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

GLOBAL TEL*LINK, SECURUS TECHNOLOGIES, INC., *et al*., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	Nos. 15-1461, 15-1498, and consolidated cases Oral Argument on the Merits Not Yet Scheduled

SECURUS TECHNOLOGIES, INC.
EMERGENCY MOTION FOR MODIFICATION OF STAY OF FCC ORDER 15-136 PENDING REVIEW

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Dated: March 17, 2016

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Petitioner Securus Technologies, Inc. ("Securus"), pursuant to Fed. R. App. P. 18 and Circuit Rule 27(f), files this Emergency Motion for Modification of Stay regarding the Federal Communications Commission ("FCC" or "Commission") order titled *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 (rel. Nov. 5, 2015), published at 80 Fed. Reg. 79136 (Dec. 18, 2015) ("*Second Inmate Rate Order*" or "*Order*") pending review. On March 7, 2016, a panel of this Court entered a stay of ***all*** new calling rates adopted in the *Order*; for the reasons explained herein, Securus now must obtain a modification of the stay in response to a new interpretation of the *Order* issued by the FCC staff approximately ***9 hours*** before a purported new intrastate rate was to become effective. Specifically, Securus moves that the Court preserve the *status quo* of the March 7 Order and make clear that the stay applies to Rule 64.6030, to the extent the FCC now is clearly overreaching and attempting to apply a new interim rate cap to intrastate calls.[1]

BASIS FOR REQUESTING EXPEDITED CONSIDERATION

Undersigned counsel has phoned the Clerk to explain the following: On March 16, 2016, approximately 9 hours before the *Second Inmate Rate Order* was due to become effective in part, the FCC's staff issued a "clarification" announcing

[1] To be clear, Securus does not seek to stay the application of Rule 64.6030 to interstate calls.

that interim rate caps would begin to apply to ***intrastate*** inmate calls at prisons on **March 17, 2016**. Public Notice, "Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Service and Effective Dates for Provisions of the *Inmate Calling Services Second Report and Order*," DA 16-280 (Mar. 16, 2016) (hereinafter "March 16 Public Notice") (provided herewith as **Appendix A**). This new interpretation of the *Order*, which was not anticipated by Securus or any other party in stay motions previously filed with this Court, will impose additional irreparable harm on Securus, beyond that which could have been addressed in this Court's stay order of March 7, 2016 ("March 7 Order").

To be very clear, the FCC has attempted a last-minute circumvention of the Court's stay to make new rate effective ***today***. For this reason, Securus respectfully requests that the Court act on this Motion expeditiously, and if possible by **March 24, 2016**. To that end, Securus suggests that the Court require the FCC to file any response to this Motion by 4:00 pm on Monday, March 21, and allow Securus to file a reply to that response by 4:00 pm on Tuesday, March 22.

STATEMENT PURSUANT TO CIRCUIT RULE 18(A)

Because of the new "interim" intrastate rate cap is purportedly already effective, it was impracticable for Securus to seek relief from the FCC before filing this Motion. Moreover, other parties to this case (Telmate, LLC and Pay Tel Communications, Inc.) asked the FCC to confirm that no "interim rate" applies to

intrastate calls, and the FCC rejected those submissions in its March 16 Public Notice, rendering any further request for relief to the agency futile.

CERTIFICATION PURSUANT TO CIRCUIT RULE 18(A)(2)

Counsel for Securus certifies that she contacted FCC counsel of record by phone prior to filing of this motion to explain the relief sought and the briefing schedule suggested herein.

FACTUAL BACKGROUND

In the *Second Inmate Rate Order*, the FCC for the first time asserted jurisdiction over rates for *intrastate* inmate calls, and adopted new rate caps applicable to both interstate and intrastate calls. In its March 7 Order, this Court stayed the amended Rules 64.6010 (amended rate caps for interstate calls and new, unprecedented rates for intrastate calls) and 64.6020(b)(2) (rate caps for "single-call services").

The March 16 Public Notice is based upon Rule 64.6030, which has been in effect since 2013,[2] and established interim rate caps on interstate calls. The 2013 version of this rule read as follows:

> No provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. A

[2] Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) ("*First Inmate Rate Order*"), *stayed in part*, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al*. (D.C. Cir. Jan. 13, 2014).

> Provider's rates shall be considered consistent with this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed $3.75 for a 15-minute call using Collect Calling, or $3.15 for a 15-minute call using Debit Calling, Prepaid Calling, or Prepaid Collect Calling.

47 C.F.R. § 64.6030 (2014). Like all the rules adopted by the FCC in its 2013 decision, these caps applied only to **interstate calls**. The *Second Inmate Rate Order* amended Rule 64.6030 to read as follows:

> No Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. These interim rate caps shall sunset upon the effectiveness of the rates established in § 64.6010.

In its March 16 Public Notice, the FCC improperly reasoned that, although the *Order* did not change the operative language in the first sentence of the rule, the 2015 amendment to the definition of "Inmate Calling Service" in Rule 64.6000 automatically amended Rule 64.6030 such that the interim rates now apply to intrastate, as well as interstate, calls. The March 16 Public Notice is clearly an overreach to attempt to cap intrastate rates after the Court already stayed all new rates.

ARGUMENT

I. STANDARD OF REVIEW

The Court applies this four-part test to evaluate motions for stay:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? … (2) Has the petitioner

> shown that without such relief, it will be irreparably injured? … (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? … (4) Where lies the public interest? … .

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). It is not necessary to show that success on the merits is more likely than not; rather, "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

II. THE FCC'S LAST-MINUTE INTERPRETATION OF ITS RULES IS ARBITRARY AND CAPRICIOUS AND COULD NOT SURVIVE JUDICIAL REVIEW

The FCC's new interpretation of Rule 64.6030 is irrational and unsupportable, and will certainly be reversed on the merits after full review by this Court. Rule 64.6030 has not been discussed by any Petitioner, Intervenor, or Respondent in this consolidated appeal, because the evident purpose of the rule was simply to *keep existing interstate rate caps in place* until new rules took effect.[3] Likewise, the FCC's Response in Opposition (ECFS Doc. 1598743) *did not even cite Rule 64.6030*, much less discuss it substantively. Indeed, the *Second Inmate Rate Order* itself never discusses Rule 64.6030, apart from one mention in a "Background" paragraph (*Order* ¶ 102). The amended version of 64.6030

[3] Two parties, Telmate, LLC and CenturyLink Public Communications, included Rule 64.6030 among the sections they requested be stayed, but neither of them discussed the content of this rule in the body of their motions.

simply appears in Appendix A of the *Order* (page 161).

