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)

JOINT RESPONSE OF GLOBAL TEL*LINK AND CENTURYLINK TO RESPONDENTS' MOTION TO HOLD CASES IN ABEYANCE

The Court should deny Respondents' motion to hold these cases in abeyance pending the FCC's consideration of a proposed order on reconsideration because, according to the FCC's own "Fact Sheet," the proposed order would have little effect on petitioners' challenges to the regulations adopted in the order under review.[1] The proposed increase in rates – supposedly to account for costs incurred by correctional facilities – would not address any of the challenged infirmities in the *Order*. Such an increase (1) would not purport to permit ICS providers to recover the costs of commissions; (2) would not alter the relationship between the

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

rates and providers' own costs (since the increase is on account of facilities' costs, not providers' costs); (3) would not address the Commission's lack of statutory authority under 47 U.S.C. § 276 to cap market-based rates; and (4) would not address any of the remaining infirmities with the *Order*.

The FCC argues that holding the cases in abeyance "will conserve the resources of the parties and this Court." Mot. 1.[2] But the opposite is true. By seeking an abeyance, and not just an extension of time to file its brief, the FCC has tipped its hand that it intends to pursue a course similar to one it has already pursued once in this proceeding, namely, to scrap the current Inmate Calling Services regulations and to start review from scratch once petitions for review of the reconsideration order are filed, months down the road.[3]

To be sure, because any new, marginally higher rate caps would replace the caps adopted in the *Order*, petitioners may have to file new petitions for review of any eventual order on reconsideration. But the most efficient way to address whatever is new in the reconsideration order is to file supplemental briefs promptly

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[2] Mot. of Respondents To Hold Case in Abeyance, *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.*, Doc. No. 1625782 (D.C. Cir. filed July 20, 2016) ("Mot.").

[3] In addition, there is reason for concern that the reconsideration order represents an attempt by the FCC to evade this Court's stay of the new rates adopted in the *Order*. Several of the petitioners informed the FCC that they would agree to the FCC's proposed abeyance if the FCC would make clear that the new rates would not go into effect prior to this Court's review. The FCC would not agree.

after the order on reconsideration is published in the Federal Register and new petitions for review are filed. Until then, particularly since petitioners have already filed their merits briefs, the parties should complete briefing on the current schedule (subject to the suspension of the briefing schedule that the Court has ordered).[4]

BACKGROUND

1. This case involves the FCC's continuing effort to limit the rates that providers of calling services in prisons and jails – "Inmate Calling Services" or ICS Providers – may charge for calls placed by inmates. In 2012, the FCC issued a Notice of Proposed Rulemaking to consider several specific proposals to reduce ICS rates. In September 2013, the FCC released its first order governing ICS rates. That order adopted "interim rate caps" of "$0.21 per minute for debit and prepaid interstate calls and $0.25 per minute for collect interstate calls." *2013 Order* ¶ 73.[5] But the FCC also went much farther, adopting a sweeping new rule imposing rate-of-return regulation for all interstate ICS calls. *See id.* ¶ 12. Several parties, including many of the ICS Providers, filed petitions for review challenging the *2013 Order*, and some sought a stay of all or part of that order. This Court granted

[4] In the event the Court decides not to deny the Commission's motion in its entirety, the Court should grant a 30-day extension of the briefing schedule rather than placing the case into abeyance for an indefinite period.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) ("*2013 Order*").

a partial stay, but allowed the interim rate caps for interstate calls to remain in effect. *See* Order, *Securus Techs., Inc. v. FCC*, Nos. 13-1280 *et al.*, Doc. No. 1474764 (D.C. Cir. Jan. 13, 2014) (per curiam).

After the case was fully briefed, the FCC successfully moved to have the case held in abeyance pending the completion of further agency-level proceedings. *See* Uncontested Mot. of FCC To Hold Case in Abeyance, *Securus*, Doc. No. 1526582 (D.C. Cir. filed Dec. 10, 2014). The FCC represented that it had begun a further rulemaking that "could moot or significantly alter the scope of" the pending challenges. *Id.* at 3, 4.

