

**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 OF TELMATE, LLC
FOR PARTIAL RECONSIDERATION**

Telmate, LLC (“Telmate”) hereby respectfully requests that the Court reconsider¹ in part its order staying portions of the FCC’s *2015 Inmate Calling*

¹ See D.C. Cir. *Handbook of Practice and Internal Procedures* § VII.D (“If a party disagrees with the special panel’s disposition of a motion, it may move for reconsideration by the same panel or by the full Court.”). Telmate seeks reconsideration by the same panel or such other relief as the Court deems appropriate. Specifically, Telmate notes that Securus Technologies and Global Tel*Link have today each filed motions seeking substantially the same relief, and Telmate does not object to the Court resolving these issues by addressing any one or any combination of the motions now before it. On March 17, 2016, this Court ordered the FCC to respond by 4:00 p.m. on March 22 to the motion by Securus Technologies and also permitted Securus to file a reply by 4:00 p.m. on March 23. See Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 17, 2016), ECF No. 1604553. Telmate is prepared to brief this motion on the same schedule.

Services Order.² Specifically, Telmate requests that the Court grant its request to stay 47 C.F.R. § 64.6030 (regarding interim rate caps) with respect to intrastate calls. The requested reconsideration is necessary to maintain the status quo which, but for the FCC's *post hoc* misinterpretation of its 2015 *Order*, would have been preserved by the Court's most recent stay in this case.

BACKGROUND

In 2013, the FCC attempted to regulate the rates charged for making interstate (but not intrastate) phone calls from prisons and jails. The FCC referred to those 2013 interstate rates as “interim” because it planned further rulemaking to establish permanent rates. The FCC codified its interim rates at 47 C.F.R. § 64.6030.

Several parties challenged the FCC's rules in 2013; this Court in turn stayed most of them but left in place Section 64.6030, which created interim rate caps for interstate calling of \$0.21 per minute for ordinary prison calls and \$0.25 per minute for collect calls. Although Section 64.6030 did not itself mention “interstate calls,” it was so limited by reference to the FCC's definition of “Inmate Calling Services,” codified at 47 C.F.R. § 64.6000, which was restricted to “interstate calls.”

² *In Re Rates for Interstate Inmate Calling Services*, Second Report and Order, WC Docket No. 12-375, FCC 15-136, 30 F.C.C. Rcd. 12,763 (rel. Nov. 5, 2015) (“*Order*”).

After undertaking a new rulemaking process in 2014 and 2015, the FCC in 2015 issued a second order proposing final rate caps for *both* interstate and intrastate inmate calls. The new caps—which did not differentiate between interstate and intrastate calling—ranged from \$0.11 per minute to \$0.22 per minute depending on facility size, and also provided a “glide path” for collect call rates that progressed from \$0.49 to as low as \$0.14 over two years. The FCC codified the new rates at 47 C.F.R. § 64.6010, and expanded those rates to apply to intrastate calling by modifying the old definition of “Inmate Calling Services” in Section 64.6000 to comprise “calls” rather than just “interstate calls.”

The FCC provided that the new 2015 definitions at Section 64.6000 and the new rates at Section 64.6010 would take effect simultaneously on March 17, 2016 (except for new rates for jails, which would take effect three months later). It also modified Section 64.6030, which still contained the 2013 interim interstate rates of \$0.21 and \$0.25, to “sunset” when the new 2015 rates in Section 64.6010 took effect. The FCC provided reasons (insufficient ones, Telmate has asserted) for the new 2015 rates, but because the FCC was replacing those caps with new rates, it did not provide any further reasoning related to the 2013 rates.

Before the 2015 rates took effect, Telmate and several other providers challenged the FCC’s new rules and asked this Court to stay them. The Court in response stayed Section 64.6010, which would have created the new 2015 rates, as

well as a subsection of 47 C.F.R. § 64.6020, which would have placed limits on single-call charges. Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581) (“*Stay Order*”). Although Telmate had requested it, the Court did not stay Section 64.6030, which contained the 2013 interim interstate rates.

The sunset provision for Section 64.6030 (the section that codified the 2013 interstate rates) depended on the new rates in Section 64.6010 taking effect. Because Section 64.6010 had been stayed, Section 64.6030 did *not* sunset when the Section 64.6010 rates would otherwise have taken effect on March 17, 2016. The new definitions in Section 64.6000 also took effect on March 17, 2016, giving rise to arguments by counsel for the Wright Petitioners that the old 2013 interim rates codified at Section 64.6030—which depend on definitions from Section 64.6000—would for the first time limit charges on *intrastate* calls as well as interstate calls.

