

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

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**COMMENTS OF SECURUS TECHNOLOGIES, INC.
ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING
PUBLIC VERSION**

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Dated: January 12, 2015

SUMMARY

Securus fully supports the Commission's focus in the Second Further Notice of Proposed Rulemaking on employing a market-based approach to Inmate Calling Services ("ICS") that has, as a "backstop", clearly defined rate caps. Competition is vibrant in this market: it has driven prices down significantly in recent years while spurring tremendous advancements in safety and technology. With the appropriate regulatory framework that emphasizes quality and price, ICS competition will flourish even more, making ICS more efficient, more safe, and more affordable than ever before for inmates, their called parties, and the general public.

The ICS Industry Proposal, filed September 15, 2014, presents a reasonable, comprehensive, and fair set of rates and rules that is based in the record. Its suggested calling rates of \$0.20 per minute for all prepaid calls and \$0.24 for all collect calls is based squarely on the cost data that ICS providers were required to submit in the Mandatory Data Collection. Those rates will ensure that all carriers' average costs are recoverable — they provide exactly the "backstop" that the Commission wants, allowing the strong competitive forces in this market to do the rest. To adopt rates any lower than the Industry Proposal would place ICS carriers in a below-cost situation from the outset, and as shown and explained in the attached Elasticity Report created by FTI Consulting, the Commission cannot rely on price elasticity, which is demonstrably weak here, to make a below-cost rate into a reasonable one. Nor should the Commission adopt rates based on the flawed "jails v. prisons" construct, because, as proven herein, that purported distinction has no credible basis and will result in unlawful rate discrimination.

Site commissions remain a crucial consideration in the ICS environment. As the Commission knows, monetary site commissions are a large part of the costs of doing business for this industry. Allowances must be made for the direct costs that correctional authorities incur in order to make telephones both available and safe for inmates. Equally important is that if the Commission allows monetary site commissions for direct ICS costs incurred by correctional facilities, then ICS carriers must be allowed to recoup monetary site commissions in rates, a mechanism that under the present rules is not permissible for interstate rates. Should the Commission amend its current policy and allow monetary site commissions, it must remain mindful of the fact that such costs were expressly excluded from the ICS providers' cost data, and certainly the Securus Cost Data, in accordance with the Commission's instructions. As such, the ICS Industry Proposal does not allow for the recovery of site commissions. A cost recovery method or factor must be added to that rate if monetary site commissions now will be permissible. And in order to ensure that correctional authorities and ICS providers can plan appropriately for the new regime, the Commission should adopt its proposed two-year transition period.

With regard to "ancillary fees", again the Industry Proposal presents the best solution. The attached Declaration of Dennis Rose, Senior Director of Billing, shows that Securus incurs substantial costs to make optional payment and calling methods available. These new methods represent tremendous, pro-consumer innovation and have made communications more accessible for inmates and their loved ones. To abolish these options or cap fees below cost would cause carriers to discontinue these valuable services, a result that is inimical to the Commissions' stated goals for this proceeding.

Mandatory intra-facility competition would likewise work against the Commission's goals. As explained in the attached Declarations from the Securus Chief Financial Officer and from the Vice President of Operations and Engineering, a multi-provider system would create such uncertainty in both the cost structure and the security of inmate calls that providers would be unwilling to compete for contracts and correctional authorities would be unwilling to continue offering service. Although competition is a salutary force in any industry, and certainly it has been so for ICS, imposing intra-facility competition in this market will actually decrease, not increase, inmates' access to telephones.

Rates for TeleTypewriter ("TTY") calls should not be different or discounted from the forthcoming rate caps. As explained in the attached Further Declaration of Curtis Hopfinger, Securus is the carrier only for TTY to TTY calls, and they have the same call path as any call. Securus does not handle, control, or bill for other types of TTY calls. As such, Securus is unable to cull TTY calls out from Voice calls, rendering any special TTY rate impossible to implement without a great deal of new software and system changes, the costs of which are, as with monetary site commissions, not included in the Securus Cost Data. A differentiated or discounted rate also raises concerns regarding fraud and inmate intimidation when an incentive to arbitrage calling rates is introduced in this manner.

Finally, the existing waiver process should be revisited and amended. The current standard for obtaining a waiver is far too onerous, requiring a carrier to commission a company-wide cost study simply to serve one facility. The Commission should permit carriers to seek waivers on a site-by-site basis where the demonstrable costs of service at a facility exceed the rate caps. The process should encourage carriers to seek out new customers and retain their existing ones rather than to serve as a deterrent to potential bids.

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ATTACHMENTS

- FTI Consulting, Inc., Report on Price Elasticity of Demand for Interstate Inmate Calling Services on Behalf of Securus Technologies, Inc. (Jan. 12, 2015) (PUBLIC VERSION)
- Declaration of Geoffrey M. Boyd, Chief Financial Officer (Dec. 9, 2014)
- Declaration of Curtis L. Hopfinger, Director – Regulatory Affairs (Dec. 10, 2014)
- Declaration of David Kunde, Vice President of Operations and Engineering (Dec. 9, 2014)
- Declaration of Dennis Rose, Senior Director – Billing (Jan. 9, 2015) (PUBLIC VERSION)

Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.415, files these Comments in response to the Second Further Notice of Proposed Rulemaking released October 22, 2014, in this docket (“Second FNPRM”).¹

BACKGROUND

A. Securus Technologies, Inc.

Securus Technologies, Inc. (“Securus”) is a telecommunications service and technology company that serves corrections and law enforcement agencies exclusively. Securus is the leader in developing and patenting the technology that makes inmate calling efficient and secure; it holds 119 U.S. patents in this technology. Presently, Securus provides telecommunications service, parolee tracking, and government information management solutions to more than 2,000 correctional facilities in 47 states and the District of Columbia.

B. The Inmate Rate Order

In 2012, in response to two petitions for rulemaking filed by Martha Wright and other individuals,² the FCC issued a Notice of Proposed Rulemaking³ to consider several specific proposals to lower inmate calling services (“ICS”) rates. The NPRM sought comment on proposals for regulating ICS, with a focus on rate caps.⁴ On September 26, 2013, the FCC

¹ The item was published in the Federal Register on November 21, 2014, at 79 Fed. Reg. 69682, *available at* <<https://www.federalregister.gov/articles/2014/11/21/2014-26922/rates-for-interstate-inmate-calling-services-second-further-notice-of-proposed-rulemaking>>.

² CC Docket No. 96-128, Petition of Martha Wright, *et al.* for Rulemaking or, in the Alternative, Petition To Address Referral Issues in Pending Rulemaking (Nov. 3, 2003); Petitioners’ Alternative Rulemaking Proposal (Mar. 1, 2007).

³ WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd. 16629 (2012) (“NPRM”).

