

PRISONERS' LEGAL SERVICES OF MASSACHUSETTS

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April 25, 2016

HAND DELIVERED

Ms. Sara Clark
Department Secretary
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118-6500

Re: D.T.C. 11-16

Dear Ms. Clark:

Enclosed please find an original and seven copies of the Petitioners' Brief in Response to Hearing Officer's Notice of March 18, 2016.

Many thanks for your attention to this matter.

Sincerely,

Bonita Tenneriello
Staff Attorney

cc: Parties of Record

**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' BRIEF IN RESPONSE TO
HEARING OFFICER'S NOTICE OF MARCH 18, 2016**

INTRODUCTION

The Department of Telecommunications and Cable can and should decide all of the issues raised in this Petition and reserved for adjudication by the Hearing Officer's Interlocutory Order of September 23, 2013 and the Commissioner's Order on Appeal of February 26, 2014. The Federal Communications Commission's recent Second Report and Order is historic, and its conclusions are founded on extensive fact-gathering. However, its future is uncertain. Portions of the Order have been stayed pending appeal, and other portions, while not stayed, are subject to appeal.¹ The appeal process will take, at minimum, many months to complete, with the possibility of remand for further rulemaking by the FCC. A principal argument made by ICS providers challenging the FCC regulations is that the FCC lacks jurisdiction to regulate intrastate ICS service – an objection that would not apply to the DTC's authority to regulate. Furthermore,

¹ See *GTL et al. v. FCC*, no. 15-1461 (and consolidated cases) (D.C. Cir.), Order, March 7, 2015 (granting in part and denying in part motions for stay); Statements of Issues to be Raised submitted by GTL (January 25, 2016), Securus Technologies (January 27, 2015), and Telmate, LLC (January 29, 2016) (all attached as Ex. 1). The parties challenge the FCC's authority to limit intrastate rates and Telmate specifically challenges its authority to limit charges for ancillary services. Any matters considered and ruled upon by the FCC may be challenged in the appeal. See 47 U.S.C. § 405.

the Petitioners' challenges to quality of service issues such as line quality and dropped calls, as well as billing practices, are not fully addressed by the FCC's Orders.

The FCC's prohibition on per-call surcharges was not stayed by the Court. During the March 28, 2016 telephonic status conference with Hearing Officer Scott, counsel for Global Tel*Link (GTL) and Securus Technologies, Inc. (Securus), stated that without per-call surcharges they intend to seek an increase in Massachusetts' per-minute cap of \$0.10. This cannot and should not be done without a careful examination of Inmate Calling Service (ICS) providers' costs and revenues. The FCC rates themselves were intended as a ceiling, and the agency encouraged states to consider lower rates:

The primary purpose of the rate caps we adopt today is to ensure that ICS rates are 'just and reasonable'....State requirements that result in rate caps below our caps advance our purpose and there is no credible record evidence demonstrating or indicating that any requirements that result in rates below our conservative caps are so low as to clearly deny providers fair compensation. Evidence in the record shows that ICS can be provided at rates at or below \$0.05 a minute.²

While the DTC Hearing Officer's Interlocutory Ruling and the Order on Appeal dismissed the Petitioner's challenge to the \$0.10 per minute rate cap as being unjust and unreasonable, this question has been re-opened by the ICS Providers' stated intent to challenge this cap. If the Department accepts the Providers' request to re-examine the \$0.10 per-minute cap, then it must determine a just and reasonable rate, and it cannot and should not restrict its own inquiry by considering only an increase, and not a decrease, to the rate cap.

This case was originally filed in 2009, it was docketed in 2011, and the motion to dismiss was decided on appeal in February 2014. While the delay in adjudication has permitted the Department and the parties to benefit from the FCC's careful analysis, there is no further benefit

² *In the Matter of: Rates for Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third FNPRN ("Second Report and Order"), adopted October 22, 2015, at ¶ 210.

to waiting the many months or years until the FCC's regulations become final. The Petitioners welcome the Department's apparent intent to move forward without further delay, as evidenced in the Notice of Briefing Schedule, and set forth below their answers to the questions posed in that Notice.

PETITIONERS' RESPONSES TO QUESTIONS POSED

1. Whether the elimination of the per-call surcharge resolves all concerns regarding the just and reasonableness of the per-call surcharge rate and warrants the Department closing that portion of its investigation.

