

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**SECURUS TECHNOLOGIES, INC. REPLY IN SUPPORT OF
APPLICATION FOR REVIEW
(DA 14-1432)**

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Dated: November 24, 2014

SUMMARY

Securus has demonstrated that the Bureau Order is in error for two reasons. Pay Tel's attempts to rehabilitate the Order are unavailing.

The Bureau did not appropriately credit the facts that Securus provided in its objection papers. Securus showed that the circumstances of Pay Tel's request are uncommon, both due to that company's structure and due to the fiercely competitive nature of the Inmate Calling Services ("ICS") industry. And though Pay Tel discounts it, despite having benefited from it, the industry's prior agreement not to share confidential data when creating a joint cost study is powerful evidence that the mutual sharing of sensitive ICS data is both dangerous and unnecessary. The Bureau may have recited those facts, but it did not truly consider them. Pay Tel's defense of the Order cannot remedy that error.

Nor can Pay Tel persuade that the Commission's balancing test for confidentiality disputes was rightly ignored by the Bureau. Need versus risk has been part of the Commission's analysis for decades. Here, because that balance plainly falls in Securus's favor, Pay Tel suggests that the Protective Order precludes any analysis at all. That position is at odds with the express terms of the very Protective Order on which Pay Tel relies – the order permits a party to object to any request for confidential data and to state their grounds for objecting. Once lodged, objections must be subject to some standard of review. That standard of review is the balancing test that Securus explicated before the Bureau.

Pay Tel is demonstrably able to participate fully in this proceeding. Its economist has had Securus's Confidential Cost Data since August 28, 2014, and Pay Tel undoubtedly relied on his analysis in order to craft a comprehensive rate proposal that it filed on October 3, 2014. Pay Tel's rights have not been infringed. Securus's competitive position, however, would be

tremendously endangered by the forced additional disclosure of its Confidential Cost Data. It cannot rely on the benign hope that no leak will occur, actually detect a leak, and then wait to quantify the damage. The Commission has long recognized and credited the weight of these risks, and the Bureau's failure to follow that practice warrants reversal of the Bureau Order.

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Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.104, files this reply memorandum in support of the Application for Review filed with the Commission on October 30, 2014 (“Application”), seeking reversal of the Order issued October 1, 2014, by the Wireline Competition Bureau under delegated authority.¹ Pay Tel Communications, Inc. (“Pay Tel”), the only party to respond to the Application for Review,² provides no credible basis to affirm the Bureau Order. Pay Tel’s economist obtained the data on August 28, 2014, enabling Pay Tel to file a very specific rate proposal in this docket, and Securus cannot bear the risk of expanding the disclosure of its Confidential Cost Data any further.

ARGUMENT

I. SECURUS HAS DEMONSTRATED THAT THE RISK OF IMPROPER DISCLOSURE IS TOO GREAT UNDER THE PARTICULAR CIRCUMSTANCES OF THIS DISPUTE

As the Application and Opposition show, the facts of this dispute are, with one exception, already conceded: Pay Tel is a small company; Pay Tel has no inside counsel; Pay Tel’s economist received the Confidential Cost Data on August 28, 2014; and no Inmate Calling Services (“ICS”) company has, to the best of Securus’s knowledge, ever shared confidential cost data with another ICS company.³ Contrary to Pay Tel’s assertion, Securus made it very clear both to the Bureau and in its Application that these circumstances are unique, that they should be

¹ WC Docket No. 12-375, Order, DA 14-1432 (Wireline Competition Bureau Oct. 1, 2014) (“Bureau Order”).

² WC Docket No. 12-375, Pay Tel Communications, Inc. Opposition to Securus Technologies, Inc.’s Application for Review (Nov. 13, 2014) (“Pay Tel Opp.”).

³ Application at 4-5; Pay Tel Opp. at 7-9.

given appropriate weight,⁴ and that the Bureau's failure to give them due consideration was reversible error.⁵

The closeness of Pay Tel and its Outside Counsel are and have consistently been the source of Securus's concern.⁶ The Bureau's failure to credit this concern is the first of two independent grounds on which Securus filed its Application for Review. It bears mention that this concern is shared by other ICS providers who have likewise filed Objections to providing cost data to Pay Tel's Outside Counsel.⁷

The question whether Outside Counsel has on occasion identified himself as Pay Tel's General Counsel is not, contrary to Pay Tel's assertion, irrelevant.⁸ Regardless of whether, as a matter of reality, Mr. Trathen actually is Pay Tel's General Counsel,⁹ that state of mind is indicative of the relationship. Pay Tel's statement that Mr. Trathen "is not aware" of

⁴ WC Docket No. 12-375, Securus Technologies, Inc. Objection to Disclosure of Confidential Information at 4-5 (Aug. 6, 2014) ("Securus Objection"); Securus Technologies, Inc. Reply in Support of Objection to Disclosure of Confidential Information at 2-3 (Aug. 15, 2014) ("Securus Reply").

