

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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)
) WC Docket No. 12-375
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In the Matter of
Rates for Interstate Inmate Calling Services

**INMATE CALLING SOLUTIONS, LLC
OPPOSITION TO SECURUS TECHNOLOGIES, INC.’S PETITION FOR STAY**

Inmate Calling Solutions, LLC (“ICSolutions”) hereby submits the Petition for Partial Stay of Order on Reconsideration, filed by Securus Technologies, Inc. (“Petition”).¹ The Petition requests that the FCC stay the effectiveness of parts of the *Order on Reconsideration* (“*Order*”) adopted by the Federal Communication Commission (“FCC” or “Commission”) on August 4, 2016, and released on August 9, 2016, in this Docket,² which modifies parts of the FCC’s *Second Report and Order*, FCC 15-136, released on November 5, 2015 (“*2015 Order*”).³ Specifically, the Petition requests that the FCC delay implementing the rules addressing rates in the *Order*.⁴

As provided below, Securus incorrectly claims that (i) it will likely prevail in a future judicial review; (ii) it will suffer irreparable harm; (iii) other interested parties will not be substantially harmed if the stay is granted; and (iv) the public interest favors granting a stay.⁵

¹ The Petition was filed on August 25, 2016. Pursuant to Section 1.45(d) of the FCC’s rules, this Opposition is filed within 7 days of submission. See 47 C.F.R. s 1.45(d) (2015).

² *Rates for Interstate Inmate Calling Services*, Order on Reconsideration, FCC 16-102, rel. Aug. 9, 2016 (“*Order*”).

³ *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) (“*2015 Order*”), stayed in part by *Global Tel*Link, et al. v. FCC*, Order, Case No. 15-1461 (D.C. Cir., Mar. 7, 2016) (staying 47 C.F.R. §§ 64.6010, setting caps on calling rates and 64.6020(b)(2), setting caps on fees for single-call services).

⁴ Petition, pg. 1.

⁵ Petition, pgs. 2-3.

Securus's arguments fail to satisfy the *Virginia Petroleum Jobbers* test⁶ and, therefore, the Petition must be dismissed.

For the first prong of the *Virginia Petroleum Jobbers* test, the Petition is incorrect that an appeal is likely to be successful.⁷ Securus basis its contention on three arguments: (A) A stay will avoid needless expenditure of the FCC's, Securus's, and the Court of Appeals' resources; (B) The Order sets rates that are below Securus's cost to provide inmate telephone services ("ITS"); and (C) The FCC has acted "unreasonably" by avoiding the regulation of ITS providers' payment of site commissions. These arguments fail to support Securus's conclusion that a reversal on appeal is likely to be successful.

Securus's first argument that its appeal will be successful because a stay will avoid costs is unsupported. It cannot be reasonably denied that it would be more economically efficient for all parties and the Court of Appeals to consider the *Order* in the current Appeal of the *2015 Order* ("Appeal")⁸ because it changes the *2015 Order*. Inarguably, there is no point in arguing about the aspects of the *2015 Order* that have been changed in the *Order*. While the Court denied the FCC's petition for an abeyance of the Appeal,⁹ it does not mean that the Court will not address the *Order* in the Appeal. As Appellants CenturyLink and Global Tel*Link pointed out in their opposition to an abeyance, the brief can consider the merits of the *Order* in the Appeal by allowing supplemental briefs.¹⁰ The Court has provided no indication that it intends to decide the Appeal without considering the changes made by the *Order*. To the contrary, the Court Order on the FCC's Petition for Abeyance orders the parties to "file motions to govern

⁶ 259 F.2d 921 (D.C. Cir., 1958).

⁷ Petition, pgs. 3-10.

⁸ *Global Tel*Link, et al. v. FCC*, Case No. 15-1461 (D.C. Cir.) (appeal pending) ("Appeal").

⁹ *Global Tel*Link, et al. v. FCC*, Case No. 15-1461, Order (D.C. Cir., Aug. 19, 2016).