⁴ NPRM ¶¶ 18-26, 28, 30-34, 36, 39-40 (seeking comment on eliminating per-call charges, capping per-minute rates, using marginal location methodology to establish rate caps, adopting tiered pricing (with different per-minute rates for different volumes of usage), establishing different caps for collect calls and debit calls, capping interstate rates at intrastate long-distance

released the *Inmate Rate Order*.⁵ The *Inmate Rate Order* adopted several of the proposals in the Wright petitions for rulemaking at least in part, including “interim rate cap[s]” nearly identical to the rate caps the Wright petitioners had sought – “\$0.21 per minute for debit and prepaid interstate calls, and \$0.25 per minute for collect interstate calls.”⁶

The FCC also went much further, adopting a sweeping new rule requiring that all interstate ICS rates be based on providers’ costs.⁷ Under this rule, all interstate ICS rates above the rate caps are unlawful (absent a waiver for “extraordinary circumstances”), and any interstate ICS rate, even if below the rate caps, is unlawful if not based on a provider’s costs to provide interstate ICS.⁸ Expressly excluded from those costs, and therefore unrecoverable through interstate ICS rates, are site commissions – which many ICS contracts require providers to pay.⁹

As part of its cost-based regime, the *Inmate Rate Order* created interim “safe harbor” levels for interstate rates (\$0.12 per minute for debit and prepaid calls, and \$0.14 per minute for collect calls). Even rates at safe harbor levels are unlawful, however, if not based on costs the FCC deems “allocable” to interstate ICS,¹⁰ and the “safe harbor” is unavailable to an ICS provider that charges rates above safe harbor levels at any of the facilities that it serves.¹¹

rates, requiring ICS providers to offer debit or prepaid calling options, mandating a certain amount of free calling per inmate per month, and restricting billing-related call blocking).

⁵ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113 (rel. Sept. 26, 2013), published at 78 Fed. Reg. 67956 (Nov. 13, 2013) (“*Inmate Rate Order*” or “*Order*”).

⁶ *Id.* ¶ 48.

⁷ *Id.* ¶ 12.

⁸ *Id.* ¶ 120.

⁹ *Id.* ¶ 7.

¹⁰ *Inmate Rate Order* ¶¶ 60, 120.

¹¹ *Id.* ¶ 60 n.226.

The *Order*'s cost-based-rate requirement applied not only to rates for interstate calls but also to "ancillary charges," a term that the *NPRM* did not even mention and which the *Order* defines broadly to include any ICS charges not assessed on a per-call basis.¹² For example, ICS providers assess such charges for services related to the debit and prepaid account systems that they maintain for inmate callers. The *Inmate Rate Order* requires that these charges be cost-based but did not adopt safe harbors or caps.

C. Petitions to FCC for Stay of *Inmate Rate Order*

Securus and a group of correctional institutions each petitioned the FCC for a stay of the *Inmate Rate Order* in full.¹³ Global Tel*Link ("GTL") petitioned the FCC for a stay of the cost-based-rate regime adopted in the *Order*.¹⁴ On November 21, 2013, the FCC's Wireline Competition Bureau denied Securus's and GTL's petitions, and deferred ruling on the correctional institutions' petition.¹⁵ Two other ICS providers, CenturyLink Public Communications, Inc. ("CenturyLink") and Pay Tel Communications, Inc. ("Pay Tel"), subsequently filed petitions for stay.¹⁶

D. Appeal of *Inmate Rate Order* to the D.C. Circuit and Resulting Stay

Securus, GTL, CenturyLink, and the Mississippi and South Dakota Departments of Corrections petitioned United States Court of Appeals for the D.C. Circuit for review of the

¹² 47 C.F.R. § 64.6000.

¹³ WC Docket No. 12-375, Securus Petition for Stay of Report and Order Pending Appeal, WC Docket No. 12-375 (Oct. 22, 2013); Correctional Institutions Petition for Stay Pending Judicial Review (Nov. 12, 2013).

¹⁴ WC Docket No. 12-375, GTL Petition for Stay Pending Judicial Review (Oct. 30, 2013).

¹⁵ WC Docket No. 12-375, Order Denying Stay Petitions and Petition To Hold in Abeyance, 28 FCC Rcd. 15927, 15963 ¶¶ 60, 62 (Wireline Comp. Bur. 2013).

¹⁶ WC Docket No. 12-375, CenturyLink Petition for Stay, WC Docket No. 12-375 (Nov. 27, 2013); Pay Tel Petition for Partial Stay (Nov. 26, 2013).

Inmate Rate Order, and each moved the D.C. Circuit for a stay of all or part of the *Inmate Rate Order* pending review.¹⁷ On January 13, 2014, the D. C. Circuit granted a stay of the *Inmate Rate Order*'s rule that all rates be cost-based,¹⁸ and the regulations deriving from that rule,¹⁹ holding that the “petitioners [had] satisfied the stringent requirements for a stay.”²⁰

E. The Pay Tel Waiver Order

The FCC set the interim debit rate cap in the *Inmate Rate Order* based on Pay Tel cost data reflecting Pay Tel's average per-minute costs.²¹ Despite this fact, Pay Tel nonetheless argued that the Interim Rate Caps were too low. On January 8, 2014, Pay Tel filed a Petition for Waiver of Interim Interstate ICS Rates, stating that “it [could not] recover its costs on a holding company level if it [was] required to charge the *Order*'s interim interstate rates”²² and that compliance with the rates would leave Pay Tel “in an economically unsustainable situation.”²³

On February 11, 2014, the day on which the portions of the *Inmate Rate Order* that are not subject to the D. C. Circuit stay – most notably, the Interim Rate Caps – became effective, the FCC granted Pay Tel's request for waiver, permitting it to charge rates as high as

¹⁷ GTL Motion for Partial Stay Pending Judicial Review, *Securus Technologies, Inc. v. FCC*, Nos. 13-1280, *et al.* (D.C. Cir. Nov. 25, 2013); Securus Emergency Motion for Stay of FCC Order Pending Review, *Securus Technologies, Inc. v. FCC*, Nos. 13-1280, *et al.* (D.C. Cir. Nov. 25, 2013); CenturyLink Motion for Stay Pending Judicial Review, *Securus Technologies, Inc. v. FCC*, Nos. 13-1280, *et al.* (D.C. Cir. Dec. 4, 2013); Mississippi Department of Corrections and South Dakota Department of Corrections Motion for Stay Pending Judicial Review, *Securus Technologies, Inc. v. FCC*, Nos. 13-1280, *et al.* (D.C. Cir. Dec. 13, 2013).

¹⁸ 47 C.F.R. § 64.6010.

¹⁹ *Id.* §§ 64.6020 (the safe harbor rule), 64.6060 (an annual reporting requirement).

²⁰ Order Granting Motions for Stay In Part, *Securus Technologies, Inc. v. FCC*, Nos. 13-1280, *et al.* (D.C. Cir. Jan. 13, 2014).

²¹ *Inmate Rate Order* ¶ 76.

²² WC Docket No. 12-375, Pay Tel Communications, Inc. Petition for Waiver of Interim Interstate Rates at 1 (Jan. 8, 2014) (“Pay Tel Waiver Petition”).

²³ *Id.* at 2.

