

**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. 15-1461 (and
consolidated cases)

**MOTION TO ENFORCE MARCH 7, 2016 ORDER GRANTING PARTIAL
STAY PENDING JUDICIAL REVIEW**

In the order under review,¹ the Federal Communications Commission adopted new inmate calling services (“ICS”) rate caps that, among other things, would apply to *intrastate*, and not just interstate, inmate calls for the first time. GTL (along with other ICS providers) petitioned for review of those rates and requested that they be stayed pending judicial review, including on the ground that the FCC lacks statutory authority to adopt rate caps that apply to intrastate ICS calls. This Court granted the stay motions in part in a summary order. *See* Order, Document No. 1602581 (D.C. Cir. Mar. 7, 2016) (per curiam) (“Stay Order”).

¹ *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”).

Nine days after this Court’s order, the FCC announced that its interim rate caps — which were allowed to go into effect in 2013 and have always applied exclusively to *interstate* rates — would apply to intrastate rates as well beginning March 17, 2016 (the next day). *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) (“*Notice*”) (“The interim rate caps apply to intrastate ICS calls . . .”).

The FCC’s action violates the clear intent of this Court’s stay order — which was to prevent new and untested regulation of intrastate rates from taking effect — and is inconsistent with the FCC’s own statements in its order denying a stay. Petitioner Global Tel*Link (“GTL”) respectfully moves this Court to enforce its prior order by clarifying that none of the FCC’s rate caps may be applied to intrastate calls pending judicial review.²

BACKGROUND

In 2013, the FCC adopted “interim” ICS rate caps of \$0.21 per minute for debit and prepaid calls and \$.025 per minute for collect calls that apply exclusively

² On March 17, 2016, this Court ordered the FCC to respond by 4:00 p.m. on March 22 to a motion by Securus Technologies related to the *Notice* and also permitted Securus to file a reply by 4:00 p.m. on March 23. *See* Order, Document No. 1604553 (D.C. Cir. Mar. 17, 2016). GTL is prepared to brief this motion on the same schedule.

to interstate calls. *2013 Order* ¶ 5.³ Although the *2013 Order* was partially stayed, *see Order, Securus Technologies, Inc. v. FCC*, No. 13-1280 *et al.* (D.C. Cir. Jan. 13, 2014), the interim rate caps took effect and continue to govern interstate ICS calls.

In November 2015, the FCC released the *2015 Order*. The *2015 Order* adopted new rate caps and, for the first time, asserted the authority to govern “all interstate *and intrastate* ICS.” *2015 Order* ¶ 9 (emphasis added). The order stated that its permanent reforms would “replace the interim interstate rate caps” adopted in the *2013 Order*. *Id.* ¶ 10. Until the new replacement rate caps took effect, however, the *2015 Order* also restated the interim rate caps and provided that such caps “shall sunset upon the effectiveness of” the new rates established in the order. 47 C.F.R. § 64.6030 (printed in *2015 Order* at 161).

Several ICS providers, including GTL, requested that the new permanent rate caps be stayed, first before the FCC and then in this Court. In explaining why their challenges to the *2015 Order* were likely to succeed, GTL (and others) argued that the FCC lacks authority under the statute to cap intrastate ICS rates. *See* GTL Mot. for Partial Stay, Document No. 1595450, at 16-18 (filed Jan. 27, 2016) (“GTL Mot.”); *see also, e.g.*, CenturyLink Mot. for Partial Stay, Document No. 1597573, at 19 (filed Feb. 5, 2016). On March 7, 2016, this Court stayed the

³ *See* Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (“*2013 Order*”).

effectiveness of the FCC's new permanent rate caps. *See* Stay Order. As a result of the stay, the interim interstate rate caps have not yet been “replace[d],” *2015 Order* ¶ 10, and have not yet “sunset,” 47 C.F.R. § 64.6030.

