Appellees"), filed their respective responses to the amended petition ("Petition") on January 20, 2012, in which they requested that the Department close the docket because Appellants had failed to adequately state a claim upon which the Department could grant relief. *In re Inmate Calls*, Global Tel*Link Corporation Response to Petition at 2 n.5 (Jan. 20, 2012); *In re Inmate Calls*, Response of Securus Technologies, Inc. at 11 (Jan. 20, 2012). Appellants and Appellees filed briefing in support of their respective positions regarding the adequacy of the Petition. *In re Inmate Calls*, Motion for Leave to Surreply and Surreply (Apr. 20, 2012); *In re Inmate Calls*, Motion for Leave to File Response and a Brief Response to Petitioners' March 23 Memorandum (Apr. 12, 2012); *In re Inmate Calls*, Motion to File Reply to Petitioners' Memorandum and Reply to Petitioners' Memorandum (Apr. 12, 2012); *In re Inmate Calls*, Memorandum Opposing Dismissal (Mar. 23, 2010).

The Hearing Officer issued his Ruling on Appellees' request on September 23, 2013. In the Ruling, the Hearing Officer, opened 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 ICS providers; and the billing practices of ICS providers. Ruling at

1-2. The Hearing Officer declined to open an investigation into the usage rate; the frequency and content of recorded warning messages; and the availability and upkeep of telecommunications equipment at correctional facilities. *Id.*

On October 16, 2013, Appellants filed their appeal of the Hearing Officer's decision to close the investigation into the usage rate component of the ICS rate-setting mechanism. Appeal.[1] The Hearing Officer's decision regarding Appellants' usage rate claim is the only matter before the Department in their Appeal. Appellees GTL and Securus both filed responses in which they urged the Department to deny the Appeal. *In re Inmate Calls*, D.T.C. 11-16, Response of Global Tel*Link Corp. to Petitioners' Appeal (Nov. 8, 2013); *In re Inmate Calls*, D.T.C. 11-16, Securus Response to Petitioners' Appeal (Nov. 8, 2013).

III. ANALYSIS AND FINDINGS

To prevail in an appeal before the Department, an appellant has the burden of proving that the Hearing Officer erred in his ruling or that he abused his discretion. *In re Pet. of Choice One Commc'ns of Mass. Inc., Conversent Commc'ns of Mass. Inc., CTC Commc'ns Corp. & Lightship Telecom LLC for Exemption from Price Cap on Intrastate Switched Access Rates as Established in D.T.C. 07-9.*, D.T.C. 10-2, Interlocutory Order on Appeal of Hearing Officer's Rulings Regarding Motions for Leave to Respond to Rebuttal Testimony at 4 (Mar. 21, 2011) (citing *In re Bay State Gas Co*., D.T.E. 02-73, *Order* at 4 (Feb. 4, 2002)); *see also Pet. of W. Mass. Elec. Co. for approval of its Transition Charge Reconciliation filing for the periods Jan. 1, 2000 through Dec. 31, 2000 & Jan.1, 2001 through Dec. 31, 2001*, D.T.E. 01-36/02-20,

[1] Appellees GTL and Securus filed motions on October 17 and October 18, 2013, respectively, to hold the current proceeding in abeyance pending further action by the FCC. *In re Inmate Calls*, D.T.C. 11-16, Securus Motion to Hold Proceeding in Abeyance pending the conclusion of the FCC's investigation into ICS rates and practices (Oct. 18, 2013); *In re Inmate Calls*, D.T.C. 11-16, GTL Motion to Hold Proceeding in Abeyance (Oct. 17, 2013);. The Department rejected both motions for abeyance on December 11, 2013.

Interlocutory Order on Appeal of Hearing Officer Ruling Denying Alternate Power Source Inc.'s Pet. to Intervene at 7 (Jan. 31, 2003).[2] If the appellant fails to establish error or abuse of discretion, the Department must affirm the Hearing Officer's ruling. *Investigation by the Dep't of Telecomms. & Energy on its own motion pursuant to G.L. c. 164, § 94, & 220 C.M.R. §§ 5.00 et seq. as to the propriety of the rates & charges set forth in the following tariffs: M.D.T.E. Nos. 34 through 68, filed with the Dep't on April 27, 2005 by Bay State Gas Co.*, D.T.E. 05-27, Interlocutory Order Regarding the Appeal of the Attorney General at 6 (Sept. 16, 2005). The Department grants its hearing officers substantial discretion and "will not readily overrule them in the sound exercise of their delegated discretion." *Investigation by the Dep't of Telecomms. & Energy on its own motion pursuant to § 271 of the Telecomms. Act of 1996 into the Compliance Filing of New England Tel. & Tel. d/b/a Bell Atlantic-Mass. as part of its application to the FCC for entry into the in-region interLATA (long distance) tel. market*, D.T.E. 99-271, Interlocutory Order on Joint Petitioners' Appeal of Hearing Officers' Decisions Dated Aug. 19, 1999 at 9 (Sept. 30, 1999).

