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

MEMORANDUM OF PETITIONERS OPPOSING DISMISSAL

INTRODUCTION

The Petitioners, in accordance with Massachusetts law[1], have filed a Petition and two Amendments which request that the Department of Telecommunications and Cable (DTC) (1) hold a public hearing regarding rates charged by Inmate Service Providers (ISPs) and set just and reasonable rates, and (2) investigate numerous complaints regarding the quality of service provided by ISPs. Respondents Securus and GTL have filed responses which argue that the case should be dismissed. DTC accordingly has directed the Petitioners to respond with briefing as to why this case should not be closed.

The Respondents' arguments that the DTC lacks jurisdiction to hear the Petitioners' complaint are entirely unfounded. As discussed below, this type of adjudicatory proceeding is an appropriate vehicle for rate-setting; despite the Respondents suggestion, formal rulemaking is not required and indeed would be inappropriate under the DTC's own procedures. The DTC's 1998 Order regulating

[1] M.G.L. 159 §§ 14 and 24

prison telephone rates, and the approval of tariffed rates filed pursuant to that Order, do not preclude the Department from re-assessing the reasonableness of rates in light of present-day circumstances. The Petitioners have given the DTC ample cause to exercise its jurisdiction, providing a wealth of evidence that new technologies and reductions in cost have eroded the basis for the current rate cap, as reflected in decreasing rates elsewhere.

The Respondents' practice of passing on to customers the cost of commissions paid to correctional facilities is a key aspect of the Petitioners' claim that current rates are unjust and unreasonable. As the Federal Communications Commission and utility regulators in Alaska and Georgia have ruled, these commissions are not a cost of providing telephone service and should be paid from telephone company profits rather than by customers. The Petitioners do not seek to outlaw the payment of commissions. They do not seek to interfere with the ability of the Department of Correction (DOC) or any county to require commissions or the Respondents' ability to offer commissions. They merely ask that the Respondents and all telephone companies be required to pay commissions from profits. This will bring an end to the perverse bidding war in which companies vie for facility contracts by siphoning off ever-more cash from customers. This is squarely within the DTC's mandate to set just and reasonable telephone rates.

Finally, the Petitioners have submitted more than sufficient information on quality of service problems to justify an investigation. There is absolutely no requirement in any law or regulation that the Petitioners first exhaust another remedy before seeking a DTC investigation. Indeed, the use of a Petition such as the instant one is an established vehicle for requesting such an investigation.

ARGUMENT

I. Standard of Review

The DTC has construed the Respondents' arguments as seeking dismissal of the Petitioners' claims. Accordingly, the appropriate standard is that governing dismissal pursuant to 220 C.M.R. 106 (6) (e). The Department must take the Petitioners' assertions of fact as true and construe them in favor of the Petitioners.[2] 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. [3] While GTL explicitly seeks dismissal[4] and portions of Securus' response may be construed as seeking dismissal, neither of the Respondents has sought summary judgment, which would be premature at this juncture as the Petitioners have not been able to conduct discovery as provided in 220 C.M.R. 106 (6) (c).

II. The DTC has Jurisdiction to Review the Respondents' Rates.

The DTC has explicit jurisdiction to hear Petitioners' complaint and the authority to set rates through an adjudicatory proceeding. Neither the existing rate cap order issued in 1998[5] nor the Respondents' tariffed rates on file with the DTC provide any basis for dismissing the complaint. The DTC has the statutory authority to review the Respondents' rates at any time. The fact that the DTC has, in the past, sanctioned the

---

[2] *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)).

[3] *See id.*

[4] *See* Response of GTL at 2.

[5] *Investigation by the Dept. of Telecommunications And Energy on its own motion regarding (1) implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-pay Line Service, and (4) the rate policy for operator services providers, ORDER ON PAYPHONE BARIERS TO ENTRY AND EXIT, AND OSP RATE CAP*, D.P.U./D.T.E. 97-88/97-18 (Phase II) (April 17, 1988) (hereinafter "1998 order").

current rates, does not now shield the rates from regulatory scrutiny. Furthermore, Petitioners, through their complaint, six appendices, five exhibits and two separate amendments, have clearly pled sufficient facts to support their claim that inmate calling rates and surcharges in Massachusetts are unjust and unreasonable.

1. The DTC Has Jurisdiction to Set Rates Through a Petition Brought Pursuant to G.L. c. 159, § 24.

The DTC's jurisdiction and authority to address this complaint through an adjudicatory-style proceeding is explicitly sanctioned by statute. The ability of twenty ratepayers to petition the Department, as they have here, is expressed in M.G.L. c. 159, § 24, which states, in relevant part: "Upon written complaint, relative to the service or charges for service...by twenty customers of the company, the department shall grant a public hearing."[6] State statute then mandates that the Department, after a hearing on such a complaint, set just and reasonable rates. M.G.L. c. 159, § 14 ("Whenever the department shall be of opinion, after a hearing had upon its own motion or upon complaint, that any of the rates...of any common carrier for any services to be performed within the commonwealth...are unjust . . . the department shall determine the just and reasonable rates."). Indeed, this appears to be exactly the procedure the Department followed in 1998 when it issued the initial rate cap order after opening an investigation on its own motion.[7] A "complaint" filed under § 24, is similarly sufficient to trigger the hearing contemplated by §§ 14 and 24.

