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 OF TELMATE, LLC
IN SUPPORT OF
MOTION FOR PARTIAL RECONSIDERATION

Telmate, LLC ("Telmate") hereby replies to the FCC's Opposition to Motions to Modify, Reconsider, or Enforce Stay. (*Global Tel*Link v. FCC*, No. 15-1461 (Mar. 22, 2016), ECF No. 1605164). The FCC asks the Court to endorse the opportunistic reading of the *Stay Order* (Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581) embodied in the Public Notice,[1] but it has no response to Telmate's arguments that this clearly accidental result was not the product of reasoned decision-making, that it will result in unintended harm to providers, or that it will create bizarre results inconsistent with

[1] *In Re Rates for Interstate Inmate Calling Services*, Public Notice, WC Docket No. 12-375, DA 16-280 (rel. Mar. 16, 2016).

the FCC's *2015 Inmate Calling Services Order*[2] itself. The Court should stay Section 64.6030 as applied to intrastate rates.

ARGUMENT

I. THE PUBLIC NOTICE WAS NOT THE PRODUCT OF REASONED DECISIONMAKING.

A. The FCC Never Intended Interim Intrastate Rate Caps.

The FCC recognizes, as it must, that it did not intend to adopt interim intrastate rate caps. *First*, it recognizes that the rate caps are an accidental byproduct of the Court's action, not the FCC's: "the extension of the interim rate caps to intrastate inmate calling services results from *this Court's decision* not to stay the definition of Inmate Calling Services, in conjunction with its refusal to stay Section 64.6030." (Opp'n at 12 n.4 (emphasis added)). *Second*, the FCC offers no evidence—because there is none—that it ever intended to extend interim rate caps to intrastate calls. *Finally*, it ignores that when the *Order* is read as a whole, it does not support extending interim rate caps to intrastate calls. Rather, the *Order*'s clear intent was to establish permanent interstate and intrastate rate caps to replace the surviving interim interstate rate caps. The FCC dismisses Telmate's argument that if Section 64.6030 were read literally, it would apply to

[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*").

international calls too, arguing that elsewhere in the *Order* the Commission clearly foreclosed such a result. (Opp'n at 11-12). But this only proves Telmate's point: Section 64.6030 can *only* be understood in the context of the full *Order*, and the *Order* shows that the FCC never promulgated interim intrastate rate caps.

Even now, the interim intrastate rate caps that the FCC defends are the result of the *Wireline Competition Bureau's* reading of the *Stay Order*, not the reasoned action of the full FCC. This Bureau-level decision is even inconsistent with the statement of Chairman Wheeler and Commissioner Clyburn that the Court's stay "does not disrupt" the 2013 interim rates.[3] The FCC attempts to wave this statement away as "entirely consistent with the conclusion that the stay also extends those rates to intrastate inmate calling," (Opp'n at 10 n.3), but it is really just further evidence that the FCC did not intend to extend its interim rate caps to intrastate rates.

B. There is No Justification for Subjecting Providers to Unintended Regulations.

Instead of explaining why the Court should not correct an admittedly unintended consequence of the stay, the FCC offers only the self-serving truism that it "*would have wanted* the interim rate caps to cover intrastate calls if this

[3] 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.

Court stayed the permanent rate caps." (Opp'n at 15 (emphasis added)). But what the FCC "would have wanted" is not the kind of reasoned decisionmaking required to support a change in FCC rules. *See Motor Vehicle Mfr. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). Rather, it is "appellate counsel's *post hoc* rationalization[] for agency action," and the Court owes it no deference. *Nat. Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (internal quotation marks omitted). Where, as here, there is no record support for extending the *Order*'s interim rate caps to intrastate calls, this novel interpretation cannot survive—even if the FCC finds that result a convenient substitute for the permanent caps stayed by this Court.

II. THE FCC'S DISCUSSION OF HARM IS INCORRECT, AND MISUNDERSTANDS BOTH THE INDUSTRY AND THE PURPOSE OF A STAY.

The FCC disputes whether providers will really be harmed by its accidental intrastate rate caps. Telmate has shown that they will be, and the FCC's argument misses the point of a stay.

