

## PRISONERS' LEGAL SERVICES OF MASSACHUSETTS

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October 16, 2017

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: Comment on WC 12-375 and WC 17-126, Current Massachusetts Prison and Jail Phone Rates and Interim MA Department of Telecommunications and Cable Order Capping Rates

Dear Ms. Dortch,

Please see the attached Massachusetts Phone Rates Fact Sheet. We would like to call the Commission's attention to the high first minute rates charged by Securus Technologies, which resemble connection fees that are now banned by the Federal Communications Commission's 2015 Second Report and Order. Note also that the Massachusetts Department of Telecommunications and Cable (DTC) has set an interim cap of 21 cents per minute for correctional facilities in the state, which Securus is flouting in all but one of the jails where they provide service. The DTC Order is attached.

Sincerely,

Karina Wilkinson  
Somerville MA

Bonita Tenneriello, Esq.  
Staff Attorney

## Massachusetts Prison and Jail Phone Rates Reform Fact Sheet\*

While Massachusetts state prisons offer phone calls for a reasonable 10 cents per minute, county Houses of Correction and jails are charging exorbitant fees to inmates and their families. Those in county custody have no choice but to use the phone provider selected by the facility. All too often, prisons and jails choose a provider because they offer the highest “site commission,” which is a kickback from the provider to the facility. Commissions can more than double the cost of phone calls. See the table below.

Legislation offered by Senator Montigny, S.1336, Representative Gonzalez, H.825, and Representative Tyler, H.966, will end commissions, a move that has lowered rates in prisons and jails in the dozen or so states that have eliminated them. This legislation will also require that state and county correctional facilities negotiate telephone contracts based on the lowest cost to users, such that prison phone rates should be the same as the rates charged for comparable residential telephone service.

It is crucial that the legislature act now. Regulation of in-state rates by the FCC has been struck

### Counties In Violation of the DTC Rate Cap and Above the FCC Interstate Cap for In-State Calls

MA County	First Minute	Additional Minute	15 Minutes	ICS Provider	Site Commission	Contract Date <sup>1</sup>	Contract End Date
Franklin Pre Paid	\$0.50	\$0.50	\$7.50	Securus	32%	9/1/13	6/30/20
Franklin	\$3.21	\$0.21	\$6.15	Securus			
Berkshire	\$3.20 <sup>2</sup>	\$0.20	\$6.00	Securus	45%	5/21/14	6/30/20
Bristol	\$3.16	\$0.16	\$5.40	Securus	48% +\$75k/year <sup>3</sup>	5/9/11	5/9/18
Essex	\$2.65	\$0.15	\$4.75	Securus	41% <sup>4</sup>	8/8/11	1/13/20 <sup>5</sup>
Barnstable	\$3.10	\$0.10	\$4.50	Securus	85% <sup>6</sup>	9/1/17	8/31/20
	\$3.75	\$0.01 <sup>7</sup>	\$3.80 Local				
Dukes	\$3.10	\$0.10	\$4.50	Securus	25%	6/11/12	6/11/22
Worcester	\$3.10	\$0.10	\$4.50	Securus	38% <sup>8</sup>	12/1/12	6/30/20
Suffolk	\$3.00 <sup>9</sup>	\$0.10	\$4.40	Securus	41% +\$187.5k	9/30/15	12/31/17

\* This fact sheet was prepared by Karina Wilkinson from public records requests she filed and those filed by Bonnie Tenneriello of Prisoners' Legal Services (PLS), as well as rates obtained by PLS, attorney Lee Petro (Drinker Biddle Reath) and Peter Wagner of Prison Policy Initiative, available at: <http://bit.ly/2fUOhVk>, Exhibit A.

<sup>1</sup> “Contract Date” is the effective date, or where the effective date is not available the date the proposal was signed.

<sup>2</sup> There is a discrepancy between the rates reported by the county and Securus as obtained by Lee Petro and Peter Wagner. Securus claims the first minute is 3.17 and 17 cents thereafter, yielding \$5.55 for a 15 minute call. Current rates were effective as of September 26, 2016 through June 30, 2017 (amendment end date). Berkshire has threads.

<sup>3</sup> Also, yearly salary for two on-site administrators, \$130,000 total. Initial contract was for 5 years, with four one year extensions (p. 4, Bristol Securus Proposal, 2011).

<sup>4</sup> The county and Securus agreed to two lump sum payments of commission in the amount of \$820,000 in July, 2016 and January, 2017.

<sup>5</sup> The documents provided by the county are unclear as to the exact date that the contract ends, but there is mention of four one year renewals in a 2016 amendment.

<sup>6</sup> Barnstable County Sheriff's Office has three one year renewal options with a 1% commission increase each year starting in 2020. The site commission for video visits and voicemail is 50%.

<sup>7</sup> Local calls are capped at \$3.80.

<sup>8</sup> The commission is an average between pre-paid and direct billed calls based on revenue and commission as stated by the county on September 26, 2016.

<sup>9</sup> There is a discrepancy between the rates reported by the county and Securus as obtained by Lee Petro and Peter Wagner. Securus claims the first minute is \$2.95 and 10 cents thereafter, yielding \$4.35 for a fifteen-minute call.

down in the federal courts.<sup>10</sup> The DTC has limited in-state rates to the FCC's interstate cap of 21 cents per minute for pre-paid and debit card calls and 25 cents for collect calls. But Securus Technologies Inc., the primary telephone provider in county jails, has flouted these caps, claiming it is exempt from regulation under a statute that de-regulated competitive, internet-based services.<sup>11</sup> This law was never intended to ban regulation of a monopolistic industry like prison telephone service.

The legislature must act to ensure prison telephone consumers are protected. Contact with loved ones promotes lower recidivism rates and successful reentry.<sup>12</sup> The telephone has become a lifeline for prison families, since prisons are often located in areas that are not accessible by public transportation. But families of the incarcerated are too often forced to choose between a telephone call or their utility bills. Children are particularly vulnerable and in need of contact with their parents. Sixty-two percent of women in state prisons and 51% of men in state prisons report having children who are minors.<sup>13</sup> In addition, prisoners rely on telephones to find housing and jobs on reentry.

### Counties Charging In-State Rates at the DTC Cap/FCC Interstate Rate Cap or Below

MA County	First Minute	Additional Minute	15 Minutes	ICS Provider	Site Commission	Contract Date	Contract End Date
Plymouth	\$0.21 debit	\$0.21	\$3.15	GTL	67%	3/14/14	9/2/17 <sup>14</sup>
	\$0.25 collect	\$0.25	\$3.75		56%		
Hampshire	\$0.21 <sup>15</sup>	\$0.21	\$3.15	ICSolutions	78% <sup>16</sup>	12/15/15	12/14/18
Middlesex	\$0.21	\$0.21	\$3.15	Securus	45% + \$125k/year <sup>17</sup>	11/1/16	6/30/20
Norfolk	\$0.16 <sup>18</sup>	\$0.16	\$2.40	GTL	40% + \$20k	5/23/16	6/19/18
Hampden	\$0.12 <sup>19</sup>	\$0.12	\$1.80	GTL	70%	6/20/16	3/26/18

<sup>10</sup> See *GlobalTel\*Link v. Federal Communications Commission*, 859 F.3d 39 (2017).

<sup>11</sup> GL c 25C s. 6A.

<sup>12</sup> The Report of the Governor's Commission on Corrections Reform, June 30, 2004 at (i) available at [http://www.mass.gov/Eeops/docs/eops/GovCommission\\_Corrections\\_Reform.pdf](http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf); Daniel LeClair, "The Effect of Community Reintegration on Rates of Recidivism: A Statistical Overview of Data for the Years 1971 Through 1987" at 2, 10, 11 (MA DOC July 1990); Christy A. Visser & Jeremy Travis, *Transitions From Prison to Community: Understanding Individual Pathways*, Annual Review of Sociology 89, 100 (2003); U.S. Department of Justice, Office of the Inspector General, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, Ch. II, n. 6 (Aug. 1999), available at <http://www.usdoj.gov/oig/special/9908/>; see also Supra note 2 and footnotes 19 and 20 of FCC Notice of Proposed Rulemaking WC Docket No. 12-375.