In light of these statutes, there is no credence to Respondent GTL's argument that this proceeding is a request for rulemaking and therefore not an "appropriate vehicle" for

[6] M.G.L. c. 159 § 24.
[7] See, 1998 Order at 1.

determining the reasonableness of Respondents' rates.[8] Respondent's argument is at odds with the Department's clear policy that ratemaking will be done through adjudication[9] and that rulemakings are used only "to adopted, amend or appeal regulations..."[10]

But even if rulemaking were an available option to resolve the issues raised in Petitioners' complaint, agencies have discretion, as Respondents concede,[11] to choose between adjudication and rulemaking when the use of either procedure would be proper. *See Arthurs v. Bd. of Registration in Medicine,* 418 N.E.2d 1236, 1246 (Mass. 1981)("It is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rule-making."); *West Bridgewater Police Ass'n v. Labor Relations Com'n*, 468 N.E.2d 659, 662 (Mass.App.Ct. 1984) ("An administrative agency, in proceeding on a case-by-case basis, should be permitted to make refinements and even new rules in light of past experience.").

Furthermore. the setting or revision of tariffed rates has never been an impediment to agency use of adjudicatory proceedings. In *Re Colonial Gas Company*, the Department of Public Utilities ruled on proposed rate changes after engaging in a hearing process, in the form prescribed by 200 CMR 1.06, and it explicitly termed its treatment of the case as "adjudication."[12] In *Re Cambridge Elec. Light Co.*, the Department of Public Utilities ruled on a challenge by petition to a specialized tariffed rate, in this case a customer transition charge ("CTC") for the recovery of stranded costs. In doing so, D.P.U. clarified the scope of adjudication: "The fact that the Department has

---

[8] Response of GTL at 24-26
[9] Massachusetts Department of Telecommunications and Cable 2010 Annual Report at 15-16.
[10] *Id.* at 17. *See also* 220 CMR 2.01.
[11] Response of GTL at 25.
[12] *Re Colonial Gas*, D.P.U. 93-78, 1993 WL 449445 (1993).

not adopted regulations under G.L. c. 30A, § 2, for recovery of stranded costs yet does not restrict the Department's broad statutory authority to promulgate such regulations in the future or to approve charges such as the CTC on a case-by-case basis. Regulatory practice may as readily be shaped by adjudication under G.L. c. 30A, § 10 as by formal rule under G.L. c. 30A, § 2, as the instant proceeding shows."[13]

Since the relief requested by Petitioners is explicitly authorized by statute and well within the traditional bounds of adjudication, the Department has clear jurisdiction to proceed with the complaint.

2. Neither the 1998 Rate Cap Order nor the Respondents' Tariffed Rates Preclude the DTC from Reviewing the Reasonableness or Justness of Respondents' Rates.

Respondents erroneously argue that because their rates comply with the 1998 Order and because the rates they offer are pursuant to tariffs on file with the DTC, they are reasonable and not subject to challenge. As stated above, the DTC is explicitly authorized to review Respondents' rates at any time on their own motion or upon complaint such as that of Petitioners to determine if new circumstances have made the old rates unreasonable.[14] Respondents' argument that a presumption of reasonableness somehow immunizes their tariffed rates from regulation is illogical and runs contrary to the DTC's clear mandate to maintain just and reasonable rates in accordance with modern day realities.[15]

The rates set by the 1998 Order were based, in part, on additional costs to inmate service providers (ISPs) that were not incurred by conventional operator service

[13] *Re Cambridge Elec. Light Co.*, D.P.U. 94-101/95-36, 164 P.U.R.4th 69 (1995)
[14] G.L. c. 159, § 24; G.L. c. 159, § 14.
[15] G.L. c. 159, § 14; *See also* http://www.mass.gov/ocabr/docs/dtc/admin/dtc-2010-annual-report.pdf.

providers (OSPs).[16] Those costs, however, have changed significantly since 1998. Respondents cite no evidence to support their contention that costs have remained the same or increased, while Petitioners' complaint contains an abundance of evidence to the contrary.[17] Petitioners cite extensively to the expert affidavit of Doug Dawson in the *Wright* Petition before the Federal Communications Commission (FCC), which details the various ways in which costs have plummeted since 1998, referencing economies of scale, increased centralization, and technological improvements. [18] Regardless, Petitioners' complaint must go forward because they are entitled to discovery concerning Respondents' contentions that costs have increased.