¹⁰ *Global Tel*Link, et al. v. FCC*, Case No. 15-1461, Joint Response of Global Tel*Link and CenturyLink to Respondents' Motion to Hold Cases in Abeyance, pgs. 2-3 (D.C. Cir., Aug. 1, 2016).

further proceedings within seven days of the deadline to Petition for Review,”¹¹ suggesting that the Court will at least consider including supplemental briefs in this Appeal. If an appeal of the *Order* occurs, it is axiomatic that it would save resources for the Court and all parties to consider the merits of the *Order* in the current Appeal as opposed to waiting until the Appeal is finalized. Thus, Securus’s argument that the Court, the FCC, and any other parties to the Appeal could avoid “needless expenditure” by staying this *Order* until after the Appeal is baseless.

Moreover, Securus grasps at straws when it suggests that the Court’s stay of the rates in the *2015 Order* “signal strongly that Securus and petitioners have shown ‘substantial case on the merits’ for overturning regulations that are premised on ignoring a major component of ICS costs, namely site commissions.”¹² There simply is nothing from the Court’s stay order to suggest the rationale behind the stay of the rates in the *2015 Order*. Indeed, Securus’s purported reasons contradict the Court’s decision to not stay the interstate rate caps in the FCC’s first *Report and Order and Further Notice of Proposed Rulemaking* (“*2013 Order*”), even though that order also did not prohibit the payment of site commissions.¹³

Securus’s arguments that the rates are still below its costs to provide service, even if true, are insufficient reasons to stay the *Order*. First, Securus misrepresents the *Order* when it reports that the “FCC states and intends that the extra funds generated by the ‘revised rate caps’ will go to correctional facilities.”¹⁴ The FCC made no such statements. The FCC never stated that all facilities will necessarily incur these costs and, therefore, are entitled to the extra rate caps. Even

¹¹ *Global Tel*Link, et al. v. FCC*, Case No. 15-1461, Order, pg. 2 (D.C. Cir., Aug. 19, 2016).

¹² Petition, pg. 5.

¹³ *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107, ¶ 56 (2013) (“*2013 Order*”) (“We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions.”); *see also* .*Order*, pg. 8, footnote 52 (“As explained below at not 151, because we do not regulate site commissions in this order (**and have not done so previously**), any revenues derived under these rate caps may be passed through to facilities.”) (emphasis added).

¹⁴ Petition, pg. 6.

Securus's references to the *Order* shows that the FCC is merely acknowledging that facilities may incur costs,¹⁵ and the rates were increased to "ensure that all providers can earn sufficient revenues to cover their ICS-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing ICS."¹⁶ The FCC has increased rates to allow the flexibility of providers to compensate facilities for any costs the facilities may incur for providing ITS, and at the discretion of ITS providers. Despite Securus's mischaracterization of the *Order*, the increase in rates is not a pass-through fee.

Securus has already gone on the record in this Docket to say that its clients incur no costs to provide ITS, that Securus bears most of the costs related to providing ITS.¹⁷ It is reasonable to presume for the purposes of determining whether to issue a stay that Securus's clients incur costs similar to what was proposed by Securus's counsel, Andrew Lipman, of \$0.01 per minute for facilities with average daily population (ADP) of 1,000 or greater, \$0.02 per minute for facilities with ADP of 300-299, and \$0.03 per minute for facilities with ADP below 300.¹⁸ The Lipman proposal was endorsed by Securus, GTL, Telmate, and Pay Tel in a joint filing in this Docket.¹⁹ Thus, based on Securus's own representations, the costs of providing ITS for Securus clients is low, enabling Securus to keep most, if not all, of the increase in rates.²⁰

Second, Securus's claim that the new rates are below their costs compares apples to oranges, as well as contradicting their concessions in this Docket and their current practices.

¹⁵ Petition, pg. 6 (citing *Order*, ¶ 30).

¹⁶ Petition, pg. 6 (citing *Order*, ¶ 6).

¹⁷ Attachment 1, Exhibit 1 (page 4).