When this Court entered its March 7 Order, the only reasonable interpretation of the stay was that the Court intended to maintain the *status quo* as to rates, as that is the purpose of a stay pending review. *See Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844 (injunctive relief "seeks to maintain the status quo pending a final determination of the merits of [a] suit"). That was how FCC Chairman Wheeler and Commissioner Clyburn understood the March 7 Order in the joint statement they released later the same day:

> While the D.C. Circuit stayed implementation of new, lower rate caps, and a related rule limiting fees for certain single call services, the Court otherwise declined to delay critical reforms including implementation of caps and restrictions on ancillary fees. Relief from these egregious fees will take effect on March 17 for prisons, and June 20 for jails. ***The stay does not disrupt the interim rates set by the Commission in 2013.***

FCC News Release, "Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate," March 7, 2016 (copy provided herewith as **Appendix B**) (emphasis supplied). The statement referred only to the interim rates set in 2013, which applied to interstate calls, and said nothing about extending those interim rates to intrastate calls.

Only later did some inmate-rights advocates discover and then publicize, largely through social media, the bizarre interpretation of Rule 64.6030 that would create a new intrastate rate of $0.21 per minute. As Telmate explained in its letter

filed March 11, 2016, at the FCC, these advocates publicized their interpretation and created confusion among interested parties, forcing Telmate to seek FCC clarification in an effort to end this confusion. Letter from Brita Strandberg, Counsel to Telmate, LLC, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375, filed March 11, 2016) (copy provided herewith as **Appendix C**); Letter from Marcus Trathen, Counsel to Pay Tel Communications, Inc., to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375, filed March 15, 2016) (copy provided herewith as **Appendix D**). Instead, the FCC staff chose to adopt the view that the *Order* greatly expanded the application of the Rule 64.6030 "interim" rates, cavalierly ignoring the fact that this position has no support in the text of the *Order* and flies in the face of administrative procedure.

By their plain language, both the title of Rule 64.6030 and its language set an "interim" (*i.e.*, temporary) rate cap. The term "interim rate" comes directly and only from the *First Inmate Rate Order*. As the Court is aware, that order only applied to interstate rates, not intrastate rates. *E.g.*, *First Inmate Rate Order*, 28 FCC Rcd at 14111 ¶ 5 ("we also set an interim hard cap on ICS providers' rates of $0.21 per minute for interstate debit and prepaid calls, and $0.25 per minute for collect interstate calls"); *id*. at 14140 ¶ 59 ("The interim rate cap framework we adopt enables providers to charge cost-based rates up to the interim rate caps.").

And every time the *Second Inmate Rate Order* mentions "interim" rate caps, the modifier "interstate" appears. *E.g.*, *Order* ¶¶ 2, 6, 10, 14.

The *Second Inmate Rate Order* set permanent – not interim – rate caps. There is no language whatsoever in the *Second Inmate Rate Order* purporting to establish interim rates or make the 2013 interim rate caps applicable to intrastate calling. As noted above, the *Order* barely mentions Rule 64.6030, and then only in a "background" discussion. Indeed, the whole and explicit purpose of the *Second Inmate Rate Order* was to establish permanent rate caps (*e.g.*, ¶¶ 15, 31, 50); the Commission never intended to establish merely "interim" rate caps on intrastate calling in the *Second Inmate Rate Order*, and it did not do so. All of the new rates, which this Court stayed, are "permanent" rates.

In addition, it is not plausible that the FCC intended to expand the scope of the interim rate caps to intrastate calling without ever mentioning this intention anywhere in the *Second Inmate Rate Order*. To do so would have violated the minimum requirements of administrative procedure and would, by itself, have been sufficient reason for this Court to have vacated that aspect of the decision. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action"); *see also* 5 U.S.C. § 553(b). An agency cannot make substantive changes to its rules by stealth, without articulating any explanation at

all, much less a "satisfactory" one, for those changes.

Further, the new interpretation of Rule 64.6030 leads to nonsensical results—

First, if the amended Rule 64.6030 were intended to apply to purported "interim" intrastate rates, it would have done so only after the amended definitions in Rule 64.6000 took effect – which is on the same dates that Rule 64.6010 would have taken effect if not stayed – March 17, 2016 in prisons, June 20, 2016, in jails. But the amended Rule 64.6030 states that the "interim rates" would "sunset upon the effectiveness of the rates established in § 64.6010" – March 17 and June 20. Thus, the March 16 Public Notice purports that the FCC adopted an intrastate rate that "sunsetted" at exactly the same time that it went into effect, which is an absurdity.

Second, the FCC's literal, context-free reading of Rules 64.6000 and 64.6030 would mean that the interim rate caps apply to *international* calls,[4] even though the Commission ***explicitly*** stated that "international calls are not subject to our rate caps … ." *Second Inmate Rate Order* ¶ 69. Conveniently, the March 16 Public Notice excludes international calls from the new $0.21 rate cap, without analysis, in a footnote. Appendix A, p.3. This incongruity alone demonstrates that the FCC never thought about Rule 64.6030 for anything but interstate calls,

[4] Rule 64.6000 encompasses ***all*** "calls to individuals outside the Correctional Facility" in the definition of ICS.

and now is reverse-engineering that rule *ad hoc* and without any rational basis.

Third, as Telmate noted in its March 11 letter (Appendix C, p.3), applying the interim $0.21 rate cap to intrastate calls would require providers to charge *lower* rates for many calls than would have been required under the permanent rate caps that this Court stayed. In the tiered rate structure of Rule 64.6010 which the Court stayed *in toto*, ICS carriers can charge $0.22 per minute.

The March 16 Public Notice is, at bottom, a brazen attempt by the FCC to set and enforce a new calling rate despite this Court's March 7 Order prohibiting all new calling rates from becoming effective. The terse, but circular reasoning in the March 16 Public Notice demonstrates that the Rule 64. 6030 end-around never occurred to the FCC until Telmate felt forced to quell the chatter about a purported $0.21 intrastate cap by filing the March 11 letter. This fact is clear in the absence, noted above, of any mention of Rule 64.6030 in the FCC's two oppositions to the motions for stay, both of which dealt squarely with the FCC's new inmate calling rates.