The Department's 1998 Order also took into account the rates charged by providers in other states in 1994 and 1995.[19] The order says, "The record shows that AT&T, MCI and Sprint Communications Company impose $3.00 per call surcharges in 33 states to cover their additional costs, and that the costs of these providers do not differ significantly from state to state."[20] Petitioners' complaint demonstrates that this is no longer the case and that rates and surcharges in the Commonwealth are unjustifiably

---

[16] 1998 Order at 9 ("These additional costs include (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").

[17] *See* Petition at 15-22, Exhibits 1and 5 and Appendix V.

[18] *See* Petition at 16 and n. 25 and 26; *See also, e.g.,* Affidavit of Douglas A. Dawson ("Dawson Affidavit 2003") at 6, Appendix A to *Martha Wright, et al.; Petition for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking,* CC Docket 96-128 (Nov. 3, 2003), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515782168 ; *and see* 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), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518909012.

[19] *See* Exhibit 1 to InVision Initial Comments cited in the 1998 Order at p. 9.

[20] 1998 *Order* at 9.

high.[21] Specifically, Petitioners provide a comparison chart of the 15-minute Intra-LATA prisoner collect call rates in 2008 compared to 2004 for 47 states and correctional facilities in Massachusetts. The chart shows that Massachusetts rates and surcharges run counter to the national trend for most major jails and prisons in the county of substantially reducing rates.[22]

Respondent Securus misleadingly claims that the Department reconfirmed the rate regime in the 1998 Order in 2004.[23] However, prison telephone rates were not even challenged in 2004 as they are now by Petitioners' complaint. The Department merely established that Verizon Massachusetts could set a flat rate rather than the variable rate it was charging for inmate collect calls, and that it could increase its surcharge because it was still under the existing $3.00 cap.[24] There was no assessment in 2004 of the reasonableness of the rates.

Respondents wrongly argue that because they have tariffs on file and approved by the Department, the rates set out in those tariffs are per se reasonable.[25] Although state statute provides that a filed tariff is deemed prima facie lawful, it is only deemed so until it is changed by the Department, which the DTC has done on a number of occasions.[26] *See, e.g., Verizon New England, Inc. d/b/a Verizon Massachusetts*, D.T.E. 98-57 (modifying tariff filed by Verizon); *New England Telephone and Telegraph Co.*, D.P.U.

---

[21] *Id.* at 11-29 and Appendix V.
[22] *Id.* at Appendix IV;
[23] Response of Securus at 8.
[24] Response of Securus, Exhibit 1.
[25] Respondent GTL also wrongly argues that because its inmate calling rates were examined and approved by the Department, they are "ipso facto just and reasonable. Response of GTL at 17. Respondent GTL cites *Verizon New England, Inc. dba Verizon Massachusetts, Arbitration Order*, D.T.E 04-33 (July 14, 2005) to support its contention. The application of this case to the claims in Petitioners' complaint is inapt, however, as the reasonableness of inmate calling rates was not assessed. *See id.* at 266. Furthermore, Petitioners do not challenge the DTC's previous approval of Respondents' rates. Petitioners contend that those rates are now unjust and unreasonable and that the Department has an obligation regulate and reset the rate regime for inmate calling services..
[26] G.L. c. 159, §17.

92-100, 1992 WL 421265 (modifying tariff filed by NET). The fact that the rates were once approved by the DTC pursuant to statute does not mean that those rates remain forever reasonable and cannot be changed.

Investigating the continued propriety of a tariffed rate upon the properly-filed complaint of ratepayers is well within the scope of the agency, and indeed has been done without controversy in a number of contexts.[27] It is within the purview of the Department to reinterpret the terms of the 1998 Order, if necessary, and to do so in an adjudicatory proceeding. Indeed, in that order, it was the Department's stated decision to "maintain its regulation of inmate calling services rates."[28] The current complaint before the DTC simply petitions the agency to ensure that those rates be updated so that they are just and reasonable.

III. The DTC Can and Should Require that Commissions be Considered Shared Profits Rather than a Legitimate Business Cost.

A key aspect of the Petitioners' challenge to existing rates is their inclusion of the cost of commissions paid by Inmate Service Providers (ISPs) to correctional facilities.[29] The cost of commissions accounts for from 30 percent to over 52 percent of gross telephone revenues across facilities.[30] The Petitioners maintain that these commissions are not a legitimate business expense, but rather represent shared profits, which may not be included in cost calculations for purposes of determining "cost plus fair rate of return"

[27] See, e.g. *New England Telephone and Telegraph Company dba NYNEX*, D.P.U. 94-35, 2000 WL 343074 (investigating the special conditions tariff paid by phone customers on Cuttyhunk Island); *Boston Edison Co.*, D.T.E. 98-14, 1998 WL 416877 (addressing the "substantive issue of whether the Company's rates ought to be reduced").
[28] *1998 Order* at 8.
[29] *See* Petition at 9-11.
[30] *See* Petition, Appendix II.

and setting just and reasonable rates.[31] This question of law, if resolved in the Petitioner's favor, further strengthens the charge that current rates are unjust and unreasonable.[32]

A. Commissions Are Not a Legitimate Cost of Service But Represent Shared Profits.

Commissions do not reimburse correctional facilities for any actual cost of providing telephone service. Commissions paid to county facilities in Massachusetts are placed in a fund used for prisoner programs,[33] while commissions paid to the Department of Correction are transferred to the General Fund of the commonwealth. [34] Rather than serve any purpose related to telephone service, commissions are a cash inducement to select the bidder's proposal – paid for by telephone customers.

