

**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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