

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**PETITION FOR STAY PENDING JUDICIAL REVIEW
OF ORDER ON RECONSIDERATION (FCC 16-102) BY**

**THE STATES OF OKLAHOMA, ARIZONA, ARKANSAS, INDIANA,
LOUISIANA, KANSAS, MISSOURI, NEVADA, AND WISCONSIN,**

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COUNTY SHERIFF'S OFFICE, LAKE COUNTY SHERIFF'S DEPARTMENT, AND**

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SUMMARY

The D.C. Circuit has twice partially stayed implementation of the Commission's *Second Report and Order* in this matter "insofar as the FCC intends to apply that provision to intrastate calling services," because it determined that "petitioners have satisfied the stringent requirements for a stay pending court review." The stays were issued after petitioners challenging the *Second Report and Order* argued that the Commission is without statutory authority and jurisdiction to set caps on intrastate (as distinguished from interstate) Inmate Calling Services ("ICS") rates. The necessary implication of the D.C. Circuit's multiple stays is that the undersigned State and Local Government Petitioners are likely to succeed on the merits of their jurisdictional argument, and that a stay pending resolution of the case would be equitable.

Now that the Commission has adopted its *Order on Reconsideration*, it may desire to enforce that new Order despite the stays imposed on the previous Orders in this matter. But because that Order again seeks to impose intrastate rate caps, enforcement of that Order before judicial review is completed would be a sign of disrespect to the D.C. Circuit. The D.C. Circuit intended to maintain the status quo of exclusive State regulation of intrastate ICS rates because of the serious jurisdictional questions raised by the Commission's attempt to cap intrastate rates. The Court's concern extends to the continued attempt to cap intrastate rates by the *Order on Reconsideration*, irrespective of the level of the rates. Any attempt by the Commission to upend this status quo or circumvent the stays issued by the D.C. Circuit by enforcing the *Order on Reconsideration* will be taken as an act of defiance towards the Court. Moreover, because the Order continues the jurisdictional dispute between the Commission and the States, considerations of comity and federalism weigh in favor of the Commission staying enforcement of the *Order on Reconsideration* until the courts validate its claim of jurisdiction. For these reasons, the Commission should stay enforcement of its *Order on Reconsideration* pending judicial review.

BACKGROUND

The *Order on Reconsideration* that is the subject of this Petition is the Commission's third attempt to set rate caps on inmate calling services. The first two are the subject of stays issued by the Court of Appeals for the District of Columbia Circuit. In its *First Report and Order*, adopted August 9, 2013, the Commission imposed caps on interstate ICS rates. Several private parties petitioned the D.C. Circuit for review and asked the court for a stay pending review. The D.C. Circuit issued a partial stay of the Commission's rules.¹ After briefing on the merits was completed, the Commission moved the court to hold the case in abeyance based on its decision to reconsider and potentially revise its rules. The D.C. Circuit granted this motion in December 2014.

Ten months later, while the cases challenging the *First Report and Order* were still being held in abeyance, the Commission adopted its *Second Report and Order*, which set new rate caps and, most importantly for present purposes, extended the reach of those rate caps to both interstate and intrastate ICS calls. The undersigned State and Local Government Petitioners were not parties to the first case challenging the *First Report and Order*, which regulated only interstate ICS call rates. However, because the *Second Report and Order* sought to regulate areas traditionally and statutorily left to the States, the State and Local Government Petitioners filed suit to challenge the *Second Report and Order*. The challenge is based primarily on the argument that the Commission's Order setting intrastate ICS rate caps simultaneously exceeds the Commission's authority and infringes upon the States' authority to regulate intrastate calls.²

Again, the parties challenging the Commission's *Second Report and Order* filed motions for stay pending review in the D.C. Circuit, arguing that a stay was warranted in part because the Commission did not have the statutory authority or jurisdiction to impose rate caps on intrastate

¹ Order, *Securus Techs., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014).

² See *Global Tel*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir.).

ICS.³ The D.C. Circuit again granted a partial stay, holding that “petitioners have satisfied the stringent requirements for a stay pending court review.”⁴ Nevertheless, after the court granted the stay, the Commission took the position that the stay applied only to the order’s permanent intrastate rate caps, and not to the higher, interim intrastate rate caps.⁵ When the petitioners objected to this position, arguing that the stay was premised on the argument that the Commission lacked authority to set intrastate rate caps altogether (no matter the rate), the D.C. Circuit for a third time granted the petitioners’ motions. This third stay made clear that the interim rate caps are also stayed “insofar as the FCC intends to apply that provision to intrastate calling services,” but that the cap on “interstate calling services is not affected by this Order.”⁶ The case then proceeded to merits briefing pursuant to an agreed scheduling order.