\$0.46 per minute, or approximately double the rate caps, for nine months.²⁴ The waiver applies to almost every site that Pay Tel serves.²⁵

F. Securus Petition to Expand Pay Tel Waiver

On February 19, 2014, Securus filed a Petition to Expand the Pay Tel Waiver, requesting that the relief granted to Pay Tel be granted to all ICS providers operating in jails located in the states that Pay Tel serves.²⁶ Securus argued that (1) all ICS providers operating in Pay Tel territory are subject to the same rate constraints as Pay Tel, (2) the rate caps were below Securus's costs of service,²⁷ (3) if Pay Tel was put in an "economically unsustainable position" by the Interim Rate Caps, and its own costs were the FCC's basis for the rate caps,²⁸ then surely Securus was in an equally unsustainable position and thus deserved the same rate relief,²⁹ and (4) granting rate relief to only one ICS provider would skew the market, because that relief would provide Pay Tel with "additional funds to develop new services and technology to enhance its competitive position."³⁰ CenturyLink filed comments supporting the Securus's Petition to Expand. The FCC denied the Petition to Expand on June 6, 2014, stating Securus had not demonstrated that it would be unable to recover its costs at the holding company level.³¹

²⁴ Order, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd. 1302, ¶¶ 11, 17 (Wireline Comp. Bur. 2014) ("*Waiver Order*").

²⁵ Pay Tel did not request or receive a waiver for "new facilities added in three states (New Mexico, California and Maryland) after the second quarter of 2013." *Waiver Order* ¶ 5, n.25.

²⁶ Securus Petition to Expand Pay Tel Waiver, WC Docket No. 12-375 (Feb. 19, 2014) ("*Securus Petition to Expand Waiver*").

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 3 (quoting Pay Tel Petition at 2).

²⁹ *Id.*

³⁰ *Id.* at 7.

³¹ WC Docket No. 12-375, Order, 29 FCC Rcd. 5973, 5978 ¶ 13, 5980 ¶ 17 (Wireline Comp. Bur. 2014) ("*Securus Denial Order*").

G. The Securus Petition for Leave to Add Fee for Cost of Voice Biometrics

Also on February 19, 2014, Securus filed a Petition for Leave to Add Fee for Voice Biometrics Technology seeking permission “to add a per-minute fee of \$0.02 to its interstate calls in order to cover the cost of providing voice biometric technology required for secure inmate calling.”³² That technology is a mandatory feature in many correctional facilities that Securus serves.

Securus noted that the Commission expressly acknowledged, as to Pay Tel, that voice biometrics impose a distinct external cost of service.³³ Securus then demonstrated with sworn testimony that it incurs the same cost that Pay Tel incurs.³⁴ The Biometrics Petition did not seek relief that would be additive to the relief sought in the Petition to Expand.³⁵ That is, had the Commission granted Securus the same rate relief of \$0.46 per minute within the same states that Pay Tel serves, the voice biometrics external cost would have been covered in that rate. The Biometrics Petition was an attempt by Securus at least to recover the fixed voice biometrics cost that the Commission itself has acknowledged as a cost of ICS. The FCC also denied the Biometrics Petition on June 6, 2014.³⁶

H. The 2014 Mandatory Data Collection

The *Inmate Rate Order* required ICS providers to comply with a detailed and extremely burdensome data collection process. Despite the D.C. Circuit’s stay of the reporting

³² WC Docket No. 12-375, Securus Petition for Leave to Add Fee for Voice Biometrics Technology at 1 (Feb. 19, 2014).

³³ *Id.* at 2-3 (citing *Inmate Rate Order* ¶ 27).

³⁴ *Id.* at 3.

³⁵ “This request is distinct from, and seeks less expansive relief than, the Petition to Expand Pay Tel Waiver that also has been filed on this day.” *Id.* at 1.

³⁶ *Securus Denial Order*, 29 FCC Rcd. at 5982 ¶ 23, 5984 ¶ 28.

requirements in 47 C.F.R. § 64.6060, the FCC moved ahead with the Mandatory Data Collection. The FCC ordered that all ICS providers file cost studies that detail the cost of providing inmate calling services, on a site-by-site basis and broken out into a multitude of discrete categories. The Mandatory Data Collection required that providers separately account for the specific costs — including telecommunications and interconnection costs, equipment costs, security costs, and “ancillary” service costs — of each type of inmate calling service an ICS provider offers, whether debit, credit, prepaid, or otherwise.³⁷ The FCC further required ICS providers to report site commissions paid and average call durations and to break down the number of revenue and non-revenue producing calls and minutes of use.³⁸ The Mandatory Data Collection covered not only interstate calls, but local, state intraLATA, state interLATA, and international calling services as well.³⁹ Last, the FCC required that each ICS provider submit a list, divided by state and call type, of all ancillary fees charged to consumers.⁴⁰ ICS providers were given only two months to comply with the Mandatory Data Collection; cost studies from each provider were due by August 18, 2014.⁴¹

Securus filed its cost data and summary report, written by FTI Consulting, Inc., on July 17, 2014. Securus refers herein to that filing as the “Securus Cost Data”.

³⁷ Instructions for Inmate Calling Services Mandatory Data Collection at 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327664A1.pdf.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Order, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd. 8316 (Wireline Comp. Bur. 2014) (extending the original 30-day time frame for filing cost studies).

I. The ICS Industry Proposal

On September 15, 2014, Securus, GTL, and Telmate, LLC (“Telmate”) – who together constitute the primary providers of ICS in the United States and represented 85% of industry revenue in 2013 – proposed a comprehensive framework for ICS regulation.⁴² With this proposal, the three ICS providers sought to address the goals of the Commission and the interests of ICS providers, correctional facilities, and inmates and their families. Though not conceding that the Commission has jurisdiction or authority over certain products, most notably financial transaction fees, the Industry Proposal was offered “in the spirit of compromise and consensus” as a holistic solution consisting of “inextricably linked components.”⁴³

The ICS Industry Proposal addresses the three dominant issues in the rulemaking: rate caps, site commissions, and ancillary fees. The providers propose “flat rate caps of \$0.20 per-minute for all debit and prepaid interstate and intrastate ICS calls, and \$0.24 per minute for all interstate and intrastate collect calls” with no per-call surcharges allowed.⁴⁴ An ICS provider should be able to seek a waiver of the rate cap on a facility-by-facility basis – not on a company-wide basis – “if the ICS provider can demonstrate that the proposed rate cap does not allow the ICS provider to economically serve [a particular] correctional facility.”⁴⁵

⁴² WC Docket No. 12-375, Letter from Securus, GTL, and Telmate to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly (Sept. 15, 2014) (“Industry Proposal”).

⁴³ Industry Proposal at 2. “The components work in concert and any single component should not be viewed as supported by the parties in isolation of the other components. Accordingly, a material change to any individual component of this proposal may lead to the withdrawal of support for, and/or direct opposition to, any modified proposal by some or all of the parties.” *Id.*

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 2-3.

