

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In The Matter of  
Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**RESPONSE OF TELMATE, LLC TO  
PETITION FOR PARTIAL RECONSIDERATION**

March 23, 2016

Brita D. Strandberg  
Jared P. Marx  
John R. Grimm  
Harris, Wiltshire & Grannis, LLP  
1919 M St NW  
Eighth Floor  
Washington, DC 20036  
*Counsel for Telmate, LLC*

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Telmate, LLC (“Telmate”) hereby responds to Michael S. Hamden’s Petition for Partial Reconsideration (the “Petition”)<sup>1</sup> of the Commission’s 2015 ICS Order (the “*Order*”).<sup>2</sup>

### SUMMARY

The Petition asks the Commission to modify its ICS rules by prohibiting site commission payments, allowing providers to assess an administrative recovery fee, and “clarifying” that the single-call service fee caps apply to third-party financial transactions. The Commission should not reform its ICS rules through piecemeal reconsideration of isolated rules, especially while some of those rules have already been stayed and the underlying *Order* is being challenged in court.

The Commission should treat the Petition as the limited, narrow request that it is. The Petition does not alter the Commission’s limited jurisdiction over Telmate, and any action the Commission takes on reconsideration must be authorized by Section 276 of the Communications Act. Likewise, the Petition will not lead Telmate to dismiss its D.C. Circuit appeal: it does not address the bulk of Telmate’s, other providers’, or States’ arguments against the *Order*, and therefore cannot moot their pending appeals. And although the Petition makes some points with which Telmate can agree, it fails to offer a complete and workable solution to the challenge of ICS reform. Nor should the Commission expand its authority over third-party transactions as Petitioner requests. Finally, Petitioner’s request for “clarification” of certain portions of the *Order* is not properly presented in a petition for reconsideration.

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<sup>1</sup> Petition for Partial Reconsideration, WC Docket No. 12-375 (filed Jan. 19, 2016) (“Petition”).

<sup>2</sup> *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136, 30 FCC Rcd. 12,763 (rel. Nov. 5, 2015).

**I. THE PETITION CANNOT EXPAND THE COMMISSION’S AUTHORITY OR MOOT TELMATE’S PENDING APPEAL.**

As a preliminary matter, Telmate emphasizes the Petition’s narrowness—it does not alter the Commission’s limited jurisdiction over Telmate, and it cannot affect Telmate’s appeal of the *Order* currently pending in the U.S. Court of Appeals for the D.C. Circuit.<sup>3</sup>

**A. Any Action the Commission Takes on Reconsideration Must Be Authorized by Section 276.**

Telmate reiterates a point it has raised repeatedly before: any action the Commission takes on reconsideration must be constrained by the Commission’s limited jurisdiction over Telmate. Because Telmate is a non-interconnected VoIP provider, the Commission has no authority to regulate it under Section 201 of the Communications Act.<sup>4</sup> Any authority to regulate Telmate must instead come from Section 276,<sup>5</sup> which allows the Commission to set rates for payphone providers including ICS providers.<sup>6</sup> As Telmate has already shown,<sup>7</sup> however, the purpose of Section 276 is to ensure payphone providers like Telmate are “fairly compensated for

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<sup>3</sup> *Telmate, LLC v. FCC*, No. 16-1029, consolidated with *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir., filed Jan. 21, 2016). Unless otherwise noted, all references to the parties’ D.C. Circuit filings refer to this consolidated matter.

<sup>4</sup> 47 U.S.C. § 201; *see generally* Petition of Telmate, LLC for Stay Pending Judicial Review, WC Docket No. 12-375 (filed Jan. 6, 2016) (“Telmate FCC Stay Petition”) (explaining limits on Commission jurisdiction over non-interconnected VoIP providers).

<sup>5</sup> 47 U.S.C. § 276; *see also Order* ¶ 250 n.878 (“[T]he use of VoIP or any other technology for any or all of an ICS providers’ [*sic*] service does not affect our authority under section 276.”).