Under the only plausible reading of the *Second Inmate Rate Order*, it is clear that Rule 64.6030 applies only to the 2013 interim rates which only applied to interstate calls. The Commission's revision of the definitions in Rule 64.6000 can have no bearing on the interim rates that were analyzed at length in the *Order* and memorialized in Rule 64.6010. The conclusion to the contrary March 16 Public

Notice is irrational, unsupported by the terms of the *Order*, and would constitute arbitrary and capricious rulemaking if put into effect. Thus, Securus has a strong probability of success on review of this issue.

II. SECURUS WILL SUFFER IRREPARABLE HARM ABSENT A MODIFIED STAY

Securus has spent tens of thousands of person-hours to implement the *Second Inmate Rate Order* since its release on November 5, 2015. This implementation required significant discussion and renegotiation of approximately 1,500 contracts with correctional institutions as to rates, rate structure, and site commissions. Affidavit of Richard Smith ¶¶ 4-6 (Mar. 17, 2016) ("Smith Aff."). Contract negotiations with state prisons had to be completed before the March 17 effective date of the new rules. On average, each contract required two lengthy meetings, many of which were in-person, to arrive at a workable amendment. Smith Aff. ¶ 4. In-person meetings resulted in travel costs and an additional allocation of time for travel. *Id*. In total, over 100 Securus personnel devoted roughly 30,000 hours to this project. *Id*. ¶ 5.

Compliance with the new rules also required modifications to the company's billing systems and updates to its rate databases for each individual facility: 20 Securus personnel spent approximately 7,200 hours on this project, adding $720,000 in labor. *Id*. ¶ 9. And to assist with this effort, Securus regulatory staff had to analyze the regulations of all 50 states to discern how the new federal rules,

especially the prohibition on "per-call" charges, can coexist with state rules. Smith Aff. ¶ 10. In all, Securus expended approximately $3.8 Million in labor costs in order to implement the new rules. Smith Aff. ¶¶ 5, 9.

Now the FCC apparently expects Securus to go back and do all that over again, so that it can comply with so-called "interim rate caps" for intrastate calls, and to do it **on approximately 9 hours' notice**, or else face the risk of penalties. *See* Smith Aff. ¶¶ 6, 7. The FCC's consistent demonization of ICS providers in its orders, notices of proposed rulemaking, and press statements can leave no observer with any doubt that the FCC will take enforcement action eagerly, if given the chance. The requirement to incur another set of massive costs, estimated at $3.0 million, to comply with this imaginary rule, Smith Aff. ¶ 7, which will never be recoverable, is itself ample enough to establish irreparable harm.

Further, the consequences of the FCC's overreach are not merely financial. Securus's correctional facility clients have themselves been put to considerable expense and disruption by the FCC's attempt to invalidate of all their existing ICS contracts and the need to renegotiate all those arrangements on an expedited schedule. If Securus is forced to inform these clients that they now have to repeat this exercise, and do so even more quickly, it will face serious and lasting injury to its goodwill and business reputation, and likely long-term loss of business opportunities. Smith Aff. ¶ 8. Loss of goodwill is a type of irreparable harm that

warrants a stay of FCC orders. *E.g.*, *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (staying *Local Competition First Report and Order*).

In addition, Securus faces further irreparable harm in the form of potentially huge numbers of complaints and claims alleging unlawful intrastate rates, since compliance with the FCC's latest dictate (yesterday) by the effective date (today) was impossible. The ICS industry has faced a number of lawsuits in the wake of the *First Inmate Rate Order*, so the expectation of further lawsuits and disputes under this new ruling is entirely reasonable. Smith Aff. ¶ 12.

Securus also anticipates a huge increase in customer service calls if the new $0.21 intrastate rate is allowed to stand, due to the publicity stemming from media coverage of the FCC's March 16 Public Notice and the public statements of those who created this misguided interpretation of Rule 64.6030. *Id*. ¶ 13. The cost of personnel and equipment to handle this massive increase in call volume will be unrecoverable.

III. THIRD PARTIES WILL NOT BE UNDULY HARMED BY A MODIFIED STAY

Third parties cannot be harmed by the stay of a new rate that even the FCC did not, prior to yesterday, believe was adopted. To the extent third parties now will claim, *ex post facto*, to have had a reasonable expectation of paying a $0.21 intrastate rate, that harm will be outweighed by the severe harm to service providers, correctional institutions, and the public interest, for the same reasons

discussed in the initial motions for stay of the proposed permanent rate caps on those calls.

Further, correctional institutions who have only recently renegotiated their inmate telephone service contracts in response to the *Second Inmate Rate Order* will be harmed in the absence of a stay, by being forced to devote even more resources to another round of contract negotiations and service changes to comply with the new interpretation of Rule 64.6030. Smith Aff. ¶ 8. Indeed, the Court must take into account that some correctional facilities may choose to withdraw telephone access from inmates entirely rather than devote still more resources to renegotiating rates, commissions, and other terms of service. *See id*.

IV. THE PUBLIC INTEREST FAVORS A MODIFICATION OF THE STAY

The harm to the public interest if the FCC is permitted to enforce its new interpretation of Rule 64.6030 is largely the same as that discussed in the initial motions for stay, and includes the additional harm to correctional facilities discussed in the Section III. above. Furthermore, the reactions of inmates who may be led to believe, quite wrongly, that they and their families are being overcharged for telephone calls cannot be predicted. Accordingly, the FCC action, if not stayed, creates a real threat to prison and jail security which is contrary to the public interest. Smith Aff. ¶ 14.

CONCLUSION

For all these reasons, the Court should modify its March 7 Order to state that Rule 64.6030 is stayed to the extent the FCC seeks to expand it to intrastate calls.

Dated: March 17, 2016

Respectfully submitted,

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Counsel to Securus Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify on this 17th day of March, 2016, that the foregoing Emergency Motion for Modification of Partial Stay of FCC Order 15-136 Pending Review, with the Appendix, was served on all parties to these consolidated appeals via ECF.

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

ATTACHMENT

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

AFFIDAVIT OF RICHARD A. SMITH

I, Richard A. Smith, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am the Chief Executive Officer of Securus Technologies, Inc. ("Securus") with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254. I am the same Richard A. Smith who submitted an Affidavit to this Court dated January 20, 2016.