¹⁸ Attachment 2, page 6.

¹⁹ Attachment 3, pgs. 1-2.

²⁰ *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 570 (D.C. Cir., 1997) ("Under a price cap system, 'the regulator sets a maximum price, and the firm selects rates at or below the cap.' Cost reductions under the price cap scheme 'do not trigger reductions in the cap,' but rather increase the company's profits.").

Securus claims that its average per-minute cost to provide ITS is \$0.1776.²¹ Securus's alleged costs are misleading because they lump all their facilities together, while the rate caps in the *Order* are differentiated by facility size. Securus's alleged costs are further contradicted by its support for the FCC's rates from the *2015 Order*, which are lower than those in the *Order*, so long as the FCC prohibited or capped commissions.²² Moreover, Securus's current practice has included offers to facilities when rates are capped at the FCC's rates are inconsistent with their allegations that they will lose costs if the *Order* is implemented. In March 2016, at Georgia DOC, Securus agreed to pay 59.6% commission on calling rates of \$0.11 per minute for all domestic prepaid and debit calling and \$0.13 per minute for all domestic collect calling, including a minimum monthly guarantee (MMG) payment of \$325,000.00, and an additional financial incentive of **\$4,000,000.00** payment to be made upon contract signing.²³ Clearly, Securus can make a reasonable profit under the FCC's previous rates when it can afford to charge the *2015 Order's* rates and still offer a \$4,000,000 upfront payment, plus 59.6% in commissions that are guaranteed to be a minimum of \$325,000.00 per month.

Third, Securus's argument that the FCC must regulate site commissions to rate caps that result in reasonable and fair profits is false. As a threshold matter, the FCC does not have the authority to regulate how a provider spends its profits. Indeed, a regulator's attempt to prohibit expenditures would raise several constitutional questions, including but not limited to the freedom of speech in the First Amendment. Nor could the FCC reasonably enforce any such regulations, particularly considering that the FCC cannot regulate political contributions or

²¹ Petition, pg. 6.

²² Attachment 3, pg. 2 ("If, however, the FCC issues an order that (a) adopts the rate caps and fees stated in the Fact Sheet, and (b) establishes a maximum site commission in the form of a per-minute, capped additive rate, consistent with the Lipman proposal, the companies will not seek judicial review of these matters.")

²³ See Attachment 4, pgs 5-6.

charitable contributions – whether they are from the providers themselves or individual employees, which are protected by the First Amendment. The *2015 Order* states: “Accordingly, if a provider is able to demonstrate that a particular state law or requirement is inconsistent with the rules we adopt in this Order, we will, consistent with section 276, preempt the inconstant requirement.”²⁴ Thus, the *2015 Order* clearly preempts contracts requiring the provision of ITS without permitting providers a fair and reasonable profit, as required in Section 276 of the Telecommunications Act.

Therefore, Securus is disingenuous when it claims to the FCC that it cannot renegotiate contracts. Nine days before the implementation date, Securus renegotiated all of their contracts to exclude site commissions as a result of the *2013 Order*,²⁵ even though their purported average costs of \$0.1776²⁶ are below the maximum rate caps of \$0.21 per minute for debit and prepaid calls and \$0.25 per minute for collect calls,²⁷ and despite the fact that the *2013 Order* did not prohibit the payment of site commissions either.²⁸ In addition to agreeing to charge the rates from the *2015 Order*, Securus agreed to charge less than the fee cap from the *2015 Order* for live agent fees, by agreeing to charge \$4.75,²⁹ instead of the permissible \$5.95 per transaction.³⁰ Nevertheless, even if they could not renegotiate their contracts, they have failed to exhaust their administrative remedies of seeking the FCC to consider an express preemption, as stated in Paragraph 211 of the *2015 Order*.

²⁴ *2015 Order*, ¶ 211.

²⁵ Attachment 5, filed as Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Exhibit B (filed mar. 11, 2014).

²⁶ Petition, pg. 6.

²⁷ 47 C.F.R. § 64.6030 (implemented in the *2013 Order*).