The FCC's elimination of the per-call surcharge is in accord with the Petitioners' contention that such charges result in unjust and unreasonable rates for ICS consumers who make brief calls and suffer from frequent dropped calls (such as when a user's cell phone results in false detection of three-way calling). Given the possibility that the FCC's prohibition of surcharges could be overturned on appeal, the Department should not close that portion of its investigation. Instead, it should adopt the FCC's analysis and prohibit per-call surcharges.

2. Whether the elimination of the per-call surcharges and the establishment of interim and final rate caps for ICS service necessitates that the Department investigate whether the \$0.10 per-minute rate cap for all intrastate ICS in Massachusetts remains just and reasonable.

Should the Department accept the ICS providers' request to investigate the reasonableness of this rate in the absence of per-call surcharges, then it must also consider whether a rate lower than \$0.10 is just and reasonable. As discussed above, the FCC suggested that rates well below its caps may be just and reasonable³, and observed that ICS providers have been willing and able to provide service for \$0.05 to \$0.06 per minute in Ohio, New Jersey,

³ *Id.*

Pennsylvania, and New Hampshire.⁴ The rate in the New York Department of Correction is \$0.048 per minute.⁵ In the face of such evidence, it would be arbitrary and capricious to consider raising, but not lowering, the current cap of \$0.10 per minute.

3. Whether the FCC's establishment of specific taxes and ancillary service charges with price caps sufficiently resolved all concerns regarding the service and other fees contained in ICS providers' tariffs and warrants the Department closing that portion of its Investigation.

ICS providers currently assess a wide range of separate charges that are ancillary to the provision of ICS such as fees to open, maintain or close an account, place funds on an account or receive a refund. Although the FCC's Order significantly limits ancillary fees⁶, the providers' federal appeal challenges these reforms. As such, consumers cannot rely on the FCC Order to ensure that fees charged in Massachusetts are just and reasonable. The FCC made clear in its First Report and Order that ancillary fees charged to ICS consumers, left unregulated, would allow the providers to simply increase fees in order to offset the lower rate caps imposed by the FCC.⁷ Therefore the Department's investigation as to these issues must remain open.

4. Whether the FCC's Order resolves concerns about dropped calls and other service quality issues and warrants the Department closing all or part of that portion of its Investigation.

Petitioners in this action have consistently asserted that their calls continue to be dropped and that the line quality and billing practices of the Providers are problematic.⁸ While the FCC's

⁴ *Id.*, at ¶ 49.

⁵ See Value Added Communications, Notice to Friends and Families of New York State Inmates, available at <http://www.myvconnect.com/NY.aspx> (accessed on April 22, 2016).

⁶ See Second Report and Order at ¶¶ 144-196.

⁷ See *In the Matter of: Rates for Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking in 12-375, adopted August 9, 2013 ("First Report and Order") at footnote 338.

⁸ See *id.* at footnote 320; See also Affidavit of Alphonse Kamanzi at ¶ 4, attached as Exhibit 2; See also the following responses of Petitioners to GTL's discovery requests filed with the DTC: <http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/pls3suppgtlgowen.pdf>, <http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/pls3supgtlsargnt.pdf>.

elimination of per-call surcharges prevents substantial overcharges from dropped calls, this regulation is being challenged in federal court. Even if the ban on surcharges were to survive legal challenge, the continuing problem of dropped calls due to false three-way detection and poor line quality would continue to plague Massachusetts ICS consumers, as would problems with billing practices and customer service. In fact, over the past two months, PLS has heard from multiple petitioners regarding these persistent problems.⁹ Therefore, the DTC must continue to investigate quality of service issues.

5. Whether the FCC's Order resolves concerns about the adequacy of billing details and warrants the Department closing that portion of its Investigation.

Although the FCC's First Order did address the issues of billing-related call blocking¹⁰ and billing related fees¹¹, the Order does not address the issue of consistent billing errors¹², which Petitioners have raised in this action. Petitioners ask that the Department continue to investigate such billing practices. This issue should be considered together with the additional service quality issues addressed above.

6. Whether any changes to scope of proceeding would moot discovery requests.

If the scope of these proceedings remains broad as Petitioners suggest it must, none of the discovery requests would be rendered moot. If the scope is expanded to include the per-minute rate, Petitioners must be permitted to serve additional discovery requests on the providers to address that issue.