2. I am providing this Affidavit in support of the Emergency Motion for Stay seeking immediate relief from the FCC's incorrect interpretation of the *Second Inmate Rate Order* that was released yesterday at approximately 3:00 pm ET. I have personal knowledge of the facts stated herein and could testify to the same.

3. Were Securus required to implement a $0.21 per-minute intrastate rate now, when we had no notice that such a rate were ever contemplated, Securus will suffer a tremendous amount of harm that never can be recouped.

4. **Contract Renegotiation.** Almost as soon as the *Second Report and Order* was released, Securus began the process of renegotiating approximately 1500 contracts as to rates, rate structure, surcharge

elimination, and site commissions which now are fully lawful for all types of calls under the new rules. First we had to digest the Order and decide how to move forward with existing contracts and review that with our Board of Directors and many of our lenders. Then, starting in late **November 2015**, we began contacting Securus's correctional facility customers. The renegotiation process necessarily included a good deal of communication to explain what the *Second Report and Order* states and how it affects existing contracts. In particular, implementing the new prohibition on "per-call" and "per-connection" charges took a great deal of time and restructuring. On average, each contract required two lengthy meetings, many of which were in-person, to arrive at a workable amendment. In-person meetings resulted in travel costs and an additional allocation of time for travel.

5. I can attest that approximately 100 Securus personnel – Account Representatives, regional Vice Presidents, Marketing Associates, and Executives – worked on re-structuring and negotiating these approximately 1500 contracts. The total person-hours totaled over 30,000, resulting in $3.0 Million worth of Securus labor. Only this time, Securus is supposed to do all of this **immediately**. We don't have the 90-day period that the FCC gave for the new rules – this "clarification" happened **9 hours** before the March 17 deadline. That is just 9 hours! Just 9 hours!

6. All of that renegotiation work is ruined due to this "clarification" that suddenly an intrastate rate of $0.21 per minute is effective at 12:01 am on March 17, 2016. All of that internal rate restructuring, all of that time spent discussing the new rules with correctional agencies, all of that external travel cost is now worthless if the FCC "clarification" stands. Money and time – 30,000 hours and $3.0 Million down the drain.

7. Even worse, Securus would have to do this entire process again: re-structuring the intrastate rates – especially site commissions – from top to bottom, explaining again to correctional facilities what this new "clarified" law means, drafting new language for 1500 contracts, travelling back out to the correctional facilities to hammer out new terms, and conducting multiple conference calls with correctional agency personnel. It would mean those 100 Securus personnel spending **another 30,000 hours**, costing Securus **another $3.0 Million**.

8. **Loss of Goodwill.** Securus, having just completed this renegotiation process that I describe above, believes it will suffer an inestimable loss of

goodwill with correctional facilities if this "clarification" becomes law. The phenomenon of "deal fatigue" is setting in – correctional facilities are noticeably tired of this negotiation and implementation process and they need to get back to their core task of keeping facilities safe and secure. Many believe that this additional work is "Securus' fault," even though it was caused by the FCC. If Securus must go back to those 1500 facilities and say we must start the process all over again, those correctional facilities will be furious. Because of this "clarification" that makes no sense and could never have been predicted, the facilities could lose faith in Securus and blame us for this mess. They could also lose their commitment to making ICS available.

9. **Cost of Billing System Re-Programming.** The Securus Billing Group and IT Group spent significant time re-programming our billing system to be compliant with the new rules – especially the prohibition on "per-call" charges – and with the new contract amendments. Approximately 20 Securus personnel spent two months on this project, for a total of 7,200 person hours valued at $720,000. Under this new FCC "clarification", everything they did must be re-done. So Securus would lose the investment already made, and must expend resources to re-program the system again. Another double loss for Securus.

10. **Regulatory Compliance Work.** As soon as the *Second Report and Order* was released, the Securus Regulatory Group spent months reviewing the intrastate rate regulations of 50 states and the District of Columbia to decide how the new rules meld with the state rules and how to implement the new rules on a state-by-state basis. There was no indication anywhere that an intrastate rate of $0.21 was adopted, and so the Regulatory Group relied on the tiered rates set out in the Order. This sudden "clarification" by the FCC requires that this entire state-by-state analysis be done all over again with this unforeseen $0.21 intrastate rate. Everything the Regulatory Group has done for months would be a waste if this FCC announcement is allowed to stand, and they would have to do the analysis all over again.

11. **Harm to Business Reputation.** The FCC announcement has created confusion and chaos, and that is no exaggeration. People now will think Securus should be charging $0.21 for all calls, not just interstate calls. Securus had absolutely no notice nor any reason to change its intrastate rate to $0.21 per minute, but the public will see that FCC "clarification" and assume otherwise. Securus anticipates an onslaught of wrong-headed

bad publicity and public disparagement now, which again hurts its customer goodwill and its reputation.

12. **New Claims and Complaints.** The FCC "clarification" has the effect of making Securus's intrastate rates – the rates it spent months re-structuring and re-negotiating – out of compliance with federal law on 9 hours' notice. Customers and attorneys could rely on the "clarification" to file lawsuits, or at the least file complaints at the FCC that will be misguided but nonetheless will require a response from Securus. This risk, which is not merely "speculative" given that several lawsuits were filed after the *First Report and Order*, is yet another type of harm that Securus faces.

13. **Enormous Increase in Customer Service Center Call Traffic.** Even if no actual court claims are filed, Securus will get a monumental increase in call traffic to its customer service representatives. Securus already has spent time and resources to educate its customer service representatives about the new rates and rules. If the new $0.21 intrastate rate stands, Securus phone lines will be glutted with customer questions and complaints. We would have to absorb all that new traffic which we never foresaw because we have been painstaking in digesting and implementing the *Second Report and Order*. In addition, we would have to re-educate the personnel again as to what the FCC is doing.

14. **Jail Unrest.** This chaos and confusion about what is the correct intrastate calling rate – and the only answer is that there is no federally mandated intrastate calling rate after the Court's March 7 Order which stayed all new rates – will carry over into correctional facilities themselves. Inmates will be angry if they believe that Securus is charging the wrong rates. There could be damage to Securus phones and equipment, as well as a threat to overall security and corrections personnel including inmates within the facilities. Having been in this industry for 8 years, I have experience with jail unrest and I know that issues with the phones can trigger it.

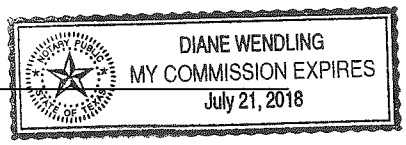
I affirm that the foregoing is true and correct to the best of my knowledge.

