

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

GLOBAL TEL*LINK, <i>et al.</i>)	
)	
<i>Petitioners,</i>)	
)	
v.)	No. 15-1461 (and
)	consolidated cases)
FEDERAL COMMUNICATIONS)	
COMMISSION and UNITED STATES)	
OF AMERICA,)	
)	
<i>Respondents.</i>)	
)		

**RESPONSE OF CENTURYLINK PUBLIC COMMUNICATIONS, INC.
IN SUPPORT OF GLOBAL TEL*LINK MOTION TO ENFORCE MARCH
7, 2016 ORDER GRANTING PARTIAL STAY PENDING JUDICIAL
REVIEW, SECURUS TECHNOLOGIES, INC. EMERGENCY MOTION
FOR MODIFICATION OF STAY OF FCC ORDER 15-136 PENDING
REVIEW, AND MOTION OF TELMATE, LLC FOR PARTIAL
RECONSIDERATION**

Pursuant to Federal Rule of Appellate Procedure 27(a)(3)(A), Circuit Rule 27, and this Court’s order dated March 18, 2016,¹ Petitioner CenturyLink Public Communications, Inc. (“CenturyLink”) files this Response in support of the motions filed on March 17, 2016, by (i) Securus Technologies, Inc., (ii) Global Tel*Link, and (iii) Telmate, LLC (collectively, the “Motions”). As explained below, this Court should grant the Motions and clarify that its March 7, 2016 stay

¹ See Order, *Global Tel*Link v. FCC*, No. 15-1461, Document #1604701 (D.C. Cir. Mar. 18, 2016).

order² precludes the Federal Communications Commission from applying the *2013 Order*'s interim interstate rate caps to intrastate calls.

I. This Court's *Stay Order* Preserved the Status Quo With Respect to ICS Calling Rates.

The Commission's *2015 Order*³ consolidated all of its new rate caps in a single provision, 47 C.F.R. § 64.6010. CenturyLink and other inmate calling services ("ICS") providers sought a stay of those rate caps,⁴ which this Court granted. *See Stay Order* at 1–2 (describing section 64.6010 as "setting caps on calling rates"). By staying the sole provision of the *2015 Order* that implemented new ICS rate caps, the *Stay Order* preserved the status quo with respect to rates. *See Securus Techs., Inc. Emergency Mot. for Modification of Stay of FCC Order 15-136 Pending Review*, Document #1604434, at 6 (D.C. Cir. filed Mar. 17, 2016) ("Securus Mot."); *Mot. of Global Tel*Link to Enforce March 7, 2016 Order Granting Partial Stay Pending Judicial Review*, Document #1604580, at 5 (D.C. Cir. filed Mar. 17, 2016) ("GTL Mot.").

² *See Order, Global Tel*Link v. FCC*, Document #1602581 (D.C. Cir. Mar. 7, 2016) ("*Stay Order*").

³ *See Second Report and Order and Third Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services*, 30 FCC Rcd 12763 (2015) ("*2015 Order*").

⁴ *See Mot. of CenturyLink Public Comm'ns, Inc. for Partial Stay, Global Tel*Link v. FCC*, Document #1597573, at 3–5, 15–17 (D.C. Cir. filed Feb. 5, 2016).

II. The Commission's *Public Notice* Contravenes the *Stay Order* and the Administrative Procedure Act.

On March 16—the last day before the *2015 Order*'s provisions went into effect, and nine days after this Court issued its *Stay Order*—the Commission's Wireline Competition Bureau issued a "Public Notice" declaring, for the first time, that the interim *interstate* rate caps adopted in 2013 and codified in section 64.6030 also apply to *intrastate* ICS calls.⁵ This Court should not countenance this last-minute maneuver for at least three reasons.

1. The *Public Notice* undercuts the *Stay Order* by disturbing the status quo with respect to ICS rates.

In 2013, the Commission adopted "an interim rate cap of \$0.21 per minute for debit and prepaid *interstate* [ICS] calls, and \$0.25 per minute for collect *interstate* [ICS] calls." *Report and Order and Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services*, 28 FCC Rcd. 14107 ¶ 48 (2013) ("*2013 Order*") (emphasis added). Although this Court granted a partial stay with respect to other provisions of the *2013 Order*, it left the interim interstate rate caps in effect. *See Order, Securus Techs., Inc. v. FCC*, No. 13-1280, Document #1474764 (D.C. Cir. Jan. 13, 2014). Thus, beginning in 2013, section

⁵ *See* Public Notice, Wireline Competition Bureau Addresses Applicable Rates for Inmate Calling Services and Effective Dates for Provisions of the Inmate Calling Services Second Report and Order, DA 16-280 , WC Docket No. 12-375, at 3 (Mar. 16, 2016) ("*Public Notice*") ("The interim rate caps apply to intrastate ICS calls.").

64.6030's interim rate caps governed interstate ICS calls, while state law governed intrastate ICS calls.

Section 64.6030's text has not changed materially since that time. As originally adopted in 2013, section 64.6030 stated in full:

Inmate calling services interim rate cap.

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 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 (2015); *see also* 78 Fed. Reg. 67,956, 67,976 (Nov. 13, 2013).

As amended by the *2015 Order*, section 64.6030 now reads:

Inmate calling services interim rate cap.

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.

