Ruth Nettles 060476-TL

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Subject: Docket No. 060476-TL
Attachments: Joint Comments of Evercom Systems, Inc. and T-Netix Telecommunications Services, Inc. 08.26.09.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and email for the person responsible for the filing is:

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b. This filing is made in Docket No. 060476-TL, In re: Petition by BellSouth Telecommunications Inc. to Initiate Rulemaking to Amend Rules 25-24.630(1) and 25-24.516(1), Florida Administrative Code.

c. The document is filed on behalf of E&T.

d. The total pages in the document are 6 pages.

e. The attached document is Joint Comments of Evercom Systems, Inc. and T-Netix Telecommunications Services, Inc.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications Inc. to Initiate Rulemaking to Amend Rules 25-24.630(1) and 25-24.516(1), Florida Administrative Code	Docket No. 060476-TL Filed August 26, 2009

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JOINT COMMENTS OF EVERCOM SYSTEMS, INC. AND T-NETIX TELECOMMUNICATIONS SERVICES, INC.

Evercom Systems, Inc. and T-Netix Telecommunications Services, Inc. (collectively referred to herein as E&T) are wholly-owned subsidiaries of Securus Technologies, Inc. and are certified to operate in the State of Florida. E&T provides the following comments in response to Staff's memorandum dated August 6, 2009, requesting comments as to the impact of the amendments to section 364.3376, Florida Statutes, on the applicability or non-applicability of rate caps to calls made by inmates in confinement facilities.

E&T presently provides inmate telephone services throughout Florida and the country. Specifically, E&T serves approximately 180 confinement facility sites, including 118 Department of Corrections (DOC) sites, in the State of Florida. Thus, its interests are substantially affected by the Commission's consideration of the impact of the new legislation on facilities E&T serves.

Florida law is clear that an agency may only initiate and pursue rulemaking when a sufficient legislative grant of rulemaking authority exists. Section 120.536(1), Florida Statutes, provides:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the *specific powers and duties* granted by the enabling statute. *No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation* and is

> not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the *specific powers and duties* conferred by the enabling statute.

(Emphasis added). See also, Florida Dept. of Highway Safety and Motor Vehicles v. JM Auto, Inc., 977 So.2d 733 (Fla. 1st DCA 2008) (finding that a "broadly worded" statute generally authorizing the Department to adopt rules to implement statutes regarding motor vehicle licenses was insufficient statutory rulemaking authority to support the Department's proposed rule addressing unauthorized supplemental dealership locations).

The First District Court of Appeal has issued a string of opinions which recognize that the Legislature intended to restrict the scope of agency rulemaking so that rules can only be adopted to implement the subject matter of the statute. See, e.g., Hanger Prosthetics & Orthotics, Inc. v. Dep't of Health, 948 So.2d 980 (Fla. 1st DCA 2007); Hennessey v. Dep't of Bus. & Prof'l Regulation, 818 So.2d 697 (Fla. 1st DCA 2002); Bd. of Trs. of the Internal Improvement Trust Fund v. Day Cruise Ass'n Inc., 794 So.2d 696 (Fla. 1st DCA 2001); Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So.2d 594 (Fla. 1st DCA 2000).

The Legislature has not provided the Commission with a specific grant of rulemaking authority to enact rate cap rules applicable to inmate telephone calls from within confinement facilities. To the contrary, the Legislature removed such authority from the Commission with the passage of Senate Bill 2626, which became law on July 1, 2009. Inmate telephone services are non-basic services, and the recent legislative change removed the ability of the Commission to set rate caps for providers of operator services, including providers of inmate telecommunication services. The Legislature did not distinguish between different types of operator services

providers and no language can be found in the new law which suggests that inmate telephone providers are to be treated differently than other non-basic operator services

The specific language which removed the authority and hence the jurisdiction of the Commission to enact rules to put in place rate caps for operator services is specifically set forth below, showing the deletion of the Commission's authority as to operator services rate caps in subsection (3):

> Operator services.— 364.3376
> 647 A person may not provide operator services as (1)(a)
> 648 defined in s. 364.02 without first obtaining from the commission
> 649 a certificate of public convenience and necessity as an operator
> 650 services provider.
> 651 This section does not apply to operator services (b)
> 652 provided by a local exchange telecommunications company or by an
> 653 intrastate interexchange telecommunications company, except as
> 654 required by the commission in the public interest.
> 655 (2)~~Notwithstanding any finding by the commission that a~~
> 656 ~~service or facility is subject to competition and should be~~
> 657 ~~regulated pursuant to s. 364.338,~~ All intrastate operator
> 658 service providers are subject to the jurisdiction of the
> 659 commission and shall render operator services pursuant to
> 660 schedules in accordance with s. 364.04 ~~tariffs approved by the~~
> 661 ~~commission~~.
> 662 ~~(3) For operator services, the commission shall establish~~
> 663 ~~maximum rates and charges for all providers of such services~~
> 664 ~~within the state.~~

The Legislative language quoted above is clear and thus a search for legislative intent is unnecessary. The Legislature expressly removed authority for the Commission to impose rate caps upon providers of operator services, including operator services provided to inmates within confinement facilities.

Any reliance upon section 364.01(4)(c), Florida Statutes, in an attempt to establish Commission authority to set rate caps for operator services is misplaced. That statutory subsection, found within a section defining the powers of the Commission and expressing legislative intent, states in its entirety:

> 4) The commission shall exercise its exclusive jurisdiction in order to:
>
> (c) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation.

The broad, general language above is analogous to the language relied upon unsuccessfully by the Department of Highway Safety and Motor Vehicles in JM Auto Inc., supra. Rulemaking authority cannot be derived from the general, broad language staff has identified in section 364.01(4)(c) to support a rule placing rate caps on operator services provided to inmates in confinement facilities.

Furthermore, a rule on operator service rate caps of any kind would violate section 120.536(1), quoted above, which prohibits the enactment of rules based on language generally describing an agency's powers or functions. In addition, a rule which would impose rate caps on operator services provided in confinement facilities would be an invalid exercise of delegated legislative authority as it would exceed the Commission's legislative grant of rulemaking authority and enlarge, modify and contravene the specific provisions of law implemented. See, section 120.52(8), Florida Statutes.

Moreover, inmate telephone services are not monopoly services. Providers of such services within correctional facilities compete vigorously for the right to provide telecommunications services within confinement institutions. The competitive solicitation

process exerts market forces on the price paid for telecommunications services originating within a confinement facility. Recognition of this fact makes the language of 364.01(4)(c) inapplicable because monopoly services are not being provided.

The Commission's inquiry triggers further legislative constructs. A more recent act of the Legislature controls over a former act and specific action or direction controls over general action or direction. See, Palm Beach County Canvassing Board v. Harris, 772 So.2d 1273, 1287 (Fla. 2000). It is axiomatic that when a material change is made to law, the Legislature is presumed to have intended a specific change. See, Mangold v. Rainforest Golf Sports, 675 So.2d 639, 642 (Fla. 1st DCA 1996)("When the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear." Citation omitted).

For the reasons set forth above, the Commission does not have rulemaking authority to establish rate caps on calls made by inmates in confinement facilities.

s/Jon C. Moyle, Jr.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Comments of Evercom Systems, Inc. and T-Netix Telecommunications Services, Inc., was served via Electronic Mail and U.S. Mail this 26th day of August, 2009 to the following:

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