The ICS Industry Proposal next states its support for the ability of correctional facilities to recover direct, quantifiable costs they incur in providing ICS and asks that the FCC “determine the appropriate amount or percentage that should be included in ICS rates for such payments to correctional facilities[.]”⁴⁶ Should the FCC allow such payments, the FCC’s approval should also come with a rule prohibiting ICS providers from granting and correctional facilities from soliciting “any payment, service, or product ... ***not directly related to, or integrated with, the provision of communications services*** in a correctional facility.”⁴⁷ This mechanism would allow facilities to obtain new and innovative services associated with ICS while excluding any payments unrelated to the provision of communications services.⁴⁸ In addition, as admin-support payments could increase an ICS provider’s costs, admin-support payments would necessitate an increase in the rate cap.⁴⁹

The ICS providers also proposed that the FCC eliminate all ancillary fees except for the following: (1) transaction or deposit fees, capped at \$7.95 per transaction or deposit; (2) a cost recovery fee related to validation and security features, capped at a maximum of 8% per call; (3) third party money transfer fees, capped at a \$2.50 administrative fee per transfer; and (4) fees for convenience or premium payment options, capped at a provider’s existing fee amounts for 3 years.⁵⁰

Last, the ICS Industry Proposal suggests that ICS providers report their rates, fee amounts, and admin-support payments to the FCC every three years, and that ICS providers

⁴⁶ Industry Proposal at 3.

⁴⁷ *Id.* at 4 (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 4-5.

annually certify compliance with the ICS rules.⁵¹

J. The Second Further Notice of Proposed Rulemaking

On October 22, 2014, the FCC released a Second Further Notice of Proposed Rulemaking,⁵² seeking, among other things, comment on the cost data submitted by ICS providers and on the various proposals for permanent caps on ICS rates.⁵³ In the *Second FNPRM*, the FCC appears to be moving away from a cost-based-rate rule toward a market-based approach that sets rate caps and limits on ancillary fees and encourages competition to reduce rates.⁵⁴ Securus hereby responds to the issues contained in the Second FNPRM.

K. The Pay Tel Petition for Extension of Waiver

On October 31, 2014, Pay Tel filed a Petition for Extension of Waiver,⁵⁵ requesting that the FCC extend the waiver it granted Pay Tel on February 11, 2014. That waiver expired on November 11, 2014,⁵⁶ and Pay Tel therefore seeks a *nunc pro tunc* order.⁵⁷ Securus and Global Tel*Link have opposed the waiver extension,⁵⁸ noting that Pay Tel's costs are low

⁵¹ Industry Proposal at 7.

⁵² WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, FCC 14-158 (rel. Oct. 22, 2014) ("Second FNPRM").

⁵³ *Id.* ¶¶ 21-27, 37-46, 47-60, 62-78, 87-96, 98-108 (seeking comment on site commissions, the costs incurred by correctional facilities to provide ICS, a transition period for site commission elimination, comprehensive reform of both intrastate and interstate ICS rates, the data filed by providers in response to the Mandatory Data Collection, various proposals for permanent caps on ICS rates, proposals for limitations on ancillary fees, and limitations on numerous other types of charges).

⁵⁴ *Id.* ¶ 6.

⁵⁵ WC Docket No. 12-375, Pay Tel Petition for Extension of Waiver (Oct. 31, 2014) ("Pay Tel Petition for Extension").

⁵⁶ *Waiver Order*, 29 FCC Rcd. at 1313 ¶ 22.

⁵⁷ Pay Tel Petition for Extension at 1.

and its intrastate long distance rates are so far in excess of costs that Pay Tel cannot plausibly argue that it is in jeopardy of being unable to recover its costs at the holding company level.⁵⁹

We await the Bureau's decision.

STANDARD OF REVIEW

The Commission must not impose rates that are confiscatory.⁶⁰ Rates must enable a regulated carrier to “maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.”⁶¹ Specifically, the rates must provide for the “reimbursement [of the carrier's] operating expenses” as recognized by “generally accepted accounting principles,” and allow the carrier to “attract capital, and compensate its investors.”⁶² Rates also must include a reasonable profit after accounting for the costs that the carrier incurs in providing service.⁶³

I. SITE COMMISSIONS SHOULD BE PAID AND RECOVERED IN CALLING RATES WHEN NECESSARY TO RECOUP CORRECTIONAL FACILITIES' DEMONSTRABLE COSTS OF MAKING TELEPHONE SERVICE AVAILABLE

The Commission seeks comment on whether site commissions should be limited,

⁵⁸ WC Docket No. 12-375, Opposition of Global Tel*Link Corporation to Pay Tel Communications, Inc.'s Petition for Extension of Waiver (Nov. 12, 2014); Opposition of Global Tel*Link Corporation to Pay Tel Communications, Inc.'s Supplement to Its Petition for Extension of Waiver (Nov. 17, 2014).

⁵⁹ WC Docket No. 12-375, Securus Technologies, Inc. Reply Comments on Pay Tel Communications, Inc.'s Petition for Extension of Waiver at 1 (Nov. 19, 2014); Opposition of Securus Technologies, Inc. to Pay Tel Communications, Inc.'s Petition for Extension of Waiver at 3 (Nov. 5, 2014).

⁶⁰ *E.g., In the Matter of Alabama Cable Telecomms. Ass'n, Comcast Cablevision of Dothan, Inc. v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12232 ¶ 51 (2001) (“Alabama Power”).

⁶¹ *Id.* (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 n.5 (1989)).

⁶² *Alabama Power*, 16 FCC Rcd. at 12232 ¶ 52.

⁶³ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 11754, 11757 ¶ 10 (1996).

or even prohibited, for ICS.⁶⁴ Securus maintains that site commission payments already may not be included in interstate calling rates as federal law stands today.⁶⁵ With regard to crafting a fair, workable, and permanent solution to ICS rates, Securus asks the Commission to ensure that site commissions are a mechanism for facilities to recover demonstrated internal, direct costs of enabling inmate access to telephones, and that the forthcoming permanent rates permit ICS carriers, both as a matter of law and as a matter of fact, to recover the costs of remitting site commissions.

The goal of this proceeding is and has been “making it easier for inmates to stay connected to their families and friends.”⁶⁶ The best way to achieve that result is to enable the existing, quite fierce competition in the ICS industry⁶⁷ actually to work downward pressure on rates while encouraging invention and innovation in secure calling platforms. Removing intervening costs that are unrelated to the provision of ICS will allow competition to work more efficiently and directly.

It is well documented in the record, and certainly has been argued forcefully at the D.C. Circuit, that correctional facilities rely on site commission payments to fund prison

⁶⁴ Second FNPRM ¶¶ 20-28.

⁶⁵ E.g., WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, with Attachment (July 31, 2014); Letter from Stephanie A. Joyce, Counsel to Securus, to Julie Veach, Chief, Wireline Competition Bureau, at 4-5 (July 30, 2014); Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC (May 15, 2014).

⁶⁶ Second FNPRM ¶ 2; *Inmate Rate Order* ¶ 2 (“promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities.”).

⁶⁷ “The competition for service contracts is, to put it mildly, robust. Securus estimates that the number of bidders for a state Department of Corrections (‘DOC’) contract averages four or five, and for city and county contracts the number is five to seven.” WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 2 (Mar. 25, 2013) (“Securus March 2013 Comments”) (citing Declaration of Curtis L. Hopfinger, Director – Regulatory and Government Affairs, ¶ 4 (Mar. 25, 2013)).

initiatives and administer inmate welfare programs. If, however, the Commission wishes to focus ICS ratemaking only on one of the elements of ICS service, those site commission payments become an insupportable financial weight that cannot rationally be paid with no mechanism of recovery.

