

December 1, 2016

BY ELECTRONIC FILING

Chief Clerk
North Carolina Utilities Commission
Dobbs Building, 5th Floor
Raleigh, North Carolina 27601

***Re: Docket No. SC-62, Sub 5
Pay Tel Communications, Inc.
Verified Petition for Waiver***

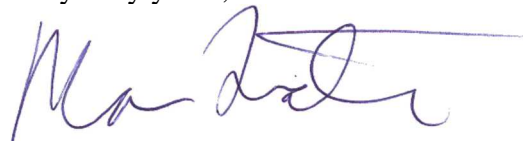
Dear Chief Clerk:

Transmitted herewith for filing in the above-referenced proceeding, on behalf of Pay Tel Communications, Inc. ("Pay Tel"), is a Verified Petition for Waiver of Rule. This Petition seeks waiver of Commission Rule R13-9(d) and mirrors a petition filed by Securus Technologies, Inc. in SC-1427, Sub 9 on August 30, 2016.

Please note that pages 10-11 and Exhibit 1 to the Petition contain information which is confidential and proprietary to Pay Tel. Due to the sensitivity of the data, this information has been redacted from this public filing. A confidential version of the filing is being made separately, subject to a claim of confidentiality under G.S. § 132-1.2.

Should any questions arise in connection with this matter, please contact the undersigned.

Very truly yours,



Marcus W. Trathen

cc: Antoinette Wike
John Garrison

OFFICIAL COPY

Dec 01 2016

¹ For the convenience of the Commission and staff, this Petition substantially mirrors a Petition filed on August 30, 2016, by Securus Technologies, Inc. in SC-1427, Sub 9 (“Securus Petition”) and seeks the same relief proposed by Securus in its petition. Notwithstanding the relief sought, as an accommodation intended to promote the prompt resolution of this proceeding, Pay Tel is willing to agree to the terms and conditions jointly proposed by Securus and the Public Staff in a Stipulation submitted on November 23, 2016. *See* Request by Securus Technologies, Inc., for Waiver of Rule 13-9(d) of the Rules and Regulations of the North Carolina Utilities Commission, *Stipulation*, Docket No. SC-1427, Sub 9 (Nov. 23, 2016).

Pay Tel Communications, Inc.
Post Office Box 8179
Greensboro, NC 27419

2. Petitioner's counsel in this proceeding, to whom all notices, pleadings and other documents related to this proceeding should be directed, is:

Marcus W. Trathen
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
Suite 1700, Wells Fargo Capitol Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601
(919) 839-0300, ext. 207 (phone)
(919) 839-0304 (fax)
mtrathen@brookspierce.com

BACKGROUND

3. Section 62-110(c) of the North Carolina General Statutes requires any payphone service provider ("PSP") to secure a special certificate from the Commission prior to providing such service. Chapter 13 of the Commission's Rules governs the provision of telephone service by means of customer-owned pay telephone instruments. Rule R13-3 requires every PSP, prior to offering any telephone service other than voiceless-facsimile service, to obtain a certificate from the Commission to do so and, additionally, requires a specific grant of authority by the Commission to provide automated collect service.

4. The Commission issued its *Order Issuing Special Certificate* in Docket No. SC-62, Sub 0, issuing to Petitioner a special certificate authorizing the provision of telephone service by means of pay telephone instruments. Subsequently, the Commission extended Petitioner's authorization to include the provision of automated collect service.

See SC-62, Sub 2. Petitioner provides ICS, which includes automated collect service, in North Carolina pursuant to this certificate.

5. Commission Rule R13-9 addresses charges for different types of service by PSPs. Rule R13-9(d) governs local, automated collect calls, which constitute the majority of the calls made through Petitioner's provision of ICS in North Carolina. Thus, Rule R13-9(d) governs how Petitioner charges for such ICS calls in North Carolina and provides as follows:

0+ Local Automated Collect Station-to-Station. The recipient of a local automated collect station-to-station call may not be charged more for the call than would have been charged by Windstream Concord Telephone, Inc. for a local collect station-to-station call.

6. Upon information and belief, Windstream Concord Telephone, Inc. ("Windstream Concord") charges \$1.71 per local, automated collect station-to station call.² Therefore, as of the date of this Petition, PSPs are authorized to charge a maximum of \$1.71 per local, automated collect station-to-station call.