<sup>13</sup> <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/24/having-a-parent-behind-bars-costs-children-states>

<sup>14</sup> There is no current contract as of 9/28/17. The contract had run concurrent with the state Department of Corrections contract with an option for four one-year renewals. The commission is only on in-state calls. GTL provides full time Site Administrator.

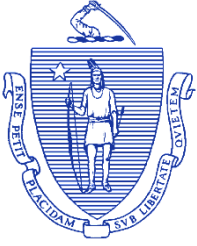
<sup>15</sup> International calls can be made with a pre-paid card for 50 cents per minute, \$7.50 for 15 minutes. There is a "public pay telephone" rate of 50 cents for 15 minutes for local calls and 21 cents per minute for "long distance" or a flat fee of \$100 per month, separate from the quoted rate for pre-paid and collect calls. Voicemails are \$1.00.

<sup>16</sup> The county has a minimal annual guarantee of \$170,000 per year. The county also receives a 50% commission on completed voicemails.

<sup>17</sup> Securus does not pay a commission on interstate calls.

<sup>18</sup> Interstate calls are at the FCC cap of 21 cents for debit and pre-paid and 25 cents collect with no commission being paid to the county on interstate calls.

<sup>19</sup> Interstate calls are also 12 cents per minute. The current contract was renewed for seven months in August.



## COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 11-16

June 14, 2016

Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in  
Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls

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### **INTERLOCUTORY ORDER**

#### **I. INTRODUCTION**

The Department of Telecommunications and Cable (“Department”) addresses the scope of its investigation in *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, Docket No. D.T.C. 11-16. The Department previously established the scope of the investigation in the September 23, 2013 *Hearing Officer Interlocutory Ruling* (“*Interlocutory Ruling*”). However, following the release of the Federal Communications Commission’s (“FCC’s”) Order, *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, *Second Report and Order and Third Further Notice of Proposed Rulemaking*, 30 FCC Rcd 12763, (rel. Nov. 5, 2015) (“*ICS Rate Order*”), the Department held a telephonic conference and sought briefing on the affect the *ICS Rate Order* had on the scope of the Department’s proceeding.

For the reasons discussed below, the Department amends the scope and procedure of its investigation. The Department amends and broadens the scope of its current investigation to (1) establish just and reasonable rates for intrastate Inmate Calling Services (“ICS”) in

Massachusetts including ancillary service charges, taxes, and fees and (2) continue its investigation of the service quality of ICS providers with regards to the frequency of dropped calls, line static, voice quality, and billing practices. While the Department is conducting its investigation, it adopts an interim per-minute usage rate cap and adopts interim permitted ancillary service charges and rate caps for those ancillary service charges. Providers of ICS are directed to file rate schedules that comply with the interim rates on or before June 17, 2016, with an effective date of June 20, 2016. In amending the scope of its investigation, the Department also establishes a new procedure for conducting the amended investigation. The Department also stays the investigation.

## II. BACKGROUND AND PROCEDURAL HISTORY

### A. Initial Investigation Establishing ICS Rates

In 1998, the Department<sup>1</sup> issued an order on payphone barriers to entry and exit, in which it established an Operator Service Provider (“OSP”) rate cap and addressed ICS rates. *See Investigation by the Dep’t of Telecomms. & Energy on its own motion regarding (1) implementation of § 276 of the Telecomms. Act of 1996 relative to Pub. Interest Payphones, (2) Entry & Exit Barriers for the Payphone Marketplace, (3) New England Tel. & Tel. Co. d/b/a NYNEX’s Pub. Access Smart-pay Line Service, & (4) the rate policy for operator servs. providers, D.P.U./D.T.E. 97-88/97-18 (Phase II) Order on Payphone Barriers to Entry & Exit, & OSP Rate Cap (Apr. 17, 1998) (“1998 Order”).* Specifically, in the 1998 Order, the Department retained its regulatory oversight of ICS rates. 1998 Order at 9. The Department determined that

<sup>2</sup> The Department of Telecommunications and Energy (“DTE”) was the predecessor agency to the Department of Telecommunications and Cable (“DTC”) and addressed the issue of ICS rates in 1998. Pursuant to Governor Deval Patrick’s Reorganization Plan, Chapter 19 of the Acts of 2007, the DTE ceased to exist, and the DTC was created, effective April 11, 2007. For the purpose of this Order, “Department” shall refer to both agencies.

it would continue to treat ICS providers as dominant carriers, because inmates had to use presubscribed OSPs at a prison payphone without competitive alternatives. *Id.*

The Department found that capping ICS rates at the ICS usage rates then charged by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts (now Verizon New England Inc. d/b/a Verizon Massachusetts) (“Verizon MA”),<sup>2</sup> or AT&T Communications of New England, Inc. (“AT&T”), precluded independent ICS providers from recovering legitimate additional costs associated with the provision of ICS. *Id.* The record showed that the unique characteristics<sup>3</sup> of ICS produced higher costs per call than those for conventional OSP calls. *Id.* As a result, the Department permitted ICS providers to assess a per-call surcharge in addition to the usage rate. *Id.* at 10. The per-call surcharge was set at a maximum of \$3.00 per call, using as a reasonable proxy the prevailing \$3.00 per-call surcharges assessed by AT&T, MCI Telecommunications Corporation, and Sprint Communications Company in 33 states at the time to cover the unique costs of ICS. *Id.* The Department also found it reasonable and administratively efficient to cap usage rates at the rates set by Verizon MA, the Incumbent Local Exchange Carrier (“ILEC”).<sup>4</sup> *Id.*

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<sup>2</sup> For ease of reference, the Department will refer to New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts and Verizon New England Inc. d/b/a Verizon Massachusetts as “Verizon MA” throughout this Order.

<sup>3</sup> The Department included a non-exhaustive list of additional costs incurred by ICS providers including “(1) costs associated with call processing systems, automated operators, call recording and monitoring equipment, and fraud control programs that are required to ensure security and to deter abuses; (2) higher levels of uncollectibles; and (3) higher personnel costs.” 1998 Order at 9-10.

<sup>4</sup> In a subsequent order responding to a motion for clarification, the Department also corrected a past inadvertent act of detariffing Verizon MA’s ICS rates and clarified the surcharge rate cap approved in the 1998 Order applied to Verizon MA. *Investigation by the Dep’t of Telecomms. & Energy on its own motion regarding (1) implementation of Section 276 of the Telecomms. Act of 1996 relative to Pub. Interest Payphones, (2) Entry & Exit Barriers for the Payphone Marketplace, (3) New England Tel. & Tel. Co. d/b/a NYNEX’s Public Access Smart-pay Line Serv., & (4) the rate policy for operator servs. providers*, D.P.U./D.T.E. 97-88/97-18 (Phase II-A) *Order on Motion for Reconsideration of NEPCC, Motion for Reconsideration of AT&T, & Motions for Reconsideration, Clarification, & Extension of Appeal Period of Bell Atlantic* at 12 (Oct. 8, 1999).