Appellants do not allege that the Hearing Officer abused his discretion in his Ruling. Thus, the sole question before the Department is whether the Hearing Officer erred in closing the investigation as to the usage rate.

Although not bound by the Massachusetts Rules of Civil Procedure, the Department uses the standard from Rule 12(b)(6) in ruling on a motion to close an investigation styled as a motion to dismiss. *See, e.g., 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*

[2] The Department of Telecommunications and Energy ("DTE") and the Department of Public Utilities ("DPU") were the predecessor agencies to the Department of Telecommunications and Cable ("DTC"). When interpreting procedural rules, the Department relies on the analyses of its predecessor agencies.

Servs., Inc. for Investigation under G. L. c.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). In his Ruling, the Hearing Officer adopted the motion to dismiss standard articulated by the Supreme Judicial Court in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-636 (2008). Ruling at 11. Under the *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. Appellants do not contend that the Hearing Officer's adoption and application of the *Iannacchino* standard was incorrect.

Rather, Appellants make two assertions in their Appeal: first, that the Hearing Officer misread their Petition as accepting a rate of $0.102 per-minute as just and reasonable (Appeal at 1-4) and second, that the Hearing Officer declined to consider substantial evidence that ICS can be offered for less than $0.102 per-minute. *Id.* at 4-8. For the reasons discussed below, the Department finds that the Hearing Officer did not make either of the errors claimed by Appellants.

A. The Hearing Officer did not misread Appellants' allegations regarding the usage rate.

Under G. L. c. 159, § 17, tariffed usage rates are considered *prima facie* lawful, and a party challenging such rates bears the burden of establishing that they are unjust or unreasonable. The Hearing Officer correctly ruled that Appellants' factual allegations did not entitle them to relief. Ruling at 18-20. The plain language of the Appellants' allegations regarding the usage rate could not plausibly suggest entitlement to relief. According to Appellants:

> The per minute cost of prisoner initiated collect calls is obviously also falling as various rate components decline. In Massachusetts, a truer per minute cost of prisoner payphone rates emerges when commissions—the shared profit element of the rates according to the FCC—are backed out of the per minute rate. A collect call from a [Department of Corrections] facility costs 10.2¢ per minute

> after backing out the 35% commission payments. Similarly, the cost of a collect call from a Hampden County jail facility costs less than 8.3¢ per minute after backing out the 52% commission. These all indicate that in Massachusetts, charges to collect call customers of 10.2¢ per minute or less cover the actual costs of providing collect telephone service for prisoners, including adequate profit margins for the providers *with no per call surcharges or other additional costs*.[3]

Initial Petition at 29. Nowhere else in their Initial Petition do Appellants come any closer to making assertions regarding the usage rate that are plausibly actionable. Instead, the bulk of Appellants' allegations focus on the per-call surcharges. Initial Petition at 15-22; 24-26. Indeed, Appellants own conclusion that, "[**t**]**he high rates for collect calls are due almost entirely to per call surcharges**[.]" belies their assertion that the Hearing Officer committed an error. *Id*. at 29 (emphasis added).

Appellants' amendments, filed on May 18, 2010, and April 27, 2011, offer them no succor. The First Amendment added additional petitioners and made allegations regarding service quality and billing practices but made no additional allegations regarding the usage rate. First Amendment at 1-2; 5. The Second Amendment simply added additional petitioners without any additional claims. Second Amendment at 1-2. The Hearing Officer did not misread the Appellants' allegations in their Petition, and did not commit an error in dismissing the usage rate claim.

[3] The Hearing Officer, finding that the allegations regarding the per-call surcharge, if true, plausibly entitled Petitioners to relief, opened an investigation into the per-call surcharge. Ruling at 26. The Hearing Officer determined an investigation into per-call surcharges was appropriate because current factors that could affect the per-call surcharge were not in existence when the per-call surcharge was established in 1998, and both Petitioners and Securus asserted that costs associated with ICS have changed. *Id*. at 24-25.

B. The Hearing Officer did not err in refusing to consider additional information submitted by Appellants during the pendency of the request to close investigation.

During the pendency of Appellees' request to close the investigation, Appellants filed additional information in an effort to bolster their Petition. *In re Inmate Calls*, D.T.C. 11-16, Affidavit of Douglas A. Dawson (Apr. 20, 2012) ("Dawson Affidavit"); *In re Inmate Calls*, D.T.C. 11-16, Amended Affidavit of Douglas A. Dawson (Mar. 27, 2013) ("Amended Dawson Affidavit"). The information was contained in the Affidavit of Douglas A. Dawson attached to Petitioners' Surreply filed on April 20, 2012, and the Amended Affidavit of Douglas A. Dawson filed on March 27, 2013. Amended Dawson Affidavit; Dawson Affidavit. This additional information does not provide an adequate basis for the Department to find that the Hearing Officer erred.