Over a month after the petitioners filed their briefs on the merits, the Commission announced that, at its next meeting, it would vote on an order for reconsideration of its *Second Report and Order*. The Commission then asked the D.C. Circuit to hold the challenge to the *Second Report and Order* in abeyance while the Commission voted on reconsideration, arguing that because the order on reconsideration might increase the rate caps, central issues in the case would be mooted or their scope substantially altered.⁷ The State and Local Government Petitioners objected to holding the case in abeyance, arguing that an increase in the challenged intrastate rate caps did not address the primary reason the State and Local Government Petitioners sought review: the Commission lacks

³ See, e.g., Mot. of Global Tel*Link for Partial Stay, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Jan. 27, 2016).

⁴ Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 7, 2016).

⁵ See Opp’n of FCC to Mot. to Modify, Reconsider, or Enforce Stay, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 22, 2016).

⁶ See Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016).

⁷ See Mot. of Resp. to Hold Cases in Abeyance, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. July 20, 2016).

the authority and jurisdiction to set intrastate rate caps at all.⁸ On August 4, 2016, the Commission voted to adopt the *Order on Reconsideration*, which was released on August 9, 2016. Ten days later, the Court once again agreed with petitioners and denied the motion to hold the case in abeyance.⁹

The State and Local Government Petitioners now request that the Commission stay its *Order on Reconsideration* while the issues common to both that Order and the *Second Report and Order*—which have already led to multiple stays by the D.C. Circuit—are fully and finally litigated.

LEGAL STANDARD

The Commission applies the traditional factors in deciding whether to grant a stay pending review, considering whether: (1) petitioners are likely to prevail on appeal; (2) petitioners will suffer irreparable harm absent a stay; (3) other parties will not be substantially harmed if a stay is granted; and (4) the public interest favors a stay.¹⁰

ARGUMENT

The D.C. Circuit has ruled three times in the petitioners' favor in their challenge to the Commission's intrastate rate caps: twice when the petitioners argued they were likely to succeed on the merits of their argument that the Commission lacked jurisdiction to regulate intrastate rates and once when the petitioners argued that this question is the central issue in their challenge. It is time for the Commission to acknowledge that the State and Local Government Petitioners raise serious questions about the Commission's authority to set intrastate ICS rate caps, and that the courts have expressed grave reservations about the intrastate caps' legality. The appropriate response is for the Commission to now preserve the status quo on those rate caps by staying its *Order on Reconsideration* until its legal validity can be fully and finally litigated. Refusing to do so would be to cast disrespect

⁸ Opp'n to Mot. to Hold in Abeyance, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. July 29, 2016).

⁹ Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Aug. 19, 2016).

¹⁰ See *Virginia Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

on both the federal courts and on the States as sovereigns whose authority to regulate intrastate rates has never been questioned.

I. Petitioners are likely to succeed on the merits of their jurisdictional challenge.

The State and Local Government Petitioners argue in their suit challenging the *Second Report and Order* that the Commission lacks the statutory authority to create intrastate ICS rate caps. As they exhaustively explain in their brief on the merits, the text, context, history, purpose, and long-standing interpretations of the Telecommunications Act of 1996 all lead to the conclusion that the Commission does **not** have plenary authority to regulate intrastate ICS rates to ensure that they are “just, reasonable, and fair,” as they attempt to do in both the *Second Report and Order* and the *Order on Reconsideration*.¹¹ The State and Local Government Petitioners need not repeat those extensive arguments here.

But even putting aside the persuasiveness of the Government Petitioners’ arguments made in their brief, it is clear that the D.C. Circuit believes that they are likely to succeed on the merits of this argument. As detailed above, in issuing its first stay of the *Second Report and Order*, the D.C. Circuit held that “petitioners have satisfied the stringent requirements for a stay pending court review.”¹² And when the Commission attempted to impose its interim intrastate rate caps despite the stay, the D.C. Circuit issued a second stay, enjoining enforcement of the interim rate caps “insofar as the FCC intends to apply that provision to **intrastate** calling services,” while noting that “interstate calling services is not affected by this Order.”¹³ Thus, it is beyond argument that the State and Local Government Petitioners are likely to succeed on the merits of their argument that the intrastate

¹¹ State and Local Gov’t Pet’rs Br., *Global Tel*Link v. FCC*, No. 15-1461, pp. 5-11, 24-47 (D.C. Cir. June 6, 2016).

¹² Order, *Global Tel*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir. Mar. 7, 2016).

¹³ See Order, *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016) (emphasis added).

aspects of the Commission’s attempted ICS regulation is unlawful—and that Petitioners have otherwise “satisfied the stringent requirements for a stay.”

It is equally clear that the Commission’s *Order on Reconsideration* does not differ from the enjoined *Second Report and Order* in this respect. Both Orders attempt to establish intrastate rate caps. The fact that the numerical rate of those caps differs in the *Order on Reconsideration* does not change the issues underlying the Commission’s authority to set intrastate caps in the first place. It is for precisely this reason that the State and Local Government Petitioners opposed holding the suit challenging the *Second Report and Order* in abeyance, which resulted in the Court denying the Commission’s motion.

