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)

REPLY IN SUPPORT OF GLOBAL TEL*LINK'S MOTION TO ENFORCE MARCH 7, 2016 ORDER GRANTING PARTIAL STAY PENDING JUDICIAL REVIEW

This Court granted a stay of the rates in § 64.6010, adopted in the *2015 Order* and applicable to both intrastate and interstate calls. The Court thereby preserved the status quo, leaving in place the interim rates from the *2013 Order*, which all acknowledge were applicable *only* to interstate calls. By sleight-of-hand, the FCC purports to transform the stay of its new rates (both inter- and intra-state) into a *sub rosa* extension of the interim rates to cover intrastate calls for the first time. That deliberate evasion of this Court's Stay Order should not be tolerated.

In seeking a stay of § 64.6010 — the new caps applicable, for the first time, to intrastate rates — GTL made clear that it understood that the relief it sought

would leave in place interim rate caps applicable only to interstate rates. Indeed, GTL said so explicitly.[1] In opposing that stay, the Commission never suggested that pre-existing 2013 interstate rates would apply to intrastate calls if § 64.6010 were stayed. And for good reason. Not only did the Commission never suggest in the *2015 Order* that the interim rates would apply to intrastate calls — a major change if it had been true — but the Commission gave as a reason for denying requests for a stay of § 64.6010 that, if a stay of the new rates were granted, intrastate calling rates would remain, as before, unregulated by the FCC.

The Commission argues, nevertheless, that the text of its regulations compelled the Bureau's decision. That argument is incorrect, as explained below, but, in any event, that is not the question presented by GTL's motion. The question is whether, in granting a stay of § 64.6010, this Court intended to preserve the status quo for intrastate rates, given the substantial challenge to the FCC's authority to impose such caps on intrastate ICS calls. We submit that, given the terms of the parties' arguments before this Court and the Court's own explanation that the stay of § 64.6010 would prevent the "calling rates" established in the *2015*

[1] GTL Mot. for Partial Stay Pending Judicial Review at 19-20 (Jan. 27, 2016) (Doc. #1595450) ("The interim rate caps on interstate calls established in the *2013 Order* . . . would remain in effect pending a stay . . . . As for intrastate calls, states retain the authority to constrain intrastate rates at any time, and many states have done so.").

Order from going into effect, the Court's order granting the motions for stay in part must be understood as applying to any new intrastate rate caps.

The FCC insists that the Court carefully crafted its Stay Order to permit the interim rates to go into effect for intrastate rates. But the Court could not have intended this, because neither the FCC nor supporting intervenors ever suggested that this would be the effect of granting GTL's motion, and, as noted, nothing in the *2015 Order* itself suggested that interim rates would apply to intrastate calls. To the contrary, the *2015 Order* repeatedly characterized § 64.6030's interim rate caps as applicable *only* to interstate calls. *See, e.g.*, *2015 Order* ¶¶ 2, 6, 7, 14, 16, 31, 217, 259.

Moreover, the FCC's newfound reading of § 64.6030 leads to absurd results. In particular, it means that the FCC adopted *interim* rate caps on intrastate calls that were substantially below many of the rates the FCC adopted in § 64.6010 for jails. It also follows inexorably that the interim rates would now apply to international calls, despite the Commission's express statement in the *2015 Order* (¶ 69) that it was not regulating international rates at all. The Court should reject the FCC's strained and disingenuous attempt to evade this Court's Stay Order.

I. The FCC itself, in denying a stay at the agency level, understood that staying the new rate caps would leave only the interim *interstate* rate caps in place. *See, e.g.*, Order Denying Stay Petitions, *Rates for Interstate Inmate Calling*

Services, 31 FCC Rcd 261, ¶ 72 (WCB 2016) ("*[A]ny delay* in the effectiveness of the [*2015 Order*] would delay immediate relief to millions of *intrastate* ICS customers . . . .") (emphases added). And, after the Stay Order was entered, two FCC Commissioners acknowledged that commonsense understanding of the stay's effect. *See* Press Release, Statement by Chairman Wheeler, Commissioner Clyburn on D.C. Circuit Partial Stay of Inmate Calling Rate (Mar. 7, 2016) ("Press Release") ("The stay does not disrupt the interim rates set by the Commission *in 2013*.") (emphasis added).