Dated: March 17, 2016

Richard A. Smith
Chief Executive Officer
Securus Technologies, Inc.

SUBSCRIBED TO AND SWORN BEFORE ME this 17th day of March, 2016.

Diane Wendling
NOTARY PUBLIC

My Commission expires: 

APPENDIX A

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 16-280
Released: March 16, 2016

WIRELINE COMPETITION BUREAU ADDRESSES APPLICABLE RATES FOR INMATE CALLING SERVICES AND EFFECTIVE DATES FOR PROVISIONS OF THE *INMATE CALLING SERVICES SECOND REPORT AND ORDER*

WC Docket No. 12-375

With this Public Notice, we remind providers of Inmate Calling Services (ICS) of the applicable rates for ICS and effective dates for provisions of the Federal Communications Commission's (Commission) 2015 order governing ICS.[1]

Background. On November 5, 2015, the Commission released the *2015 ICS Order*, which undertook comprehensive reform of the ICS marketplace and, among other things, established new rate caps for both interstate and intrastate ICS calls, limited ancillary service charges, and adopted other measures designed to ensure that ICS rates are fair, just, and reasonable. Several parties filed motions asking the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to stay many of the rules adopted in the *2015 ICS Order*.[2] On March 7, 2016, the D.C. Circuit stayed two individual provisions of the Commission's ICS rules: 47 CFR § 64.6010 (setting caps on ICS calling rates that vary based on the size and type of facility being served) and 47 CFR § 64.6020(b)(2) (setting caps for single-call services).[3] The D.C. Circuit's *March 7 Order* left the Commission's order and adopted rules undisturbed "in all other respects."[4]

Effective Dates of Rules. In accordance with the *2015 ICS Order*, the rules limiting charges for ancillary services – other than the rule related to single-call services, which the D.C. Circuit stayed – will take effect on March 17, 2016 for all ICS calls from prisons, and on June 20, 2016 for all ICS calls from

[1] *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) (*2015 ICS Order*). This Public Notice supersedes the information in the previous Public Notice regarding the effective dates of the Commission's ICS rules and requirements. *Wireline Competition Bureau Announces the Comment Cycle and Effective Dates for the Inmate Calling Second Report and Order and Third FNPRM*, Public Notice, 30 FCC Rcd 14507 (WCB 2015).

[2] *See* Opposition of Respondent the Federal Communications Commission to Motions for Partial Stay at 2, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Feb. 12, 2016) (summarizing the motions ICS providers filed with the D.C. Circuit).

[3] *See Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016) (*March 7 Order*).

[4] *Id.* at 2.

jails.[5] Those same effective dates also apply to the rates for ICS calls involving TTY devices,[6] the rule governing the treatment of taxes and fees,[7] the rule prohibiting per-call or per-connection charges,[8] the rule prohibiting flat-rate calling,[9] and the rules governing minimum and maximum calling account balances.[10] In addition, as noted below, the interim rate caps – $0.21 per-minute for debit and prepaid ICS calls and $0.25 per-minute for collect ICS calls – first established in the *2013 ICS Order*[11] and extended in the *2015 ICS Order*[12] remain in effect for interstate ICS calls, and will take effect for intrastate calls from prisons on March 17, 2016, and for intrastate ICS calls from jails on June 20, 2016.[13]

The rules requiring annual reporting and certification are subject to the Paperwork Reduction Act, as is the rule requiring consumer disclosure of ICS rates.[14] Those rules will take effect upon publication in the Federal Register of a notice of Office of Management and Budget (OMB) approval.[15] All other rules and requirements adopted in the *2015 ICS Order* are either in effect, or will take effect on March 17, 2016, except for the one-time Mandatory Data Collection, which is to occur two years after it is approved by OMB.[16]

Telmate Request. On March 11, 2016, Telmate, LLC (Telmate) sought clarification from the Wireline Competition Bureau as to the effectiveness of the interim rate caps with respect to intrastate calls.[17] Contrary to certain statements made by Telmate, the interim rate caps will apply to all interstate

[5] 47 CFR § 64.6020(a), (b)(1), (3)-(5). As noted above, 47 CFR § 64.6020(b)(2) has been stayed by the D.C. Circuit. *See March 7 Order*.

[6] 47 CFR § 64.6040(a)-(b).

[7] 47 CFR § 64.6070.

[8] 47 CFR § 64.6080.

[9] 47 CFR § 64.6090.

[10] 47 CFR § 64.6100.

[11] *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (*2013 ICS Order*).

[12] *See* 47 CFR § 64.6030 (stating that "[n]o Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute"). Under the Commission's rule, the interim caps will "sunset upon the effectiveness of the rates established in section 64.6010." 47 CFR § 64.6030. The D.C. Circuit has, for the time being, stayed the rates established under section 64.6010. *See March 7 Order* at 1-2. Thus, the interim caps have not sunset.

[13] *See 2015 ICS Order*, 30 FCC Rcd at 12918, para. 336 (indicating that the definitions adopted in 47 CFR § 64.6000 take effect 90 days from publication in the Federal Register, but that rules and requirements governing the rates and fees for ICS in jails take effect 6 months from the date of publication); *see also infra*, addressing Telmate, LLC's request for clarification.

[14] 47 CFR § 64.6060 (imposing annual reporting and certification requirements); 47 CFR § 64.6110 (requiring disclosure of ICS rates).

[15] *2015 ICS Order*, 30 FCC Rcd at 12918, para. 338.

[16] *See id.* at 12862, 12918-19, paras. 198, 336, 339.

[17] Letter from Brita Strandberg, Counsel to Telmate, LLC, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375 (filed Mar. 11, 2016) (Telmate Letter); *see also* Letter from Marcus Trathen, Counsel to Pay Tel Communications, Inc., to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC

(continued…)

and intrastate ICS calls. The interim rate caps apply to intrastate ICS calls by operation of the rules adopted in the *2015 ICS Order* and the terms of the D.C. Circuit's *March 7 Order*.[18] Rule 64.6000(j) defines "Inmate Calling Service" as "a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, regardless of the technology used to deliver the service."[19] The definition does not distinguish between interstate or intrastate calls, and thus the "Inmate Calling Services Interim Rate Cap" set forth in rule 64.6030 applies to both interstate and intrastate calls. More specifically, rule 64.6030 prohibits any "Provider" from charging rates for "Collect Calling . . . Debit Calling, Prepaid Calling, or Prepaid Collect Calling" in excess of the interim rate caps.[20] The terms "Provider," "Debit Calling," "Prepaid Calling," and "Prepaid Collect Calling" all incorporate the definition of "Inmate Calling Service" and thus apply to both interstate and intrastate calls.[21] Likewise, the Commission's definition of "Collect Calling" encompasses both interstate and intrastate calls.[22] Accordingly, and as discussed above, the interim rate caps will remain in effect for interstate ICS calls and will take effect for intrastate calls in accordance with the schedule adopted in *2015 ICS Order*.