Securus emphasizes that this discussion of site commissions regards **monetary payments to correctional facilities**. In fact, Securus urges the Commission to define “site commissions” in this manner and add it to Rule 64.6000 (Definitions). The definition should expressly exclude the provision of security software, monitoring equipment, and any other item that correctional facilities need in order to maintain the security of the calling system. The security-related choices that correctional facilities make for inmate telephone calls are inarguably at the core of their statutory mandate to operate jails and prisons.⁶⁸ The Commission must not impede, punish, or alter those choices. To include security-related equipment and features within the term “site commission,” and then hold that site commissions cannot be recovered in rates, would indeed impede, punish, and alter correctional facility choices in contravention of settled precedent.

II. THE COMMISSION SHOULD ADOPT THE INMATE CALLING RATE CAPS IN THE ICS INDUSTRY PROPOSAL

The Commission’s aim in this follow-on proceeding is to set permanent rates for inmate-initiated calls that are “a market-based approach to encourage competition” and “ensure

⁶⁸ WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 11-12 (Dec. 20, 2013) (“Securus December 2013 Comments”) (citing, *inter alia*, *McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003); *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001)); Securus March 2013 Comments at 9-10 (citing, *inter alia*, *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001); *Ivey Walton, et al. v. New York State Dept. of Correctional Svcs.*, 921 N.E. 2d 145, 893 N.Y.S. 2d 453, 485 (N.Y. Ct. App. 2009)).

fair but not excessive ICS compensation.”⁶⁹ The ICS Industry Proposal – \$0.20 per minute for all debit and prepaid calls, \$0.24 per minute for all collects calls⁷⁰ – achieves both of those results.

According to the public, redacted versions of the cost data submitted in response to the Mandatory Data Collection, ICS costs of service are as follows:

| Carrier | Final, Per-Minute ICS Cost |
|-----------------|----------------------------|
| Global Tel*Link | \$0.1341 |
| Pay Tel | \$0.1967 |
| Securus | \$0.1776 |
| Telmate | \$0.1583 |

These four carriers represent more than 85% of the ICS market.⁷¹ All of them incur a per-minute cost of at least 13.4 cents.⁷² The Commission’s statement that “the providers’ data reported costs of \$0.133 per minute for debit” calls⁷³ is therefore puzzling. Nothing in the Securus Cost Data supports that number, and that cost data has never been challenged or subject

⁶⁹ Second FNPRM ¶ 6.

⁷⁰ Industry Proposal at 2.

⁷¹ The Industry Proposal states at Page 1 that Global Tel*Link, Securus, and Telmate comprise 85% of the market. Added to that, Pay Tel serves 184 city and county correctional facilities. Pay Tel Waiver Petition at 2 n.4.

⁷² With the many new types of prepaid calling options that both inmates and called parties now enjoy, the vast bulk of inmate-initiated calls are now debit calls.

⁷³ Second FNPRM ¶ 54.

to any clarification. The Commission should not base the forthcoming rates on that \$0.133 figure, because on its face it puts four major carriers in a below-cost situation.⁷⁴

The Commission should not believe that demand elasticity can save below-cost rates.⁷⁵ First, elasticity in this market is not perfect or boundless. External factors like time limits and phone availability remain a ceiling on the amount of calling minutes that a correctional facility can generate. Secondly, Securus's experience since the *Inmate Rate Order* shows that price reductions do not create a material or long-term increase in demand. In order to study this issue, Securus tasked FTI Consulting, the experts who analyzed and summarized the Securus Cost Data, with reviewing call traffic and determining what, if any, effect that the Interim Rate Caps had on interstate demand. Provided herewith is FTI's report⁷⁶ which states, in summary:

⁷⁴ The Commission asks how the 2008 Wood Study should be harmonized with the cost data submitted in 2014 pursuant to the Mandatory Data Collection. Second FNPRM ¶ 54. The answer is that the 2008 Wood Study has been supplanted by the far more recent, detailed, and granular 2014 data. The Wood Study averaged the costs of seven quite different ICS providers – Securus, Custom Teleconnect, Inc., Public Communications Services, Inc., ATN, Inc., Embarq, NCIC, and Pay Tel – who reported their cost of service in fewer than 12 overall categories; costs were not reported on a site-by-site or product-by-product basis. For its time, the Wood Study was the most complete cost study ever provided by the ICS industry, but the Mandatory Data Collection was far more exacting and resulted in a far richer, more precise data set.

In addition, Securus had informed the Commission in October 2011 that its cost of service increased 16.5% since creation of the 2008 Wood Study, CC Docket No. 96-128, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC (Oct. 11, 2011), and explained in its March 2013 Comments that others of its cost components, such as billing costs and R&D costs, had raised substantially in the previous few years. WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 4-5 (Mar. 25, 2013) (citing Declaration of Curtis L. Hopfinger, Director – Regulatory and Government Affairs, ¶¶ 16-19 (Mar. 25, 2013)).

⁷⁵ “Would correctional facilities be likely to select ICS providers with lower rates and fees, so as to increase usage and, depending on the elasticity of demand, thereby increase cost recovery to the facilities?” Second FNPRM ¶ 43.

⁷⁶ FTI Consulting, Inc., Report on Price Elasticity of Demand for Interstate Inmate Calling Services on Behalf of Securus Technologies, Inc. (Jan. 12, 2014) (“Elasticity Report”). This Report has been filed in a redacted Public Version and in a Confidential Version, because it

- In total, Securus has experienced a **67.4% increase** in interstate call minutes.⁷⁷
- Only 23.0% of the increase in call minutes, or **15.5 %** of today's interstate call volume, can reasonably be attributed to price elasticity (the Interim Rate Caps).⁷⁸
- Other significant factors that increased interstate call minutes are substitution (rate arbitrage), normal churn and growth patterns, and demand-stimulating initiatives that Securus commenced apart from implementing the *Inmate Rate Order*.⁷⁹

In addition, as a general principle, price elasticity cannot result in a profitable enterprise if the rate cap is set below a carrier's average cost. If each minute of service is priced below average cost, increased demand simply means that every minute of service is below cost. Here, Securus's average cost, as calculated in accordance with the Commission's instructions, is \$0.1776 per minute. Although the price elasticity of 15.5% would provide *some* increase in volume, a below-cost rate will not be ameliorated via that increased volume, because *each* of the minutes are being reduced in price below the average cost, making *all* of the minutes unprofitable on average. Unless there were much greater price elasticity such that the decreases in the rate cap actually increased revenue – a situation that FTI has found not to be the case and is not likely to occur in the future – and unless Securus's incremental, per-minute cost were \$0.00 – which is not the case – reducing the rate caps to below Securus's average cost will have a significantly negative impact on Securus and on every other carrier with similar costs. In short,

contains non-public, price-related information that has enormous competitive importance. Securus seeks confidential treatment for the unredacted Elasticity Report pursuant to the Protective Order, DA 13-2434, issued December 19, 2013, in this docket.

⁷⁷ Elasticity Report at 4.

⁷⁸ *Id.* at 21 (Figure 21).

⁷⁹ *Id.* at 3-4, 12-13, 15-17.

any rate cap that is lower than Securus's average cost of \$0.1776 would be unreasonable and unlawful.