7. The existing rate cap was set by the Commission in 2008 in the context of a request by Pay Tel and two other PSPs for a waiver of Rule R13-9(d) then in effect. At issue was whether Rule R13-9(d) should be waived or revised so as to establish a maximum charge for local, automated collect calls, as the majority of ICS calls in North Carolina were—and still are—local, automated collect calls. Ultimately, the Commission revised Rule R13-9(d) to establish that the rate charged by Windstream Concord for local,

² See Concord Local Exchange General Price List, Seventh Revised Page 6, September 14, 2006, ¶ H.1.c (2)(specifying a service charge for such calls of \$1.36 each plus a local dial rate of \$0.35), attached as Exhibit 1 to Securus Petition.

automated collect calls would be the maximum rate that may be charged by any PSP for such calls.³ The Commission's justification for this decision to use the Windstream Concord rates as a "proxy" or "surrogate" included the facts that: (1) the Commission had used surrogate rate caps for operator-handled calls ever since Rule R13-9 was initially adopted in 1986; and (2) the Commission had recently approved, on an *ad hoc* basis, the same rate for two PSPs in the context of certification proceedings, noting that Windstream Concord was the only local exchange company that still provided this service to confinement facilities, as others had ceased to do so.⁴ Significantly, the Commission did not undertake an examination of PSP costs in establishing these surrogate rate caps.

8. Subsequent to the adoption of the existing rate cap by the Commission, the Federal Communications Commission ("FCC") has undertaken significant investigation of the rates charged by ICS providers. In 2012, 2013 and 2014, the FCC issued notices of proposed rulemaking, seeking comments regarding ICS rates and practices, including intrastate rates.⁵

9. The culmination of the FCC's investigation was its issuance of a Second Report and Order⁶ which adopted comprehensive reforms to the ICS market, including rate caps for both interstate and intrastate ICS calls and certain limits on ancillary service

³ See generally *Order Revising Rule R13-9(d)*, Docket No. P-100, Sub 84c, May 1, 2008 ("2008 Order").

⁴ 2008 Order, at 3, 8-9.

⁵ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012); Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013); Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014).

⁶ *Rates for Interstate Inmate Calling Services, Second Report and Order and Third Further Notice of Proposed Rulemaking*, 30 FCC Rcd 12763 (2015) ("FCC ICS Order").

charges.⁷ In the FCC ICS Order, the FCC made note of its “duty to act to fulfill [its] statutory mandate of ensuring that ICS rates are just, reasonable and fair,”⁸ citing to provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, which provide that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful”⁹ and that “the [FCC] shall take all actions necessary (including any reconsideration) to prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.”¹⁰

10. Petitioner has complied with the requirements of the FCC ICS Order that are currently in effect by restructuring its charge for ICS collect calls from a flat, per-call rate set at the Windstream Concord proxy cap to a per-minute charge. However, the FCC’s prohibition of flat-rate calling arrangements, combined with North Carolina cap on local calling rates, has had a detrimental impact on Pay Tel’s ability to earn fair compensation for the provision of ICS in North Carolina. As demonstrated by the cost documentation

⁷ The rules adopted by the FCC pursuant to this order are codified at 47 C.F.R. part 64, subpart FF (the “FCC ICS Rules”).

⁸ FCC ICS Order, ¶ 3, n. 12.

⁹ 47 U.S.C. § 201(b).

¹⁰ 47 U.S.C. § 276(b)(1)(A).

provided, at the current capped rate per call, Petitioner is not recovering its costs to provide these local automated collect calls in North Carolina.

Effect of the FCC ICS Order Requirements

11. As is relevant to Petitioner's provision of ICS in North Carolina, the FCC ICS Order: (a) established per-minute rate caps for interstate and intrastate calling;¹¹ (b) permitted ICS providers to charge only specific ancillary service charges, prohibiting those not specifically permitted and establishing caps for the permitted ancillary service charges;¹² and (c) prohibited per-call surcharges and flat-rate, non-time-sensitive rates.¹³ Significantly, the FCC ICS Order did not directly regulate or rule unlawful site commissions contractually required by correctional facilities to be paid by ICS providers.¹⁴

12. Following the issuance of the prior FCC ICS Order, several ICS providers, including Petitioner, appealed the FCC ICS Order to the United States Court of Appeals, District of Columbia Circuit.¹⁵ On March 7, 2016, the D.C. Circuit stayed two provisions of the FCC ICS Rules: (a) the provision establishing per-minute rate caps for interstate and intrastate calling; and (b) the provision relating to certain special billing methods called

¹¹ 47 C.F.R. § 64.6010.

