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October 16, 2013

**Via electronic service and surface mail**

Catrice C. Williams, Secretary  
Department of Telecommunications and Cable  
1000, Washington Street, Suite 820  
Boston, MA 02118-6500

Re: D.T.C. 11-16

Dear Ms. Williams:

Enclosed for filing please find an original and three copies of the Petitioner's Appeal. Please feel free to contact me with any questions or concerns at 617-482-2773 x 106.

Sincerely,



Bonita Tenneriello  
Staff Attorney

cc: Parties of Record

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\* Formerly known as Massachusetts Correctional Legal Services

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

No. D.T.C. 11-16

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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PETITIONER'S APPEAL

The Petitioners respectfully request that the Commissioner reverse the portion of the Hearing Officer Interlocutory Ruling that dismisses their request to open an investigation into the usage rate component of the Inmate Calling Service (ICS) rate-setting mechanism. The Petition was misconstrued as accepting a usage rate of \$0.102 per minute as reasonable, when Petitioners actually contend that a reasonable usage rate should be far lower than that. Substantial evidence demonstrates that the actual costs of ICS (excluding commissions) is significantly lower than Massachusetts' current usage rate of \$1.50 per 15-minute call. The Federal Communications Commission's recent landmark ruling on interstate ICS rates, and the data cited therein, further supports this conclusion; the agency is considering a flat, distance-insensitive ICS rate of \$0.07 per minute. The Petitioners' allegations are sufficient to demonstrate that an investigation into the usage rate component of ICS charges is necessary in order to determine just and reasonable ICS rates.

**I. The Petitioners Did Not Propose \$0.102 per minute as a Just and Reasonable Rate.**

The Interlocutory Ruling states that "the current usage rate cap is equivalent to the per-minute cost accepted by Petitioners as just and reasonable." Interlocutory Ruling at 19.

However, the Petitioners have never accepted the current usage cap of \$1.50 for 15 minutes as just and reasonable. This conclusion is based on a misinterpretation of the portion of the 2009 Petition that discussed the unreasonableness of ICS rates in Massachusetts. The Petitioners examined rates under the GTL contract with the Department of Correction (DOC), and calculated that if site commissions of 35 percent were deducted from the rate, the remaining charge would be \$1.53 for a 15-minute call, or \$0.102 per minute. *See* 2009 Petition at p. 29, citing Appendix VI.

The Petitioners made this point to demonstrate that the costs of providing ICS were far lower than the rates actually charged; they did not state that \$0.102 was a reasonable rate. While the Petitioners knew that 35 percent of the rate charged by GTL was dedicated to site commissions, they had no way of knowing what the basis was for the remaining 65 percent of the bill. There was no reason to assume that GTL's charges, after commissions, were based only on ICS-related costs, and in fact there is reason to believe otherwise. Indeed, the Federal Communications Commission in its recent ruling emphasized that even after eliminating site commissions, current ICS rates are likely to contain impermissible, non-ICS-related costs. *See* Exh. 1, *In re the Matter of Rates for Interstate Inmate Calling Services*, Federal Communications Commission No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, August 9, 2013 ("FCC Order") ¶62 n. 229, ¶63 n. 235, ¶71 n. 266.

Therefore the Petitioners did not propose \$0.102 per minute as a just and reasonable rate. Rather, this calculation was simply presented to demonstrate the *unreasonableness* of current rates. Furthermore, Petitioners cited evidence that rates lower than \$0.102 were yielding a fair profit to ICS providers. They calculated that if site commissions were eliminated from the Hampden County telephone contract, the charge would have been less than \$0.083 cents per

minute. *See* Petition at 28. The Petitioners also cited flat rates in other jurisdictions – including two served by Securus and GTL respectively – which were fare lower than \$0.102, assuming an average call length of nine minutes or longer. *See id*, citing rates in Rhode Island, New Mexico (Securus contract) and Montgomery County Maryland (GTL contract).

In addition, under the Department’s 1998 order, the usage rate component of ICS covers only “traditional cost recovery, not the unique additional costs associated with ICS.” Interlocutory Ruling at 19. Even if the Petitioners had proposed \$0.102 per minute as a reasonable ICS rate, this clearly is not the same as accepting a usage rate of \$0.10 *plus* additional ICS-related costs. Instead, the Petitioners’ evidence demonstrated that in 2009 ICS was being provided for \$0.102 or less (absent commissions), *including* the unique costs of providing telephone service to prisoners.

Finally, even if the Petitioners had accepted \$0.102 per minute as just and reasonable, a rate-setting mechanism that allows providers to charge up \$1.50 per 15-minute call, allocated as the providers desire, is necessarily suspect.<sup>1</sup> The FCC has noted that rate structures which make the cost of shorter calls disproportionately high may be unreasonable and unfair, particularly given the problem of dropped calls, as raised by Petitioners in this case. *See* FCC Order ¶ 85.<sup>2</sup>

The Petitioners presented evidence that industry costs have decreased since the usage rate was set in 2004 and, indeed, even since the Petitioner’s filing in 2009, due to new technology, increased centralization and economies of scale. *See* Amended Affidavit of Douglas Dawson

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<sup>1</sup> For example, a consumer may be charged \$1.00 for the first minute and then \$0.035 for subsequent minutes, making a three minute call \$1.07, or \$0.35 per minute, rather than \$0.10 per minute.