On July 21, 2004, the Department approved revisions to Verizon MA's ICS rates. *See Dep't of Telecomms. & Energy Industry Notice, Collect Inmate Calls – Rate Cap* at 1 (rel. Sept. 3, 2004) (“2004 Industry Notice”). Verizon MA requested to replace its multiple-component usage rates with a flat usage rate of \$0.10 per minute for ICS calls. *Id.* at 1-2. In the 2004 Industry Notice, the Department clarified that ICS providers were not required to adopt a flat usage rate, but were required to maintain usage rates that would not exceed the usage rate for a corresponding “average call.” *Id.* at 2. The Department defined an “average call” for purposes of complying with the rate cap as a 15-minute collect ICS call. *Id.* Thus, ICS providers may not charge usage rates that exceed \$1.50 for a 15-minute collect call. The Department made clear, however, that the cap on the usage rate is separate and distinct from the per-call surcharge, which remains capped at \$3.00 per call. *Id.*

B. Petitioners' Complaint and ICS Providers' Answers

On August 29, 2009, Petitioners filed with the Department a petition requesting relief from allegedly unjust and unreasonable rates for ICS, pursuant to G. L. c. 159, §§ 14, 17 and 24. *Pet. of Recipients of Collect Calls from Prisoners at Correctional Inst. in Mass. Seeking Relief from the Unjust & Unreasonable Cost of such Calls (“In re Inmate Calls”)*, D.T.C. 11-16 at 1 (“Initial Petition”). The Department was unable to determine whether the Initial Petition provided legally and factually sufficient bases to support an investigation or other action, and thus, the Department's then Competition Division Director, requested additional information from Petitioners on September 29, 2009. *Letter from Michael Isenberg to Bradley W. Brockmann, Esq.* at 1-2 (Sept. 29, 2009). Specifically, the Petitioners' counsel was asked to clarify the status of each petitioner; identify the ICS providers providing service to each petitioner; explain the method of

payment for the calls if the inmates listed are responsible for the charges; and supplement the scope and nature of their quality of service allegations. *Id.*

Petitioners amended their Initial Petition in response to the Department's request and further clarified that they were asking the Department to "investigate the pervasive quality of service issues Petitioners encounter in connection with prisoner telephone calls." *In re Inmate Calls*, Amendment 1 & Supplement on Quality of Service, at 1 (May 18, 2010) ("First Amendment"). Petitioners' alleged quality of service issues with the service providers Evercom Systems Inc., now doing business as Securus Technologies Inc. ("Securus"), and Global Tel\*Link Corporation ("GTL"). First Amendment at 5. Subsequently, Petitioners filed a second amendment to the Initial Petition on April 27, 2011, increasing the number of petitioners to 56. *In re Inmate Calls*, Amendment 2, Additional Petitioners, at 1 (Apr. 27, 2011) ("Second Amendment" together with the Initial Petition and the First Amendment, the "Complaint").

In their Complaint, Petitioners ask the Department to open an investigation pursuant to G. L. c. 159, §§ 14, 17, and 24, and to determine just and reasonable rates for ICS. Initial Petition at 3. In support of their request, Petitioners assert that: (1) the per-call surcharge of up to \$3.00 assessed is excessive, unnecessary, and should be eliminated; (2) the per-minute usage rate must be lowered to reflect just and reasonable rates; and (3) all fees including service, maintenance, and prepaid accounts should be included in the calculation of just and reasonable per-minute usage rates. *Id.* at 3-4.

On November 10, 2011, the Department opened a docket for Petitioners' Complaint and set a deadline of November 21, 2011, for Answers. *Letter from Hearing Officer Kalun Lee to Parties Re: Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Mass. Seeking Relief from the Unjust & Unreasonable Cost of such Calls*, D.T.C. 11-16,



(Nov. 10, 2011). Securus submitted a motion for extension of time on November 14, 2011. Also on November 14, 2011, GTL submitted its consent motion for extension of answer.<sup>5</sup> On November 18, 2011, the Department granted the motions for extension of time, extending the answer submission deadline for all parties until January 20, 2012. *In re Inmate Calls*, D.T.C. 11-16, *Order on Motions to Extend Time for Responses* (Nov. 18, 2011).

GTL filed with the Department its *Global Tel\*Link Corporation Response to Petition* (“GTL Answer”) on January 20, 2012. According to GTL, Petitioners’ claims against GTL should be dismissed pursuant to 220 C.M.R. § 1.06(6)(e) for failure to state a claim upon which relief may be granted because Petitioners can prove no set of facts in support of their claims. GTL Answer at 2 n.5. Specially, GTL claims that GTL’s rates and practices for ICS are consistent with state-mandated requirements, Petitioners have made no showing that GTL’s ICS rates or practices violate Massachusetts law, and have not provided sufficient evidence to support an investigation into service quality claims. *Id.* at 2. On January 20, 2012, Securus filed a *Response of Securus Technologies Inc.* (“Securus Answer”). Securus asserts Petitioners have failed to meet their burden of proof. Securus Answer at 11. Securus claims that pursuant to G. L. c. 159, § 17 its ICS rates are deemed *prima facie* lawful unless and until the Department finds the rate to be unjust and unreasonable. *Id.* at 12. Securus claims that the Department should measure the reasonableness of the rate by an ICS provider’s ability to recover legitimate additional costs incurred in providing ICS. *Id.* at 13. In addition, in determining the reasonableness of the rate, Securus suggests comparing the rates for ICS to those assessed to the general public for like services. *Id.* Securus claims automated collect calls in Massachusetts from a public payphone is the appropriate like service. *Id.* at 14. The current tariffed rate for

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<sup>5</sup> On November 16, 2012, Inmate Calling Solutions, LLC (“ICSolutions”) separately contacted the Department requesting to receive the same extension, if any, granted to GTL and Securus.

automated collect calls from a public payphone includes a \$4.99 per-call surcharge plus an \$0.89 per minute usage rate. *Id.* Securus also claims that Petitioners failed to justify further investigation into issues involving Securus's service quality and customer service. *Id.* at 38.

On January 18, 2012, Inmate Calling Solutions, LLC d/b/a ICSolutions ("ICSolutions") also responded to the Complaint. *See Response of Inmate Calling Solutions, LLC* ("ICSolutions Answer"). ICSolutions states it only serves one county facility, it is minimally referenced in the Complaint, it has not received any complaints concerning rates or quality of service in at least five years, it has been in compliance with all applicable regulations and in accordance with its tariff filed with the Department, and participation would be expensive and burdensome. ICSolutions Answer at 1-2. For the reasons listed above, ICSolutions declined to participate further in the proceeding. *Id.* at 2.

Although contained in the answers of Respondents, the Hearing Officer found these assertions sufficient to qualify as motions to dismiss. On January 27, 2012, the Hearing Officer directed Petitioners to respond to Respondents' assertions that the Complaint did not contain sufficient allegations of fact to support an investigation. *Hearing Officer Kalun Lee Email to Parties* (Jan. 27, 2012). On March 23, 2012, Petitioners filed a *Memorandum Opposing Dismissal* ("Petitioners Response"). On April 12, 2012, GTL submitted to the Department a *Motion for Leave to File Response and a Brief Response to Petitioners' March 23 Memorandum* ("GTL Reply"). Securus also submitted a *Motion to File Reply to Petitioners' Memorandum and Reply to Petitioners' Memorandum* ("Securus Reply") on April 12, 2012. On April 20, 2012, Petitioners submitted a *Motion for Leave to Surreply and Surreply* ("Petitioners' Surreply").

C. Department Public Hearing

On May 18, 2012, the Hearing Officer notified parties that the Department, in accordance with G.L. c. 159, § 24 and 220 C.M.R. § 1.06, would hold a public hearing regarding the issues identified in the Complaint. That is, the Department sought public comments regarding the rates charged and service quality provided by the ICS providers. The Department released a Notice of Public Hearing on June 12, 2012, setting July 19, 2012, as the date for the public hearing.

At the July 19, 2012, public hearing (“Hearing”), the Department received oral testimony from members of the public and more than 200 pieces of written testimony. *See*, Public Comments, *available at* <http://www.mass.gov/ocabr/government/oca-agencies/dtc-lp/dtc-11-16.html> (last accessed June 6, 2016). Among other things, customers of GTL and Securus testified about a pattern of: (1) poor service quality and dropped calls; (2) being charged a connection fee each time a dropped call was redialed; (3) difficulties receiving refunds or credits for dropped calls; and (4) a variety of surcharges in addition to the connection and per-minute fees. *See, e.g., In re Inmate Calls*, D.T.C. 11-16, Tr. of Public Hearing at 48, 59, 62, 63, 66, 70, 72, & 127 (July 19, 2013).