For further information, please contact Gil Strobel, Wireline Competition Bureau, Pricing Policy Division, at 202-418-7084 or via e-mail at gil.strobel@fcc.gov.

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Docket No. 12-375 at 1 (filed Mar. 15, 2016) (contending that clarification is not necessary but agreeing with Telmate that the interim rate caps should not be construed to reach intrastate calls). The Wright Petitioners filed an "initial response" to the Telmate Letter later that same day. Letter from Andrew Jay Schwartzman, Counsel to the Wright Petitioners, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375 at 1 (filed Mar. 11, 2016) (Wright Petitioners' Response).

[18] Contrary to Telmate's contention (Telmate Letter at 3), it is not a "bizarre result" of the *March 7 Order* that ICS providers will, for the time being, be unable to charge as much for some categories of calls (calls from small jails, and collect calls from medium- and large-sized jails) as the permanent rate caps would have permitted. The Commission found that the cost of providing both interstate and intrastate ICS for most calls and facilities is much less than what providers are permitted to charge under the interim rate caps. *See 2015 ICS Order*, 30 FCC Rcd at 12775, para. 22 (adopting rate caps that are lower than the interim rate caps for the vast majority of calls). In view of that finding – and when for most calls, the interim rate caps permit ICS providers to charge much higher rates than would the permanent rate caps – the *March 7 Order* reasonably ensures that intrastate calls will not go unregulated while the *2015 ICS Order* is appealed. Insofar as Telmate contends that the interim rate caps cannot reasonably apply to intrastate calls because, "read literally," the definition of Inmate Calling Services "would also apply to international calls," *see* Telmate Letter at 3, the Commission made clear in the *2015 ICS Order* that "international calls are not subject to [the Commission's] rate caps" – a point that Telmate acknowledges. *See* Telmate Letter at 3 (quoting *2015 ICS Order*, 30 FCC Rcd at 12798, para. 69).

[19] 47 CFR § 64.6000(j); *see also* Wright Petitioners' Response at 2-3 (discussing the effect of the Commission's revision of 47 CFR § 64.6000(j)).

[20] 47 CFR § 64.6030.

[21] *See* 47 CFR § 64.6000(g), (p), (q), (s).

[22] *See* 47 CFR § 64.6000(d) (defining Collect Calling as "an arrangement whereby the called party takes affirmative action clearly indicating that it will pay the charges associated with a call originating from an Inmate Telephone"); *see also* 47 CFR § 64.6000(k) (defining "Inmate Telephone" as "a telephone instrument, or other device capable of initiating calls" – not limited to interstate calls – "set aside by authorities of a Correctional Facility for use by Inmates").

APPENDIX B

FCC NEWS from the Federal Communications Commission

Media Contact:
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For Immediate Release

Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate

WASHINGTON, March 7, 2016 – Today, the U.S. Court of Appeals for the District of Columbia Circuit granted in part and denied in part motions to delay implementation of portions of the FCC's Nov. 2015 Order reforming inmate calling rates and fees, pending the outcome of petitions for court review of the Order. While the D.C. Circuit stayed implementation of new, lower rate caps, and a related rule limiting fees for certain single call services, the Court otherwise declined to delay critical reforms including implementation of caps and restrictions on ancillary fees. Relief from these egregious fees will take effect on March 17 for prisons, and June 20 for jails. The stay does not disrupt the interim rates set by the Commission in 2013. Chairman Tom Wheeler and Commissioner Mignon Clyburn issued the following statement:

"While we regret that relief from high inmate calling rates will be delayed for struggling families and their 2.7 million children trying to stay in touch with a loved one, we are gratified that costly and burdensome ancillary charges will come to an end. These fees can increase the cost to consumers of a call by nearly 40 percent, compounding the burden of rates that are too high. This is significant relief, particularly in combination with the 2013 rate caps, and will still provide significant and meaningful relief to consumers. Ultimately, we believe the court will uphold the new rates set by the Commission. We look forward to the day when we stop erecting barriers to communication and have a system where all rates and fees paid by friends and family to stay in touch with their loved ones in jail or prison will be just, fair, and reasonable."

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APPENDIX C

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

March 11, 2016

Via Electronic Filing

Matthew DelNero
Chief
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375

Dear Mr. DelNero:

Telmate, LLC ("Telmate") hereby respectfully requests the opinion of the Wireline Competition Bureau regarding whether Section 64.6030 of the Commission's rules, which imposes interim rate caps for inmate calling services, applies only to *inter*state rates and not also, for the first time, to *intra*state rates. This clarification is necessary because, while the Commission's public statements appear to confirm that Section 64.6030 simply preserves the *interstate* interim rate caps established in the *2013 Order*, counsel to the Wright Petitioners has asserted that these caps should now apply to intrastate rates as well. That result would negatively affect both providers and States, which would suffer the dramatic and immediate site commission (revenue) reductions otherwise avoided by the D.C. Circuit's stay.[1] Telmate respectfully requests that the Bureau resolve this question no later than Wednesday, March 16, 2016, the day before Section 64.6030 is scheduled to become effective for prisons.[2]

[1] *See, e.g.*, Press Release, Arkansas Attorney General Leslie Rutledge, D.C. Circuit Grants Stay of Costly FCC Order (March 7, 2016) ("The stay from the D.C. circuit is welcome news for local budgets and law enforcement across Arkansas . . . . Because of the court's action, jails and prisons will not be shortchanged during the legal challenge to the FCC's order. If this costly order had taken effect, the result would have been disastrous for many local communities.").

[2] Section 64.6030 is not scheduled to go into effect for jails until June 18, 2016. *See 2015 Order* ¶ 336 (explaining that "rules and requirements governing the rates and fees charged in connection with inmates held in jails . . . shall become effective 6 months after publication in the Federal Register").