<sup>2</sup> The FCC Order permits ICS providers to satisfy the safe harbor provisions through 15 minute rate caps, but seeks comments as to whether rate structure requirements are necessary to ensure the reasonableness of cost of shorter calls, and requires ICS providers to provide data on dropped calls. FCC Order ¶¶ 87-88.

(Dawson I), filed on March 26, 2013, ¶ 21 (noting that ICS costs have “dropped precipitously in the last few years” due to technology and centralization); Exh. 2, Second Affidavit of Douglas A. Dawson (Dawson II), ¶ 4 (noting, “the cost of long distance calling has plummeted in the last decade” and that the ICS industry’s move to automated pre-pay systems “have eliminated most of the uncollectables, which were the largest individual component of my cost estimates in 2003 and 2007”); *and see generally* Dawson I, ¶¶ 22-27.

Not only is the usage rate set in 2004 outdated, but it no longer makes sense to peg prison telephone rates to ordinary pay telephones. As Mr. Dawson attests, the payphone industry is not in any sense analogous to the ICS industry, *see* Dawson II, ¶¶ 17, 18 and, in fact, the payphone industry is now moribund, due largely to the increased use of cell phones and related devices. *See id.*, ¶ 16.

In sum, Petitioners presented sufficient evidence that ICS – including unique prison-related costs – could be offered more cheaply than the current usage rate. Additional evidence since their original filing only demonstrates that costs have continued to fall.

**II. There is Substantial Evidence that ICS is Profitably Provided at Rates Lower than the Current Massachusetts Usage Rate.**

The Petitioners’ expert, Douglas Dawson, and a telecommunications expert providing evidence in the FCC rulemaking proceeding, Coleman Bazelon, have both determined that ICS can profitably be provided for \$0.07 per minute, with no additional surcharge. *See* Exh. 1, Dawson II, and Declaration of Coleman Bazelon (Bazelon), attached to Dawson II as Exh. A. ICS is offered in some jurisdictions as cheaply as \$0.04 and \$0.05, absent commissions. *See* Bazelon p. 16, Table I. The Federal Communications Commission has cited the wide variation in interstate ICS rates as evidence of a market failure in the intrastate market as well. *See* FCC Order ¶ 132. While setting interim “safe harbor” rates slightly higher than \$0.10, the FCC has

required providers to provide cost data and is considering a flat, distance-insensitive rate of \$0.07 per-minute. FCC Order ¶ 155.

These facts, construed in the Petitioners favor as they must be<sup>3</sup>, are sufficient to demonstrate that the current usage rate of \$0.10 is unjust and unreasonable, particularly considering that the existing usage rate does not even purport to account for additional, unique ICS-related costs. To dismiss this claim now, before any discovery, would hamstring the Department's inquiry and would violate the Petitioner's right to seek just and reasonable rates.

**A. ICS Can Profitably Be Offered for less than \$0.10 Per Minute.**

In 2003, the Petitioner's expert Douglas Dawson undertook an analysis of the ICS industry for the petitioners in the FCC rulemaking proceeding, *Martha Wright et al.*<sup>4</sup> Earlier this year, an additional telecommunications expert, Coleman Bazelon, on behalf of the Wright petitioners, reviewed Mr. Dawson's earlier work and updated it to account for changes in the industry over the past decade. *See* Bazelon, attached as Exh. A to Dawson II. Mr. Dawson has in turn reviewed Mr. Bazelon's recent analysis and adopts his conclusions. The two experts concur that ICS can profitably be offered for \$0.07 per minute. *See* Bazelon ¶ 26; Dawson II ¶ 4.

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<sup>3</sup> In considering dismissal, the Department must take the Petitioners' assertions of fact as true and construe them in favor of the Petitioners. *See* Petition of the Attorney General of the Commonwealth of Massachusetts, pursuant to G.L. c. 164, § 93, for an Investigation of the Electric Distribution Rates of Fitchburg Gas and Electric Light Co., DTE 99-18, Order of Oct. 18, 2001 at 4 (2001) (citing *Riverside Steam & Electric Co.*, DPU 88-123, at 26-27 (1988)). Dismissal may not be granted unless it appears that the Plaintiffs would be entitled to no relief under any statement of facts that could be proven in support of their claim. *See id.*

<sup>4</sup> *See* Exh. 3, Declaration of Douglas A. Dawson in Support of Petitioners' Alternative Proposal ("Dawson Declaration 2007-I") at 5-6, Appendix B to Petitioners' Alternative Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (March 1, 2007). To avoid waste, Petitioners do not include hundreds of pages of Exhibits to Mr. Dawson's 2007 affidavit, but will provide these on request; after the current federal government shut-down ends, they will be available at:

[http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6518909012](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518909012).