⁵ Application at 4-6. Securus did not "fail[] to 'specify with particularity' the alleged error warranting Commission review," Pay Tel Opp. at 6 n.19, having provided two enumerated grounds, with supporting evidence, for reversing the Bureau Order pursuant to 47 C.F.R. § 1.115. Application at 4 (citing 47 C.F.R. § 1.115(b)(2)(ii) & (iv)).

⁶ Securus Objection at 5; Securus Reply at 2; Application at 5-6.

⁷ WC Docket No. 12-375, Telmate LLC Objection to Disclosure of Confidential Information (Sept. 12, 2014); Global Tel*Link Corporation Objection to Disclosure of Confidential Information (Sept. 12, 2014); Letter from Cherie R. Kiser, Counsel to Global Tel*Link Corporation, to Marlene H. Dortch, FCC (Oct. 6, 2014) (lodging supplemental objection to Pay Tel's request for confidential data).

⁸ Pay Tel Opp. at 7 ("Securus does not explain why this is relevant").

⁹ Securus never has asserted that Mr. Trathen *is* Pay Tel's General Counsel. *E.g.*, Application at 5. Mr. Townsend's sworn statement that "Mr. Trathen is not, and never has been, engaged by Pay Tel as Pay Tel's General Counsel" is well taken, but beside the point. Declaration of Vincent Townsend, President of Pay Tel, ¶ 3(e) (Aug. 15, 2014) (filed with Pay Tel Communications, Inc. Supplemental Response to Securus Technologies, Inc.'s Objection to Disclosure of Confidential Information (Aug. 19, 2014)).

having made that representation¹⁰ is not a final refutation. Being unaware is not the same as knowing the contrary.¹¹

Pay Tel's belittling of the ICS industry's course of conduct is likewise unsuccessful.¹² As Securus has shown, this industry does not share cost information, even when cooperating within the bounds of a regulatory proceeding.¹³ Every other ICS provider in this proceeding continues to apply that practice.¹⁴ The Bureau also erred in failing to credit this fact appropriately.

Had the Bureau given due consideration to these facts, it would have held that Securus need not provide its fully disaggregated, highly detailed cost data to Outside Counsel. The Commission now should remedy that error by reversing the Bureau Order.

II. PAY TEL'S REJECTION OF THE COMMISSION'S BALANCING TEST ONLY REPEATS THE BUREAU'S ERROR, RENDERING ITS OPPOSITION UNAVAILING

As the Application for Review shows, the Commission's risk-versus-need balancing test should have been applied by the Bureau and persuaded it not to accede to Pay Tel's demand for additional disclosure of Securus's confidential data.¹⁵ Pay Tel's argument that

¹⁰ Pay Tel Supplemental Response at 2 n.4.

¹¹ Mr. Trathen did not supply a sworn statement on this issue, but he has done so in other contexts. *E.g.*, WC Docket No. 12-375, Pay Tel Communications, Inc.'s Petition for Extension of Waiver, Declaration of Marcus W. Trathen (Oct. 31, 2014) (discussing various conversations and meetings with Staff of the North Carolina Utilities Commission).

¹² Pay Tel Opp. at 8.

¹³ Application at 4; Securus Reply at 3; Securus Objection at 2-3.

¹⁴ Several ICS providers, including Global Tel*Link, Securus, Telmate, and Pay Tel, have submitted their confidential cost data to an economist for his review of the Commission's cost analysis in the Second Further Notice of Proposed Rulemaking released October 22, 2014, in this docket. No provider's Outside Counsel or employees will receive any of that confidential data, nor will they receive the proprietary version of the economists's analysis or report.