For this reason, the FCC has refused to allow companies to pass on the cost of commissions to customers through preemption of state rate caps or a surcharge above state rate caps for local collect calls.[35] The Regulatory Commission of Alaska (RCA) and Georgia Public Service Commission (GPSC) have also determined that commissions

---

[31] Traditional principles of utility regulation require that rates be set which allow the utility to meet its cost of service and a "fair and reasonable return" on its investment. *See Hingham v. Dept' of Telecommunications and Energy*, 433 Mass. 198, 203 (2000) (citing *Lowell Gas. Co. v. Dept. of Public Utils.*, 324 Mass. 80, 94-95 (1949)).

[32] Even if the Department were to rule that commissions are a legitimate cost of service, the petition would still need to proceed in order to determine whether overall costs justify the rates charged, and whether the level of commissions paid is a reasonable cost or is instead excessive.

[33] *See* "An Act transferring county sheriffs to the Commonwealth," Senate. No. 2119, Section 12.a (enactment of the Senate and House of Representatives providing that inmate telephone funds shall remain with the office of the sheriff in abolished counties) (2009) (attached as Exh. 1); *see also* Appendix C to "Inmate Fees as a Source of Revenue: Review of Challenges," *Report of the Special Commission to Study the Feasibility of Establishing Inmate Fees* (Power Point) , Massachusetts Executive Office of Public Safety and Security (July 1, 2001) (listing use of fees collected by counties and DOC).

[34] *See* G.L. c. 29 § 2 (April 1, 2003).

[35] *In re Implementation of Pay Telephone Reclassification and Compensation Provisions of Telecommunications Act of 1996, ORDER ON REMAND & NOTICE OF PROPOSED RULEMAKING* ("FCC Prison Payphone Order"), FCC No. 02-39, 2002 WL 252600, 17 F.C.C.R. 6347 (Feb. 21, 2002).

are not a cost of service and have refused to let telephone companies pass on the cost of commissions to consumers.[36] As the RCA held:

> The inclusion of a commission requirement in a bid solicitation for regulated utility service conflicts with the regulatory objective of ensuring that utility costs are necessarily incurred and rates are just and reasonable...By allowing commissions to be recovered through rates, the governing regulatory body acquiesces in this commission-based bid process and promotes a system where the service provider has an incentive to increase the price of service regardless of the actual costs incurred.[37]

The respondents have cited no case in which a utility regulator has held that commissions are a legitimate cost of service.[38]

Respondent Securus claims that the commission payments they provide to correctional facilities are "no different than any other fees or payments Securus is required to make to other government agencies."[39] Commissions, however, are neither user fees nor regulatory fees under Massachusetts law.[40] A governmental fee is collected "not to raise revenues but to compensate the governmental entity providing the services for its expenses."[41] Regulatory fees are ordinarily "imposed by an agency upon those subject to its regulation" to "serve regulatory purposes," raising money "to help defray

---

[36] *Re Evercom Systems Inc., ORDER GRANTING IN PART, AND DENYING IN PART, PETITION FOR RECONSIDERATION*, Regulatory Commission of Alaska No. U-00-143, 2001 WL 1246903 (April 24,2001); *Re Investigate Long Distance Charges, CORRECTED ORDER*, Georgia Public Service Commission No. 14530-U, 2002 WL 31096880 (March 19, 2002).

[37] *Re Evercom Systems, Inc.*, Regulatory Commission of Alaska, 2001 WL 1246903 at *4.

[38] In its effort to find any authority allowing commissions to be passed on to customers, Securus cites *Sims et al. v. AT&T*, 2001 Ind. PUC Lexis 502 (August 24, 2001). *See* Response of Securus at 16-17 and n. 37. But Securus is wrong when it says that *Sims* "implicitly recognized that compensation to facilities is clearly a cost associated with providing the services." *Id.* The Indiana Utility Regulatory Commission in *Sims* rejected the complaint of unreasonable and discriminatory rates not based on an analysis of costs but rather because the rates charged were no higher than non-prison rates for similar services. *Id.* at *38. The practice of paying commissions was not challenged or discussed in that case, and the only mention of commissions is a reference to ATT testimony in defense of its rates. *See Sims* at *29.

