

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GLOBAL TEL*LINK, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 15-1461 (and
consolidated cases)

Oral argument
not yet scheduled

**STATE AND LOCAL GOVERNMENT PETITIONERS'
OPPOSITION TO MOTION HOLD IN ABEYANCE**

The State and Local Government Petitioners oppose Respondents' Motion to hold these cases in abeyance. The potential decision of the Commission to possibly increase the challenged intrastate calling rate caps does nothing to address the primary reason the State and Local Government Petitioners have filed this challenge: the Commission lacks the authority and jurisdiction to set intrastate rate caps at all. That the Commission is considering the repetition of its fundamental legal error is not a reason to indefinitely put this case on hold. In addition to the reasons advanced by Petitioner Securus for opposing the Respondents' Motion, the State and Local Government Petitioners state the following:

1. As Securus explains in its Response to the Motion, the Commission has twice attempted to regulate inmate calling services over the last three years, and this

Court has twice entered partial stays of those orders pending review of the merits. But despite several years of litigation over these orders, this Court has never had the opportunity to fully adjudicate any petitioner's claim on the merits because the first challenge was held in abeyance pending the Commission's consideration of a second order. After the Commission published its second order, compounding the errors of its first order, the present challenge was filed. The Commission now asks that this case too be held in abeyance as it once again reconsiders its order.

2. The State and Local Government Petitioners were not parties to the first case challenging the first ICS order, which regulated only interstate ICS call rates. However, the State and Local Government Petitioners filed suit to challenge the second order, which expanded ICS regulation to include intrastate calls. The challenge is based primarily on the argument that the Commission's setting of intrastate ICS rate caps simultaneously exceeds the Commission's authority and infringes upon the authority of the States to regulate intrastate calls.

3. The Commission asks the Court to hold this case in abeyance while it considers potentially setting new intrastate rate caps. But the fundamental flaw alleged by the State and Local Government Petitioners—that the Commission has no authority to regulate these intrastate calls—would remain even if the contemplated reconsideration order is passed. The Commission's potential decision to double-down on illegally regulating intrastate matters does not justify holding this entire case in

abeyance since it would have no bearing on the primary basis for the State and Local Government Petitioners' challenge.

4. That the intrastate nature of the rate caps, rather than the magnitude of the caps, is the primary issue in this suit is made clear by this Court's second stay order in this case. After this Court granted an initial stay in this case, 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.¹ When 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), this Court granted Petitioners' motions to clarify the stay by ordering a second stay that 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."²

5. Moreover, when deciding to hold a case in abeyance, this Court may "take account of the traditional factors in granting a stay, including the likelihood that the movant will prevail when the case is finally adjudicated."³ This Court has now

¹ See Opp. of FCC to Mot. to Modify, Reconsider, or Enforce Stay, No. 15-1461, Doc. #1605164 (D.C. Cir. Mar. 22, 2016).

² See Order, No. 15-1461, Doc. #1605455 (D.C. Cir. Mar. 23, 2016).

³ *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (citing *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); see also *Lead Indus. Ass'n, Inc. v. Evtl. Prot. Agency*, 647 F.2d 1184, 1187 (D.C. Cir. 1980).

twice found that Petitioners, not Respondents, have met the “stringent requirements for a stay,”⁴ which necessarily includes the holding that Petitioners are likely to prevail on the merits of their claim that the Commission lacks authority to regulate intrastate rates. It cannot be said that the Commission is also likely to prevail such that their motion for an abeyance should be granted. This conclusion is unaltered by the potential reconsideration order that—although the exact contents of the order the Commission intends to vote on remains a mystery—appears to be based on the same legal position this Court has preliminarily rejected. That the Commission will potentially address a secondary issue while holding fast to their primary legal error in trying to regulate intrastate rates does not warrant putting a stop to this case.

6. Nonetheless, depending on the contents of the potential order on reconsideration, the State and Local Government Petitioners acknowledge that the substance of Respondents’ brief may need to be changed if the Commission votes to issue a new Order. For this reason, the State and Local Government Petitioners informed the Respondents that they would agree to a short extension (*e.g.*, seven days) to file their brief in this case to take into account any Commission action. Respondents did not respond to this proposal.

For these reasons, this Court should deny Respondents’ Motion asking the Court to hold this case in abeyance.

⁴ See Order, No. 15-1461, Doc. #1605455 (D.C. Cir. Mar. 23, 2016).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: s/ Mithun Mansinghani
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