¹² 47 C.F.R. § 64.6020.

¹³ 47 C.F.R. § 64.6090.

¹⁴ FCC ICS Order, ¶¶ 131-132. The rate caps were established without considering the cost of such commissions exacted by correctional facilities.

¹⁵ See *Global Tel*Link v. FCC*, No. 15-1451 and consolidated cases (D.C. Cir.).

single-call services.¹⁶ The D.C. Circuit denied the motions for stay of the FCC ICS Order in all other respects.¹⁷

13. Thus, as of the date of this Petition, the rate caps on intrastate calls are stayed by order of the D.C. Circuit. However, the prohibition of per-call surcharges and flat-rate, non-time sensitive rates¹⁸ and the elimination and reduction of certain ancillary service charges¹⁹ took effect as of March 17, 2016 for prisons and as of June 20, 2016 for jails.²⁰ Petitioner currently serves 53 jails in North Carolina and no prisons.

14. Additionally, subsequent to the issuance of the FCC ICS Order, the FCC issued an Order on Reconsideration,²¹ pursuant to which it raised the rate caps on interstate and intrastate calls to “ensure” ICS providers the ability to earn sufficient revenues to cover their ICS-related costs and compensate correctional facilities for reasonable costs the facilities incur directly as a result of providing ICS. Specifically, the Order on Reconsideration made clear that it increased the rate caps it had previously established “to better ensure that ICS providers are able to receive fair compensation for their services, including the costs they may incur in reimbursing facilities for expenses reasonably and

¹⁶ *Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 7, 2016) (staying §§ 64.6010 and 64.6020(b)(2) of the FCC’s rules).

¹⁷ The D.C. Circuit, on March 23, 2016, issued an order modifying the stay to provide that the interim rate caps established in section 64.6030 were also stayed as applied to intrastate calls. *Global Tel*Link v. FCC*, No. 15-1451 (D.C. Cir. Mar. 23, 2016).

¹⁸ 47 C.F.R. § 64.6090.

¹⁹ 47 C.F.R. § 64.6020(a).

²⁰ *FCC ICS Order*, ¶ 336.

²¹ Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, *Order on Reconsideration* (August 9, 2016) (“Order on Reconsideration”).

directly related to the provision of ICS.”²² Specifically, relying on analyses submitted in the record, the FCC increased its rate caps by \$0.02 for prisons, by \$0.05 per minute for larger jails, and by \$0.09 per minute for the smallest jails to account for costs incurred by facilities in providing access to ICS.²³ Consistent with this approach (i.e., building a component into the rates intended to compensate facilities for costs they incur), the FCC made clear that it was not prohibiting or specifically regulating site commissions.²⁴ Thus, correctional facilities remain unregulated by the FCC as to the commissions that may be lawfully required from ICS providers. Critically, the Order on Reconsideration recognizes that facilities may incur legitimate costs, recoverable through ICS rates, in connection with making ICS available; the FCC concluded:

[W]e find that: (1) at least some facilities likely incur costs that are directly and reasonably related to the provision of ICS, (2) it is reasonable for those facilities to expect providers to compensate them for those costs, (3) such costs are a legitimate cost of ICS that should be accounted for in our rate cap calculations, and (4) our existing rate caps do not separately account for such costs.²⁵

15. In short, as of the date of this Petition:

²² Order on Reconsideration, ¶¶ 12-13. Appeals from this order have been consolidated by the D.C. Circuit in *Securus Technologies, Inc. v. FCC*, No. 16-1321. Acting on various motions for stay, the Court has issued an order staying the operation of the order and holding the consolidated appeal in abeyance pending disposition of the prior pending appeal in No. 15-1461, et al, *Global Tel*Link v. FCC*. See *Securus Technologies, Inc. v. Federal Communications Commission*, Order, No. 16-1321 (Nov. 2, 2016).