Instead of unwarranted reliance on elasticity, the Commission's focus should remain that, as Securus has explained and shown, competition does drive down rates.⁸⁰ Large correctional facilities have enjoyed, even well before the *Inmate Rate Order*, low calling rates:

The New Mexico DOC, which Securus has served since September 2011, has an interstate collect calling rate of just \$0.65, flat-rate, regardless of length. The Missouri DOC contract, which was signed in June 2011, contains an interstate calling rate of \$1.60 for a 12-minute call. . . . Santa Fe County in New Mexico, which Securus has served since 2007, now has an interstate calling rate of \$1.70 for a 12-minute call.⁸¹

These examples show that robust competition has been putting downward pressure on rates, particularly where site commissions are not paid,⁸² even in the absence of regulatory intervention. That competition will continue to work if the FCC maintains adherence to reasonable rates which allow carriers to recoup the costs of ICS service.

The Commission's goal for this rate proceeding is to adopt a rate cap that will "serve as a backstop to the market-based solution" that it now prefers.⁸³ A "back-stop" is all that is needed, Securus has shown, and it must be higher than carriers' reported costs. Where the "back-stop" rate cap is, for a particular facility, meaningfully higher than a carrier's ICS costs, that carrier will bid a rate far below the rate cap.⁸⁴ In other words, competition will ensure that

⁸⁰ Securus March 2013 Comments at 5-6.

⁸¹ *Id.* at 6.

⁸² New Mexico abolished percentage-based site commissions by a statute enacted in 2001, and the Missouri DOC decided years ago not to request or accept site commissions. *See, e.g., Inmate Rate Order* ¶ 33 ("Site commission payments are currently prohibited in seven states, as well as at some federal detention facilities including dedicated facilities operated by ICE.").

⁸³ Second FNPRM ¶ 47.

⁸⁴ This type of competitive bidding is possible only if each carrier is unaware of the other

the “back-stop” rate cap does not become the default or universal rate for every facility across the country. For Securus’s part, its actual average interstate rate since the *Inmate Rate Order* has been approximately **\$0.17 per minute**, a rate that is far lower than the Interim Rate Caps. Securus is confident that this trend will continue. But the rate that the Commission adopts here must begin from the premise that the costs reported by the carriers are covered.

Pay Tel’s “Ethical Proposal”, suggesting a rate of \$0.08 per minute for state prisons and \$0.22 or \$0.26 for jails depending on size,⁸⁵ is badly conceived and will not achieve that result. Pay Tel persists in advancing the “jails v. prisons” construct that has no reasonable basis. Rather, that construct is simply the product of Pay Tel’s choice never to serve state prisons, rendering the “Ethical Proposal” opportunistic in the extreme.

Moreover, the fact that Pay Tel has no state prison clients raises the question whether Pay Tel has standing in this proceeding to suggest a calling rate for those facilities. Any calling rate limited to prisons would have absolutely no effect on Pay Tel. As such, Pay Tel lacks standing to suggest, or later challenge, calling rates for state prisons. It is merely a member of an industry that provides services to correctional facilities *in general*. In fact, even if Pay Tel were “exploring ... opportunities” to enter the state prison calling services market, it would not be able to meet upon review the “standing requirement that a petitioner demonstrate an injury in fact that is ‘actual or imminent,’ not ‘remote [or] speculative.’” *Doe Run Res. Corp. v. E.P.A.*, 528 F. App’x 1, 2-3 (D.C. Cir. 2013) (alterations in original) (quoting *Grocery Mfrs. Ass’n v.*

carriers’ cost of service. That is to say, if Carrier A knows that every other carrier has costs that are close to the rate cap, Carrier A will feel no competitive pressure to bid a rate significantly lower than the rate cap. For this reason, strict confidentiality must be maintained for all carriers’ cost data, and the risk of harm, under the totality of circumstances, must be balanced against the need to disclose highly sensitive cost information.

⁸⁵ WC Docket No. 12-375, Pay Tel Communications, Inc. Ethical Proposal for Reform of Inmate Calling Rates and Fees (Oct. 3, 2014).

EPA, 693 F.3d 169, 175 (D.C. Cir. 2012)) (dismissing a challenge to the Environmental Protection Agency’s expansion of an emissions standard because the petitioner “ha[d] no concrete plans to install new technology . . . that would be covered only under the expanded applicability provision.”).

Because Pay Tel does not serve any state prisons, “nothing distinguishes [it] from any other party who might someday wish” to sell calling services to state prisons. *New York Reg’l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (dismissing for lack of standing a challenge to a Federal Energy Regulatory Commission ruling because the petitioner was not a participant in the regulated market and the “challenged FERC orders [did] not place any legal burden on [the petitioner] or determine any legal rights.”). Pay Tel’s opinions as to appropriate state prison calling rates are therefore as irrelevant as its opinions on the price of snacks sold in the commissary or the quality of care in a health care unit – all are markets in which Pay Tel is not a participant. Its suggestions thus may be properly ignored.

Further, as Securus has stated previously, if the Commission is resolute in adopting some sort of tiered rate structure, the appropriate determining factor is call volume. ICS carries very large direct costs, and the provision of secure calling platforms requires “a certain baseline of equipment regardless of whether there are 10 inmates or 1,000.”⁸⁶ These direct costs are amortized through paid calling minutes. Volume is the key, not the label on the facility’s front door.

Indeed, Pay Tel itself gives the lie to its own strict “jails v. prisons” concept — which makes no allowance for facility size — by allowing itself a higher rate for low-volume jails. Jails with 1-349 ADP would have the \$0.26 rate, and jails over 350 ADP would have the

⁸⁶ Declaration of Geoffrey M. Boyd, Chief Financial Officer, Securus, ¶ 8 (Dec. 9, 2014).

\$0.22 rate. It is curious that Pay Tel believes giving itself a volume-based rate structure is “ethical”, while giving a volume-based rate structure to ICS providers serving state prisons would be “unethical”.

The folly of the “jails v. prisons” construct is easily shown through publicly available information demonstrating that county jails often are much larger than prisons. Pay Tel’s argument that call volume at “jails” always, necessarily, is lower, and thus more challenging from a cost perspective, simply is unfounded. Securus has researched the issue of jail size and capacity and can provide the following statistics:

| Correctional Facility | Average Daily Population | Total Capacity |
|-----------------------|--------------------------|---------------------------------------|
| Cook County, IL | 9,000 ⁸⁷ | Approx. 10,100 – 10,150 ⁸⁸ |
| Dallas County, TX | 6,500 ⁸⁹ | 7,126 ⁹⁰ |
| Harris County, TX | 10,000 ⁹¹ | 9,434 ⁹² |

⁸⁷ “The Cook County Department of Corrections (CCDOC) is one of the largest (96 acres) single site county pre-detention facilities in the United States. Primarily holding pre-trial detainees, the Department admits approximately roughly 100,000 detainees annually and averages a daily population of 9,000.” Available at http://www.cookcountysheriff.org/doc/doc_main.html. The jail population on September 2, 2014, was 9,957. Sheriff’s Daily Report, Cook County Sheriff’s Office, available at http://www.cookcountysheriff.org/pdf/DOC/JailPopulation/CCSO_BOIT_ExecDirLog_09022014_v1.0.pdf. No other “Daily Report” is available online.