[39] Response, at 15.

[40] *Emerson College v. City of Boston*, 391 Mass. 415 (1984), at 424. *See also Nextel Communications of Mid-Atlantic, Inc. v. Town of Randolph*, 193 F.Supp.2d 311, 321 (D. Mass, 2002), *Greater Franklin Developers Ass'n v. Town of Franklin*, 49 Mass.App.Ct. 500 (2000).

[41] *Id.*, at 425.

the agency's regulation-related expenses."[42] The Massachusetts Executive Office of Administration and Finance, following these principles, provides in its fee-setting procedures, "[f]ees may not be used purely as a tool to raise revenue, but should reflect the government's expense in providing the service associated with the fee."[43]

Commission payments to the correctional facilities are used to raise general revenue in precisely the way that a governmental fee may not, going to the state's general fund in the case of DOC commissions and to counties' inmate benefit funds. Since correctional facilities are not agencies in the position of regulating Respondents' activities, the revenue from commissions does not defray the cost of regulation. In fact, a payphone increases the value of the entity's premises,[44] making it impossible to view the commission payments as the kind of compensatory charge that defines a regulatory fee. Commissions are not regulatory fees because they do not "bear at least a 'rough correlation to the expense to which the State is put in administering its licensing procedures or to the benefits those who make the payments receive.'"[45]

Neither do Commissions reimburse correctional facilities for the rental value of the telephones' location. Indeed, the FCC has held that prison payphones actually add value to the premises: "A payphone that 'earns just enough revenue to warrant its

---

[42] *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Bd.*, 421 Mass. 196 (1995), citing Justice Breyer's opinion in *San Juan Cellular Tel. Co. v. Public Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

[43] Executive Office of Administration and Finance, "Procedures for Setting Fees" (ANF 6), June 25, 2008, Appendix C, at p. 30, available at http://www.mass.gov/anf/budget-taxes-and-procurement/admin-bulletins/procedures-for-setting-fees-anf-6.html.

[44] *See FCC Prison Payphone Order* at **4; *see also, In the Matter of a Commission Inquiry into the Rates and Charges of Institutional Operator Service Providers, RECOMMNENDED DECISION OF THE HEARING EXAMINER*, New Mexico Public Regulation Commission No. 07-00316-UT, November 4, 2010, at 67 ("New Mexico Rate Inquiry"), *adopted by the Commission in ORDER REMANDING CASE ON THE ISSUE OF RATE-0F-RETURN*, December 22, 2010, at 2, attached as Exhibit 2.

[45] *Walton v. N.Y. State Dep't of Corr. Svces.*, 921 N.E.2d 145, 151 (N.Y. Court of Appeals 2009) (citation omitted) (holding, where state legislature had passed a law banning commissions from telephone charges, that customers were not entitled to a refund of charges paid previously because the practice did not violate the state constitution, and commissions did not constitute an unlawful tax or fee).

placement, but not enough to pay anything to the premises owner' is 'a viable payphone...because the payphone provides increased value to the premises.' Therefore, *location rents are not a cost of payphones but should be treated as profit.*"[46] The New Mexico Public Regulation Commission similarly determined that the space occupied by prison payphones has no rental value, noting that prisons have a legal obligation to provide access to telephone service, telephones do not occupy an additional room, and prisons have no other potential paying tenant other than one commissary at each facility.[47]

Finally, while non-prison payphones may include in their rates a contribution to common costs in order to "ensure the current number of payphones is maintained,"[48] the FCC has determined, "[t]hat policy has little or no application in the prison context" because:

> considering that ICS providers offer commissions, prison payphones are already profitable. Any increase in inmate calling services' revenue to permit a larger contribution to common costs will not encourage it to provide more payphones but will only encourage higher location commissions. Further, the correctional facility and its communications policy, not the market, often determine the number of payphones.[49]

The Department itself in its 1998 order discussed costs unique to prison telephone service and -- although the payment of commissions was already widespread -- did not include commissions as a business cost. While prison telephone rates were capped at the level of operator service provider (OSP) rates charged by Bell Atlantic or AT&T,

---

[46] *FCC Prison Payphone Order* at **4, quoting *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1966, THIRD REPORT AND ORDER, AND ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER*, 14 FCC Rcd.2545, 2562 (1999), *pet. Den. Sub nom American Public Comm. Council f. FCC*, 215 F.3d 51 (D.C. Cir. 2000) ("*Third Report and Order*") (emphasis supplied).

[47] New Mexico Rate Inquiry, Exh. 2, at 67.

[48] *FCC Prison Payphone Order* at **6. .

[49] *Id.* The FCC also cited methodological problems in determining the distribution of common costs, calling it an "intractable problem." *Id.*

depending on whether the call was intraLATA or intrastate, the Department permitted a surcharge of up to $3.00 to account for additional costs unique to inmate calling services.[50] The Department listed the additional costs of prison phone service that had been demonstrated on the record of the case, which were: "(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 uncollectables; and (3) higher personnel costs."[51] The Department did not include commissions as a cost justifying for the surcharge.