2. The FCC released the *Order* in November 2015; the *Order* set new rate caps (for most facilities, sharply lower than the interim caps), tiered according to whether the facility in question was a prison or a jail and, if a jail, how many inmates it houses. Before the new rules took effect, four of the ICS Providers moved this Court to stay aspects of the *Order*. The ICS Providers argued that the *Order*'s rate caps unlawfully excluded the payment of site commissions as a valid cost; the rates were unlawfully set below providers' reported costs, in violation of the requirement that FCC regulations must "ensure that all [ICS] providers are fairly compensated for each and every . . . call," 47 U.S.C. § 276(b)(1)(A); the FCC lacks statutory authority to cap intrastate ICS rates; the FCC lacks authority to regulate ancillary fees; the ancillary and single-call-fee caps were arbitrary and

capricious; the FCC lacks jurisdiction over video communications; and the *Order*'s definition of "site commission" was vague and overbroad. The Court granted the motions in part and stayed the *Order*'s new rate caps and its cap on fees for single-call services. *See* Order, *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.*, Doc. No. 1602581 (D.C. Cir. Mar. 7, 2016) (per curiam).

Following this Court's stay order, the FCC announced for the first time that it intended to apply the *2013 Order*'s "interim" interstate rate caps – which were unaffected by the stay – to *intra*state ICS when the *Order*'s unstayed rules took effect.[6] The same ICS Providers moved the Court to clarify the scope of the stay, noting that one of the primary arguments supporting the stay was that the FCC lacked authority to impose intrastate rate caps. *See, e.g.*, GTL Mot. To Enforce Stay, *Global Tel*Link*, Doc. No. 1604580 (D.C. Cir. filed Mar. 17, 2016). On March 23, 2016, the Court stayed the interim rate caps "insofar as the FCC intends to apply [those rates] to intrastate calling services." Order, *Global Tel*Link*, Doc. No. 1605455 (D.C. Cir. Mar. 23, 2016) (per curiam).[7]

[6] *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*, 31 FCC Rcd 2026, 2027-28 (2016).

[7] Judge Millett dissented from the Court's March 23 order.

3. Pursuant to an agreed briefing schedule, two sets of petitioners – ICS Providers and state and local governments and law enforcement organizations – filed opening briefs on June 6, 2016.

On July 14, 2016, the FCC released a "Fact Sheet" describing a proposed order on reconsideration that is on the FCC's agenda for its August 4, 2016, open meeting.[8] The Fact Sheet indicates that the proposed order would increase rate caps "to account for costs facilities incur in offering ICS" by $0.02 per minute for prisons, $0.05 per minute for most jails, and $0.09 per minute for the smallest jails. Aside from the change in the level of the caps, the Fact Sheet does not indicate any other change to the FCC's approach to regulating ICS rates. For example, the Fact Sheet does not say that the proposed order would reconsider or revise the FCC's authority to impose rate caps for intrastate calls.

4. The FCC subsequently filed a motion to hold this case in abeyance and to suspend the briefing schedule, arguing that the proposed order could substantially alter the "nature and scope of this litigation" such that putting the case on hold may "conserve the resources" of the parties and the Court. Mot. 4-5.

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[8] *See* Fact Sheet: Providing Affordable, Sustainable Inmate Calling Services (FCC rel. July 14, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0714/DOC-340306A1.pdf; *see also* FCC To Hold Open Commission Meeting Thursday, August 4, 2016 (FCC rel. Jul. 28, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0728/DOC-340522A1.pdf.

ARGUMENT

The Court should deny the FCC's motion to hold this case in abeyance and, instead, require the parties to complete briefing according to the schedule to which all parties, including the FCC, agreed (subject to the suspension of the briefing schedule that the Court has already ordered). The premise for the FCC's motion – that the proposed reconsideration order could dramatically alter the nature of petitioners' challenge – is unwarranted. If the FCC simply adopts a marginal increase in rate caps as the Fact Sheet suggests, that action will have a minimal impact on this appeal. On the contrary, virtually all of the grounds for challenge to the *Order* will be unaffected.

Accordingly, the most efficient course is to complete briefing now, consolidate the petitions for review of any reconsideration order, and give the parties the opportunity to address the impact of such an order on pending issues in supplemental briefs filed according to an expedited schedule. That course will ensure that the FCC is not rewarded for any possible gamesmanship intended to evade or delay review by this Court. That course, not starting over from scratch months down the road, will conserve the parties' resources and help to ensure that judicial review of the FCC's actions – which ICS Providers have been seeking for nearly *three years* – is not further delayed.