On March 16, 2016 — *less than one day* before its intrastate rates would have taken effect had they not been stayed — the FCC's Wireline Competition Bureau issued a Public Notice announcing that, notwithstanding this Court's stay order, “the interim rate caps will apply to all interstate *and intrastate* ICS calls.” *Notice* at 2-3 (emphasis added). The Bureau reasoned that, while the language of § 64.6030 had not materially changed from its adoption in the *2013 Order*, the *2015 Order* amended the *definition* of ICS to include all ICS calls, not just interstate calls, and thus the interim rates would apply to ICS as redefined. *See Notice. Compare 2013 Order* at 89 (defining ICS as “offering of interstate calling capabilities from an Inmate Telephone”), *with 2015 Order* at 159 (removing “interstate” from the definition of ICS, among other amendments). ICS providers were provided approximately nine hours to bring their rates into compliance.

ARGUMENT

I. The FCC's insistence that the *2015 Order* enacted intrastate rate caps that are not subject to this Court's stay order cannot be squared with the evident import of that stay order or the FCC's own statements. Among the principal regulatory changes effected by the *2015 Order* was the imposition of rate caps on

intrastate, and not just interstate, ICS rates. This unprecedented assertion of authority was one of the principal issues raised in GTL's stay request and in stay requests filed by other ICS providers. GTL argued, in particular, that 47 U.S.C. § 276 does not provide the clear authorization required to allow the FCC to cap intrastate ICS rates in view of the statutory bar on FCC regulation of intrastate matters. *See* GTL Mot. 16-18. Presented with this and other arguments, this Court stayed the provision in the rules containing those new intrastate caps.

The apparent purpose of the Court's order was to preserve, pending review, the *status quo* with respect to rate caps and thus to prevent the caps on intrastate rates from going into effect. *See* Stay Order at 1-2 (characterizing stayed provision, 47 C.F.R. § 64.6010, as "setting caps on calling rates"). One of the express bases for GTL's request for stay — which asked specifically for a stay of § 64.6010 — was that intrastate rate caps were *ultra vires* and should not be allowed to go into effect.

Furthermore, the FCC itself acknowledged, both in denying the petitions for stay filed before the agency, and in a statement made in the wake of the stay order, that the effect of a stay of the new rate caps would be to prevent application of rate caps to intrastate ICS calls. Thus, the FCC stated that "*any delay in the effectiveness of the [2015 Order] would delay immediate relief to millions of intrastate ICS customers.*" Order Denying Stay Petitions, *Rates for Interstate*

Inmate Calling Services, WC Docket No. 12-375, DA 16-83, 2016 WL 279250, ¶ 72 (WCB Jan. 22, 2016) (emphasis added). Following the stay, Chairman Wheeler and Commissioner Clyburn stated that the stay did “not disrupt the interim rates set by the Commission *in 2013*.” Press Release, Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate, Mar. 7, 2016. There is no dispute that the interim rates set “in 2013” apply only to interstate rates.

In short, it is clear that the parties understood that a stay of the new intrastate rate caps in § 64.6010 would prevent unprecedented intrastate caps from going into effect. Given the terms of the parties’ dispute before this Court, the only reasonable understanding of this Court’s stay order is that it prevents those intrastate caps from taking effect pending judicial review.

II. The FCC states in its public notice that § 64.6030 governs intrastate rates because the *2015 Order* broadened the definition of ICS. But regulations, no less than statutes, must be interpreted in context with a view to their place in the overall scheme. *See generally King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The *2015 Order* clearly distinguishes new intrastate rate caps from *prior* “interim” rates; none of the order’s repeated uses of the term “interim” suggests the existence of “interim” intrastate rates. *See 2015 Order* ¶ 2 (referring to “the adoption of interim interstate rate caps in 2013”); ¶ 6 (“The record indicates that our interim

interstate rate caps increased call volumes”); ¶ 128 n.437 (arguing that interim regime permitted gaming of the system by “attempting to recover site commission payments through intrastate rates that were not subject to our interim rate caps”); ¶ 259 (in considering proper transition time to new rates, “[w]e have the benefit of understanding how the transition to implement the interim interstate rate caps occurred”). The FCC’s effort to impose intrastate caps by reinterpreting its preexisting regulations finds no support in the *2015 Order*.

CONCLUSION

This Court should enforce its stay order and prevent intrastate rate caps from taking effect pending judicial review.

Respectfully submitted,

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March 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 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 motion was served by prepaid first-class U.S. Mail on the following:

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