Respondent Securus nevertheless now seeks to justify its rates in part by arguing that commissions are a legitimate cost associated with inmate calling services.[52] Securus argues that the list of unique prison costs set forth in the 1998 Order was not exclusive, yet it concedes that the Department was "well aware" of the practice of paying commissions at the time.[53] GTL likewise acknowledges, "[t]he Massachusetts commission system for inmate calling had been in place for at least four years when the Department adopted its 1998 rate cap policy."[54] The logical conclusion is that the Department believed the surcharge to be justified (at the time) by the factors it cited, and that it deliberately excluded commissions as a cost factor.[55] There remains absolutely no justification to pass on commissions to customers as a business cost.

---

[50] 1998 Order at 9-10.
[51] *Id.* at 9, citing comments of intervenor Invision.
[52] Response of Securus at 14-18.
[53] Brief of Securus at 16 ("the Commission was well aware of htes additional compensation-related costs in considering the rate structure for ICS").
[54] Response of GTL at 13.
[55] Whether the surcharge is still justified by the factors cited in the 1998 Order is a matter of factual dispute which should be left for further discovery and analysis by the Petitioner's expert.

B. Considering Commissions to be Shared Profits Will Not Interfere with the Respondents' Freedom of Contract.

The Respondents seek to justify their position by arguing that correctional Requests for Proposals (RFPs) for telephone service require commissions, and"[a]ny bid response that indicated that no compensation would be paid would be non-responsive and the bidder would be disqualified."[56] However, the Petitioners do not seek to ban the payment of commissions, nor do they argue that the DTC has authority to enforce such a ban. They simply ask that the DTC use its authority to stop a perverse bidding war in which telephone companies win contracts by padding their bids with ever-higher cash inducements paid for by the customers.[57]

If commissions must come from company profits rather than be passed on to customers, then all telephone companies equally will have to reassess the amount of cash they can offer to facilities. As the RCA found, "Where prison phone service solicitations require commissions, the exclusion of commissions from rates compels bidders to consider the impact of a proposed commission on its profit margin."[58] This would de-escalate the amounts of commissions paid by all companies and free customers from the burden of channeling cash to prisons. The notion that any telephone company would be competitively disadvantaged by the end of this arms race is illogical.

Facilities and phone companies may agree to the payment of commissions, but they do not have the authority to require ratepayers to pay for those commissions. Only

---

[56] Response of Securus at 15.

[57] Several state legislatures and the District of Columbia have chosen to end this arms race with statutes forbidding the payment of commissions through phone rates. These include California, Cal. Gov't Code § 15819.40 Amended by Stats. 2007, c. 175 (S.B.81), § 1, eff. Aug. 24, 2007; New Mexico, N.M.S.A. 1978, Section 33-14-1 (2001);New York, McKinney's Correctional Law § 623 (2008); Rhode Island, R.I. Gen. Laws § 42-56-38.1(c) (2007); South Carolina, S.C. St. § 10-1-210 (2008); and Washington D.C., D.C. Code § 24-263.01 (2001).

[58] *Re Evercom Systems, Inc.*, 2001 WL 1246903 at*5.

the DTC may set rates. As the Georgia PSC observed, "The RFP process is not deigned to ensure just and reasonable rates for the parties that are being billed for the service." [59] The New Mexico Public Regulation Commission has similarly rejected the notion that its ability to regulate is circumscribed by the terms of prison telephone contracts:

> The Commission has no jurisdiction over the contracts entered into between [telephone company] E & T and correctional facilities or jails and has no power to enforce those contracts in any way. The contracts involve services E & T will provide the facilities and the amount E & T will pay the facilities in order to provide those services. Rates are paid by the inmates to the facility and are not essential to the contracts.[60]

The FCC has noted that the companies themselves do not even benefit from the inclusion of commissions in prison customer rates. Rather, the winners in this arms race are the correctional facilities:

> [M]uch of any additional revenue ICS providers receive would likely be retained by the location monopolist, the confinement facilities, in the form of higher commissions...The additional revenue stream likely would drive up the commissions offered by competing ICS providers to the confinement facilities, thereby keeping the ICS providers' net revenue flat.[61]

The FCC thus urged states "to examine the issue of the significant commissions paid by ICS providers to confinement facilities and the downward pressure that these commissions have on ICS providers' net compensation and, more importantly, the upward pressure the impose on inmate calling rates."[62]

Any rate cap set by the DTC "interferes" with prison telephone contracts to the extent that it limits what companies may charge customers. The DTC is mandated to set just and reasonable rates based on the cost of service plus a reasonable rate of return.[63]

---

[59] *Re Investigate Long Distance Charges*, 2002 WL 31096770 at *5.
[60] New Mexico Rate Inquiry, *Order Remanding Case*, at 4-5.
[61] *Id.*, 2002 WL 252600 at ***8.
[62] *Id.*, 2002 WL 252600 at ***9.
[63] *See Hingham v. Dept' of Telecommunications and Energy*, 433 Mass. at 203.