The FCC halfheartedly contends (at 10 n.3) that the statement by Chairman Wheeler and Commissioner Clyburn is "entirely consistent" with the Bureau's post-hoc extension of the interim rate caps to intrastate calls.[2] But "the interim rates set by the Commission in 2013" are interstate rate caps. *See also* Press Release (noting that ancillary charge regulation will provide "significant relief, particularly in combination with *the 2013 rate caps*") (emphasis added). The Commissioners' statements cannot reasonably be read to refer to rate caps that have significantly expanded since their promulgation in 2013.

II. The FCC's (and the Wright Petitioners') only affirmative argument in support of the *Notice* is that the amended definition of ICS in 47 C.F.R.

[2] *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, WC Docket No. 12-375, DA 16-280 (rel. Mar. 16, 2016) ("*Notice*").

§ 64.6000(j) "compelled" the Bureau to interpret the interim rate caps the way that it did. FCC Opp. 9. But the far more reasonable interpretation of § 64.6030, entitled "Inmate Calling Services Interim Rate Cap," is that it applies to the only "interim" rate caps ever adopted — the interim *interstate* rate caps. *Cf. INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (relying on regulation's title as interpretive guide to meaning of its text). By contrast, the FCC's interpretation ignores that context in favor of a textual reading that finds no support in the *2015 Order* and leads to absurd results.

Indeed, in defending its decision to extend its interim interstate rates to *intrastate* calls with nine hours' notice, the FCC was careful *not* to suggest that the *2015 Order* ever envisioned such an outcome.[3] Nor does the FCC dispute the point, made by GTL and Securus, that the *2015 Order* makes absolutely no reference to "interim" *intra*state rates. *See* FCC Opp. 12 n.4; GTL Mot. 6; Securus Mot. 8. Thus, either the FCC adopted new interim intrastate rates without any trace of a written explanation — an obvious violation of the APA — or, more plausibly, it did not adopt such rates at all.

The FCC suggests (at 12) that, notwithstanding the *2015 Order*, "the language of this Court's partial stay and the agency's rules" *require* the FCC's interpretation of § 64.6030. But if the *2015 Order* were irrelevant, it would be no

[3] The Wright Petitioners imply the same lack of intentionality (at 3), disclaiming any interest in "speculat[ing] about intent."

answer to say, as the FCC does (at 12), that "international calls are not subject to [the Commission's] rate caps" simply because the *2015 Order* says so. The order is plainly relevant in interpreting the regulations, and the FCC's reliance on the order proves the point. That order's lack of any indication whatever that the 2013 interim interstate rate caps were extended to intrastate calls renders the FCC's interpretation of § 64.6030 untenable.

The history of the stay proceedings and the structure of this Court's Stay Order further confirm that intrastate rate caps were not meant to take effect until their legality could be assessed. *See supra* pp. 1-2; GTL Mot. 4-5. The fact that this Court allowed rules governing per-call charges, flat-rate calling, and ancillary service charges to take effect is not inconsistent with that purpose. *Contra* FCC Opp. 11. The Court may simply have concluded either that the challenges to the rates established in § 64.6010 were more substantial than those to ancillary fees or that, irrespective of the movants' likelihood of success on the merits, sweeping new rate caps would cause more irreparable harm than the regulations the Court permitted to take effect. None of this suggests that the Court envisioned (or required) that interim rate caps that only ever applied to interstate calls would suddenly extend to intrastate calls *sub silentio*.

III. The FCC's policy arguments (at 12-18) are not relevant here, because the question presented is not whether intrastate rate caps are a good idea. And

because GTL has not moved for a modification to the Stay Order, it need not make an additional showing of irreparable harm.

The question presented is whether, in staying the FCC's "caps on calling rates," Stay Order 1-2, this Court intended to extend the FCC's 2013 interim interstate rate caps to *intrastate* calls for the first time. The only reasonable reading of the Stay Order indicates that the Court intended to prevent just such an outcome.

CONCLUSION

This Court should enforce its Stay Order and prevent the FCC from extending the interim rate caps to intrastate calls pending judicial review.

Respectfully submitted,

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March 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 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.

/s/ *Michael K. Kellogg*
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