

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
)	
Rates For Interstate Inmate Calling Services)	WC Docket No. 12-375
)	

OPPOSITION TO PETITION FOR STAY

The Wright Petitioners (the “Petitioners”) hereby submit this Opposition to the Petition For Stay Pending Judicial Review, filed by Telmate, LLC (the “Petition”).¹ The Petition requests that the FCC stay the effectiveness of certain aspects of the Second Report and Order, adopted on October 22, 2015, and released on November 5, 2015, in the above-captioned proceeding.² In particular, the Petition requests that the FCC delay implementing the rules “with respect to the rate caps, the limits on ancillary charges and all related rules” adopted in the *Second R&O*.³

As set forth below, Telmate incorrectly asserts that (i) it will likely prevail in a future judicial review; (ii) it will suffer irreparable harm; (iii) other interested parties will not be substantially harmed if the stay is granted; and (iv) the public interest favors granting a stay.⁴ Not only does the Petition ignore the enormous impact caused by a further delay in providing

¹ The Petition was filed on January 6, 2016. Pursuant to Section 1.45(d) of the FCC’s rules, this Opposition is filed within seven (7) days of the submission. *See* 47 C.F.R. § 1.45(d) (2015).

² *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136, rel. Nov. 5, 2015 (the “*Second R&O*”). The Second R&O was published in the Federal Register on December 18, 2015. *See* 80 FED. REG. 79135 (Dec. 18, 2015). *See also* Report and Order, 28 FCC Rcd. 14,107 (2013)(the “*First R&O*”).

³ *Petition*, pg. 2.

⁴ *Petition*, pg. 5.

real relief to ICS consumers, Telmate also fails to satisfy the *Virginia Jobbers* test for granting a stay. Therefore, the Petition must be dismissed.

I. Telmate Will Not Be Successful On The Merits

1. Telmate Failed To Provide Any Economic Evidence Supporting Assertions of Fair Compensation.

A majority of Telmate’s Petition argues that the FCC adopted rate caps and ancillary fee limitations are “impermissibly low” and that the FCC’s decision not to ban site commissions will not permit ICS providers to receive “fair compensation.”⁵ However, Telmate failed to provide any analysis of its costs to support these arguments, and ignores previous decisions relating to “fair compensation” and site commissions.

First, the decision as to whether site commissions are recoverable “costs” was settled thirteen (13) years ago. In particular, the FCC determined that site commissions are “negotiable by contract with the facility owners and represent an apportionment of profits between the facility owners and the providers of the inmate payphone service.”⁶ While ICS providers like Telmate would have preferred that the FCC save ICS providers from the folly of their own making, the FCC’s adoption of caps on ICS rates and ancillary fees fits squarely within its statutory authority and its past long-standing precedent.

⁵ *Petition*, at 8.

⁶ *See Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand, 17 FCC Rcd 3248, 3262 (2002). Telmate cites one example - the State of Texas – to argue that site commissions will continue to be demanded. *Petition*, pg. 10. However, Telmate ignores language in the actual ICS contract between CenturyLink and the Texas Department of Criminal Justice which specifically indicates that the parties will renegotiate the agreement in good faith “[s]hould Federal or State statutes or regulations change in the future either reducing or eliminating commissions or reducing the rates, fees or other charges that are allowed or required to be collected by the Contractor.” *See Petitioners’ Ex Parte Submission*, dated Aug. 2, 2013 (providing similar examples from Texas, Louisiana, California, Charleston County, S.C.).

Moreover, Telmate’s Petition fails to provide *any* analysis of its *own* costs to support its argument that the rate caps and ancillary fees are “impermissibly low” *for* Telmate.⁷ Instead, Telmate clutches onto a statement cited in the *Second R&O* that “rate caps ‘will largely cover individual ICS providers’ costs in providing service.”⁸ Telmate can’t be arguing that its costs are identical as the rest of the ICS providers in the proceeding, so its efforts to latch onto a high-cost ICS provider to demonstrate that Telmate will not receive fair compensation must be rejected. Instead, there is sufficient evidence in the record that Telmate will be fairly compensated under the new rate caps and permissible ancillary fees, especially when one acknowledges that call volume will substantially increase after the new rates go into effect.

2. Regulation of Ancillary Fees Was Appropriate

Next, Telmate incorporates arguments presented by Securus Technologies in its Petition for Stay to conclude that the FCC cannot “regulate financial transaction and other fees that are unrelated to inmate calling.”⁹

Initially, it must be pointed out that Telmate’s premise is incorrect – ancillary fees and other financial fees, which are wholly-created by Telmate and other ICS providers to increase their monopoly profits, are most certainly related to inmate calling. As the record in this proceeding amply demonstrates, ICS customers have no choice other than to deal with the one ICS provider serving the facility if it seeks to receive a telephone call from an inmate. ICS providers and correctional authorities have argued strenuously against the introduction of competitive ICS service, and, as a result, ICS customers do not have seat at the table when rates, fees and site commissions are negotiated between ICS providers and correctional authorities.