Nothing requires it to sanction bids that offer ever-higher payments to prisons at the cost of ever-higher phone rates to prisoners and their families.

While Securus argues that the reduction of commissions would lead to reduced prison programming, this consideration is outside the DTC's purview. The D.T.C. cannot know how county facilities would choose to allocate funds if commissions were reduced, nor is it charged with the oversight of correctional budgets. (In the case of the DOC commissions go to the state's general fund.) The D.T.C. is charged with the oversight of telephone rates. Requiring prison phone customers, many or most of them impoverished, to foot the bill for prison expenses that should be paid by the public at large is unjust and unreasonable.

C. DOC Regulations Do Not Require or Authorize The Respondents to Pass on the Cost of Commissions to Customers.

GTL asserts that "[t]he commission system is specifically mandated by Massachusetts DOC regulation, and has been upheld by Massachusetts courts,"[64] and Seucrus similarly avers, "the Department of Corrections' authority to enter into agreements providing for [commissions] has been affirmed by Massachusetts courts."[65] The implication that either regulation or case law permits the cost of commissions to be passed on to customers – much less requires it -- is flatly false. The regulation cited merely requires that any commissions which are received by the DOC must be returned to the General Fund of the Commonwealth.[66]

The *Breest v. Dubois* decision cited by both respondents merely held that the Commissioner of Corrections has the power "to enter into contracts necessary or

---

[64] Response of GTL at 12, citing 103 C.M.R. 482.06(6) and *Breest v. Dubois*, No. 94-1665H, 1997 WL 449898 (Mass. Super. July 28,1997).
[65] Response of Securus at 15, citing *Breest* at *8.
[66] *See* 103 C.M.R. 482.06(6).

incidental to the exercise of his authority to regulate telephones," including "those in which it receives a commission."[67] *Breest* did not consider whether telephone companies could include the cost of commissions in their rates. No telephone company was a party to *Breest*, which noted that "any challenge to the validity of a rate approved by the DPU must be brought before the agency, not the superior court."[68] In fact, while the Commissioner of Correction is explicitly authorized to contract with telephone companies, he does not have authority to approve of prisoner fees that are not explicitly authorized by statute. *See Souza v. Sheriff of Bristol County*, 455 Mass. 573, 582 (Mass. 2010) (rejecting argument that Commissioner's statutory authority to audit and inspect county facilities, and regulations implementing that authority, enabled Commissioner to authorize County to charge prisoner fees; "Neither the regulations nor the statutory provisions authorizing inspections provide an authorization to impose the challenged fees").

IV. The Petitioners' Complaints Regarding Quality of Service Should Be Investigated

Respondents argue that Petitioners' quality of service complaints are not properly before the Department[69] and that Petitioners should have first raised those complaints with Respondents' through other means.[70] This argument misstates Petitioners' burden in bringing their quality of service complaints before the Department. There is no statutory requirement that a complainant exhaust other remedies, whether inside the customer service departments of the providers or through other administrative bodies.

---

[67] *See Breest* at. *8-*9.
[68] *Id.* at *8. *Cacicio v. Secretary of Public Safety*, 422 Mass. 764 (1996), also cited by respondents, similarly upheld the validity of the prison telephone regulations. The only challenge was to portions of the regulations that provide for the monitoring and recording of prison phone calls; the payment of commissions was not raised in that case.
[69] Response of GTL at 18
[70] Response of GTL at 18-20, Response of Securus at 34-37

The Department has never before required exhaustion when taking up quality of service complaints made by a group of customers or a municipality. Instead, it has addressed the complaints on their merits, whether granting or denying the relief requested. For instance, in *Re New England Telephone and Telegraph Company*, D.P.U. 20197 (75 P.U.R.4th 405), the Department of Public Utilities heard a request from one hundred subscribers for relief in a complaint about calling area and quality of service. The quality of service complaints were "incorporated into the proceeding"[71] without any mention of an exhaustion requirement or mandatory procedure.[72]

In *Re Verizon-Massachusetts in the Towns of Athol et al.*, DTE 99-77 (2001 WL 427319), the Department of Telecommunications and Energy received a quality of service complaint from a town's Board of Selectmen. In its Order, the DTE notes that it promptly docketed the matter after receipt of the Petition and scheduled a public hearing, again without reference to any pre-Petition complaint requirement.