<sup>6</sup> 47 U.S.C. § 276(b)(1) (requiring the Commission to “ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call”); *id.* § 276(d) (defining “payphone service” to include “inmate telephone service in correctional institutions”).

<sup>7</sup> *See Telmate FCC Stay Petition* at 8; *Mot. of Telmate, LLC for Stay Pending Judicial Review* at 5, 9 (D.C. Cir. Jan. 29, 2016), ECF No. 1596259 (“Telmate D.C. Circuit Stay Motion”).

each and every completed . . . call,”<sup>8</sup> not to set rate caps on what payphone providers may charge customers. Thus, Telmate maintains the position it has taken before the Commission and the D.C. Circuit that any regulation that does not leave it fairly compensated—including any new regulation resulting from the Petition—is outside the Commission’s jurisdiction.

**B. The Commission’s Actions on Reconsideration Cannot Moot Telmate’s Appeal.**

Telmate also emphasizes that eliminating site commissions will not “encourag[e] those parties that are appealing the Second ICS Order to dismiss those claims” as Petitioner suggests.<sup>9</sup> The Petition only addresses a small handful of providers’ objections to the *Order*, and even addressing site commissions<sup>10</sup> and fees for single-call services<sup>11</sup> as Petitioner urges cannot resolve the parties’ objections to the Commission’s unreasoned ratemaking<sup>12</sup> and improper regulation of ancillary fees.<sup>13</sup> Nor does the Petition address the breadth of the Commission’s power under Section 276, which lies at the heart of Telmate’s appeal, because Telmate is not subject to Section 201 as a one-way VoIP provider.<sup>14</sup> And the Petition does nothing to negate the States’ arguments that the FCC cannot “undermine the legitimate prerogatives of state and

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<sup>8</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>9</sup> Petition at 3.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> See Telmate’s Statement of Issues at 1-2 ¶ 3 (D.C. Cir. Jan. 29, 2016), ECF No. 1596262; Telmate D.C. Circuit Stay Motion at 14-15.

<sup>13</sup> See generally Securus Techs., Inc.’s Statement of Issues to Be Raised (D.C. Cir. Jan. 27, 2016), ECF No. 1595637; Securus Techs. Inc.[’s] Emergency Mot. for Partial Stay of FCC Order 15-136 Pending Judicial Review at 4 (D.C. Cir. Jan. 27, 2016), ECF No. 1595628 (“Securus Stay Motion”). Indeed, as Telmate shows below, Petitioner’s request that the Commission expand its single-call service regulations could actually interfere with providers’ pending appeals.

<sup>14</sup> See Telmate’s Statement of Issues at 1 ¶ 1; Telmate D.C. Circuit Stay Motion at 5.

local officials to manage their correctional facilities.”<sup>15</sup> Thus, the majority of questions before the D.C. Circuit will remain live, regardless of what action the Commission takes on reconsideration.

## **II. A RECONSIDERATION PETITION IS THE WRONG WAY TO REFORM ICS.**

Telmate agrees that, as part of a comprehensive solution, there is merit to Petitioner’s proposal to replace site commissions with an administrative recovery fee on top of a reasonable rate.<sup>16</sup> Indeed, Telmate advanced a similar idea in the Joint Provider Proposal.<sup>17</sup> But the problems with ICS rate regulation cannot be solved in a piecemeal fashion, focusing only on certain regulations, and the Petition is simply not the right vehicle to address the broader problems with the *Order*.

### **A. The Commission Must Address Site Commissions and Rates Together.**

Petitioner is correct that the Commission’s failure to address site commissions is a major problem with the *Order*, but site commissions cannot be addressed without also addressing rate caps, because the two operate together to determine whether ICS providers are “fairly compensated for each and every completed . . . call.” Ultimately, it is the Commission’s *rate caps*, not any single cost that providers face, that dictate whether providers’ compensation is fair. The *Order*’s rate caps fail to permit full cost recovery, including of costs related to site commissions, but because the rate caps also fail to permit full recovery of other costs, merely

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<sup>15</sup> See State of Oklahoma’s Statement of Issues at 2 ¶ 1 (D.C. Cir. Mar. 17, 2016), ECF No. 1604432.