47 C.F.R. § 64.6030 (eff. Mar. 17, 2016); *see also* 80 Fed. Reg. 79,136, 79,177

("These rules shall become effective March 17, 2016."). Critically, the *2015*

Order did not modify section 64.6030's operative first sentence in any way. Nor

did the *2015 Order* state that the Commission was expanding the interim interstate

rate caps to apply to *intrastate* calls, or provide any reasoning in support of such an

expansion. On the contrary, when the *2015 Order* refers to interim rates, it repeatedly describes them as “interim *interstate* rate caps.” See *2015 Order* ¶¶ 2, 6, 7, 14, 16, 21, 31, 217, 259 (emphasis added).

Thus, the status quo at the time the *Stay Order* issued was that section 64.6030’s interim rate caps applied only to interstate ICS calls. Chairman Wheeler and Commissioner Clyburn continued to adhere to this view after the *Stay Order* issued, commenting that the *Stay Order* “did not disrupt the interim rates set by the Commission in 2013.”⁶ CenturyLink and other ICS providers likewise understood that section 64.6030 would continue to operate as it always has: as a rule governing interstate ICS rates. See Mot. of Telmate, LLC for Partial Reconsideration, Document #1604585, at 4–5 (D.C. Cir. filed Mar. 17, 2016) (“Telmate Mot.”).

The *Public Notice* upends that settled understanding by adopting an interpretation of section 64.6030 that no party to this litigation ever advanced prior to this Court’s March 7 *Stay Order*. In taking that step, the *Public Notice* undermines this Court’s authority and the basic purposes of a stay. See *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir.

⁶ Press Release, Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate, Mar. 7, 2016, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0307/DOC-338101A1.pdf (emphasis added).

1977) (injunctive relief “seeks to maintain the status quo pending a final determination of the merits of [a] suit”).

2. The *Public Notice*'s interpretation of section 64.6030 is also invalid because it marks a sudden and unexplained departure from prior agency practice, in violation of the Administrative Procedure Act's requirement of reasoned decision making. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Although the Commission repeatedly characterized section 64.6030's interim rate caps as applicable only to interstate calls, *see, e.g., 2015 Order* at ¶¶ 2, 6, 7, 14, 16, 31, 217, 259, the *Public Notice* attempts to broaden section 64.6030 through definitional sleight of hand. According to the *Public Notice*, section 64.6030's interim rate caps now apply to both interstate and intrastate ICS calls based on the following chain of reasoning:

- i. “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,”
- ii. “[t]he terms ‘Provider,’ ‘Debit Calling,’ ‘Prepaid Calling,’ and ‘Prepaid Collect Calling’ all incorporate the definition of ‘Inmate Calling Service,’”

- iii. “[r]ule 64.6000(j) defines ‘Inmate Calling Service’” in a way that “does not distinguish between interstate or intrastate calls,”
- iv. therefore “the ‘Inmate Calling Services Interim Rate Cap’ set forth in rule 64.6030 applies to both interstate and intrastate calls.”

Public Notice, at 3.

Regardless of its merit (or lack thereof), that convoluted explanation cannot support the Commission’s reinterpretation of section 64.6030 because it does not appear in the *2015 Order*. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Even if the *2015 Order* could be stretched to bear the interpretation the *Public Notice* now ascribes to it, the *2015 Order* would nevertheless violate the rule that agencies must provide a “reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” *Greater Boston*, 444 F.2d at 852. Prior to the *2015 Order*’s issuance, the Commission applied section 64.6030’s interim rate caps only to interstate calls. The *2015 Order* did not amend section 64.6030’s operative first sentence in any way, and the Commission did not provide a reasoned explanation for (or an opportunity to comment on) the expansion of the interim rate caps to intrastate calls.

3. As Securus and Telmate point out, the Commission’s newfound construction of section 64.6030 would lead to bizarre and unexplained results if permitted to stand. See Securus Mot. at 9–11; Telmate Mot. at 8–9. In particular,

several of the *2015 Order*'s permanent rate caps are higher than the interim rate caps. Whereas section 64.6030 caps debit and prepaid calling rates at \$0.21 per minute and collect calling rates at \$0.25 per minute, the *2015 Order* prescribes a permanent cap of \$0.22 per minute for debit and prepaid calls from certain jails and an initial cap of \$0.49 for collect calls from all jails—a level nearly twice as high as the interim cap. *See 2015 Order* ¶ 9. As a result, under the *Public Notice*'s interpretation of section 64.6030, rates for many calls would go up when the permanent caps took effect, in contravention of the *2015 Order*'s statement that rates would “transition *down* on an annual basis” under the new regime. *2015 Order* ¶¶ 22 (emphasis added); *see also id.* ¶ 88 (referring to “a two-year step-down transitional period (emphasis added)).

A literal reading of section 64.6030 and the definitions upon which the *Public Notice* relies would also cause the interim rate caps to apply to international ICS calls, a result that the *2015 Order* expressly disclaims. *See Securus Mot.* at 9; *see also 2015 Order* ¶ 69. Taken together, these incongruities are strong evidence that the Commission never intended section 64.6030 to apply to intrastate calls, *Securus Mot.* 9–10, and that section 64.6030, when read in its proper context, applies—as it always has—only to interstate calls, *see GTL Mot.* at 6–7. These results alone make the Commission's current position arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should grant the Motions and clarify that, until this case is heard and decided, the *Stay Order* precludes application of section 64.6030's interim interstate rate caps to intrastate calls.

Respectfully submitted,



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March 21, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2016, I caused the foregoing Response to be filed with the Clerk of the U.S. Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system. Users of the CM/ECF system will be served with the Response through the CM/ECF system.



Robert A. Long, Jr.