On October 25, 2012, Securus filed with the Department its *Response of Securus Technologies, Inc., to Public Comments* (“Securus Public Comment Response”). Also on October 25, 2012, GTL filed its *GTL Response to Public Comments* with the Department. On November 5, 2012, Petitioners filed their *Proposed Reply of Petitioners Regarding Public Comments* (“Petitioners Public Comments Reply”) with the Department. On March 27, 2013, Petitioners submitted an *Amended Affidavit of Douglas A. Dawson* to the Department, amending the *Affidavit of Douglas A. Dawson* attached to Petitioners’ Surreply. On April 29, 2013,

Petitioners mailed a letter to Department's Commissioner requesting that the Department move forward on Petitioners' complaint.

D. Department's Interlocutory Ruling and Discovery

The Hearing Officer issued his Ruling on Petitioners' complaint on September 23, 2013. In the Ruling, the Hearing Officer, opened an investigation into the per-call surcharge assessed by ICS providers; the tariffed service and other fees assessed by ICS providers; the telephone service quality provided by ICS providers; and the billing practices of ICS providers. *In re Inmate Rates*, D.T.C. 11-16, *Hearing Officer Interlocutory Ruling* at 1-2 (Sept. 23, 2016 ("Interlocutory Ruling")). The Hearing Officer declined to open an investigation into the usage rate; the frequency and content of recorded warning messages; and the availability and upkeep of telecommunications equipment at correctional facilities. *Id.*

On September 26, 2013 Petitioners filed *Petitioners' Motion for Extension of Time to Appeal* requesting until October 18, 2013 to file an appeal of a portion of the Interlocutory Ruling. The Hearing Officer, in an email ruling, granted an extension until October 16, 2013 for parties to file appeals. *Hearing Officer Kalun Lee Email to Parties* (Sept. 26, 2013). On September 27, 2013, Securus filed *Motion for Extension of Time* seeking a deadline of October 26, 2013 to file responses to any appeal. On October 1, 2013, GTL filed *Motion for Extension of Response Deadline*, requesting an extension of time to October 28, 2013 to respond to any appeal of the Interlocutory Ruling. On October 16, 2013, Petitioners' filed *Petitioners' Appeal* of the Hearing Officer's decision to close the investigation into the usage rate component of the ICS rate-setting mechanism. The Hearing Officer in an email ruling granted Securus's and GTL's motions granting an extension until October 28, 2013, in which to respond to Petitioner's appeal. *Hearing Officer Kalun Lee Email to Parties* (Oct. 16, 2013). On October 18, 2013,

Securus filed *Motion to Hold Proceeding in Abeyance* and GTL filed *Motion to Hold Proceeding in Abeyance*. Both parties requested that the Department hold its proceeding in abeyance until the FCC resolved its ongoing rulemaking addressing similar issues to the Department's proceeding. On October 21, 2013, Petitioners' filed *Petitioners' Motion for Extension of Time* request that the Department grant an extension until November 8, 2013 to file responses to the motions for abeyance. Hearing Officer Lee granted the request. *Hearing Officer Lee Email to Parties Granting Extension* (Oct. 21, 2013). Also, on October 21, 2013, a representative for Securus emailed the Hearing Officer to bring attention to Securus's request in its motion for abeyance that the Department suspend the requirement that any responses to Petitioner's appeal be filed by October 28, 2013 and in the event the request is denied that parties be given ten days from the date of such denial to respond to Petitioners' appeal. *Attorney Paul Besozzi Email to Hearing Officer Kalun Lee* (Oct. 21, 2013). Hearing Office Lee responded to Securus's emails directing the parties to confer and coordinate a mutually agreeable schedule of deadlines for responses to Petitioners' appeal, Securus's motion for abeyance, and GTL's motion for abeyance. *Hearing Officer Kalun Lee Email to Parties Directing Parties Coordinate on Filing Deadlines* (Oct 21, 2013). On October 22, 2013, the representative for Securus responded via email that the parties had conferred and established November 8, 2013 as the deadline for filing responses to Petitioners' appeal, Securus' motion for abeyance, and GTL's motion for abeyance. Hearing Officer Lee approved the agreed upon filing deadlines. *Hearing Officer Kalun Lee Email to Parties* (Oct. 23, 2013). On November 8, 2013, Petitioners filed *Petitioners Opposition to Respondents' Motions to Hold Further Rulemaking Proceedings in Abeyance*, GTL filed *Response of Global Tel\*Link Corporation to Petitioners' Appeal*, and Securus filed *Response to Petitioners' Appeal*. On February 26, 2014, the Department issued an Order denying Petitioners'

appeal of the Hearing Officer's Interlocutory Ruling. *In re Inmate Rate*, D.T.C. 11-16, *Order on Appeal of Hearing Officer's Ruling* (Feb. 26, 2014). On February 27, 2014, the Department issued a Procedural Order establishing a discovery schedule and ground rules for the parties. *In re Inmate Rate*, D.T.C. 11-16, *Procedural Order* (Feb. 28, 2014). Between March 2014 and September 2014, parties engaged in discovery. The discovery stalled following disagreements between the parties, which the parties were unable to resolve. As a result, the Department received various unresolved motions to compel. *See e.g. Petitioners' Motion to Compel Responses of Securus and Global Tel\*Link to Interrogatories and Requests for Production* (May 30, 2014); *Motion of Securus Technologies, Inc. to Compel Petitioners' Response to First Set of Information Requests (Securus 1-43 to 1-49)* (May 30, 2014); *Global Tel\*Link Corporation's Motion to Compel Responses to Discovery Requests* (May 30, 2014); *Petitioners' Proposed Motion to Compel Responses of Inmate Calling Solutions' to Petitioners' Interrogatories and Requests for Production of Documents* (June 13, 2014). The discovery period remains pending.

E. FCC Order and Department Case Status Conference

While the discovery period remained pending, the Department assigned a new Hearing Officer to the investigation on July 27, 2015. *In re Inmate Calls*, D.T.C. 11-16, *Hearing Officer Assignment* (July 27, 2015). On November 5, 2015, the FCC released the *ICS Rate Order*. In the Order, the FCC established new rate caps that apply to both interstate and intrastate ICS and limited and capped ancillary services charges.<sup>6</sup> *ICS Rate Order* at 12765. The Department took official notice of the *ICS Rate Order* on January 22, 2016 and scheduled a telephonic case status

<sup>6</sup> Parties to the FCC proceeding appealed the ICS Rate Order to the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit Court") and submitted multiple requests to stay the ICS Rate Order. The DC Circuit Court granted in part and denied in part multiple requests to stay the ICS Rate Order on March 7, 2016 and a modification to the stay order on March 23, 2016. *See Order, Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581; *Order, Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016), ECF No. 1605455.

conference to discuss the effect the FCC's Order had on the scope of the proceeding. *See In re Inmate Calls*, D.T.C. 11-16, *Official Notice and Case Status Conference* (Jan. 22, 2016). The parties filed *Joint Response to Official Notice of January 22, 2016* with proposed dates for the telephonic case status conference on February 3, 2016. The Department issued a notice scheduling the telephonic case status conference for February 29, 2016. *In re Inmate Calls*, D.T.C. 11-16, *Case Status Conference* (Feb. 4, 2016). On February 18, 2016, Network Communications International Corp. ("NCIC") filed *Petition for Late Intervention and Request for Inclusion on the Service List* requesting to intervene in the Department's proceeding. GTL filed *Global Tel\*Link Corporation Opposition to Late-Filed Intervention and Request for Inclusion on the Service List* and Securus filed *Opposition of Securus Technologies, Inc. to Petition of Network Communications International Corp. for Late Intervention and Request for Inclusion on the Service List* opposing NCIC's petition to intervene on February 23, 2016. Petitioners filed *Petitioners' Assent to the Intervention of Network Communications International Corporation* assenting to NCIC's petition to intervene on February 26, 2016. While its petition was pending NCIC was permitted to participate in the telephonic case status conference held on February 29, 2016. The Department denied NCIC's petition to intervene on March 8, 2016. *In re Inmate Calls*, D.T.C. 11-16, *Hearing Officer Ruling Network Communications International Corp. Petition to Intervene* (Mar. 8, 2016).