This plainly was not the FCC’s intent for Section 64.6030, since, among other things, it was supposed to sunset before the new, broader definitions at Section 64.6000 took effect. Moreover, before yesterday, the FCC had never even suggested—let alone supported with evidence or reasoning—that the 2013 interstate caps could appropriately be extended to intrastate calling. The most natural reading of the Court’s stay order was therefore that it simply maintained the long-standing status quo by leaving in place the Commission’s 2013 interstate rate

caps. *See* Letter from Brita D. Strandberg, Counsel for Telmate, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, at 2, WC Docket No. 12-375 (filed Mar. 11, 2016) (“Telmate Letter”) (attached as Exhibit A); Letter from Marcus W. Trathen, Counsel for PayTel, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, at 2, WC Docket No. 12-375 (filed Mar. 15, 2016) (attached as Exhibit B); Mot. of Global Tel*Link for Partial Stay Pending Judicial Review at 4 (Jan. 27, 2016), ECF No. 1595450. This is therefore the reading that Telmate initially adopted.

When proponents of ICS reform publicly took the position that the interim rate caps would now apply to both interstate and intrastate rates, Telmate promptly sought clarification from the Commission. Telmate Letter (citing statements by counsel to the Wright Petitioners); Letter from Andrew Jay Schwartzman, Counsel for the Wright Petitioners, to Matthew DelNero, Chief, Wireline Competition Bureau, FCC, WC Docket No. 12-375 (filed Mar. 11, 2016) (attached as Exhibit C). In its request, Telmate explained the reasons why the interim rate caps could not apply to intrastate rates. Telmate Letter. Yet, despite Telmate’s arguments, on March 16 the Commission released a Public Notice asserting that its interim rate

caps do apply to intrastate calls.³ Telmate seeks reconsideration by this Court in order to give effect to the Court's *Stay Order* as adopted.

ARGUMENT

The Court should reconsider Telmate's request to stay Section 64.6030 in order to prevent the extension of the 2013 interstate rate caps to intrastate calls. Section 64.6030 sets interim rate caps that are substantially the same (except that they do not include safe-harbor rates for 15-minute calls) as the *2013 Order's*⁴ interim caps—which do not apply to intrastate calls. The FCC never intended the 2015 *interim* rate caps to apply to intrastate calls either—its asserted policy that Section 64.6030 caps intrastate calls is the result of an opportunistic reading of this Court's *Stay Order*, not reasoned decisionmaking.

I. RECONSIDERATION IS NECESSARY TO PRESERVE THE STATUS QUO.

By staying Section 64.6010's new *permanent* rate caps, but not Section 64.6030's *interim* rate caps, it appears the Court intended to leave in place the interstate rate caps the FCC adopted in its *2013 Order*, as modified by the Court's partial stay of those rules. Indeed, Global Tel*Link argued in its stay motion that

³ *In Re Rates for Interstate Inmate Calling Services*, Public Notice, WC Docket No. 12-375, DA 16-280 (rel. Mar. 16, 2016) (“FCC Public Notice”) (attached as Exhibit D).

⁴ *In Re Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 F.C.C. Rcd. 14,107 (2013).

“if the *Order* is stayed . . . the existing rate caps from the 2013 *Order* will remain in place[.]” (Global Tel*Link Motion at 4). And the FCC seemed to agree—at least at first. The day the Court entered its stay, FCC Chairman Tom Wheeler and Commissioner Mignon Clyburn stated that “[t]he stay does not disrupt the interim rates set by the Commission in 2013.”⁵

Telmate agrees with Global Tel*Link that the Court’s stay results in the application of the interim rate caps to interstate rates, and not intrastate rates. The FCC in its Public Notice takes the contrary position, asserting that because the definition of inmate calling services no longer distinguishes between interstate and intrastate calling, the interim rate caps now apply to both interstate and intrastate calls.⁶ As Telmate explained to the FCC, this reading is contradicted by the *Order* itself.

The FCC never intended to impose *interim* intrastate rate caps. Under the *Order*, the interim rates contained in Section 64.6030 were supposed to sunset the same day the new permanent rates *and definitions* took effect. *Order* App. A. According to the Commission, it is these new definitions that extend rate caps to

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 FCC Public Notice.

intrastate calls—and they were never intended to be in effect at the same time as the interim rates.

Confirming this, nothing in the *Order* extends the 2013 interstate rate caps to intrastate calls. The *Order* does not even state that the FCC took this step, much less reflect the sort of reasoned decisionmaking that would be required to support such an extension. 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 . . .”). Rather, in sharp contrast to the lengthy discussion of the reasons for adopting the now-stayed permanent rate caps, the *Order* contains no support or analysis for extending the Section 64.6030 caps of \$0.21 and \$0.25 to intrastate calling.