²³ Order on Reconsideration, ¶ 22 (relying on an analysis submitted by the National Sheriffs Association as well as a joint analysis submitted by two costs analysts, Darrell Baker, of the Alabama Public Service Commission and Don Wood, an outside cost consultant for Pay Tel).

²⁴ Order on Reconsideration, ¶ 38.

²⁵ Order on Reconsideration, ¶ 12.

- a. Although there are no currently-applicable FCC-imposed rate caps on intrastate ICS calls, the FCC has implemented “interim” rate caps on interstate ICS calls which are substantially below the rates previously charged;
- b. Per-call surcharges and per-call flat rates are prohibited;
- c. Only specified ancillary service charges are permitted and all other ancillary service charges are prohibited;
- d. Correctional facilities may lawfully continue to require site commissions from ICS providers and are doing so; and,
- e. The FCC recognizes that facilities may incur legitimate costs, recoverable through ICS rates, in connection with making ICS available.

North Carolina’s Current Rate Cap Does Not Reflect Cost of Service

16. The FCC has consistently characterized its actions in the ICS investigation as being undertaken “to ensure that ICS rates comply with the Telecommunications Act, while balancing the unique security needs related to providing telecommunications service in correctional institutions and ensuring that ICS providers receive fair compensation and a reasonable return on investment.”²⁶

17. As Pay Tel argued in the 2008 proceeding leading to the current rate cap, the rate relief which was provided by allowing the use of the Windstream Concord rate

²⁶ FCC ICS Order, ¶ 21 (citing 2013 order)(emphasis added).

resulted in pricing for ICS that did not reflect Petitioner's cost of service.²⁷ It continues to be the case that the rate Petitioner is allowed to charge under Rule R13-9(d) does not reflect its cost of service. Additionally, the elimination and reductions of charges for certain ancillary services—as well as the implementation of interim rate caps on interstate ICS calls—have reduced key revenue streams that were used to help recover the remaining costs which are not recovered through below-cost caps local calls.

18. In conjunction with its ICS investigation, the FCC, in June 2014, required all ICS providers to file “data related to the costs of providing ICS.”²⁸ On August 18, 2014, Pay Tel filed a cost report implementing the Mandatory Data Collection prepared by its economic consultant, Don Wood. At the direction of Pay Tel, data compiled and reflected in the cost report was used by Mr. Wood to provide North Carolina-specific cost information. The North Carolina-specific report, which includes highly sensitive, proprietary information regarding Petitioner's cost of service in North Carolina, is attached as CONFIDENTIAL Exhibit 1. This analysis reflects the lawful commission costs that Pay Tel paid in North Carolina during the study period and which Pay Tel continues to be contractually obligated to pay to correctional facilities in North Carolina.

19. As is evident in the Pay Tel's North Carolina Cost Report, the Windstream Concord rate of \$1.71 per call does not reflect or recover Petitioner's actual cost of service in North Carolina. Specifically, **[BEGIN CONFIDENTIAL PORTION]** Petitioner's

²⁷ See 2008 Order, at 7 (taking note of Petitioner's position “the rate relief which would be provided by allowing the use of the Concord rate would still result in pricing inmate calling at artificially low levels.”).

²⁸ Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, *Public Notice*, Commission Announces Inmate Calling Services Data Due Date, June 17, 2014 (“Mandatory Data Collection”).

average cost per minute, for all payment methods, is [REDACTED]. Again, this includes the cost of lawful commission payments that Pay Tel is contractually required to pay to the North Carolina correctional facilities that it services. While all but one of those correctional facilities have a [REDACTED] minute call duration maximum, the real average length of an intrastate ICS call in North Carolina is approximately [REDACTED] minutes. Thus, applying Petitioner's average per-minute cost to the average call duration in North Carolina results in an average "per-call" cost of [REDACTED]; however, at present, application of Rule R13-9(d) limits the amount Petitioner may charge to [REDACTED]. [END CONFIDENTIAL PORTION]

20. Thus, at present, Petitioner does not recover its cost of providing ICS service in North Carolina, which conflicts with the well-established guiding principle in this State that rates must be set so as "to protect both the right of the public utility to earn a fair rate of return and ensure its financial integrity, while also protecting the right of the customers to pay a retail rate which reasonably reflects the cost of service rendered on their behalf,"²⁹ as well as with the FCC's commitment to ensure that ICS providers receive the "fair compensation and a reasonable return on investment"³⁰ that is required.