²⁸ *2013 Order*, ¶56 (“We do not conclude that ICS providers and correctional facilities cannot have arrangements that include site commissions.”); *see also .Order*, pg. 8, footnote 52 (“As explained below at not 151, because we do not regulate site commissions in this order (***and have not done so previously***), any revenues derived under these rate caps may be passed through to facilities.”) (emphasis added).

²⁹ Attachment 4, pg. 6.

³⁰ 47 C.F.R. § 64.6020(b)(3).

In addition, Securus's argument that it pays commissions at all of its facilities, and that should be a reason to stay the rates, ignores the fact that Securus has been making offers that continue to include the payment of substantial commissions and agreeing to contracts that are knowingly inconsistent with the *2015 Order*. Securus's conscious and purposeful decision to make exorbitant commission offers and to continue to charge rates much higher than the rates the FCC has signaled it has found to be fair, just, and reasonable cannot be a reason to stay the *Order*. In many cases, Securus funds their current commission offers by charging much higher first minute rates for in-state rates that are the equivalent of a per-call charge,³¹ arguably in violation of the effective rules of the *2015 Order*. And, while Securus is making these claims that they pay commissions on all of their contracts, they do not provide any specific information. There are many contracts by ITS providers that have caveats of not paying commissions on interstate calling revenue or the higher first minute of intrastate revenue.³² Securus's argument that they are bound to pay the commissions while still offering exorbitant commission offers is a self-perpetuating problem that should not hold up the FCC's ability to pass regulations. The financial offer Securus made to the Georgia DOC in March 2016 is a perfect example. The FCC could never arrive at a fair, just, and reasonable rate cap if the providers can always claim that their current contracts are inconsistent with the rates when the providers are purposely entering into such agreements.

³¹ See Attachment 6 (showing first minute rates of \$5.90 at a jail in Michigan, \$5.56 at a jail in Texas, \$4.99 at a jail in Virginia, and \$4.00 at a jail in Missouri). These are a sample of jails in a sample of States, and many more facilities in many more states can have similar higher first-minute rates. Since these rates were obtained on July 28, 2016, Securus has removed the rate calculator from its public website to prevent further research.

³² See Wright Petitioners Consolidated Comments, WC Docket No. 12-375 at Ex. B (filed Mar. 11, 2014) ("Due to the FCC's Order, Securus no longer will pay site commissions on interstate calls."); see also *Rates for Interstate Inmate Calling Services*, Ongoing Payment of Interstate Site commissions in Contravention of *Inmate Rate Order* (FCC 13-113), WC Docket No. 12-375, pg. 2 (posted May 5, 2015) (showing Securus continued with its policy to not pay site commissions on interstate calls).

As for the second prong of the *Virginia Petroleum Jobbers* test, Securus fails to meet the burden necessary to warrant a stay. Securus's arguments are essentially that, because the *Order* is not in its favor, it will suffer irreparable harm. It is rare that regulations satisfy all interested participants. Thus, an affected party needs to show more than just that its operations will change in a somewhat detrimental manner in order to support a stay. Moreover, in this case specifically, because Securus is charging rates as high as \$19.41 for a 15-minute call for some of their intrastate calls, Securus may very well lose revenue if this *Order* is not stayed. Indeed, the *Order* is intended to stop practices of such high calling rates and those providers who have rode the wave of high rates will likely suffer. But, it does not necessarily follow that their profits will be unreasonable or otherwise unfair in the eyes of the law. Regulated providers are entitled to fair and reasonable profits, not a continuance of their existing revenue.

Securus's assertion that it spent \$3 million to renegotiate 1,500 contracts for the rates in the *2015 Order* is questionable, at best.³³ Given the fact that Securus is only installed at a fraction of the limited number of State DOCs, most of the 1,500 contracts must have been jails. It is hard to believe that Securus was renegotiating the rates of their existing jail contracts to the tune of \$2,000 a contract prior to the Court of Appeals' stay of the rates in the *2015 Order* on March 7, 2016, particularly when considering Securus was one of the proponents arguing for the stay and the implementation dates for jail rates was not until June 20, 2016. Such imprudent spending cannot be controlled by or otherwise attributable to the FCC.