¹⁵ Application at 6-8; *see also* Securus Reply at 4.

the test does not exist or that, if it exists, the test should not apply here is simply not compelling. The argument is likely an effort to mask the most important fact of this dispute: Pay Tel’s economist, Don Wood, has had Securus’s confidential cost data since August 28,¹⁶ and obviously has used it to assist Pay Tel in crafting a counterproposal, titled “Ethical Proposal”, for the ongoing rate review in this proceeding.¹⁷

The FCC precedent that Securus has provided is both germane and controlling in this dispute.¹⁸ Pay Tel attempts to distinguish this precedent on the ground that, in those instances, the question was whether to release data to the public.¹⁹ That is a distinction without a difference: the identity of the audience does not change the basic function of comparing risk to need. If the audience’s identity did matter, however, it would only further support Securus’s position – here, the audience is a direct competitor of Securus’s with the motivation and ability to misuse confidential data to gain unfair competitive advantage. In any event, Pay Tel fails to persuade that the Bureau rightly ignored the Commission’s balancing test.

Pay Tel’s position, at its core, is that the Bureau’s adoption of the Protective Order somehow nullifies or precludes any balancing of interests. Or perhaps Pay Tel seeks to replace the Commission’s precedent with the bare terms of the Protective Order. But, as Securus explained to the Bureau, if no further analysis were permitted then the Protective Order would not include a procedure for lodging objections.²⁰ And when an objection is made, it requires a

¹⁶ Application at 3, 6-7; *see also* Pay Tel Opp. at 3.

¹⁷ WC Docket No. 12-375, Pay Tel Communications, Inc. Ethical Proposal for Reform of Inmate Calling Rates and Fees (Oct. 3, 2014).

¹⁸ Application at 7 (discussing *Rural Call Completion*, 28 FCC Rcd. 16,154 (2013); *Modernizing the FCC Form 477 Data Program*, 28 FCC Rcd. 9887 (2013); *AT&T Request for Inspection of Records*, 5 FCC Rcd. 2464 ¶ 5 (1990)).

¹⁹ Pay Tel Opp. at 11.

²⁰ Application at 2; Securus Reply at 3-4.

standard of review. That standard is the balancing test.

Pay Tel made a very specific rate proposal that plainly stems from cost information submitted by, at a minimum, Securus, because it includes a rate for “State and Federal Prisons” which Pay Tel does not serve.²¹ This proposal surely was based on Mr. Wood’s analysis of Securus’s cost data. The Ethical Proposal itself demonstrates that Pay Tel is in fact able to participate in the underlying rate proceeding. Mr. Wood is ably assisting Pay Tel, and its counsel is a very vocal advocate for Pay Tel’s positions. Pay Tel’s “due process concerns”²² thus ring hollow, and its showing of need is meager.

The Bureau should have balanced Pay Tel’s greatly diminished need for further disclosure against the tremendous risk of irreparable harm that Securus presented.²³ “Knowing a competitor’s detailed, disaggregated costs is akin to seeing their future bids in advance; the substantial and irreparable harm that will result is obvious.”²⁴ And though the Commission reserves the right to “disbar” counsel who improperly disclose confidential information,²⁵ unearthing and proving such allegations is itself a burden and is not an assured remedy. The competitive harm from improper disclosure is, however, assured, and it is irreparable: “Securus cannot simply change its cost figures or its entire service configuration if its cost data gets leaked.”²⁶ In a word, what is at risk here is Securus’s ability to remain in business in this fiercely competitive market.

²¹ *E.g.*, Pay Tel Communications, Inc.’s Petition for Waiver of Interim Interstate ICS Rates at 2 (Jan. 8, 2014). Both Securus and Global Tel*Link provide ICS to several state prison systems.

²² Pay Tel Opp. at 12.

²³ *E.g.*, Application at 6; Securus Reply at 4.

²⁴ Securus Objection at 3.

²⁵ WC Docket No. 12-375, Protective Order, DA 13-2434 ¶ 16 (Dec. 19, 2013).

²⁶ Securus Reply at 4.

The Bureau, in refusing to apply the balancing test, failed to give due consideration to this risk. The Order is simply a formulaic recitation of the Protective Order, resting fully on the conclusion that any “Outside Counsel” who signs the Protective Order must get all of the data they request. The calculus appears to be that, absent quantifiable proof of wrongdoing, which wrongdoing would be without adequate remedy, no Objection will be honored. The Commission is not, however, so formulaic regarding confidential data. The interests of the parties must be credited and compared. Here, in such a comparison, it is clear that Securus’s Objection should have been affirmed, because Pay Tel’s expert already has and is using Securus’s confidential data, and the risk of harm from expanding that disclosure is too great.

CONCLUSION

For all these reasons, the Commission should grant this Application and set aside the Bureau Order as it regards disclosure of Confidential Data to Pay Tel or its “Outside Counsel”.

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Dated: November 24, 2014

CERTIFICATE OF SERVICE

I hereby certify on this 24th day of November, 2014, that the foregoing Reply in

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