⁷ *Petition*, pg. 9.

⁸ *Id.* (citing *Second R&O* at ¶ 55).

⁹ *Id.*, at pg. 13 (citing Securus Petition for Stay, pgs. 5-8).

ICS providers created ancillary fees to be part and parcel of their per-call profit stream. In situations where parties are arrested and held pending arraignment, it is impossible for the creation and funding of a prepaid account by sending a check, as the arrested party would be released before the check is received and the account is established. More recent types of ancillary fees like single-call services were created to charge the full value of a 15-minute call, regardless of the call's duration.

As such, in light of the lack of competition to consumers who wish to receive calls from a particular facility, the FCC made a reasoned decision to impose a comprehensive solution to per-minute rates and ancillary fees charged to ICS customers. If ICS providers such as Telmate want to permit competition to be introduced, then references to other competitive industries where the FCC does not regulate ancillary fees may make sense. In the context of ICS, though, the FCC appropriately used its statutory authority to adopt caps to limit the exorbitant fees imposed by ICS providers.

3. Waiver Process Has Been Used By FCC and States in ICS Context

Finally, Telmate asserts that it will be successful on the merits in its judicial appeal because the FCC included provisions in its rules to grant waivers for high-cost ICS providers.¹⁰ Telmate argues that the grant of a waiver does not satisfy Section 276 because the statute requires fair compensation for each and every call.

It should be noted that the FCC has previously found the term “fairly compensated” permits a range of compensation rates that could be considered fair,¹¹ but that the interests of

¹⁰ *Petition*, pg. 15.

¹¹ *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3254-58, paras. 14-24 (2002).

both the payphone service providers and the parties paying the compensation must be taken into account.¹² Moreover, it is well-established that the agency may set rates using industry averages.¹³ If Telmate was correct, the FCC would be forced to find the highest cost of all the ICS providers and set ICS rates above that cost. Such an absurd result runs counter to established agency rate-making procedures, and thus the argument must be rejected.¹⁴

Telmate also ignores the fact that the waiver process has actually benefited ICS providers at the FCC and on the state level. For example, the FCC granted Pay Tel Communications a limited waiver of the interstate ICS rate cap adopted in the *First R&O*, noting that the combination of the interstate ICS rates and the state-based intrastate ICS rates prevented Pay Tel from recovering its costs.¹⁵ On the state level, Securus Technologies obtained rate-cap variances in New Mexico for several of its facilities.¹⁶

Thus, the waiver process should not be discounted by Telmate, and it certainly has failed to demonstrate that it will be successful on appeal because the FCC articulated the availability of waiver to address high-cost facilities.

¹² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 at 2570, para. 55 (1999) (*Payphone Third Report and Order*); see also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21302-03, para. 82 (2002) (holding that “fair” compensation under section 276 “implies fairness to both sides”).

¹³ See e.g., *Southwestern Bell*, 168 F.3d 1344, 1362 (1999) (“the use of industry-wide averages is one commonly-employed technique in evaluating the reasonableness of rates charged by regulated entities.”) and *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).

¹⁴ See *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (“Unquestionably the courts, in interpreting a statute, have some ‘scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results.’”) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941))

¹⁵ *Rates for Interstate Inmate Calling Services*, Order, 29 FCC Rcd 1302 (2014).

¹⁶ See *In the Matter Of The Request For Rate Cap Variance Of Securus Technologies, Inc., An Institutional Operator Service Provider*, Case No. 15-00002-UT.

II. Telmate Failed to Show Losses Are Irreparable

Telmate's Petition also failed to provide any analysis to support its claim that it will suffer irreparable injury as the result of the rates and fees adopted in the *Second R&O*. To be sure, Telmate will likely not earn the same level of unjust, unreasonable and unfair revenue from ICS customers as the result of the new ICS rates and ancillary fees, but there is evidence in the record that the lower rates will increase call volume by more than 50%.¹⁷

Even if Telmate will no longer earn monopoly profits, Telmate did not provide any evidence that its reduced revenue stream is a cognizable "irreparable harm." To establish an irreparable harm, the Commission has stated that the "injury must be 'both certain and great; it must be actual and not theoretical. Petitioners must provide 'proof indicating that the harm [they allege] is certain to occur in the near future.'"¹⁸ Moreover, the FCC recently denied stay motions, stating:

Several general principles govern the irreparable injury inquiry. First, "the injury must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). A movant must also "substantiate the claim that the irreparable injury is 'likely' to occur....Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." *Id.* Further, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Id.* The only exceptions to this rule are when (1) the economic loss threatens the "very existence of the movant's business," *id.*, and (2) such loss is great, certain, and