On March 7, 2016, in response to requests filed by Telmate and others, the D.C. Circuit granted a partial stay[3] of the Commission's *2015 Order*.[4] In particular, the Court stayed new Section 64.6010, which established rate caps for inmate calling in prisons and jails, and new Section 64.6020(b)(2), which established caps for single-call service fees. After the most recent stay was issued, Chairman Tom Wheeler and Commissioner Mignon Clyburn issued a joint statement indicating that the stay left in place "the 2013 rate caps" [5]—the interim *inter*state rate caps that survived an earlier stay of rate caps adopted in the *2013 Order*.[6] This understanding of the Court's action is consistent with the general purpose of stays, which is to maintain the status quo pending judicial resolution of a contested issue.[7] It is also consistent with the Commission's *2013* and *2015 Orders*, as neither order adopts the Section 64.6030 interim rates with respect to intrastate calling.

Nevertheless, a press report has quoted Andrew Schwartzman, an attorney for the Wright Petitioners, as asserting that the interim rate caps will now extend to *both* interstate and intrastate rates, despite the stay.[8] The same report indicates that a Commission spokesman declined to comment on the accuracy of Mr. Schwartzman's interpretation. In light of this apparent confusion, Telmate requests clarification so that it and all other ICS providers, states, and facilities may operate in a manner that is consistent with the Commission's Orders pending appeal.

Telmate notes that its stay request challenged whether 47 U.S.C. § 276 provides authority to create rate caps in any setting—and since Section 201 does not apply to Telmate's one-way VoIP service, this also means that Telmate challenged whether Section 276 provides authority to impose interstate rate caps on one-way VoIP providers such as Telmate. Telmate accordingly does not believe that it is properly subject to any of the rate caps adopted by the Commission,

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[3] *See* Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581.

[4] *In re Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking ("*2015 Order*"), WC Docket No. 12-375, FCC 15-136 (rel. Nov. 5, 2015).

[5] Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate (Mar. 7, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0307/DOC-338101A1.pdf.

[6] *In re Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking ("*2013 Order*"), 28 FCC Rcd 14,107 (2013).

[7] *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (noting that injunctive relief "seeks to maintain the status quo pending a final determination of the merits of [a] suit"); *Alsaaei v. George W. Bush*, No. 05-2369, 2006 WL 2367270, at *1 (D.D.C. Aug. 14, 2006) ("A primary purpose of a stay pending resolution of issues on appeal is to preserve the status quo among the parties.").

[8] Jon Brodkin, *In blow to inmates' families, court halts new prison phone rate caps*, ARS TECHNICA (Mar. 7, 2016), http://arstechnica.com/tech-policy/2016/03/in-blow-to-inmates-families-court-halts-new-prison-phone-rate-caps/.

interim or otherwise. Nevertheless, Telmate requests clarification so that it can abide by the Commission's rules while the D.C. Circuit considers their lawfulness.

Mr. Schwartzman appears to take the position that the interim cap language of Section 64.6030, which the Commission adopted under the *2013 Order* and did not modify in the *2015 Order*, should be read in conjunction with Section 64.6000 definitions that the Commission did modify in the *2015 Order*. But this reading is repeatedly contradicted by the *2015 Order* itself.

The Commission's *2015 Order* simply does not expand the interim rate caps to intrastate rates, which would be a dramatic change from the 2013 interim caps. The *2015 Order* does not state that the Commission is taking this step, much less reflect the sort of reasoned decisionmaking that would be required to support such an extension.[9] Rather, in sharp contrast to its lengthy discussion of its basis for adopting the Section 64.6010 rate caps, the *2015 Order* contains no support or analysis for extending the § 64.6030 caps of $0.21 and $0.25 to intrastate calling. This omission is sensible here, where the interim rate caps established in the *2013 Order*—and temporarily preserved by the *2015 Order*—were based on a record that contained primarily interstate cost data volunteered by just a small subset of providers.

Applying Section 64.6030 to intrastate rates would also create a number of plainly unintended outcomes. First, many of the FCC's permanent intrastate rates are *higher* than the interim rates.[10] It would be a bizarre result for the Commission to establish interim intrastate rates below the permanent intrastate caps, but more extraordinary still to do so without any acknowledgment or discussion of this step. Similarly, applying the interim rate caps to intrastate collect calls would run directly counter to the two-year step-down period for collect calls the Commission adopted. Indeed, the text of Sections 64.6000 and 64.6030 demonstrates that the FCC could not have intended the new definitions to modify the interim rates, because read literally, the new definition of Inmate Calling Services would also apply to international calls, even though FCC was explicit that "international calls are not subject to [the] rate caps[.]"[11]

Reading Section 64.6030 to merely maintain the existing interstate rate caps makes sense, of course, because the FCC never intended that the interim rate caps and the new definitions would be in effect at the same time. Rather, the interim caps were to "sunset upon the effectiveness of the rates established in section 64.6010."[12] Because the new definitions and the permanent rate caps were supposed to begin taking effect at the same time,[13] the FCC expected the interim rate caps to expire as the new definitions became effective. But the Wright Petitioners suggest that the interim rates will remain in place after the new definitions take effect,

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[9] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change . . . .").

[10] *Compare 2015 Order* App. A § 64.6010, *with id.* § 64.6030.

[11] *2015 Order* ¶ 69.

[12] *2015 Order* App. A (modifying 47 C.F.R. § 64.6030).

[13] *See 2015 Order* ¶ 336.

apparently because only the effectiveness of the new *rates* triggers Section 64.6030's sunset provision, and the Court stayed the new rates but not the new definitions. This would cause the rate caps to be modified by new definitions that the FCC did not intend to apply to the interim rate caps.

The most natural reading of Section 64.6030, in light of the Commission's *2013* and *2015 Orders* and the procedural history here—and the only reading potentially consistent with the obligation "to supply a reasoned analysis"[14]—is that it does not extend to intrastate calling. However, because an attorney for the Wright Petitioners has suggested otherwise, we now ask the Bureau to clarify the scope of the rule no later than March 16, 2016, before the rate caps for prisons take effect.

Sincerely,

/s/
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Jared P. Marx
John R. Grimm
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[14] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42.