F. Parties' Briefings on Scope of Investigation

During the case status conference the Department determined it would establish a schedule for parties to submit briefs on the issues discussed. On March 18, 2016, the Department issued a notice of briefing schedule. *In re Inmate Calls*, D.T.C. 11-16, *Notice of Briefing Schedule* (Mar. 18, 2016). Securus filed *Motion for Extension of Time* requesting an

extension of the deadline for filing initial and reply briefs on March 24, 2016. The Department granted Securus's motion on March 28, 2016.<sup>7</sup> *In re Inmate Calls*, D.T.C. 11-16, *Hearing Officer Ruling Securus Technologies Inc. Motion for Extension of Time* (Mar. 28, 2016). Parties submitted their initial briefs to the Department on April 25, 2016 and their reply briefs on May 24, 2016. *See Petitioners' Brief In Response to Hearing Officer's Notice of March 18, 2016* (Apr. 25, 2016) ("Petitioners Initial Brief"); *Initial Brief of Securus Technologies, Inc.* (Apr. 25, 2016) ("Securus Initial Brief"); *Brief of Global Tel\*Link Corporation* (Apr. 25, 2016) ("GTL Initial Brief"); *Inmate Calling Solutions, LLC Initial Brief in Response to Hearing Officer's Notice dated March 18, 2016* (Apr. 25, 2016) ("ICSolutions Initial Brief"); *Petitioners' Reply Brief in Relation to the Hearing Officer's Notice of March 18, 2016* (May, 24, 2016) ("Petitioners Reply Brief"); *Reply Brief of Securus Technologies, Inc.* (May 24, 2016) ("Securus Reply Brief"); *Reply Brief of Global Tel\*Link Corporation* (May 24, 2016) ("GTL Reply Brief"); *Inmate Calling Solutions, LLC Reply Brief in Response to Hearing Officer's Notice dated March 18, 2016* (May 24, 2016) ("ICSolutions Reply Brief").

#### G. ICS Providers' Rate Schedule Filings

Independent from, but related to the above captioned proceeding, ICS providers have recently filed amendments to their rate schedules<sup>8</sup> on file with the Department to align their rate schedules with the rules the FCC adopted in the *ICS Rate Order*. GTL filed an amendment to its rate schedule, M.D.T.C. Tariff No. 2, on May 18, 2016 requesting an effective date of June 20,

<sup>7</sup> On April 5, 2016, Petitioners filed *Emergency Motion to Require Compliance with Massachusetts Inmate Calling Rate Plan* requesting that the Department declare unlawful rates changed under GTL's amended contract with the Department of Corrections ("DOC"). On April 7, 2016, GTL filed *Response of Global Tel\*Link Corporation to Petitioners' Emergency Motion to Require Compliance with Massachusetts Inmate Calling Rate Cap* arguing the Department should deny Petitioners' Motion. The Department denied Petitioners Motion in a ruling on May 17, 2016. *In re Inmate Calls*, D.T.C. 11-16, *Hearing Officer Ruling Petitioners' Motion to Require Compliance with Massachusetts' Inmate Calling Rate Cap* (May 17, 2016).

<sup>8</sup> Rate schedule is the statutory term for a tariff in Massachusetts. *See e.g.*, G.L. c. 159, §19. The Department in this Order uses the terms tariff and rate schedule interchangeably.



2016. GTL filed a second amendment to its rate schedule on May 24, 2016 requesting an increase to the per-minute usage rate for the ICS services it provides. GTL included a Letter of Explanation<sup>9</sup> with its filing to explain the proposed changes to its rates in its amended rate schedule.<sup>10</sup> Securus similarly filed an amendment to its rate schedule, M.D.T.C. Tariff No. 1, requesting an increase to the per minute usage charge for the ICS services it provides and an effective date of June 20, 2016.<sup>11</sup> Securus also included a Letter of Explanation with its filing to explain the proposed changes to its rates in its amended rate schedule.

### III. ANALYSIS AND FINDINGS

The FCC's *ICS Rate Order* directly and specifically affects the Department's previously permitted rate structure for ICS and ancillary service charges. As a result, for the reasons discussed below, the Department finds it appropriate to amend the scope and procedure of its current investigation. While its investigation is pending the Department adopts interim intrastate rates for ICS calls and interim ancillary service charges. The Department also stays its investigation pending resolution of the appeal of the FCC's *ICS Rate Order*.

#### A. The Prohibition on the Pre-Call Surcharge Requires Reconsideration of the Department's ICS rate structure

The FCC in its *ICS Rate Order* sought to adopt comprehensive reform of interstate and intrastate ICS calls to ensure just, reasonable, and fair ICS rates. *ICS Rate Order* at 12765. As a

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<sup>9</sup> See 220 C.M.R. § 5.03(1)(b)(requiring a letter of explanation to accompany any tariff and schedule filings explaining proposed increases or reductions in charges and the effect of the proposed increases or reduction on customers).

<sup>10</sup> DSI-ITI, LLC and Public Communications Services, Inc., GTL affiliates that are not parties to this proceeding, followed a similar rate schedule filing strategy with an initial amended rate schedules received by the Department on May 19, 2016 and May 20, 2016 respectively and second amended rate schedules requesting rate increases and including Letters of Explanation received on May 23, 2016 for both companies. Public Communications Services, Inc., another GTL affiliate, only submitted one amended rate schedule with a Letter of Explanation.

<sup>11</sup> Securus's amended rate schedule includes additional revisions to its rate schedule to comply with the FCC's ICS Order, including changes to definitions and permitted ancillary charges. GTL made similar changes in an amended rate schedule filed with the Department in April to align its rate schedule with the FCC's ICS Order in accordance with the effective dates of the FCC's rules for ICS provided to prisons.

part of its reform the FCC prohibited the assessment of per-call or per-connection charges and flat-rate calling for ICS. 47 C.F.R. §§ 64.6080-64.6090 (2016); *ICS Rate Order* at 12810-12813. The FCC adopted a transition period for compliance with its reforms establishing an effective date of 90 days after publication in the Federal Register for ICS providers serving prisons and six months after publication in the Federal Register for ICS providers serving jails. *ICS Rate Order* at 12884-12885. The Department in the intervening period sought comment from parties on the effect of the FCC's *ICS Rate Order* on its ICS investigation. *See Case Status Conference Notice* (Feb. 4, 2016); *Notice of Briefing Schedule* (Mar. 18, 2016).

