United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1461 **September Term, 2015**

FCC-80FR79136

Filed On: March 23, 2016

Global Tel*Link,

Petitioner

v.

Federal Communications Commission and United States of America,

Respondents

Centurylink Public Communications, Inc., et al.,

Intervenors

Consolidated with 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, 16-1057

BEFORE: Henderson, Kavanaugh, and Millett,* Circuit Judges

ORDER

Upon consideration of the motion to modify stay, the motion for partial reconsideration, the motion to enforce stay, the response in support, the responses in opposition, and the replies, it is

ORDERED that the Federal Communications Commission's "Second Report and Order and Third Further Notice of Proposed Rulemaking," FCC 15-136 (Nov. 5, 2015) be stayed with respect to 47 C.F.R. § 64.6030 (imposing interim rate caps), insofar as the FCC intends to apply that provision to intrastate calling services. With respect to this provision, petitioners have satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C.

---

* Circuit Judge Millett would deny the stay.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1461 **September Term, 2015**

Circuit Handbook of Practice and Internal Procedures 33 (2016). The application of 47 C.F.R. § 64.6030 to interstate calling services is not affected by this Order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Inmate Telephones – Regulatory Timeline

Prior to 1996 – the Federal Communications Commission regulated interstate calls, and a few very powerful companies, including Bell Telephones, had a monopoly over providing services. Calls within states (intrastate calls) were not regulated by the FCC and regulation was left to the individual states.

In 1996, Congress passed the Telecommunications Act, which was intended to break up the huge monopolies on providing telephone service and make it so that any company could compete by offering telephone services. Established carriers were required by law to provide access to their phone systems to competitors at wholesale prices.

As a result of the Telecommunications Act, many smaller companies began entering into the market for inmate phone calls. The business model was essentially to buy phone access at wholesale prices, add security and other features, and sell hardened telephones and phone access to correctional facilities. There are a fixed number of correctional facilities in the United States, and as the number of companies offering services increased, competition for those facilities increased as well. This dynamic quickly resulted in inmate telecommunications providers offering commissions to correctional facilities in exchange for their business. In some states, jails and prisons were required by law to issue a request for proposals, and to select the carrier offering the highest commission to the facility. The predictable result of this dynamic was that commissions to facilities continued to grow, and the rates charged to inmates and their families increased to cover the cost of those commissions.

In 2000, a class action lawsuit against Corrections Corporation over exorbitant telephone rates and exclusive telephone contracts was filed, and quickly dismissed. The court made it clear that the FCC had jurisdiction over these issues, not the courts. In 2002, the rates for inmate phone calls had become very high in some states, and a grandmother named Martha Wright filed a petition with the FCC (Wright Petition). That petition asked the FCC to regulate the costs of inmate phone calls. That petition failed to gain any traction, and in 2007 the Wright petitioners filed an alternative petition – again asking the FCC to step in and regulate inmate phone calls. In 2008, the FCC started gathering data from providers of inmate calling services (ICS).

ICS changed a good deal between 2000 and 2010, due in large part to evolving technology. Collect calls were largely replaced by prepaid and debit calling, and most ICS providers adopted some type of single-call billing option. This option allows a person getting a call from an inmate to pay for the call with a credit card without going to the trouble of setting up an account with the ICS provider and depositing a minimum amount of funds in the account to cover calls. This option proved to be extremely popular – due to its convenience and the ability to immediately speak to an inmate without taking the time to set up an account. The fees associated with single-call billing allowed ICS providers to provide more robust security tools, such as voice recognition,

three-way calling detection, and flagging of words and phrases in inmate communications (such as the words escape, hostage or rape). These investigative tools have helped facilities increase safety and security, and have resulted in thousands of criminal prosecutions that would otherwise go undiscovered. During this period ICS revenue became an increasingly important revenue source for jail and prison budgets, particularly in economically depressed areas.

In December 2012 the FCC finally took action on the Wright Petition and issued a Notice of Proposed Rulemaking to regulate interstate ICS rates. That Notice of Proposed Rulemaking was the beginning of a series of regulatory steps by the FCC to make drastic changes in ICS. In response to the FCC Notice of Proposed Rulemaking (WC Docket 12-375) thousands of comments were provided by parties both for and against ICS regulation. Many jails and prisons filed comments to let the FCC know that they would not be able to continue to provide some programs and services to inmates without the revenue stream from ICS.

In September 2013, the FCC issued Order 113-13, to cap the rates for interstate calls. The Order also implemented cost-based rates, safe harbor rates, and annual cost reporting by ICS providers, but those three items were stayed by the US Court of Appeals for the DC Circuit. The Court left in place interim rate caps for interstate calls of $.21 per minute for debit and pre-paid calls and $.25 per minute for collect calls, as well as the rest of the 131-page Order. In that Order, the FCC made it clear that it did not believe that payment of commissions by ICS providers to facilities was appropriate, and that it was not part of the legitimate cost of providing ICS services. Many ICS providers stopped paying any commission on interstate calls immediately. Other providers continued to pay commissions on interstate calls until the FCC sent a stern warning letter on August 20, 2014 (DA -14-1206). Although the FCC has never actually prohibited the payment of site commissions on interstate calls, the August letter was an unambiguous threat – they made it clear that if they learned of the payment of site commissions on interstate calls they would investigate, and the ICS carrier and facility could be liable for penalties and refunds. The interim rates on interstate calls became effective on February 11, 2014, and remain in effect today.

The FCC was far from done with regulation of ICS, and the 2013 Order made it clear that the FCC intended to regulate both interstate and intrastate ICS, regulate ICS calling for deaf and hearing-impaired inmates, and regulate ancillary fees charged by ICS providers.

On November 5, 2015, the FCC issued a Second Report and Order, and Third Further Notice of Proposed Rulemaking (FCC 15-136). This 210-page Order enacted tiered rate caps for both interstate and intrastate calls, depending upon the size of the facility. It also severely limited ancillary fees, setting forth six fees which may be charged (and the amount of those fees) and flatly prohibiting any other fee not specifically allowed. The Order also prohibited account funding minimums and established funding maximum limits, prohibited flat-fee, flat-rate or per-call charges, and provides that all TTY or TDD calls be charged at no more than 25% of the regular call rate for the facility. The Order

specifically notes that it is a regulatory change that will likely require changes to the contracts between ICS providers and facilities.

The 2015 Order was immediately appealed to the US Court of Appeals for the DC Circuit. The Court issued a partial stay of the Order, staying the implementation of the interim rate caps, and leaving in place the existing interstate rate caps ($.21 per-minute for debit and pre-paid calls and $.25 per minute for collect calls). The Court has yet to decide the challenge brought against the 2013 Order, so it is likely that a decision on the challenge to the 2015 Order will take a significant period of time.

The significant changes to ICS as a result of the 2015 Order are already in effect for prisons, and will be in effect for jails on June 23, 2016. Because the Order significantly changes the regulatory landscape of every ICS contract, and prohibits a number of commonly charged fees – ICS providers are in the process of negotiating contract amendments with every facility. Most facilities will see an immediate decrease in the ICS revenue they have been getting – largely as a result of the severe limitations on ancillary fees. Facilities that have relied upon ICS revenue will be forced to either reduce services or find alternative revenue sources to fill this void. ICS providers will also experience a loss of revenues, and the likely outcome is the consolidation or acquisition of smaller companies, and a reduction in the security features offered by ICS providers. Perhaps most ironically in light of the FCC's goal of reducing costs to inmates – some facilities will likely lose ICS services completely as they simply do not generate sufficient revenue to make a contract profitable for the ICS provider.