A. There Is No Basis for the FCC's Claim that a Marginal Increase in the Rate Caps Would Affect the "Nature and Scope" of Petitioners' Challenge

Simply increasing prison rate caps by two cents does not materially affect any of the issues that the ICS Providers have raised in their challenges to the *Order*. *First*, although the FCC purported to increase the caps to account for costs *incurred by inmate institutions* as a result of providing calling services to their inmates, that does not address petitioners' challenge to the FCC's failure to permit ICS providers to recover costs associated with *payment of site commissions*. Accordingly, what the FCC acknowledged before would remain true after the marginal increase that the reconsideration order proposes – namely, that if site commissions are taken into account, the FCC's rate caps will be below providers' actual costs.[9]

Second, the marginal increase in rates is unlikely materially to alter the arguments regarding the below-cost nature of the rate caps. The record evidence of ICS Providers' costs did not include any costs incurred by correctional facilities. To the extent the FCC increases rate caps simply to account for a separate category of costs that were not previously included, that would not significantly affect

[9] The individual whose reconsideration petition purportedly provided the basis for the FCC's proposed action recently filed an ex parte letter with the FCC emphasizing that an increase in the rate cap, without a limitation on site commissions, cannot address the infirmities in the *Order*. *See Ex Parte* Letter from Michael S. Hamden to Marlene H. Dortch, FCC (July 22, 2016).

petitioners' challenge to the FCC's refusal to address record evidence FCC's caps are below costs documented by numerous ICS providers and would deny cost recovery for a substantial percentage of all inmate calls.[10] Moreover, any impact of the new rate caps can be addressed in short compass in supplemental briefing.

Third, the marginal increase in rates would have no impact on petitioners' argument that § 276(b)(1)(A) does not provide statutory authority for the FCC to reduce compensatory market rates.[11] On the contrary, if the FCC lacks statutory authority under that provision to cap intrastate rates, the specific level of the caps is beside the point.

Fourth, all of petitioners' remaining arguments concern regulatory matters other than the rate caps themselves, such as the FCC's authority to sharply restrict ancillary fees. The Fact Sheet gives no indication that the FCC intends to change course with regard to these matters.

In sum, the proposed reconsideration order does not represent a significant change in approach by the FCC and would not alter the nature or scope of petitioners' challenge.

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[10] The record shows that the *Order*'s rate caps *and* the proposed order's new rate caps are below the cost of providing service in many jurisdictions even when excluding site commissions from the analysis. *See* Joint Br. for the ICS Carrier Petitioners, Doc. No. 1617174, at 29-35 (D.C. Cir. filed June 6, 2016).

[11] The state and local government petitioners' brief is almost exclusively directed to a similar argument.

B. The Parties Should Complete Briefing According to the Current Schedule

The FCC voluntarily agreed to the current briefing schedule – despite the pendency of a petition for reconsideration before the agency – and petitioners have stuck to their side of the bargain by filing opening briefs on June 6, 2016. Perhaps if the FCC were proposing to abandon the *Order*'s unlawful regulatory approach it would make sense to put matters on hold and determine the appropriate course after the FCC had acted, but, as discussed above, the FCC has made no such proposal. On the contrary, the FCC *rejected* petitioners' suggestion to stay any new rules adopted in the proposed order pending review by this Court. Given the FCC's clear indication that it intends to persist with the regulatory approach embodied in the *Order*, with only marginal changes to rate levels, the most appropriate course is to require the parties to complete briefing according to the current schedule.[12]

Once any reconsideration order is ripe for review – that is, after notice of the order is published in the Federal Register – and parties have filed petitions for review, the parties can consolidate the new appeals with this proceeding and propose an expedited schedule for supplemental briefing to address any new

[12] There is little risk that any of the issues in this case will be mooted before briefing is complete, even as a technical matter. All provisions of the *Order* under review will remain in effect until any order on reconsideration becomes effective, which is unlikely to occur for months.

issues. In that way, the Court can promptly schedule the case for argument and resolve the basic statutory issues presented once and for all.

As a result of the FCC's repeated requests for delay, interim rates – which have been in effect since 2014 – have never been reviewed on the merits. The Court should not allow this case to be derailed without adequate justification. By requiring the parties to complete the current briefing, the Court can best conserve the resources of the parties, with no burden on the Court, and ensure prompt resolution of these petitions.

CONCLUSION

This Court should deny the FCC's motion.

Dated: August 1, 2016

Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ *Michael K. Kellogg*
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August 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 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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