In their briefs, parties agree the FCC's prohibition on per-call surcharge prohibits ICS providers from assessing a per-call surcharge as permitted under the Department's rate structure and that there are concerns about the reasonableness of the remaining \$0.10 per minute usage rate.<sup>12</sup> *See* Petitioners Initial Brief at 3-4 (Apr. 25, 2016); ICSolutions Initial Brief at 4-5; GTL Initial Brief at 6-8; Securus Initial Brief at 5-7. The parties differ, however, on the action the Department should take to resolve this concern. Petitioners' claim that the FCC's prohibition on per-call surcharges or per-connection surcharges could be overturned on appeal, and as such, the Department should continue its investigation into the per-call surcharge and adopt the FCC's analysis for prohibiting per-call charges. Petitioners Initial Brief at 3. With regard to the reasonableness of the \$0.10 per minute usage rate, the Petitioners assert that any investigation into the per minute usage rate, must consider whether a rate lower than \$0.10 per minute is just and reasonable. *Id.* Petitioners argue that it is appropriate to investigate the per-minute rate and the per-call surcharge in this proceeding and to otherwise close this investigation would be

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<sup>12</sup> The usage rate is capped at the rates set by Verizon MA, which Verizon MA set at \$0.10 per minute in 2004. *See* 1998 Order at 10; 2004 Industry Notice at 1. ICS providers may adopt multiple-component usage rates, but have to maintain usage rates that do not exceed a \$1.50 for a 15-minute call. 2004 Industry Notice at 1.

prejudicial, a waste of Department resources, and inconsistent with Department ICS rate setting practices. Petitioners Reply Brief at 3. ICSolutions similarly raises concerns about the reasonableness of the \$0.10 per minute rate, following the FCC's preemption of the permitted per-call surcharge. ICSolutions Initial Brief at 6, 8-11. However, ICSolutions asserts that while the \$0.10 per-minute rate is confiscatory, warranting a new rate be established, a rulemaking proceeding would be the appropriate process to resolve such matters and this proceeding should be closed.<sup>13</sup> ICSolutions Initial Brief at 8-11, 14-16; ICSolutions Reply Brief at 6. GTL agrees that adjustments should be made to the Department's per-minute usage rate cap in light of the preemption of the per-call surcharge, but insists it is not an issue for this proceeding and would be best be addressed in a generic rulemaking proceeding, through a waiver process, or during tariff approval. GTL Initial Brief at 6-8; GTL Reply Brief at 5. Securus similarly asserts that the elimination of the per-call surcharge, limits ICS providers' abilities to recover the legitimate addition costs of providing ICS and the remaining \$0.10 per-minute usage charge is confiscatory. Securus Initial Brief at 6-7. While Securus agrees that the Department needs to address the continued just and reasonable of the \$0.10 per-minute usage rate, it suggests the Department do so in an appropriate, independent process, separate from this proceeding. Securus Reply Brief at 7.

The Department agrees with the parties that the federal prohibition on per-call or per-connection surcharges requires the Department to reconsider its permitted rate structure for ICS. The Department also agrees that it must establish a new rate structure and rate to ensure just, reasonable, and fair rates for ICS. The Department agrees with ICSolutions that it does not

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<sup>13</sup> ICSolutions initially asserted that the Department should adopt an interim rate, but withdrew its statements to the extent they be constructed as recommending the Department adopt an interim rate in this proceeding. ICSolutions Initial Brief at 6, 12-14; ICSolutions Reply Brief at 3.

currently have sufficient evidence in the record to establish a new permanent rate structure and rate for ICS at this time. *See* ICSolutions Initial Brief at 4, 12. However, the Department believes that continuing this investigation with amendments to the scope and procedure will allow the Department to gather sufficient evidence for establishing an appropriate rate structure and rate for ICS. Accordingly, the Department amends the scope of its investigation to close its narrow investigation into the just and reasonableness of the per-call surcharge rates and open a broader investigation into establishing a just and reasonable intrastate rate structure and rates for ICS. *See* G.L. c. 159, §§ 13, 14. The Department in this Interim Order does not make any findings with regard to the just and reasonableness of a per-minute usage rate structure or setting the per-minute rate cap at \$0.10 per minute for ICS calls. Any final rate determined by the Department may be higher, lower, or unchanged from \$0.10 per minute. However, to ensure the provision of ICS continues uninterrupted, the Department will adopt an interim ICS rate structure and rate.

B. Interim ICS Rate Structure and Rate

The Department in its Briefing Notice did not request that parties propose interim rates. However, ICSolutions alleging there is insufficient time before ICS providers are no longer permitted to assess a per-call surcharge to gather sufficient evidence to establish a final rate cap, suggested the Department adopt an interim rate. ICSolutions Brief at 4-5. ICSolutions recommends two possible interim intrastate rates for ICS. *Id.* “ICSolutions recommends that the Department adopt an interim intrastate rate consistent with the current authorized total maximum charge of \$4.50 for a 15 minute call, or \$0.30 per minute” or “[i]n the alternative, consider using the FCC’s interim interstate rates as a proxy for the Massachusetts interim intrastate rates.” ICSolutions subsequently withdrew any statements recommending that the Department set an

interim rate in this proceeding, asserting that the appropriate mechanism for raising an issue with the intrastate rate would be through a rulemaking or waiver process. ICSolutions Reply Brief at 3, 6. Petitioners in reply assert that the elimination of the per-call surcharge does not prove that the remaining \$0.10 per-minute usage rate is unreasonable or require imposition of a higher interim rate. Petitioners Reply Brief at 7. GTL and Securus did not propose an interim rate, but in proposed rate schedules filed with the Department both parties seek interim approval to adopt per-minute rates in excess of \$0.10 per minute.<sup>14</sup> Securus has requested a maximum capped per-minute calling rate of up to \$0.35 per minute. *See* Securus Letter of Explanation at 1 (May 19, 2016). Securus reached its proposal relying on a twelve (12) minute average length for ICS calls and added together the \$3.00 it could recover as a per-call surcharge plus \$0.10 per minute for twelve minutes (\$1.20) to determine a \$4.20 cap for its average ICS call. *Id.* at 2. Securus then divides that cost by the 12 minute call length to reach \$0.35 per-minute. GTL requests a \$0.27 per minute usage rate cap, asserting that the proposal translates to a total charge of \$4.05 for an ICS call lasting 15 minutes. GTL Letter of Explanation at 1-2.

The FCC has disrupted the Department's rate recovery structure for ICS by prohibiting ICS providers from assessing per-call surcharges. When the Department added the per-call surcharge rate element it was to allow ICS providers the ability to recover legitimate additional costs associated with ICS. *Interlocutory Ruling* at 19. The per-minute usage rate concerned only traditional cost recovery. *Id.* In eliminating, the per-call surcharge, the Department is left with a per-minute rate cap at a rate for traditional cost recovery. *Id.* This alone does not establish that

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<sup>14</sup> GTL affiliates DSI-ITI, LLC, Public Communications Services, Inc., and Value-Added Communications, Inc. made similar rate schedules filing requesting the same interim relief as GTL.

the remaining \$0.10 per-minute usage rate available to ICS providers is confiscatory,<sup>15</sup> but the Department should complete its investigation before determining whether an additional charge is still necessary to recovery legitimate additional costs associated with ICS. As the investigation is still ongoing it would be premature for the Department to rely on information submitted thus far into the record to establish an interim or permanent cap.

The Department, in finding it necessary to adopt an interim rate for ICS adopts the rates of \$0.21 per minute for prepaid, debit, and prepaid collect calls and \$0.25 per minute for collect calls, finding the FCC's interim interstate rates a reasonable proxy for establishing interim rates for Massachusetts intrastate ICS rates. The FCC in reviewing its interim rate caps, adopted in 2013, found that interstate call volumes have increased without compromising correctional facility security requirements. *ICS Rate Order* at 12768, 12772. In addition, the FCC has only granted one temporary waiver of the rate caps based on extraordinary circumstances involving below average cost intrastate rates, suggesting that the interim rates are reasonable. *Id.* at 12772 n. 43; 12806. Further, the FCC in establishing the interim rate cap relied on provider submitted cost data and used the highest costs in its record to set conservatively high per-minute rates. *See* ICSolutions Initial Brief at 13; *In re Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, *Report & Order & Further Notice of Proposed Rulemaking*, 28 FCC Rcd 14107, 14147-14153 (rel. Sept. 26, 2013). Additionally, the Department finds using the FCC's data supported interim rates preferable to calculating a per-minute rate using an average call length and the per-call surcharge rate cap and per-minute rate cap because the resulting per-minute rate

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<sup>15</sup> The Department opened this investigation to determine the just and reasonableness of the per-call surcharge and its \$3.00 maximum rate cap, which would include the opportunity for Petitioners to prove their claim that the legitimate additional costs associated with ICS have fallen or been eliminated. *Id.*

quickly increases the next minute cost for calls above average length.<sup>16</sup> Thus, the Department finds it reasonable to use the FCC's interim interstate rates as a proxy for Massachusetts intrastate rates to ensure ICS providers continue to receive fair compensation and a reasonable return.