APPENDIX D

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March 15, 2016

By Electronic Filing ***Letter***

Matthew DelNero
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 12-375, Inmate Calling Services Proceeding

Dear Mr. DelNero:

This letter is submitted on behalf of Pay Tel Communications, Inc. ("Pay Tel") in connection with the request of Telmate, LLC ("Telmate")[1] for clarification regarding whether Section 64.6030 of the Commission's Rules, 47 C.F.R. § 64.6030, "Inmate Calling Services Interim Rate Cap," applies to intrastate rates for inmate calling services ("ICS").

As described below, Pay Tel believes that the Commission's orders and rules are abundantly clear and need no further clarification by the Bureau. If the Bureau believes that such clarification is necessary, Pay Tel urges the Bureau to grant Telmate's request and confirm that the Commission has not adopted "interim" rates affecting intrastate ICS.

As noted by Telmate, the D.C. Circuit's Stay Order[2] stayed Commission Rule 47 C.F.R. § 64.6010, "Inmate Calling Services Rate Caps," which set forth new permanent rate caps applicable to intrastate and interstate ICS calls for jails and prisons. The Stay Order did not stay, or otherwise address or discuss, Rule 64.6030. Rule 64.6030 reads, in its entirety: "No Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling,

[1] *See* Letter from Brita D. Strandberg, et al., Counsel to Telmate, LLC, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375 (Mar. 11, 2016).

[2] *See* Order, Global Tel*Link v. FCC, No. 15-1461 (D.C. Cir. Mar. 7, 2016) ("Stay Order").

or Prepaid Collect Calling in excess of $0.21 per minute. These interim rate caps shall sunset upon the effectiveness of the rates established in Section 64.6010."[3]

While it is true that the Second ICS Order[4] revised the First ICS Order's[5] definition of "inmate calling service" to eliminate the prior definition's limitation to interstate calling,[6] this change does nothing to alter the scope of the interim rates actually approved by the Commission in its orders.

On its face, both the title of Rule 64.6030 itself and its language set forth an "interim" (i.e., temporary) rate cap. The only order that established interim rate caps was the First ICS Order and, in this regard, Rule 64.6030 merely carries forward the interim rate caps adopted in the First ICS Order—applicable now, as then, only to interstate rates.

The First ICS Order only applied to interstate rates, not intrastate rates. The Second ICS Order, by contrast, set permanent—not interim—rate caps on interstate and intrastate calls. There is no language whatsoever in the Second ICS Order purporting to establish interim rates or making findings regarding interim rate caps applicable to intrastate calling. To the contrary, the whole purpose of the Second ICS Order was to establish permanent rate caps; there was no reason for the Commission to establish "interim" rate caps on intrastate calling in the Second ICS Order, and it did not do so.

Substantive legal requirements do not spring forward by themselves. It is simply immaterial to this discussion that the definition of "inmate calling services" was altered in the Second ICS Order. Since the Commission set no interim rates for intrastate calls, Rule 64.6030 has no intrastate application. This could not be clearer and, accordingly, there is no need for any "clarification" by the Bureau.

This commonsense interpretation is supported by the Joint Statement of Chairman Wheeler and Commissioner Clyburn on the Stay Order. As they explained in a statement released March 7, 2016, "[t]he stay does not disrupt the interim rates set by the Commission in 2013."[7] As discussed above, the interim rates set by the Commission in 2013 apply only to interstate calls.

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[3] 47 C.F.R. § 64.6030.

[4] *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 15-136 (rel. Nov. 5, 2015) ("Second ICS Order").

[5] *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd. 14,107 (2013) ("First ICS Order").

[6] 47 C.F.R. § 64.6000(j).

[7] Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate (Mar. 7, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0307/DOC-338101A1.pdf.

The Commission, of course, carried Rule 64.6030 forward in the Second ICS Order because of the delayed effective date for the new, permanent rate caps for both prisons and jails.[8] Given that the new, permanent rate caps did not become immediately effective, the Commission had to carry forward the interim interstate rate caps established under the First ICS Order, or else ICS providers could have raised interstate rates above the First ICS Order's interim cap during the gap between issuance of the Second ICS Order and the effective date of the new, permanent rate caps.

A contrary interpretation leads to nonsensical results. To take the inmate activists' position[9] is to argue that the Commission drafted a rule that would have been a legal nullity and of no consequence whatsoever. Assuming that Rule 64.6030 did apply to intrastate rates, in what "interim" period would the intrastate rate caps have been $0.21 (for debit calls) and $0.25 (for collect calls)? The answer is there would not be such an "interim" period. Given the delayed effective date of the revised permanent rate caps adopted in the Second ICS Order, any intrastate application of Rule 64.6030 would not have taken effect until the exact same dates that the Second ICS Order's permanent rate caps in Rule 64.6010 take effect—meaning the Rule 64.6010 permanent rate caps would take priority over the Rule 64.6030 interim rate caps immediately and that there is no Rule 64.6030 "interim" period as to intrastate rate caps. To argue a reading of Rule 64.6030 in which "interim" intrastate rate caps would never take effect proves the absurdity of the inmate activists' construction. Surely it cannot be contended that the Commission drafted Rule 64.6030 with a view to overcoming a court stay of permanent intrastate rates—which would be an exercise in futility given that the Commission cannot adopt a rule to circumvent a hypothetical future court order! Certainly, had this been the Commission's intent there would be some basis for such a conclusion in the text of the Second ICS Order, as well as some basis cited in the record for the adoption of interim intrastate rates.

Moreover, in addition to the absurdity (pointed out by Telmate) of setting an "interim" rate for collect calls a full $0.24 below the cost determined by the Commission, the interpretation urged by the inmate activists would result in an "interim" intrastate rate for jails with an ADP of 0-349 that is $0.01 below the cost determined by the Commission.

In the full context of the Commission's orders in this proceeding, it is clear that Rule 64.6030 merely addresses interim rates—which only applied to interstate calls—and the Commission's revision of the definition of "ICS" has no bearing on the actual interim rates that were adopted.

In accordance with Section 1.1206 of the Commission's rules, this letter is submitted for inclusion in the record of the above-captioned proceeding.

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[8] Second ICS Order, ¶ 336.

[9] *See* Letter from Andrew Jay Schwartzman, et al., Counsel for the Wright Petitioners, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375 (Mar. 11, 2016).

Please do not hesitate to contact the undersigned should any questions arise concerning this presentation.

Sincerely yours,

/s/ Marcus W. Trathen
Marcus W. Trathen

cc:

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Jonathan Sallet, General Counsel, FCC
Marlene H. Dortch, Secretary, FCC