



PUBLIC NOTICE

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WIRELINE COMPETITION BUREAU SEEKS TO REFRESH THE RECORD ON ANCILLARY SERVICE CHARGES RELATED TO INMATE CALLING SERVICES

WC Docket No. 12-375

Comment Date: 30 days after date of publication in the Federal Register

Reply Comment Date: 45 days after date of publication in the Federal Register

By this Public Notice, the Wireline Competition Bureau (Bureau) seeks to refresh the record on ancillary service charges imposed in connection with inmate calling services (ICS).¹ In the *2015 ICS Order*,² the Commission adopted rules limiting the ancillary services for which ICS providers could assess fees³ and capping the permissible charges for these ancillary services.⁴

In *Global Tel*Link v. FCC*, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's plenary authority to cap ancillary service charges for interstate ICS,⁵ but held that, based on the record before the Court, the Commission lacked authority to regulate ancillary service charges for intrastate ICS.⁶ Because the Court could not "discern from the record whether ancillary fees can be segregated between interstate and intrastate calls," the Court remanded the issue to the Commission for further consideration.⁷ We seek to refresh the record on ancillary service charges in response to the D.C. Circuit's remand.

The *2015 ICS Order* did not address whether any particular ancillary service charge could be segregated between interstate and intrastate calls given the Commission's imposition of identical rate caps

¹ 47 CFR § 64.6000(a). Ancillary service charges are charges assessed on ICS consumers that are not included in the per-minute charges for individual ICS calls. 47 CFR § 64.6000(a).

² *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order, 30 FCC Rcd 12763 (2015) (*2015 ICS Order*).

³ The Commission permits five types of ancillary service charges: automated payment fees, fees for single-call and related services, live agent fees, paper bill/statement fees, and third-party financial transaction fees. See 47 CFR § 64.6000(a).

⁴ *2015 ICS Order*, 30 FCC Rcd at 12845-51, paras. 161-74; see also 47 CFR § 64.6020. These rules applied uniformly to interstate, international, and intrastate ICS.

⁵ *Global Tel*Link v. FCC*, 866 F.3d 397, 412, 415 (D.C. Cir. 2017), *clarifying and amending* 859 F.3d 39 (D.C. Cir. 2017) (*GTL v. FCC*). References to the Commission's jurisdiction over interstate services herein include its jurisdiction over international services.

⁶ *Id.* at 415.

⁷ *Id.*

for interstate and intrastate calls alike.⁸ We now seek specific comment on whether each permitted ICS ancillary service charge may be segregated between interstate and intrastate calls and, if so, how.⁹ We ask commenters to explain in detail the basis for any claim that an ancillary service charge may be segregated, including addressing the range of different functions that might be associated with each charge where relevant.¹⁰

We also seek comment on how the Commission should proceed in the event any permitted ancillary service is “jurisdictionally mixed” and cannot be segregated between interstate and intrastate calls. Jurisdictionally mixed services are “[s]ervices that are capable of communications both between intrastate end points and between interstate end points.”¹¹ Jurisdictionally mixed services “are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies.”¹²

To the extent any permitted ancillary service charge or associated function is jurisdictionally mixed, we seek comment on how best to apply the prescribed cap to that ancillary service or function pursuant to section 201(b) of the Communications Act of 1934, as amended.¹³ Should we simply apply the cap to jurisdictionally mixed services? Is it possible or practical to allow higher rates on only a portion of such ancillary services? How would such a rule apply here? Is it possible to separate the interstate and intrastate aspects of each such ancillary service charge or function?¹⁴ If so, how? If not, can the Commission proceed to regulate the entire ancillary service charge to the extent it is not jurisdictionally severable?¹⁵ One court has interpreted *GTL v. FCC* to hold that the Commission may not cap interstate ancillary fees “except to the extent those for interstate calls ‘can be segregated’ from intrastate calls.”¹⁶ Given the holdings of the Supreme Court and federal appellate courts on the issue, is that interpretation correct?

Finally, we ask commenters to (1) suggest specific rule language responsive to the D.C. Circuit’s

⁸ *2015 ICS Order*, 30 FCC Rcd at 12813-16, paras. 106-13; *see also* 47 CFR § 64.6020.

⁹ *See* 47 CFR § 64.6000(a).

¹⁰ For example, a “Live Agent Fee” can be assessed when an ICS consumer uses an optional live operator to complete different types of ICS-related transactions. *See* 47 CFR § 64.6000(a)(3). To the extent these individual transactions jurisdictionally differ (e.g., if a live operator is used by an ICS consumer to complete either an interstate or intrastate ICS call as well as to assist that same consumer with paper billing), how should the Commission factor that transaction into applying the Live Agent Fee cap?

¹¹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22413, para. 17 (2004).

¹² *Id.*; *accord* *PSC of Md. v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *see also* *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170, para. 86 (2014) (seeking comment on whether ancillary charges in connection with ICS are “inherently dual jurisdictional in nature”).

¹³ 47 U.S.C. § 201(b).

¹⁴ *See Pub. Util. Comm’n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (holding that even when a service “is used inseparably and interchangeably for interstate and intrastate calling, the FCC must limit its regulation to the interstate aspects if it can do so”).

¹⁵ *See Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n. 4 (1986); *Pub. Serv. Comm’n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (holding that the Commission may preempt in the area of matters governed by section 2(b) of the Act only “when (1) the matter to be regulated has both interstate and intrastate aspects, (2) FCC preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would ‘negate[] the exercise by the FCC of its own lawful authority’ because regulation of the interstate aspects of the matter cannot be

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remand, and (2) propose any additional steps the Commission should take to ensure, consistent with the D.C. Circuit’s opinion, that its actions on remand “properly reflect[]” the reforms adopted in 2015¹⁷ and that providers of interstate ICS do not circumvent or frustrate the Commission’s ancillary service charge rules.¹⁸

Pursuant to sections 1.415 and 1.419 of the Commission’s rules,¹⁹ interested parties may file comments and reply comments on or before the dates set forth in the Federal Register notice of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Ex Parte Rules. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁰ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies).

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 ‘unbundled’ from regulation of the intrastate aspects”); see also *Minn. Pub. Util. Comm’n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 422 (5th Cir. 1999); *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

¹⁶ *Mojica v. Securus Technologies, Inc.*, 2018 WL 3212037 (W.D. Ark. June 29, 2018).

¹⁷ *2015 ICS Order*, 30 FCC Rcd at 12853, para. 178

¹⁸ For example, should the Commission prohibit an ICS provider that generates separate paper bills for interstate and intrastate ICS (merely to impose two separate paper bill charges on ICS consumers) from imposing a \$2.00 charge for the interstate paper bill and an additional charge for the intrastate bill? Alternatively, should the Commission lower the cap for any separate paper bills for interstate ICS to \$0.00 if an ICS provider charges \$2.00 or more for paper bills for intrastate services?

¹⁹ 47 CFR §§ 1.415, 1.419.

²⁰ See *id.* §§ 1.1200 *et seq.*

Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation.

If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the Commission's rules.²¹ In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf).²² Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Additional Information. For further information, contact Minsoo Kim of the Wireline Competition Bureau at (202) 418-1739 or Minsoo.Kim@fcc.gov.

²¹ *Id.* § 1.1206(b).

²² *Id.* § 1.49(f).