As an initial matter, it is inappropriate to consider allegations not contained within the Petition on a motion to close investigation styled as a motion to dismiss. *See Investigation by the Dep't of Telecomms. & Energy on its own motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Mass.' intrastate retail telecomms. servs. in the Commw. of Mass.*, D.T.E. 01-31-Phase I, Order at 14 (May 8, 2002) ("D.T.E. 01-31 Order"). Appellants had ample opportunity to request leave to amend their Initial Petition. 220 C.M.R. § 1.04(3). Indeed, Appellants twice amended their Initial Petition, but did not make additional allegations in support of their claim about the per-minute ICS rate. *See* First Amendment; Second Amendment. Appellants' failure to adequately plead a usage rate claim cannot be cured by repeated calibrations informed by a motion to dismiss. D.T.E. 01-31 Order at 14.

Moreover, a review of the assertions in the Dawson Affidavit and Amended Dawson Affidavit suggests that they would have been no help to Appellants' usage rate claim. Mr.

Dawson states that the fact "there are states that have lower rates than Massachusetts is reason enough for DTC to investigate the [usage] rates charged in Massachusetts prison and jails." Amended Dawson Affidavit at 9.[4] The Initial Petition, however, shows that numerous states charge more than Massachusetts for an IntraLATA 15 minute collect call. Initial Petition at Appendix IV. More importantly, the Department did not establish the usage rate for ICS calls in Massachusetts at those set by other states. Rather, usage rates for ICS calls are pegged to those set by the Incumbent Local Exchange Carrier ("ILEC"), Verizon Massachusetts.[5] *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* at 10 (Apr. 17, 1998); *Dep't of Telecomms. & Energy Industry Notice, Collect Inmate Calls – Rate Cap* at 1-2 (rel. Sept. 3, 2004) (Revisions to the ILEC's rates that allowed ICS providers to charge usage rates that do not exceed $1.50 for a 15-minute collect call.).

C. New information cannot be considered on appeal.

As part of their Appeal, Appellants submit new information in the form of three exhibits to support their argument that the Hearing officer ruled in error. *In re Inmate Calls*, D.T.C. 11-16, Exhibits 1-3 (Sept. 26, 2013). Exhibit 1 is a Report and Order and Further Notice of Proposed Rulemaking ("*Order and FNPRM*") issued by the Federal Communications

[4] Mr. Dawson also made numerous general statements regarding telephone industry technology cost trends, but did not sufficiently particularize them to the provision of ICS in Massachusetts. *See* Amended Dawson Affidavit at 9-12. More importantly, Mr. Dawson's own words work against Appellants' usage rate claim when he stated that "I would have to guess today that the net effect of all of the [telephone industry cost trends] have probably cut the cost at least in half on a per minute basis." *Id.* at 12. The Department has discretion in opening its investigations, but to pursue an investigation on someone's guess is, without more, inappropriate. *Complaint of Schreiber & Associates, P.C. & S&A Servs. of Watertown, Ltd. Regarding CTC Commc'ns Corp.*, D.T.E. 02-86, Order at 15 (June 2, 2003).

[5] The Petitioners did not argue in their Petition it is inappropriate to cap usage rates at ILEC payphone rates, or that the ILEC rate itself should be recalculated.

Commission ("FCC"); Exhibit 2 is the Second Affidavit of David A. Dawson dated October 11, 2013, in which Mr. Dawson in turn incorporates the Declaration of Coleman Bazelon filed in the *Order and FNPRM* and dated March 25, 2013; and the Declaration of Douglas A. Dawson In Support of Petitioners' Alternative Proposal filed on February 16, 2007, in CC Docket No. 96-128, *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*. It is well established that the Department does not generally consider new arguments or evidence on appeal. *See, e.g.*, D.T.E. 01-31 Order at 14 ([A] movant should state his case fully when the motion is filed and not expect to supplement with new facts and argument on appeal."); *see also Investigation by the Dep't on its own motion as to the propriety of the rates & charges set forth in the following tariff: M.D.P.U. No. 1, Revision Sheet Nos. 1A, 1B, 2, 3, 4, & newly created Sheet Nos. 6 & 7, filed with the Dep't on Nov. 16, 1995 to become effective Dec. 1, 1995 by Mass.-Am. Water Co.*, D.P.U. 95-118, Order at 7 (Apr. 9, 1996). Appellants have demonstrated no reason for the Department to now consider arguments and supporting documents that were never properly presented to the Hearing Officer or included in their pleading.[6]

IV. RULING

For the reasons stated above, the Department DENIES the Appellants' Appeal.

/s/ Geoffrey G. Why
Geoffrey G. Why
Commissioner

[6] Appellants argue in their Appeal that the Department should not foreclose a lower usage rate for Massachusetts before discovery has begun. Appeal at 8. It bears noting that ICS usage rates are not permanently fixed in Massachusetts; rather there is a presumption that tariffed usage rates are just and reasonable. That presumption is rebuttable. *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").