<http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/pls3supgtlwill.pdf>,
<http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/jacobsteinregtl1.pdf>,
<http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/plsrespgtl1st.pdf>,
<http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/2ndplsrespgtl1st.pdf>,
<http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/3rdplsrespgtl1st.pdf>,
<http://www.mass.gov/ocabr/docs/dtc/dockets/11-16/4thplsrespgtl1st.pdf>

⁹ See Kamanzi Affidavit at ¶¶ 5, 6.

¹⁰ See First Report and Order at ¶¶ 108-114

¹¹ See *id.* at ¶¶ 163, 164, and 169.

¹² See *id.* at ¶ 5.

Date: April 25, 2016

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Bonita Tenneriello', written over a horizontal line.

Bonita Tenneriello, Esq.

Elizabeth Matos, Esq.

James Pingeon, Esq.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1461**September Term, 2015****FCC-80FR79136****Filed On: March 7, 2016**

Global Tel*Link,
Petitioner

v.

Federal Communications Commission and
United States of America,
Respondents

Centurylink Public Communications, Inc., et
al.,
Intervenors

Consolidated with 15-1498, 16-1012,
16-1029, 16-1038, 16-1046, 16-1057

BEFORE: Tatel, Brown, and Griffith, Circuit Judges

ORDER

Upon consideration of the motions for stay, the oppositions thereto, and the replies; the motion of the State of Oklahoma for leave to file a motion for stay and the oppositions thereto; and the motion of Network Communications International for leave to file an amicus curiae brief in response to the motions to stay, it is

ORDERED that the motion of Oklahoma for leave to file a motion for stay be denied. It is

FURTHER ORDERED that the motion of Network Communications International to file an amicus brief in response to the motions to stay be denied. It is

FURTHER ORDERED that the motions for stay be granted in part and denied in part. The motions are granted as to the provisions of the Federal Communications Commission's "Second Report and Order and Third Further Notice of Proposed Rulemaking," FCC 15-136 (Nov. 5, 2015), regarding 47 C.F.R. §§ 64.6010 (setting caps

- Exhibit 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1461**September Term, 2015**

on calling rates) and 64.6020(b)(2) (setting caps on fees for single-call services). With respect to these provisions, petitioners have satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2016). The motions are denied in all other respects.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Robert J. Cavello

Deputy Clerk

GLOBAL TEL*LINK, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

In accordance with this Court's December 24, 2015 Order, petitioner Global Tel*Link submits this nonbinding statement of issues to be raised in this case.

¹ Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136 (rel. Nov. 5, 2015) (the “Order”).

service; (iii) applied its rate caps to both interstate and *intrastate* ICS calls.

The issues to be raised are:

1. Whether the FCC's decision to exclude site commissions from its calculation of the cost of providing ICS violates the Communications Act because it caused the FCC to set rate caps at a level that do not permit ICS providers to recover an acknowledged cost of providing ICS;

2. Whether the FCC's decision to exclude site commissions from its calculation of the cost of providing ICS violates the Constitution's Takings Clause because it caused the FCC to set confiscatory rate caps that do not permit ICS providers to recover an acknowledged cost of providing ICS;

3. Whether the FCC's decision to exclude site commissions from its calculation of the cost of providing ICS was arbitrary, capricious, not in accordance with law, or in excess of statutory jurisdiction;

4. Whether, notwithstanding the FCC's decision to exclude site commissions from its cost calculations, the rate caps in the *Order* are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law or in excess of statutory jurisdiction, or contrary to constitutional right, power, privilege or immunity; and

5. Whether 47 U.S.C. § 276(b)(1)(a), which authorizes the FCC to ensure that ICS providers are “fairly compensated” for intrastate calls, authorizes the FCC to reduce and cap intrastate ICS rates.

Respectfully submitted,

/s/ Michael K. Kellogg
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Benjamin S. Softness
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*Counsel for Global Tel*Link*

January 25, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that, on this date, a copy of the foregoing was served by U.S. first-class mail on the following:

Donald B. Verrilli, Jr.
Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

/s/ Michael K. Kellogg
Michael K. Kellogg

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLOBAL TEL*LINK, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,

Respondents.

No. 15-1461, and
consolidated cases

STATEMENT OF ISSUES TO BE RAISED

Petitioner Securus Technologies, Inc. (“Securus”), through counsel and pursuant to the Clerk’s Order dated December 30, 2015, hereby identifies the issues it will raise in this appeal. They are:

1. Whether the Federal Communications Commission (“FCC”) exceeded its authority, acted contrary to the record, or was arbitrary and capricious in adopting unprecedented caps on the fees for processing financial transactions such as credit card payments in the *Second Inmate Rate Order*.¹
2. Whether the Federal Communications Commission (“FCC”) exceeded

¹ WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 15-136 (rel. Nov. 5, 2015), published at 80 Fed. Reg. 79136 (Dec. 18, 2015).

its authority, acted contrary to the record, or was arbitrary and capricious in adopting unprecedented caps on optional “Single-Call Services” such as Text2Connect and PayNow in the *Second Inmate Rate Order*.