In fact, DTE has explicitly stated that the ability of customers to petition the Department provides a major safeguard against problems with quality of service. The Department's "authority to investigate service quality problems pursuant to a petition from elected officials or groups of twenty or more affected customers provides adequate protection from degradation in the quality of service..."[73] The Department's ability to hear quality of service complaints in the form of a petition is crucial to its regulation of utilities. The procedural and administrative requirements that Respondents seek to place

[71] Re New England Telephone and Telegraph Company, D.P.U. 20197 (75 P.U.R.4th 405) at 406
[72] *See also* Re Plymouth Water Company, D.P.U. 91-254 (1992 WL 506135) (approving a settlement after twenty customers petitioned the Department over billing practices); Re Boston Edison Company, D.P.U. 87-136 (1995 WL 627748) (addressing a quality of service complaint brought by twenty ratepayers).
[73] Re The Berkshire Gas Company, DTE 98-61/98-87 (1998 WL 996028).

on this Petition have no basis in legal authority and are entirely antithetical to the Department's purview.

The long list of "formal complaint channels" provided by Securus illustrates the absence of any legally mandated complaint procedure prior to bringing this matter before the Department.[74] The list shows that there are a variety of state institutions (administrative and otherwise) with different mandates that exist, at least in part, to hear quality of service complaints. In its variety, the list shows that there is definitively not any specific requirement to be fulfilled or specific path mandated before a complaint can be brought to the Department in this form.

In support of the idea that there is a "well-defined process" for dealing with all quality of service complaints, Respondent GTL cites the Office of Consumer Affairs and Business Regulation website for filing a complaint with the Consumer Division of the DTC.[75] From the website's recommendation that customers "[f]irst, try to contact your telecommunications or cable company," GTL extrapolates the existence of a "preferred complaint policy" that would render the Petition improper. This single recommendation to try resolving problems with the company first cannot possibly be seen to constitute any kind of binding exhaustion requirement and does not preclude the proper filing of a complaint with the Department in this case.

GTL also cites D.P.U. 18448 (1977), which established a procedure that pertains exclusively to residential customers and exclusively to billing complaints.[76] Furthermore, this document gives both customers and companies the unqualified right to bring any new

[74] Response of Securus at 34, listing "the DTC, the FCC, the state AGO, the state OCABR, or the BBB"
[75] http://www.mass.gov/ocabr/government/oca-agencies/dtc-lp/consumer-dtc/file-a-complaint.html
[76] D.P.U. 18448, Rule 6.1 ("If any matter relating to a bill is disputed by the customer, the following procedure shall apply")

complaint directly to the Department: "Any party aggrieved by any action in violation of these Rules may at any time request a hearing before the Department by making a complaint in writing to the Department, provided that such matter has not been previously investigated by the Department."[77] This set of rules clearly forecloses any argument that Petitioners have improperly brought this complaint before the Department because they have not complained sufficiently to their individual providers.

Despite the absence of any requirement, the Petition and its amendments make clear that Petitioners have, in fact, brought quality of service to Respondents' attention on numerous occasions.[78] Furthermore, several of the Petitioners comment on their bad experiences with attempting to resolve quality of service issues with the providers' customer service departments.[79] These family members and friends of prisoners report difficulty in even being connected with a company agent able and willing to record their quality of service complaint. The very nature of customer service problems makes it increasingly difficult for these Petitioners to communicate their complaints and decreases the likelihood that their initial complaints will be translated into a company record. Petitioner Shirley Turner's experience illustrates the inherent difficulties that customer service problems pose to customers. Respondent Securus' (previously Evercom) customer service department told Ms. Turner that the only way to receive credit for problem calls was to download a form off the Internet. After Ms. Turner informed the company that she did not have internet access, it denied her request to have a copy of the form mailed to her.[80]

---

[77] *Id.*, Rule 6.3.
[78] See First Amendment to Petition, Supplement on Quality of Service.
[79] See First Amendment to Petition at 20-24
[80] Affidavit of Shirley Turner at ¶ 7, attached as Exhibit A-10 to Petitioner's First Amendment.

Because many Petitioners face these difficulties in even reaching the point where their complaints can be recorded, Respondents' analysis of the formally recorded complaints in their system does not faithfully depict the nature of Petitioners' complaints. Ultimately, Respondents' claims that Petitioners have not adequately complained to the companies about quality of service are both factually inaccurate and unresponsive to the underlying service problems that Petitioners have identified.

CONCLUSION

For the reasons stated above, the Petition should not be dismissed and the Department should declare that commissions paid to correctional facilities are not a legitimate business cost which may be included in telephone rates.

Date: March 23, 2012

Respectfully submitted:

Bonita Tenneriello, Esq.
Elizabeth Matos, Esq.
James Pingeon, Esq.
10 Winthrop Square, 3rd Floor
Boston, Massachusetts 02110
(617) 482-2773 (telephone)
(617) 451-6383 (facsimile)
btenneriello@plsma.org
ematos@plsma.org
jpingeon@plsma.org

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)~~ and e mail on 3/23/12

sig.