In light of this, the Commission must acknowledge that the Government Petitioners have a substantial likelihood of prevailing on the merits of their jurisdictional arguments and that the D.C. Circuit has grave concerns about the legality of the Commission’s attempt at intrastate ICS-rate regulation. At the very least, the Commission should recognize that its intrastate rate caps raise “an admittedly difficult legal question” that merits a stay of its own Order.¹⁴ To do otherwise would defy the D.C. Circuit’s intent to maintain the status quo that existed before the *Second Report and Order* with respect to intrastate-rate regulation, and to disparage that Court as incorrectly ruling on a question the Commission doesn’t believe is at all “difficult.” Such outright disrespect of the Court’s decrees managing the enforcement of regulations while it fully considers their merits risks the Commission being reprimanded or sanctioned by the court.¹⁵ The Commission should avoid that

¹⁴ *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977).

¹⁵ See *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960) (sanctions are necessary to ensure that it is understood that “[t]he executive branch of government has no right to treat with impunity the valid orders of the judicial branch.”); *Am. Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62, 69-70 (D.D.C. 2003) (holding Army Corps of Engineers in civil contempt for failing to comply with injunction and imposing fines of \$500,000 per day of non-compliance, noting that “Litigants may not defy court orders because their commands are not to the litigants’ liking. If the rule of law is to

result, and the perception that it is attempting to skirt the D.C. Circuit’s previous stays of its ICS Orders, by deciding to itself stay its *Order on Reconsideration* pending judicial review.

II. The balance of equities favors a stay of the *Order on Reconsideration*.

As noted above, the D.C. Circuit has already held that the petitioners’ challenge to the Commission’s intrastate ICS rate caps meets “the stringent requirements for a stay pending court review.”¹⁶ This necessarily includes a determination of the fact that, when considered in light of the petitioners’ likelihood of success on the merits, the balance of equities favors a stay.¹⁷ The D.C. Circuit’s decision on this matter is enough for the Commission to stay its *Order on Reconsideration*.

In any event, equitable considerations warrant a stay of the Commission’s *Order on Reconsideration*. As stated in the State and Local Government Petitioners’ brief on the merits, and as shown by the affidavits attached thereto, the Government Petitioners stand to lose millions of dollars if the intrastate rate caps are not stayed—money that is not recoverable from the Commission even if Petitioners prevail on their challenge.¹⁸ This loss of revenue will, in turn, undermine critical correctional and rehabilitative programs in jails and prisons.¹⁹ While the *Order on Reconsideration*’s increased rate caps might lessen the magnitude of that harm, because the Order’s maximum rates are still well-below the status quo, the existence of irreparable harm remains.

be upheld, it is essential that the judiciary takes firm action to vindicate its authority and to compel compliance with lawfully issued directives.”); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 903 (N.D. Cal. 1984) (holding Administrator of the Environmental Protection Agency in contempt for failing to comply with court order).

¹⁶ Order, *Global Tel*Link v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir. Mar. 7, 2016).

¹⁷ See *Basardb v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008); *Lead Indus. Ass’n, Inc. v. E.P.A.*, 647 F.2d 1184, 1187 (D.C. Cir. 1980) (per curiam).

¹⁸ State and Local Gov’t Pet’rs Br., *Global Tel*Link v. FCC*, No. 15-1461, pp. 22-23 (D.C. Cir. June 6, 2016).

¹⁹ *Id.*

Nor will a stay cause increased harm to other parties; it would only maintain the status quo as it existed before the *Order on Reconsideration* (and before the *Second Report and Order*), pursuant to the D.C. Circuit's partial stay of the *Second Report and Order*.²⁰ And the public interest is best served by ensuring that the Commission's *Order on Reconsideration* is lawful and awaiting judicial review rather than by enforcing it in the face of a high risk that it will be invalidated by the courts.²¹

Finally, the Commission should be cognizant that this case represents a jurisdictional dispute between the Commission on the one hand and the States on the other. Section 152(b) of the Communications Act undoubtedly leaves regulation of intrastate telephone calls to the States.²² Even if the Commission disagrees with the States' argument that the Commission does not have the authority to impose intrastate ICS rate caps, as a matter of comity and cooperation between governmental powers, the Commission should await formal approval by the courts before it uses a novel legal theory to seize power away from the States in an area that has traditionally been regulated by the States.²³ The absence of such respect for States as sovereigns makes our federal system more difficult.²⁴

²⁰ *Holiday Tours*, 559 F.2d at 844 (noting that a stay “seeks to maintain the status quo pending a final determination of the merits of the suit”).

²¹ See *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21-22 (D.D.C. 2009) (granting a temporary injunction of an agency rule in part because “the general public interest [is] served by agencies’ compliance with the law”).

²² See 47 U.S.C. § 152(b); see also *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 360 (1986).

²³ Cf. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010) (comity requires “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways”) (citations omitted).

²⁴ Cf. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“Our Federalism” requires “sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”); cf. also *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“[O]ur federalism requires that Congress

CONCLUSION

For the foregoing reasons, the undersigned State and Local Government Petitioners respectfully request that the Commission stay its *Order on Reconsideration* (FCC 16-102) pending judicial review.

DATED: September 2, 2016

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