<sup>16</sup> Petition at 5, 12.

<sup>17</sup> Letter from Brian D. Oliver, Richard A. Smith, Curt Clifton, & Vincent Townsend to Marlene H. Dortch, WC Docket No. 12-375 (filed Oct. 15, 2015) (“Joint Provider Proposal”).

eliminating site commission obligations will not make the rate caps “fair.” This is especially true when the underlying rationale for those rates is unsupported, as Telmate has shown.

Because Petitioner’s views on site commissions have some merit, the Commission should take those views into account if and when it again considers ICS reforms. Indeed, Telmate has argued for ICS reforms that, among other things, recognize and provide compensation for costs incurred by correctional facilities.<sup>18</sup> As Telmate describes above, however, the fairness of ICS rates is a complex question that depends on a number of factors besides whether facilities can recover certain costs. Petitioner’s narrow request for reconsideration fails to offer a comprehensive solution to the ICS market. The potential for other solutions not raised in the Petition further underscores the importance of comprehensive, not piecemeal, consideration of ICS reforms. Any changes to the *Order* should not come from a narrow petition for reconsideration but a broad rulemaking with comment from all affected parties.

**B. The Commission Should Not “Clarify” Its Authority Over Third-Party Financial Transactions.**

Telmate opposes Petitioner’s request to “clarify” whether the limits on single-call service rates extend to financial transactions between ICS providers and third-parties.<sup>19</sup> The D.C. Circuit is currently considering the scope of Commission authority over third-party financial transactions—an issue central to Securus’s appeal. Securus has argued persuasively that the Commission does not possess such authority,<sup>20</sup> and shown a likelihood of success on the merits of this challenge, leading the D.C. Circuit to stay the Commission’s cap on single-call service

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<sup>18</sup> *Id.*

<sup>19</sup> Petition at 16.

<sup>20</sup> *See* Securus Techs., Inc.’s Statement of Issues to be Raised at 1 ¶ 1; Securus Stay Motion at 4.

rates.<sup>21</sup> Under the circumstances, where it is probable that the court will invalidate the Commission's asserted authority to regulate third-party financial transactions, any "clarification" of that authority would be clouded with doubt until the court decided Securus's appeal. The Commission should therefore refrain from "clarifying" the scope of its authority at this time.

### **III. CLARIFICATION IS IMPROPER AS PART OF A REQUEST FOR RECONSIDERATION.**

Additionally, Telmate opposes the Petition on procedural grounds, to the extent it seeks clarification of other portions of the *Order*.<sup>22</sup> Telmate does not believe a petition for reconsideration is the proper means for requesting clarification of a Commission order. Telmate reserves the right to oppose or respond to a request for clarification if Petitioner should file one, but does not believe Petitioner's request is properly before the Commission in this posture.

### **CONCLUSION**

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

March 23, 2016

/s/ Brita D. Strandberg  
Brita D. Strandberg  
Jared P. Marx  
John R. Grimm  
Harris, Wiltshire & Grannis, LLP  
1919 M St NW  
Eighth Floor  
Washington, DC 20036  
*Counsel for Telmate, LLC*

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<sup>21</sup> See Order, *Global Tel\*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016), ECF No. 1602581 (finding standard for stay—including likelihood of success on the merits—satisfied, and staying, *inter alia*, 47 C.F.R. § 64.6020(b)(2) (limiting single-call service fees)).

<sup>22</sup> See Petition at 15 (seeking clarification of terms "authorized fee," "mandatory tax," and "mandatory fee"); *id.* at 16 (seeking clarification of *Order*'s single-call rule).