⁸⁸ This estimate is based on articles published in March 2013, when the issue of jail capacity seems to have received local news coverage in Chicago. “Cook County jail population nears capacity again,” Chicago Tribune (March 2, 2013), available at http://articles.chicagotribune.com/2013-03-02/news/ct-met-cook-county-jail-overcrowding-20130303_1_judges-sheriff-tom-dart-electronic-monitors. “Preckwinkle, Dart sound alarms on jail overcrowding,” WBEZ91.5 (March 20, 2013), available at <http://www.wbez.org/news/preckwinkle-dart-sound-alarms-jail-overcrowding-106196>.

⁸⁹ Jail Facts, Dallas County Sheriff’s Department, available at http://www.dallascounty.org/department/sheriff/jail_facts.php.

⁹⁰ Detention Centers, Dallas County Sheriff’s Department, available at <http://www.dallascounty.org/department/sheriff/detention.php>.

⁹¹ Facts About the HCSO, Harris County Sheriff’s Office, available at <http://www.harriscountysheriff.com>.

| Correctional Facility | Average Daily Population | Total Capacity |
|--|---|--|
| Maricopa County, AZ | 8,098 ⁹³ | Approx. 10,924 ⁹⁴ |
| Maine DOC System | 2,191 (State Facilities) ⁹⁵ 18 (State Inmates Housed in County Jails) | 2,294 (State Facilities) 99 (State Contracted Capacity in County Jails) |
| Miami-Dade County, FL | 5,642 ⁹⁶ | 5,456 |
| New York City – includes Rikers Island | Approx. 11,800 ⁹⁷ | Approx. 18,000 ⁹⁸ |

harriscountyso.org/documents/PressKits/HCSO%20Fact%20Sheet.pdf.

⁹² “County jail passes compliance inspection for fifth year in a row,” Houston Chronicle (March 28, 2014), *available at* <http://blog.chron.com/houstonpolitics/2014/03/county-jail-passes-compliance-inspection-for-fifth-year-in-a-row/>.

⁹³ This figure is the adult jail population in the County’s 2013 fiscal year. Maricopa County Justice System Annual Activities Report Fiscal Years 2012 & 2013, Maricopa County Justice System Planning & Information, *available at* <http://www.maricopa.gov/CriminalJustice/pdf/Annual/2012-2013.pdf>.

⁹⁴ The Maricopa County Sheriff’s Office provides the capacities or approximate capacities of each of its jail facilities. *Available at* <http://www.mcso.org/JailInformation/FourthAve.aspx/>.

⁹⁵ Maine DOC population and capacity as of December 29, 2014. Maine Department of Corrections – Capacity and Census (December 29, 2014), *available at* <http://www.maine.gov/corrections/adult/popreport.pdf>. In the online chart, “SCCP” refers to Supervised Community Confinement Program, a program through which inmates are allowed supervised release. SCCP inmates are excluded from the capacity and population count.

In 2011, the average daily population in the Maine DOC’s adult facilities was 2,038 inmates, according to Maine’s Office of Program Evaluation & Government Accountability. *Available at* http://www.maine.gov/legis/opega/GOC/GOC_meetings/Current_handouts/6-8-12/Final%20CPP%20Info%20Brief%206-8-12.pdf/. The Maine DOC states that the budgeted capacity of these adult facilities on March 14, 2011 was 2,088. *Available at* <http://www.maine.gov/corrections/PublicInterest/census/>.

⁹⁶ Miami-Dade County operated five facilities until November 22, 2012, when the Women’s Detention Center was closed. Female inmates now are incarcerated at the Turner Guilford Knight Correctional Center which houses both men and women. *Available at* <http://www.miamidade.gov/corrections/facilities.asp>. It is not clear whether the 5,642 ADP figure remained correct after the consolidation took place.

⁹⁷ Preliminary Mayor’s Management Report-FY2014, City of New York Department of Correction, *available at* <http://www.nyc.gov/html/doc/downloads/pdf/MMR-2014.pdf>.

| Correctional Facility | Average Daily Population | Total Capacity |
|-------------------------|---|---|
| North Dakota DOCR | 1,257 (Adult) ⁹⁹ -- | Approx. 1,071 (Adult) ¹⁰⁰ 107 (Juvenile) |
| Rhode Island DOC System | 90 (Max. Security) ¹⁰¹ 1,014 (Medium Security) 956 (Intake Centers) 2,060 TOTAL | 166 (Max. Security) 1,066 (Medium Security) 1,148 (Intake Centers) 2,380 TOTAL |
| San Diego County, CA | 4,705 ¹⁰² | 5,365 ¹⁰³ |
| Utah DOC System | 7,018 ¹⁰⁴ | 7,431 |
| Vermont DOC | Approx 1,600 ¹⁰⁵ | Approx 1,600 ¹⁰⁶ |

⁹⁸ Most of the inmates in the New York City system are housed on Rikers Island which has a capacity of approximately 15,000 inmates. New York City also operates four borough jails that have a combined capacity of approximately 3,000 inmates. Facilities Overview, City of New York Department of Correction, *available at* <http://www.nyc.gov/html/doc/html/about/facilities-overview.shtml>.

⁹⁹ Adult population on December 31, 2013. This number does not include transitional facilities or housing contracted out to county facilities. DOCR Fact Sheet 2013, *available at* http://www.nd.gov/docr/media/stats/factsheet/2013_fact_sheet.pdf.

¹⁰⁰ These numbers do not include transitional facilities or housing contracted out to county facilities. Adult Corrections, *available at* <http://www.nd.gov/docr/adult/>; North Dakota Youth Correctional Center, *available at* <http://www.nd.gov/docr/juvenile/youth.html>.

¹⁰¹ The Rhode Island Department of Corrections has published complete monthly statistics for the year 2012. *Available at* <http://www.doc.ri.gov/administration/planning/docs/FY12-13%20Cap%20&%20Midnight%20Count.pdf>.

¹⁰² Population as of January 8, 2014. *Available at* <http://apps.sdsheriff.net/inmatepopulation/displaypop.aspx>

¹⁰³ Figure based on the California Board of State and Community Corrections rated capacity of each of San Diego County's jail facilities. *Available at* <http://www.sdsheriff.net/detentionfacilities.html>.

¹⁰⁴ Average monthly ADP December 2013 through December 2014. *Available at* https://crbiprod.utah.gov/cognos10/cgi-bin/cognos.cgi?b_action=xts.run&m=portal/cc.xts&gohome=.

¹⁰⁵ This figure is for 2014 and does not include inmates housed out of state. Facts and Figures FY 2014, Vermont Department of Corrections, *available at* <http://www.doc.state.vt.us/about/reports/latest-facts-figures-adobe/view>.

| Correctional Facility | Average Daily Population | Total Capacity |
|-----------------------|--------------------------|----------------|
| Wyoming DOC | 2,068 ¹⁰⁷ | -- |

Thus we see that facility type is not at all determinative of the number of inmates housed there. Many counties have inmate populations, and therefore call volumes, that are higher than many DOC systems. In addition, inmate length of stay, which is another factor affecting call volume, cannot be predicted merely by the jurisdiction of the correctional facility — many county jails house inmates for sentences lasting a year or more. There is no justification for assuming that all jails have lower call volume than state prisons or that jails need calling rates that are 150%-200% higher than state prison rates. It would be unreasonable, arbitrary, and capricious for the FCC to adopt a rate structure based on the formulaic and false “jails v. prisons” dichotomy that was invented by a carrier that has no experience, and no risk of loss, in serving DOC systems.