¹⁷ See *Praeses Ex Parte Submission*, Oct. 13, 2015, pg. 2 ("Interstate ICS call volume is now approximately 76 percent higher than before the effective date of the 2013 ICS Order and overall interstate ICS revenue has increased approximately 12 percent. Praeses expects that this same trend will affect intrastate ICS call volume and revenue once the Commission's proposed new intrastate rate caps take effect, thereby substantially mitigating the loss of intrastate ICS revenue that will occur as a result of the lower intrastate ICS rates."). See also *Petitioners' Ex Parte Submission*, dated July 18, 2013 ("the recent statements of CenturyLink, GTL and Securus demonstrate that a lower ICS rate will lead to higher call volumes, and a commission of 50% or more can still be paid to the correctional authority. Each tout their low rate/high commission rate proposals as delivering higher call volumes and higher revenues for the Florida DOC. Their blended 15-minute rate was less than \$0.10 per minute, and each proposed to pay an annual commission in excess of 46%.").

¹⁸ See *Connect America Fund*, Order, 27 FCC Rcd 7158, 7160 (2012).

imminent. *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211 (D.D.C. 2012).¹⁹

Nowhere in the Petition did Telmate even attempt to make this showing. Other than a general assertion that the *Second R&O* “sets rates (and fees) below Telmate’s site commission-excluded costs,” the record is devoid any substantiation of Telmate’s purported irreparable harm.²⁰

III. A Stay Will Harm Consumers

Finally, Telmate is simply wrong in concluding that third parties will not be harmed by the grant of the Petition.²¹ Indeed, the record in this proceeding overwhelmingly demonstrates the significant and adverse effects caused the unjust, unreasonable and unfair ICS rates and ancillary fees. Even under the current interim rate caps for interstate ICS calls, third parties (i.e., the customers) continue to pay excessive ancillary fees. As such, the illogical argument that third parties will not be harmed by the grant of the Petition must be disregarded.

Instead, this proceeding demonstrated the overwhelmingly positive public interest benefits from the adoption of the *First R&O*, and that any delay in the effectiveness of the *Second R&O* would be, in fact, counter to the public interest. As discussed above, a delay in the effectiveness of the *Second R&O* would delay immediate relief to millions of intrastate ICS customers and all ICS customers currently being charged usurious ancillary fees.²² The Petitioners have shown that increased contact between inmates and their families and loved ones will reduce recidivism rates, which will decrease the cost of incarceration. In fact, it was shown

¹⁹ See *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Opinion, DA 15-1454 (Dec. 18, 2015).

²⁰ *Petition*, at 15.

²¹ *Petition*, at 17.

²² See *Petitioners’ Ex Parte Submission*, dated Sept. 17, 2014 (providing intrastate ICS rates and ancillary fees).

that just a 1% decrease in the recidivism rate would result in savings of more than 250 million dollars for state, county and local jurisdictions.²³

The Petitioners have provided previous statements from Securus, GTL and CenturyLink in response to a Request for Proposal asserting that the reduction in rates and fees would lead to increased call volume, increased revenues for ICS providers, and, in turn, increased commissions paid to the correctional facilities that receive commissions.²⁴ In light of several ICS providers advocacy directed to correctional authorities that low ICS rates would drive up revenue and commissions paid to the correctional authorities, Telmate's assertion that low ICS rates will cause it irreparable damage and not serve the public interest is simply incorrect. In the absence of any support for these arguments, the FCC must find that Telmate failed to establish a public interest benefit for delaying the effectiveness of the ICS rate caps adopted in the *Second R&O*.

CONCLUSION

Thus, Telmate has (i) failed to establish that an appeal of the *Second R&O* would be successful on the merits; (ii) failed to provide any solid evidence that ICS providers will suffer irreparable harm; (iii) failed to show the lack of harm to third parties (in fact, great harm be caused from a delay in the effectiveness of the lower ICS rates); and (iv) failed to show any public interest benefit from granting a stay.

Therefore, Petitioners oppose the Petition for Stay, and respectfully request that the FCC adopt an order denying the request as legally unsustainable.

²³ *Petitioners Comments*, pg. 36 (citing Declaration of Coleman Bazelon, Ph.D).

²⁴ *Petitioners' Ex Parte Submission*, dated July 18, 2013 ("the recent statements of CenturyLink, GTL and Securus demonstrate that a lower ICS rate will lead to higher call volumes, and a commission of 50% or more can still be paid to the correctional authority. Each tout their low rate/high commission rate proposals as delivering higher call volumes and higher revenues for the Florida DOC. Their blended 15-minute rate was less than \$0.10 per minute, and each proposed to pay an annual commission in excess of 46%.").

Respectfully submitted,

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January 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on January 11, 2016, the forgoing Opposition was served via electronic mail on the following persons:

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