The Commission’s intent not to adopt interim intrastate rate caps is again evidenced by the unintended consequences of the Commission’s new position. First, many of the FCC’s permanent intrastate rates are higher than the interim rates. Compare *Order* App. A § 64.6010, with *id.* § 64.6030. It would be a bizarre result to adopt interim intrastate rates that are lower than the permanent intrastate caps,⁷ but more extraordinary still to do so without any acknowledgment or

⁷ The FCC claims that this result is not “bizarre” because providers’ costs are much lower than what the permanent caps allow. FCC Public Notice at 3 n.18. Of course, the Commission never offered this rationale in its *Order*, and thus cannot rely on it now.

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.⁸ The FCC has no answer to this.

Finally, the text of Sections 64.6000 and 64.6030 demonstrates that the FCC could not have intended the new definitions to apply at the same time as the interim rates, because read literally, the new definition of Inmate Calling Services would also apply to international calls, even though the FCC was explicit that “international calls are not subject to [the] rate caps[.]” *Order* ¶ 69.

The FCC’s *post hoc* rationalization of an unintended result cannot be the product of reasoned decisionmaking. The Commission’s approach significantly alters the status quo leading up to appeal—which is the opposite of the purpose of a stay. *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. 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.”). For these reasons, Telmate’s request for reconsideration should be granted.

⁸ *Order* ¶ 89.

II. THE FCC'S NEW POSITION WILL FURTHER HARM PROVIDERS AND THE PUBLIC INTEREST.

The FCC's decision that its interim rate caps now apply to intrastate collect calls will result in additional harm to providers because it will subject them to rates the FCC acknowledges may be too low to allow them to recover costs. The FCC argues 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," FCC Public Notice at 3 n.18 (emphasis added). But in the *Order*, the FCC acknowledged that the costs of providing collect calls are higher than the costs of providing prepaid and debit calls. *Order* ¶ 86. In the *Order*, the FCC therefore set initial collect calling rates at \$0.49 per minute for jails, and then gradually stepped down that rate—not because it expects collect calling to become more affordable to providers, but to allow time to transition away from collect calling altogether. *Id.* ¶ 88. But if the interim rates apply to intrastate collect calls, those calls will be subject to the dramatically lower \$0.25 per minute rate without allowing providers the "glide path" envisioned by the *Order*. *Id.* ¶ 89.

The FCC also concluded that it is costlier to provide service in smaller facilities, *id.* ¶ 32, and acknowledged that its rates will not allow "inefficient" providers to recover their costs. *See id.* ¶ 53 ("[E]fficient providers would be able to operate profitably under our rate caps." (emphasis added)). The Court stayed these new rate caps, finding that they could irreparably injure Petitioners—yet by

applying the *interim* rate caps to intrastate calls, the FCC is extending rates that, at least for jails, are lower than its harmful permanent rates, to intrastate calls that were never intended to fall under the interim caps. Subjecting additional categories of calls to rate caps that are below providers' costs will result in additional harm beyond the harm the Court averted by staying the new rate caps pending appeal. The same considerations that justified the initial stay justify Telmate's request for reconsideration.

States, correctional facilities, and inmates will be harmed as well, as the Commission's *post-hoc* interpretation of its *Order* will result in a substantial infringement on state authority and immediate and unexpected reductions in intrastate calling rates. These reductions are likely to impact the continued availability of inmate calling services, as the new rates will not allow facilities to be fully reimbursed for the costs they incur to provide access to inmate calling. Any reduction or discontinuance of inmate calling service would ultimately harm inmates and the public. For these reasons, as well, the Court should grant Telmate's requested relief.

CONCLUSION

For the foregoing reasons, the Court should reconsider its partial denial of Telmate's stay request, and stay Section 64.6030 as applied to intrastate calls.

Respectfully submitted,

March 17, 2016

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

I further certify that a copy of the foregoing motion will be served by prepaid first-class U.S. Mail on the following:

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/s/ Brita D. Strandberg

EXHIBIT A



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 *interstate* rates and not also, for the first time, to *intrastate* 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 stay³ 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 *interstate* 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,

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 Brodtkin, *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,

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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¹⁴ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42.

EXHIBIT B



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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 Order² 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 Order⁴ revised the First ICS Order’s⁵ 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.

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' position⁹ 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.

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

EXHIBIT C



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March 11, 2016

Via Electronic Filing

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

RE: Docket 12-375

Dear Mr. DelNero:

The Wright Petitioners respectfully submit this initial response to Telmate, LLC's letter to the Chief, Wireline Competition Bureau dated March 11, 2016.¹

The Wright Petitioners share Telmate's concern that the Commission address this matter as soon as possible. In the interest of facilitating prompt action by the Commission, this response is necessarily brief and does not comprehensively discuss all the points raised in the Telmate letter. Should circumstances require, the Wright Petitioners will address other arguments at more length in a later submission.