C. The Department Continues its Investigation into Services and other Fees and Establishes Interim Ancillary Service Charges

The FCC set limits and caps on ancillary service charges as a part of its comprehensive reform of interstate and intrastate ICS rates. ICS Rate Order at 12769. The FCC established a limited list of permitted ancillary service charges and adopted per use caps or instructions for assessing each permitted ancillary service charge. 47 C.F.R. § 64.6020; *ICS Rate Order* at 12846. The Department sought comment from the parties on the effect of the FCC's establishment of permitted ancillary service charges and price caps or instructions for assessing the effects such charges had on the Department's investigation into the services and other fees in ICS providers' rate schedules. *See Case Status Conference Notice* (Feb. 4, 2016); *Notice of Briefing Schedule* (Mar. 18, 2016).

In their briefs, parties agree that the FCC addresses the services and other fees in ICS providers' rate schedules, but disagree as to the effect the *ICS Rate Order* has on the Department's investigation. Petitioners assert the Department should continue to investigate the issue and determine its own limits to ancillary services charges. Petitioners Initial Brief at 4; Petitioners Reply Brief at 6. Petitioners argue that if the FCC's ancillary service fees are overturned, there would be no limits on ancillary service charges in place in Massachusetts.

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<sup>16</sup> For example, in considering the \$0.35 per-minute rate proposed by Securus with the current intrastate rate in Massachusetts, at 12 minutes both calls cost \$4.20, but at 13 minutes under the current rate the cost is \$4.30, while at \$0.35 per-minute the cost would be \$4.55. While at 11 minutes the call would cost under \$0.35 per minute rate, than the current intrastate rate, the Department will not burden ICS customers with above average call length with immediate cost increases because of the change in rate structure.

Petitioners Initial Brief at 4; Petitioners Reply Brief at 7. ICSolutions asserts that the Department should preserve Department and party resources by awaiting resolution on the appeal of the *ICS Rate Order* before determining whether to close the Department's investigation into services and other fees, but would not object should the Department close this portion of the investigation. ICSolutions Initial Brief at 6-7; ICSolutions Reply Brief at 2. GTL and Securus assert that the FCC's determination of permissible ancillary surcharges, taxes, and fees eliminate the need for the Department to address Petitioners' concerns regarding ICS providers' services and other fees. GTL Initial Brief at 8-9; GTL Reply Brief at 6; Securus Initial Brief at 7-8; Securus Reply Brief at 8. Securus and GTL argue that should the FCC's limits on ancillary service charges and fee be overturned on appeal, ICS Providers would still have to file rate schedules subject to the Department's review and approval to ensure they are just and reasonable mooted the need for the Department to take further action. GTL Initial Brief at 9; GTL Reply Brief at 6-7; Securus Reply Brief at 9.

The Department agrees that the *ICS Rate Order* has affected the Department's investigation into the services and other fees in ICS providers' rate schedules, as the *ICS Rate Order* explicitly limits the ancillary service charges that may be assessed and establishes rate caps or instructions for how to assess such charges. 47 C.F.R. § 64.6020; *ICS Rate Order* at 12846. In considering these effects, the Department concludes it should keep this part of its investigation open, but must amend its scope. In opening its investigation, the Department found that the services and other fees assessed were related to the provision of ICS calls, but not contemplated in the 1998 Order, warranting a Department review to determine if such other services and fees were just and reasonable. *Interlocutory Ruling* at 27-28. While, ICS Providers are changing the included services and other fees in their rate schedules to comply with the *ICS*



*Rate Order*, the Department has also not determined whether the FCC's permitted ancillary service charges and rate caps are just and reasonable. The FCC in the *ICS Rate Order* made clear that the ancillary service charges and the rate caps it sets operate as a ceiling to enable and encourage further reforms by the states. *ICS Rate Order* at 12769, 12774. Accordingly, the Department continues, but amends its investigation to determine the appropriate ancillary service charges and other fees and establish the just and reasonable rate caps or instructions for assessing such charges and fees. While its investigation is pending, the Department establishes the FCC's permitted ancillary service charges and their rate caps or instructions<sup>17</sup> as the interim permitted ancillary service charges and fees and their rate caps or instructions for intrastate ICS in Massachusetts.

D. ICS Providers are Directed to file Rate Schedules reflecting the Interim Rates

As detailed above, the Department in this Order adopts interim rate caps of \$0.21 per-minute for prepaid, debit, and prepaid collect ICS calls and \$0.25 per-minute for collect ICS calls. The Department also adopts interim permitted ancillary service charges and rate caps or instructions for such charges as detailed in the *ICS Rate Order*. Accordingly, the Department directs any and all service providers with a section in its rate schedule for the provision of intrastate ICS in Massachusetts to file amended rate schedules to comply with the provisions of this Order with an effective date of June 20, 2016. *See* G.L. c. 159 § 14. Any provider with a rate schedule currently requesting rates above the interim rates adopted in this Order with an effective date of June 20, 2016 should withdraw its pending rate schedule and refile an amended rate schedule. The Department will waive the filing fee for the rate schedule of any party with a pending rate schedule filed to comply with the *ICS Rate Order* with an effective date of June 20,

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<sup>17</sup> *See* 47 C.F.R. §§ 64.6000, 64.6020, 64.6070, 64.6100.

2016. The rate schedules should be submitted to the Department on or before June 17, 2016.

The Department will allow the rate schedules to go into effect on June 20, 2016, but reserves its 30-day review period to confirm compliance with this Order and the FCC's *ICS Rate Order*.

Any pending rate schedules that propose rates above the interim rates not withdrawn on or before June 17, 2016 will be automatically rejected on that day. *See* G.L. c. 159, § 20. ICS Providers currently serving Jails in Massachusetts should inform the Department of any delays implementing the interim rates and any corrective actions the ICS provider will need to take following the delay in implementation.

E. The Department Continues its Investigation into Service Quality and Billing

The FCC's *ICS Rate Order* primarily focused on reforming interstate and intrastate ICS rates, but the Department also sought comment on whether the *ICS Rate Order* resolved any of the concerns about dropped calls, voice quality, line static, the adequacy of billing schedules, and other service quality issues under investigation. The parties agree that the FCC's *ICS Rate Order* does not directly address the dropped calls, voice quality, line static, and other service quality issues under investigation, although the elimination of the per-call surcharge does address the cost concerns associated with dropped calls. Petitioners Initial Brief at 4-5, Petitioners Reply at 11; GTL Initial Brief at 10; Securus Initial Brief at 8. With regards to the adequacy of billing details, Petitioners assert that while the *ICS Rate Order* addresses billing related issue, it does not address the adequacy of billing details. Petitioners Initial Brief at 5. Securus and GTL disagree asserting that consumer disclosure requirements adopted in the *ICS Rate Order* along with exist FCC and Department rules appropriate address Petitioners complaints over the adequacy of billing details. GTL Initial Brief at 13; GTL Reply Brief at 8; Securus Initial Brief at 11; Securus Reply Brief at 15.

The Department agrees with the parties that the *ICS Rate Order* does not specifically address the service quality issues under investigation and the Department agrees with Petitioners that the *ICS Rate Order* does not address the billing quality issues raised in the proceeding. While the FCC rule prohibiting the per-call surcharge removed a cost associated with reconnecting a call, it does not address the underlying service quality concerns of disconnections, heavy static, and poor voice quality. *See Interlocutory Ruling* at 28-30. The FCC's new consumer disclosure rule for ICS rates similarly does not address the billing practices under Department investigation. *See Interlocutory Ruling* at 30-31. Accordingly, the Department continues its investigation into service quality and billing practices.<sup>18</sup> *See* G.L. c. 159, §§ 13, 16.

