



March 11, 2016

Via Electronic Filing

Matthew DelNero
Chief
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375

Dear Mr. DelNero:

Telmate, LLC (“Telmate”) hereby respectfully requests the opinion of the Wireline Competition Bureau regarding whether Section 64.6030 of the Commission’s rules, which imposes interim rate caps for inmate calling services, applies only to *interstate* rates and not also, for the first time, to *intrastate* rates. This clarification is necessary because, while the Commission’s public statements appear to confirm that Section 64.6030 simply preserves the *interstate* interim rate caps established in the *2013 Order*, counsel to the Wright Petitioners has asserted that these caps should now apply to intrastate rates as well. That result would negatively affect both providers and States, which would suffer the dramatic and immediate site commission (revenue) reductions otherwise avoided by the D.C. Circuit’s stay.¹ Telmate respectfully requests that the Bureau resolve this question no later than Wednesday, March 16, 2016, the day before Section 64.6030 is scheduled to become effective for prisons.²

¹ See, e.g., Press Release, Arkansas Attorney General Leslie Rutledge, D.C. Circuit Grants Stay of Costly FCC Order (March 7, 2016) (“The stay from the D.C. circuit is welcome news for local budgets and law enforcement across Arkansas Because of the court’s action, jails and prisons will not be shortchanged during the legal challenge to the FCC’s order. If this costly order had taken effect, the result would have been disastrous for many local communities.”).

² Section 64.6030 is not scheduled to go into effect for jails until June 18, 2016. See *2015 Order* ¶ 336 (explaining that “rules and requirements governing the rates and fees charged in connection with inmates held in jails . . . shall become effective 6 months after publication in the Federal Register”).

On March 7, 2016, in response to requests filed by Telmate and others, the D.C. Circuit granted a partial stay³ of the Commission's 2015 Order.⁴ In particular, the Court stayed new Section 64.6010, which established rate caps for inmate calling in prisons and jails, and new Section 64.6020(b)(2), which established caps for single-call service fees. After the most recent stay was issued, Chairman Tom Wheeler and Commissioner Mignon Clyburn issued a joint statement indicating that the stay left in place "the 2013 rate caps"⁵—the interim *interstate* rate caps that survived an earlier stay of rate caps adopted in the 2013 Order.⁶ This understanding of the Court's action is consistent with the general purpose of stays, which is to maintain the status quo pending judicial resolution of a contested issue.⁷ It is also consistent with the Commission's 2013 and 2015 Orders, as neither order adopts the Section 64.6030 interim rates with respect to intrastate calling.

Nevertheless, a press report has quoted Andrew Schwartzman, an attorney for the Wright Petitioners, as asserting that the interim rate caps will now extend to *both* interstate and intrastate rates, despite the stay.⁸ The same report indicates that a Commission spokesman declined to comment on the accuracy of Mr. Schwartzman's interpretation. In light of this apparent confusion, Telmate requests clarification so that it and all other ICS providers, states, and facilities may operate in a manner that is consistent with the Commission's Orders pending appeal.

Telmate notes that its stay request challenged whether 47 U.S.C. § 276 provides authority to create rate caps in any setting—and since Section 201 does not apply to Telmate's one-way VoIP service, this also means that Telmate challenged whether Section 276 provides authority to impose interstate rate caps on one-way VoIP providers such as Telmate. Telmate accordingly does not believe that it is properly subject to any of the rate caps adopted by the Commission,

³ See Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581.

⁴ *In re Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking ("2015 Order"), WC Docket No. 12-375, FCC 15-136 (rel. Nov. 5, 2015).

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 *In re Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking ("2013 Order"), 28 FCC Rcd 14,107 (2013).

⁷ 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. George W. 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.").

⁸ Jon Brodtkin, *In blow to inmates' families, court halts new prison phone rate caps*, ARS TECHNICA (Mar. 7, 2016), <http://arstechnica.com/tech-policy/2016/03/in-blow-to-inmates-families-court-halts-new-prison-phone-rate-caps/>.

interim or otherwise. Nevertheless, Telmate requests clarification so that it can abide by the Commission's rules while the D.C. Circuit considers their lawfulness.

Mr. Schwartzman appears to take the position that the interim cap language of Section 64.6030, which the Commission adopted under the *2013 Order* and did not modify in the *2015 Order*, should be read in conjunction with Section 64.6000 definitions that the Commission did modify in the *2015 Order*. But this reading is repeatedly contradicted by the *2015 Order* itself.

The Commission's *2015 Order* simply does not expand the interim rate caps to intrastate rates, which would be a dramatic change from the 2013 interim caps. The *2015 Order* does not state that the Commission is taking this step, much less reflect the sort of reasoned decisionmaking that would be required to support such an extension.⁹ Rather, in sharp contrast to its lengthy discussion of its basis for adopting the Section 64.6010 rate caps, the *2015 Order* contains no support or analysis for extending the § 64.6030 caps of \$0.21 and \$0.25 to intrastate calling. This omission is sensible here, where the interim rate caps established in the *2013 Order*—and temporarily preserved by the *2015 Order*—were based on a record that contained primarily interstate cost data volunteered by just a small subset of providers.

Applying Section 64.6030 to intrastate rates would also create a number of plainly unintended outcomes. First, many of the FCC's permanent intrastate rates are *higher* than the interim rates.¹⁰ It would be a bizarre result for the Commission to establish interim intrastate rates below the permanent intrastate caps, but more extraordinary still to do so without any acknowledgment or 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. Indeed, the text of Sections 64.6000 and 64.6030 demonstrates that the FCC could not have intended the new definitions to modify the interim rates, because read literally, the new definition of Inmate Calling Services would also apply to international calls, even though FCC was explicit that "international calls are not subject to [the] rate caps[.]"¹¹

Reading Section 64.6030 to merely maintain the existing interstate rate caps makes sense, of course, because the FCC never intended that the interim rate caps and the new definitions would be in effect at the same time. Rather, the interim caps were to "sunset upon the effectiveness of the rates established in section 64.6010."¹² Because the new definitions and the permanent rate caps were supposed to begin taking effect at the same time,¹³ the FCC expected the interim rate caps to expire as the new definitions became effective. But the Wright Petitioners suggest that the interim rates will remain in place after the new definitions take effect,

⁹ 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 . . .").

¹⁰ Compare *2015 Order App. A* § 64.6010, with *id.* § 64.6030.

¹¹ *2015 Order* ¶ 69.

¹² *2015 Order App. A* (modifying 47 C.F.R. § 64.6030).

¹³ See *2015 Order* ¶ 336.

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apparently because only the effectiveness of the new *rates* triggers Section 64.6030's sunset provision, and the Court stayed the new rates but not the new definitions. This would cause the rate caps to be modified by new definitions that the FCC did not intend to apply to the interim rate caps.

The most natural reading of Section 64.6030, in light of the Commission's *2013* and *2015 Orders* and the procedural history here—and the only reading potentially consistent with the obligation “to supply a reasoned analysis”¹⁴—is that it does not extend to intrastate calling. However, because an attorney for the Wright Petitioners has suggested otherwise, we now ask the Bureau to clarify the scope of the rule no later than March 16, 2016, before the rate caps for prisons take effect.

Sincerely,

/s/

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¹⁴ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42.