Dawson and Bazelon base their suggested rate on an analysis of the underlying costs of service and the additional costs of providing debit and collect payment options. Bazelon ¶¶ 14-25. The two experts also cite ICS rates in several states lower than \$0.10 (absent commissions) as evidence of the reasonableness of their suggested rate. *See* Bazelon ¶¶ 30-34; Dawson II ¶ 6. Interstate rates in other jurisdictions are a relevant comparison to Massachusetts' intrastate rates because of the "lack of significant discrepancy in the cost of providing these services across states." Dawson ¶ 20. Dawson notes that with centralized technology and industry consolidation, "[m]ost of a prison provider's costs are now fixed at big hub locations and a much smaller percentage of their costs are driven incrementally at each prison." *Id.* ¶ 26.

Bazelon cites rates of \$0.05 per minute in Oklahoma and New York, and \$0.04 in New Mexico as a proving "that it is commercially viable to provide prison phone service for only \$0.05 per minute." He also notes that South Carolina charges an average of \$0.07 per minute, and that five other states have rates of \$0.10 or less, and concludes that these rates "demonstrate that it is possible, absent commissions, to provide prison phone service for far less than the rates currently charged in most states today." Bazelon ¶ 33. Dawson reviewed this data, supports Bazelon's conclusion that ICS can be provided for \$0.10 per minute, and states that this gives ground to question the reasonableness of Massachusetts' current usage rate. Dawson II ¶¶ 5-6.

These facts are certainly enough to create a triable dispute over the reasonableness of Massachusetts' per-minute rate.

**B. The Federal Communications Commission Is Considering a Permanent Interstate Rate of \$0.07 per minute.**

In its recent landmark decision, the Federal Communications Commission set interim limits on interstate ICS rates, ruling that charges below a "safe harbor" of \$0.12 per minute for debit and prepaid calls and \$0.14 for collect calls will be presumed just and reasonable, setting a

cap of \$0.21 for debit and prepaid calls and \$0.25 for collect calls, and permitting providers to seek to justify rates between the safe harbor and the cap. *See* FCC Order ¶ 5. The FCC held that ICS rates, including ancillary fees, must be cost-based, and that site commissions are not a cost of providing ICS and may not be passed on to consumers. *See id.*, ¶ 7. Providers are required to submit data on their underlying costs so that the FCC can develop a permanent rate structure. *See id.*

The interim rates set by the FCC were calculated by averaging interstate ICS rates charged in seven states that have eliminated site commissions, and also by considering the rates charged in ten other states after commissions are deducted. *Id.*, ¶¶ 63-65. The agency noted that rates in five of the states that have eliminated site commissions were between \$0.04 and \$0.08 per minute, and only two of the states charged higher. “Given that evidence in the record does not suggest a dramatic difference in costs among states...the states with higher rates are likely to include non-ICS costs” other than commissions. *Id.*, ¶ 63 n. 235. However, it used existing rates as the basis for its calculation “in the interest of being conservative in setting our interim safe harbor.” *Id.* *See also id.*, ¶71 n. 266 (“In the calculation of conservative safe harbor rates we have not sought to back out these additional charges” other than commissions).

The FCC repeatedly cautions that the interim rates are generous to the industry, and do not represent a calculation of the actual costs of ICS. “Our use of these states’ data does not indicate that we conclude these interstate rates are necessarily at cost....There may well be other factors driving these rates above what we would consider to be reasonable cost but we nevertheless include these states to make a conservative safe harbor rate level calculation.” *Id.* ¶62 n. 229. “...[I]n this order we are not simply ‘calling’ our measures conservative but rather are relying on record evidence in a conservative fashion. Indeed, as we emphasize herein, the



rates we set for the safe harbor and the cap reflect costs that *exceed* the cost data that any party submitted in the record.” ¶ 62 n. 230 (emphasis in original).

To develop permanent interstate rates, the FCC has required ICS providers to turn over data detailing their costs. *Id.* ¶¶ 124-26. It is also requesting comment on its authority to regulate intrastate rates, while at the same time urging state regulators to reform ICS rates. *Id.* ¶¶ 129-34. The variation in rates that demonstrates market failure in the interstate market leads the FCC “to conclude that the same failure has occurred for intrastate ICS rates as well.” *Id.* ¶ 132. The FCC seeks comment on its “tentative conclusion” that site commissions should not be recovered through intrastate rates for the same reason it has banned their recovery through interstate rates. *Id.* ¶ 133. Most saliently, the agency is considering the Wright Petitioner’s proposed rate of \$0.07 per minute as a flat, distance-insensitive rate for all calls. *Id.* ¶ 155.


For the Department to now ratify a per-minute rate of \$0.10, and to consider adding on to this rate additional charges to cover unique ICS-related costs, flies in the face not only of the analysis of petitioners’ expert, but also of the FCC’s own analysis. The FCC states that its own interim safe harbor and rate caps are likely to include non-ICS costs and are generous to ICS providers, and it is considering a permanent rate as low as \$0.07 per minute. The DTC should not foreclose such a rate for Massachusetts before discovery has even begun.

### **Conclusion**

For the above-stated reasons, the portion of the Hearing Officer’s ruling that dismisses the Petitioner’s challenge to the per-minute usage rate should be reversed.

Date: *October 16, 2013*

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail (by hand) on *October 16, 2013*

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