Waiver of the North Carolina Local Rate Cap Is Justified

21. In light of the foregoing, Petitioner hereby seeks authority from the Commission to charge rates that are both consistent with the FCC's ICS Order per-minute rate structure and that are compensatory, based on Petitioner's cost to provide ICS in North Carolina.

²⁹ *State ex rel. Utilities Com'n v. Nantahala Power and Light Co.*, 332 S.E.2d 397, 313 N.C. 614 (1985), *rev'd on other grounds*, 476 U.S. 953 (1986).

³⁰ FCC ICS Order, ¶ 21 (citing 2013 order).

22. Consistent with the FCC's prohibition on per-call flat rates, Petitioner proposes a restructuring of the rate authorized by Rule R13-9(d). Specifically, Petitioner proposes a cap or maximum "per-minute" calling rate of \$0.28 for 0+ local automated collect station-to-station calls in North Carolina.³¹ Petitioner proposes that this maximum calling rate of \$0.28 per minute become effective not later than 30 days from the date of this Verified Petition. The actual rate that Petitioner would charge at any particular correctional facility, subject to the maximum rate cap, would be determined based on Petitioner's contract with that correctional facility, which would govern both per-minute charges, as well as the maximum duration of the calls.

23. Petitioner's proposal would establish a fair and reasonable rate in light of the overall circumstances presented and, in contrast to the existing rate cap, would provide Petitioner with a better chance of recovering its costs of service and earning a reasonable return on its investment, thereby promoting the widespread availability of the service.³²

RELIEF REQUESTED

24. Because Petitioner's proposal is based on Petitioner's actual cost to serve facilities in North Carolina, a waiver of Rule R13-9(d)—which only established a surrogate rate—is appropriate. Therefore, Petitioner respectfully requests that the Commission enter an order:

- a. Waiving the requirements of Rule R13-9(d) as applied to Petitioner;

³¹ Under the proposed maximum rate of \$0.28 per minute, a six-minute call would incur a total charge of \$1.68, which is \$0.03 less than the current \$1.71 rate cap. Thus, calls of durations of six minutes or less would be less expensive than under the current rate cap.

³² Although the rate proposed is lower than Pay Tel's average per-minute cost of providing service, Petitioner believes that the rate proposed is sufficient to induce the provision of service and could, combined with operational efficiencies, allow providers generally to recover the costs of incremental operation.

- b. Approving Petitioner's proposal to implement a cap or maximum calling rate of \$0.28 per minute for 0+ local automated collect station-to-station calls in North Carolina; and
- c. Approving Petitioner's proposal that this maximum calling rate of \$0.28 per minute become effective not later than 30 days from the date of this Verified Petition.

Respectfully submitted, this 1st day of December, 2016.



Marcus W. Trathen
Brooks, Pierce, McLendon,
Humphrey & Leonard, LLP
Suite 1700, Wells Fargo Capitol
Center
150 Fayetteville Street
P.O. Box 1800 (zip 27602)
Raleigh, NC 27601
(919) 839-0300, ext. 207 (phone)
(919) 839-0304 (fax)
mtrathen@brookspierce.com

VERIFICATION

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

Vincent Townsend, first being duly sworn, deposes and says that he is the President for Pay Tel Communications, Inc.; that he has read the foregoing Petition and the same is true of his personal knowledge, except as to any matters and things therein stated on information and belief, and as to those, believes them to be true; and that he is authorized to sign this verification on behalf of Pay Tel Communications, Inc.

Vincent Townsend
Signature

Vincent Townsend
Printed Name

WITNESS my hand and notarial seal, this 30th day of November, 2016.

My Commission Expires: 8/25/2018

Katelyn T. Armfield
Signature of Notary Public

Katelyn T. Armfield
Name of Notary Public – Typed or Printed

Notary Seal



CONFIDENTIAL EXHIBIT 1

**PAY TEL COMMUNICATIONS, INC.
NORTH CAROLINA COST REPORT**

[Intentionally omitted]