A. The Public Notice Will Harm Providers.

Telmate has shown that the Public Notice will cause it harm because the interim intrastate rate caps are lower than some of the permanent rate caps. (Mot. of Telmate for Partial Reconsideration at 8 (Mar. 17, 2016), ECF No. 1604585). The FCC suggests that this result is not unreasonable because the same is true of

the interim *inter*state rates. (Opp'n at 14 n.6). But this is irrelevant: the same interim *interstate* rate caps have been in effect since the *2013 Order*,[4] predating the *Order*'s permanent caps. Once the *Order* took effect, rates for interstate calls would only change from the temporary to the permanent rates. But *intra*state rates were not subject to *any* caps, so abruptly subjecting them to low temporary caps followed by higher permanent caps would result in a temporary flash cut to intrastate rates before returning them to the permanent caps the FCC adopted. The FCC has no explanation for why such an arbitrary and temporary rate reduction is appropriate—it simply argues that the Court should allow it to happen. Worse, the FCC asks the Court to endorse this unintended outcome even though it would undo the FCC's plainly intended two-year "glide path" for collect calls, which was designed to give providers "sufficient time to adapt[.]" *Order* ¶ 89.

The FCC also claims that any harm from the discrepancy between temporary and permanent rate caps will be "offset by the considerably higher permissible rates under the interim rate caps for all other categories of calls." (Opp'n at 14-15). The FCC fails to explain how rates *lower even than those actually adopted by the FCC* can simply be absorbed or offset by other, hypothetical gains. Moreover, the FCC appears to assume that all providers have call and facility types and

[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).

volumes sufficient to generate these hypothetical offsets. This is untrue and the FCC points to no evidence in the administrative record to support its assumption. Nor does it explain why the FCC should adopt a rule that disfavors small companies which compete to serve the more numerous, small, higher cost facilities—especially where the Commission has expressed an interest in promoting competition in the industry and ensuring service availability to all inmates. For all of these reasons, application of the interim rate caps to intrastate rates cannot be reconciled with the FCC's obligation to ensure providers are "fairly compensated for each and every completed . . . call." 47 U.S.C. § 276. Perhaps most importantly, however, the FCC cannot have explained how providers are fairly compensated by interim intrastate rates because the FCC never intended its interim rates to apply to intrastate calls.

Finally, the FCC ignores the fact that all providers, including Telmate, provided detailed explanations of the types of harm they will suffer under its rate caps in their initial motions for a stay. The same harms that justify staying the FCC's permanent intrastate rate caps pending judicial review also justify not imposing newly discovered temporary intrastate rate caps pending judicial review.

B. The Question for the Court is Not Whether Providers *Can* Operate Under Unintended Regulations.

The FCC's argument that providers can "at a minimum, recover their costs of providing service for intrastate calls," (Opp'n at 13), ignores the purpose of a

stay. The FCC seems to suggest that the question before the Court is whether providers can adapt to a novel regulation the Commission never intended, but that is not the question. A stay is intended to preserve the status quo pending judicial review. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). There is no dispute that the status quo before the Public Notice did not include interim intrastate rate caps. But rather than explain why the Court should not restore the status quo, the FCC tries to justify a new set of rate caps it *never adopted*. The Court should modify its stay to avoid subjecting Telmate to a bizarre and unintended regulatory structure that resembles neither the stayed *Order* nor the status quo before the *Order* was issued.

III. TELMATE HAS EXPLAINED ITS REQUEST TO STAY SECTION 64.6030.

Ignoring the extensive filings in this matter, the FCC argues that Telmate never explained why the Court should stay Section 64.6030. (Opp'n at 6 n.2). This is wrong. Telmate requested a stay of several sections of the *Order*, explicitly including Section 64.6030, which it supported with a 20-page motion explaining why the FCC's actions were not permitted by 47 U.S.C. § 276. This argument supports Telmate's entire stay request, including its request to stay the interim rates.

The FCC also argues that there is no rationale for staying the interim rate caps as they apply to intrastate calls, because the Court allowed other portions of

the *Order* affecting intrastate rates to take effect. (Opp'n at 11). But that plainly over-reads the Court's stay order. The Court never endorsed the imposition of temporary intrastate rate caps because that issue was not before it. The FCC first announced the temporary intrastate rate caps only *after* the stay took effect, and after the Wright Petitioners suggested it publicly. No party argued in the stay briefing that any such result was permissible or even possible. [5]

CONCLUSION

For the foregoing reasons, the Court should grant Telmate's Motion for Partial Reconsideration and stay Section 64.6030 as it applies to intrastate calls, pending judicial review of the *Order*.

[5] The Wright Petitioners' unsolicited Opposition to Motions for Stay ((Mar. 22, 2016), ECF No. 1605118) raises no substantive argument meriting a separate response but accuses Telmate of using "misleading nomenclature" by "inexplicably . . . not includ[ing] the title of the *Public Notice* in its citation." (Wright Opp'n at 2 n.5). Nonsense. Undersigned counsel cited the Public Notice using the convention we use for FCC documents, (Mot. of Telmate at 6 n.3), and included the entire Public Notice itself as Exhibit D to Telmate's motion. No one who read Telmate's motion would be misled about the nature of the Bureau's Public Notice.

Respectfully submitted,

March 23, 2016

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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