The critical - and dispositive - fact is that in its *2015 Order*, the Commission amended Section 64.6000(j) and, in so doing, deleted the word "interstate" from the definition of "Inmate

¹At the time that counsel received word of the Telmate letter at about noon today, it had not been posted to the Commission's ECFS system. Counsel for Telmate graciously provided a copy upon request. The letter was posted at about 1 p.m. today.

Calling Services.”² No party asked the Commission or the Court of Appeals to stay the effectiveness of this amended rule. Thus, the Commission is not only free to enforce this new definition as of March 17, 2016, it would be defying its own rules if it did not do so.

The interim rate caps adopted in 2013 remain in effect.³ The Court of Appeals previously allowed these caps to go into effect and, since the adoption of the *2015 Order*, no party has asked the Commission or the Court of Appeals to stay the interim rule. By its terms, the “Inmate Calling Services Rate Cap” says that “No provider shall charge...rate[s]” in excess of \$0.21 and \$0.25 cents for collect and other calls, respectively. The rule does not distinguish between interstate and intrastate calls. Thus, the clear impact of the changed definition of “Inmate Calling Service” is to make the interim rate caps applicable to “Inmate Calling Services” as redefined and thus extend their application to intrastate calls.

The essential thrust of Telmate’s argument is that when the Commission adopted the interim rate caps it did not intend them to apply to intrastate calls and that when it adopted the *2015 Order* it did not state any intention to apply the interim caps to intrastate calls. Even if that were true, it does not matter. The Commission did not contemplate that there would be a stay of the new, interstate and intrastate rules so it is understandable that it saw no need to discuss the interim caps which it believed would be superseded. That does not stop the Commission from enforcing its rules as written notwithstanding changed circumstances. What matters is that the Commission unquestionably, and expressly, changed the operative definition in a manner which has the effect of extending the interim caps to intrastate calls. In the absence of any change to the interim rule, the changed definition expands the scope of the rule.

²In the *2013 Order*, the Commission defined Inmate Calling Services as follows:
Inmate calling services means the offering of *interstate* calling capabilities from an Inmate Telephone;

2013 Order, 28 FCCRcd 14107, 14195 (2013) (Emphasis added.)

In the *2015 Order*, the Commission amended the definition to read as follows:
Inmate Calling Service means 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;

2015 Order, 30 FCCRcd 12763, 12921 (2015).

³The interim rule reads as follows:

§ 64.6030 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.

Telmate also asks for clarification as to whether the Court's stay order precludes the Commission from exercising authority under 47 U.S.C. §276. However, it is crystal clear that the Court did not block the Commission from enforcing Section 276. New Section 64.6020, governing ancillary fees, unquestionably applies to both intrastate and interstate services, and the Commission explicitly relied upon Section 276 as authority for adopting it.⁴ The Court was asked to block the enforcement of new Section 64.6020 in its entirety, but it carefully identified and stayed the application of only one subsection of that provision - the restriction on single call charges as set forth in new section 64.6020(b)(2). Thus, in allowing the remainder of new Section 64.6020 to go into effect, the Court indubitably allowed the FCC to rely upon Section 276. This is also true for the other provisions which were not stayed, including the new rules governing TTY calls (47 C.F.R. §64.6040), annual reporting (47 C.F.R. §64.6060), taxes and fees (47 C.F.R. §6070), per-call charges (47 C.F.R. §64.6080), flat rate calling (47 C.F.R. §64.6090), account balances (47 C.F.R. §64.6100) and customer disclosure (47 C.F.R. §64.6110). Thus, there is no way for Telmate to conclude that anything the Court did even suggested that the FCC was precluded from relying upon Section 276 in adopting its new rules.

The fact that the Commission has been allowed to go forward with most of the new rules adopted pursuant to Section 276 also underscores why the effect of the Court's decision is to allow application of the interim rate caps in Section 64.6030 to intrastate calls. Since the Court chose not to prohibit the use of Section 276 for the various new provisions other than rate caps and one ancillary fee, the best reading - indeed, the only possible reading - of the Court's action is that, at least for now, the Commission now has additional authority to employ Section 276 and that this extends to the interim rate caps.

Respectfully submitted,

/s/

Andrew Jay Schwartzman
Eric G. Null
Counsel for the Wright Petitioners

cc. Brita Strandberg
Jared P. Marx
John R. Grimm

⁴2015 Order, 30 FCCRcd at 12859-61, ¶¶ 193-196.

EXHIBIT D



PUBLIC NOTICE

Federal Communications Commission
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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").