Similarly, it is unclear why Securus would have such an antiquated and inefficient billing system that would require 7,200 man hours of re-programming, at an amount of \$720,000.00, in order to change rates.³⁴ In addition to being nonsensical how Securus would have used 7,200

³³ Petition, pg. 11.

³⁴ Petition, pg. 12.

man hours of reprogramming while it was arguing for a stay of the rates, every facility has a different rate structure. Surely, Securus doesn't have to reprogram its billing system every time it gets a contract with a new rate structure. If their billing system can handle multiple rate structures to accommodate their 1,500 contracts, it is hard to understand why Securus's technology department does not have a way to change the rates to the streamlined rates in the FCC's *2015 Rate Order*. But, even if they did incur those costs for the rates, it is even harder to believe that they would be unable to utilize at least some of the development for this *Order*. Accommodating a new rate structure should not be reinventing the wheel. If it is, again, the FCC cannot be held accountable for the inefficiencies of a minority of the companies. It is management's decision what technology to use, not the FCC's decision.

For the third prong of the *Virginia Petroleum Jobbers* test, Securus ignores the harm that will occur by continuing with the uncertainty of intrastate rates. Securus presents its stay as "simply the continuation of the status quo," but it is anything but status quo in the industry. After the *2013 Order*, many providers increased fees dramatically to maintain their revenue. Now that fees have been capped, some providers are using significantly higher intrastate rates to increase revenue. Many States do not regulate intrastate rates at all or in a meaningful manner to rein in exorbitant rates. The result is industry confusion that has translated to an uncertainty hindering competition. Providers will be unable to compete unless and until they adopt the predatory practices of charging substantially higher for intrastate rates and even charging a higher non-commissionable first minute, to serve as the equivalent of per-call fees without having to charge an actual per-call fee. Providers that want to operate in the spirit of the law, by charging fair, just, and reasonable rates, if for no other reason than to avoid future litigation for unjust and unreasonable rates or other unjust enrichment claims, will be unable to compete and

will be squeezed out of the market. Moreover, in this day and age of mobile cell phones, and the disconnection of a phone number's area code from the actual location of the phone, it does not make sense why in-state consumers would pay more than six times what their interstate counterparts pay.³⁵ For those consumers who have non-local, in-state numbers and actually live outside of the facility's jurisdiction, and cannot vote for the officials who make the decisions on commissions in contracts, are the most susceptible to high rates. The regulation of interstate rates and fees, while leaving intrastate rates unregulated, is causing a great deal of harm.

As for the fourth prong of the *Virginia Petroleum Jobbers* test, the public interest is not served by a stay. The failure of the market to effectively control rates is hindering competition. Whenever one charge is controlled, the industry finds another charge to manipulate, forcing all providers to choose between charging fair, just, and reasonable rates or charging exorbitant rates. The market needs certainty in what rates and charges are lawful, while leaving the providers to the decisions of how to utilize the revenue. That's what this *Order* is attempting to accomplish.

Thus, the Petition has (i) failed to establish that an appeal of the *Order* would be successful on the merits; (ii) failed to provide any solid evidence that Securus will suffer irreparable harm; (iii) failed to show the lack of harm to third parties (in fact, great harm be caused from a delay in the effectiveness of the lower ICS rates); and (iv) failed to show any public interest benefit from granting a stay. Therefore, Petitioners oppose the Petition for Partial Stay, and respectfully request that the FCC deny the request as legally unsustainable.

Respectfully submitted this 31st day of August, 2016.

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³⁵ At Benzie County, Sheriff's Department in Michigan, a 15-minute call for a prepaid or debit call costs \$3.15 for an interstate call, while an in-state call costs \$19.41. See Attachment 6.

CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2016, the forgoing Opposition was served via electronic mail on the following persons:

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