3. Whether the definition of “Site Commission” in Rule 64.6000 and the attendant reporting requirement in Rule 64.6060 are impermissibly vague, overly broad, in excess of FCC authority or jurisdiction, or arbitrary and capricious.
4. Whether the FCC’s attempt in Rule 64.6060 to impose regulatory requirements on video services at correctional facilities was issued without notice in violation of the Administrative Procedures Act, 5 U.S.C. § 553(b) or was in excess of its authority or jurisdiction.

Dated: January 27, 2016

Respectfully submitted,

By: s/Andrew D. Lipman
Andrew D. Lipman
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By: s/Stephanie A. Joyce
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Counsel to Securus Technologies, Inc

CERTIFICATE OF SERVICE

I hereby certify on this 27th day of January, 2016, that the foregoing
Statement of Issues to Be Raised was served on the following person via First
Class Mail:

Loretta E. Lynch
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

All other parties have appeared and will receive the filing via ECF
notice.

By: /s/ Stephanie A. Joyce
Stephanie A. Joyce

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GLOBAL TEL*LINK, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED
STATES OF AMERICA,

Respondents.

No.: 15-1460 (and consolidated
cases)

STATEMENT OF ISSUES

Petitioner Telmate, LLC (“Telmate”) hereby submits its nonbinding statement of issues to be raised in this case:

1. Whether the Federal Communications Commission (“FCC”) exceeded its authority under 47 U.S.C. § 276 when it set rate caps limiting what inmate calling service providers can charge for voice over Internet protocol (“VoIP”)-based inmate payphone calls.
2. Whether the FCC exceeded its authority under 47 U.S.C. § 276 when it set rate caps limiting what inmate calling service providers can charge for non-telecommunications “ancillary services.”
3. Whether it was arbitrary, capricious, contrary to law, or an abuse of discretion for the FCC to ignore record evidence of inmate calling service

providers' costs, conclude without evidence that the majority of inmate calling service providers are "inefficient," and set industry-wide rate caps based on the reported expenses of only a subset of providers.

4. Whether it was arbitrary, capricious, contrary to law, or an abuse of discretion for the FCC to refuse to prohibit site commissions while also setting rate caps that do not allow inmate calling service providers to recover site commissions, despite acknowledging that they contribute to high-cost inmate calling rates, and are often mandatory.

January 29, 2016

Respectfully submitted,

/s/
Brita D. Strandberg
Jared P. Marx
John R. Grimm
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Counsel for Telmate, LLC

CERTIFICATE OF SERVICE

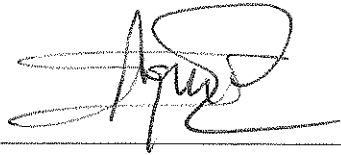
I hereby certify that on January 29, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Brita D. Strandberg

AFFIDAVIT OF ALPHONSE KAMANZI

I, Alphonse Kamanzi, hereby depose and state:

1. I am a paralegal with Prisoners' Legal Services, which is a petitioner in the action DTC 11-16 filed with the Department of Telecommunications and Cable, titled "Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls."
2. I have worked as a paralegal with Prisoners' Legal Services for the past nine (9) years.
3. I have been the paralegal assigned to this case since 2012.
4. As the paralegal assigned to this case, I am tasked with responding to inquiries from petitioners and non-petitioners regarding the status of this action pending before the DTC.
5. Since being assigned to this case in 2012, I have received steady phone calls and letters from Inmate Calling Service users registering multiple complaints regarding the quality of prison phone calls at both state and county jail facilities throughout Massachusetts as well as problems with billing practices.
6. Since March 1, 2016, I have received complaints from twelve (12) petitioners regarding the phone companies' billing practices including overcharging and problems trying to secure refunds.
7. Since March 1, 2016, I have received complaints from eighteen (18) petitioners regarding quality of service including line quality, dropped calls, false 3-way detection, interference, and changes or disruption in service.



Signed and sworn to under the pains and penalties of perjury

this 25th day of April, 2016