F. Department Investigation Procedure

The Department in amending the scope of its investigation also considers whether such changes should affect the procedure it has established for the investigation. Through this Order, the Department broadens the scope of its investigation to determine the appropriate rate structure and just and reasonable rates for providing intrastate ICS to jails and prisons in Massachusetts. It reforms its investigation into the additional services and fees related to the provision of ICS calls to determine the ancillary service charges, taxes, and fees to permit and the appropriate rate and rate structure. And the Department continues its investigation into service quality and billing issues. The Department believes that these changes to the scope warrant a revision to the

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<sup>18</sup> In their briefings, GTL and Securus raised additional issues concerning the ripeness of Petitioners initial complaints, the availability of complainants and their continues use of ICS services, evidence supporting initial complaints, additional network investments, causes of disconnections, the complaint process, and existing consumer protections. GTL Initial Brief at 10-15; Securus Initial Brief at 8-12. While, this information could prove relevant to the Department's eventual resolution of the investigation, it does not provide the Department with sufficient information concerning the ICS service quality and the billing practices of ICS providers to resolve the Department's investigation. The Department relied on the information in the Petitioners' complaint and provided at the public hearing to open an investigation into these issues on its own motion pursuant to G.L. c. 159, § 16. *Interlocutory Ruling* at 30-31. The Department's investigation will look into ICS service quality and practices of ICS providers to determine whether specific Department action is necessary to provide relief under G.L. c. 159, § 16.

procedure of this investigation.<sup>19</sup> The Department will lead an investigation that will include an opportunity for comments, submission of expert reports or testimony, and discovery. It will also open an intervening period where interested parties will be given the opportunity to intervene. Current parties to the investigation will retain their party status and will not be required to intervene.

G. The Department Grants the Requests to Stay its Investigation

In amending the scope and procedure of its investigation, the Department recognizes the effect the rules adopted in the *ICS Rate Order* have on its investigation. Resolution of the appeal of the *ICS Rate Order* will further affect the investigation regardless of the outcome. In their briefings GTL and ICSolutions both recommend that the Department stays or otherwise suspend its investigation pending resolution of the appeal of the *ICS Rate Order*. See ICSolutions Initial Brief at 4-7; GTL Reply Brief at 2-3. Petitioners maintain the proceeding should keep its investigation open and give finality to the issues before the Department regardless of the outcome of the appeal. Petitioners' Reply Brief at 1, 6-7. For the reasons discussed below, the Department stays its investigation pending resolution of the appeal of the *ICS Rate Order*.

The Department will dismiss without prejudice or stay a proceeding when proceeding is an inefficient use of the Department's and the parties' resources. See *Pet. for Arbitration of an Interconnection Agreement between Intrado Commc'ns Inc. & Verizon New England Inc. d/b/a Verizon Mass.*, D.T.C. 08-9, *Arbitration Order* at 10 (May 8, 2009); *Proceeding by the Dep't of Telecomms. & Energy on Its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60 Track A and Track B, *Interlocutory Order on Motion to Stay of Verizon New England, Inc. d/b/a Verizon*

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<sup>19</sup> The Department anticipates that the reformed scope of the proceeding will moot the pending discovery requests, but the Department will address this issue at a later date.

*Mass.*, at 16-17 (Apr. 2, 2004); *see also Pet. of Safari Commc'ns, Inc. for Designation as an Eligible Telecomms. Carrier on a Wireless Basis*, D.T.C. 11-4, *Order of Dismissal without Prejudice* (March 1, 2012) (dismissing petition in light of FCC order reforming the eligible telecommunications carrier designation process requiring FCC approval of a compliance plan before re-filing) (“*Safari Order*”). In instances in which the Department and the FCC are ostensibly dealing with similar issues, the Department will grant a party’s motion for abeyance in cases where there is a risk of administrative inefficiency resulting from the Department’s rulings later being deemed inconsistent with the FCC’s rules. *Investigation by the Dep’t of Telecomms. & Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements & Combinations of Unbundled Network Elements & the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Mass. Resale Servs. in the Commw. of Mass.*, D.T.E. 01-20, *Interlocutory Order on Part B Motions* at 19 (Apr. 4, 2001) (staying a proceeding where review of proposed cost study may later have been deemed inconsistent with new FCC rules) (“*TELRIC Interlocutory Order*”). The Department has also dismissed or stayed proceedings pending the outcome of FCC proceedings when it would be unreasonably onerous for the Department to issue a decision without preceding action by the FCC. *Id.* (staying a proceeding to review Verizon’s proposed avoided cost study until the FCC promulgated new pricing rules for state commissions to follow); *see also Safari Order*, D.T.C. 11-4 at 2.

The FCC in adopting its *ICS Rate Order* comprehensively reformed intrastate ICS rates, adopted sharp limits on the charges ICS Providers may assess, and eliminated per-call surcharges disrupting the rate mechanisms through which the Department permitted recovery. The D.C. Circuit Court then stayed the reformed intrastate rates, but permitted the elimination of per-call

surcharges and the limits on ancillary service charges. It is uncertain which of the FCC's new ICS rules will remain following resolution of the appeal. As such, the Department determines it is prudent to stay its investigation finding it would be unreasonably onerous and administratively inefficient for the Department to proceed with its investigation without knowing whether the specific rate caps and reforms adopted in the *ICS Rate Order* will continue to operate as a ceiling with the possibility of preemption if any reforms adopted by the Department proved inconsistent with the FCC's framework. See *TELRIC Interlocutory Order*, D.T.C. 01-20 at 19; *Safari Order*, D.T.C. 11-4 at 2; *ICS Rate Order* at 12769, 12774, 12864. Further, the Department is adopting interim intrastate rates and interim ancillary service charges. Allowing ICS Providers to provide services subject to these interim rates and charges pending resolution of the appeal should yield useful information towards determining just and reasonable rates for intrastate ICS in Massachusetts. Accordingly, the Department stays its investigation pending resolution of the appeal of the *ICS Rate Order* in the D.C. Circuit Court.

#### IV. ORDER

Accordingly, after review and consideration, it is:

ORDERED: That the Department's investigation in D.T.C. Docket No. 11-16 continues; it is

FUTHER ORDERED: That the scope of the Department's investigation is amended and broadened; it is

FURTHER ORDERED: That the Department investigation into the just and reasonableness of the Massachusetts intrastate ICS rate and rate structure continues, as amended; it is

FURTHER ORDERED: That the Department's investigate into the just and reasonableness of the ancillary service charges, taxes, and fees assessed in relation to the provision of intrastate ICS in Massachusetts continues, as amended; it is

FURTHER ORDERED: That the Department's investigation into service quality and billing issues continues, as amended; it is

FURTHER ORDERED: That the interim intrastate ICS rates are \$0.21 per minute for prepaid, debit, and prepaid collect calls and \$0.25 per minute for collect calls; it is

FURTHER ORDERED: That the interim permitted ancillary service charges, taxes, and fees and their rate caps or instructions for intrastate ICS in Massachusetts are the FCC's permitted ancillary service charges, taxes, and fees and their rate caps or instructions; it is

FURTHER ORDERED: Service providers with a section in its rate schedule for the provision of intrastate ICS in Massachusetts are directed to file amended rate schedules to comply with the provisions of this Order with an effective date of June 20, 2016 on or before June 17, 2016; it is

FURTHER ORDERED: That the procedure for the Department's investigation is amended as described herein; it is

FURTHER ORDERED: That the Department's investigation is stayed pending judicial review of the FCC's *ICS Rate Order* in the United States Court of Appeals for the District of Columbia Circuit; and it is

FURTHER ORDERED: That all parties comply with all other directives contained herein.

By Order of the Department



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Karen Charles Peterson, Commissioner

## **RIGHT OF APPEAL**

Pursuant to G.L. c. 25, § 5 and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court.