The jurisdiction of a correctional facility is not a predictor of the ability to recover ICS costs and set reasonable ICS rates. But those twin goals are the point of this entire proceeding. Therefore, assuming that the Commission can lawfully even give consideration to Pay Tel’s proposed “jails v. prisons” rate structure, the idea should be rejected as baseless, arbitrary, and capricious. In addition, the “jails v. prisons” structure invites unlawful

¹⁰⁶ “Doc Chief: Out-Of-State Prisons A Reality Given Vermont’s Inmate Numbers,” VTDigger.org (Feb. 25, 2014), *available at* <http://vtdigger.org/2014/02/25/doc-chief-state-prisons-reality-vermonts-inmate-numbers/>.

¹⁰⁷ This figure is the average daily population of inmates at Wyoming DOC-operated facilities in 2014. Wyoming Department of Corrections Annual Report FY14, *available at* http://corrections.wy.gov/about/annual_report.html.

discrimination as between inmates at state prisons versus inmates at jails.¹⁰⁸ As shown above, there is no bright-line or cognizable difference in service between county jails and state prisons, and thus to adopt such vastly different calling rates based on that empty distinction would constitute dissimilar treatment of customers that plainly are similarly situated. Subjecting inmates to different rates based on whether they violated county law as opposed to state law is unjustifiable.

Finally, the Commission should hold expressly that security-related optional features, the most well-known of which is Voice Biometric technology,¹⁰⁹ will be priced as an additive per-minute charge that is not included in the forthcoming price cap. These features, which are provided only at the express request of a correctional facility, are not included in Securus's typical costs of service. The Securus Cost Data treats these features as Ancillary Fees "because it is not part of the basic ICS services provided to every facility."¹¹⁰ The Commission previously has treated voice biometrics in this manner when, in the Inmate Rate Order, it stated

¹⁰⁸ It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a); *see also Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) (rates must not be "unduly discriminatory").

¹⁰⁹ Second FMPRM ¶ 60; *Inmate Rate Order* ¶ 27. The Securus trade name for this feature is Continuous Voice Verification ("CVV").

¹¹⁰ WC Docket No. 12-375, FTI Consulting, Inc., Report Implementing the FCC Mandatory Data Collection on Behalf of Securus Technologies, Inc. at 6 n.4 (July 17, 2014) (Public Version).

that Pay Tel's cost data shows that this feature entails \$0.02 per minute of additional cost.¹¹¹ All such optional, add-on security features that are outside a carrier's typical suite of services warrant this kind of additive rate.

III. TRANSACTION FEES ARE NECESSARY TO RECOVER THE COSTS OF PROVIDING OPTIONAL, CONVENIENCE PAYMENT METHODS

The Commission asks several questions regarding "ancillary fees", which generally refer to the fees applied when ICS bill payors use optional payment methods, other than money order or check, to pay for ICS.¹¹² Securus continues to believe that the Commission lacks jurisdiction and authority over financial transactions,¹¹³ but it has joined the Industry Proposal which includes several provisions related to these fees.

The Industry Proposal offers, among other things, to cap optional or "premium" payment methods for three years.¹¹⁴ Administrative fees associated with third-party remitters such as Western Union and MoneyGram would be capped at \$2.50. A total of **19 different ancillary fees** would be eliminated completely.¹¹⁵ Instead, a Validation Fee of up to 8% of the price of each call would be assessed to cover the cost of validating each call, including but not

¹¹¹ Pay Tel reports average actual and projected costs for debit and collect ICS calls of \$0.208 per minute and \$0.225 per minute, respectively, inclusive of additional fees for continuous voice biometric identification service, or \$0.189 and \$0.205 per minute without such costs.

Inmate Rate Order ¶ 75.

¹¹² Second FNPRM ¶¶ 80-108.

¹¹³ See Securus December 2013 Comments at 20-21; Securus Technologies, Inc. Reply Comments in Response to DA 13-1445 at 1-2 (July 24, 2013) (citing, *inter alia*, *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (vacating broadcast flag rules as outside the Commission's authority); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (vacating BitTorrent decision)).

¹¹⁴ Industry Proposal at 6.

¹¹⁵ *Id.*, Attachment.

limited to security databases, billing databases, the Line Information Data Base (“LIDB”), and other number databases, a function which is “necessary for the safety and security of the general public, inmates, their families and friends, and correctional facility employees.”¹¹⁶

Some parties continue to insist that transaction fees are pure profit and are divorced from any cost. Securus has explained that most of its fees are necessary to pay for the services of third-party companies and financial institutions without which these optional payment and calling methods would not be possible.¹¹⁷ Attached hereto is the Declaration of Dennis Rose, Senior Director – Billing for Securus, which explains these costs in greater detail.¹¹⁸

The most important fact for the Commission to consider is that Securus relies on third-party vendors and financial institutions in order to provide convenient, optional payment and calling methods. Perhaps the most discussed payment method is the ability to pay via credit card over the phone or via website. Securus cannot perform these transactions on its own. It has contracts with credit-card processing companies who actually validate the charge and ensure that it appears on the payor’s credit card bill.¹¹⁹ Payments via credit card cost impose the following costs on a per-transaction basis:

- Fee of up to ****CONFIDENTIAL**** \$, “depending on volume,” charged to Securus by the credit card processing vendors

¹¹⁶ Industry Proposal at 5.

¹¹⁷ WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Chairman Tom Wheeler, *et al.* at 4-5 (Oct. 6, 2014) (responding to letter from Alabama Public Service Commission filed Sept. 30, 2014).

¹¹⁸ WC Docket No. 12-375, Declaration of Dennis Rose (Jan. 9, 2015). The public version of this Declaration has been redacted to protect confidential, non-public, competitively sensitive cost data. The unredacted version has been filed separately in accordance with the Protective Order, DA 13-2434, adopted in this proceeding.

¹¹⁹ Rose Decl. ¶ 3.

- In 2014 alone, “chargebacks” of ****CONFIDENTIAL**** \$ on ****CONFIDENTIAL****, for an average of ****CONFIDENTIAL**** \$ of bad debt across all credit card transactions
- Internal costs of ****CONFIDENTIAL**** \$ per transaction for labor and the development of specialized software and Interactive Voice Response/Website software¹²⁰

Two other important charges, which erroneously are discussed as “ancillary fees”, are premium options called “Text2Connect” and “PayNow”. Securus discussed these call completion methods at length in its *ex parte* letter filed October 6, 2014, in this docket.¹²¹ Text2Connect enables an inmate to place a collect call to a wireless phone. This service is a game-changer, because wireless carriers for decades refused to allow collect calls under any circumstances. This product is not a financial transaction and is not an account-setup process. It is an **“optional, promotional program,”**¹²² and it is becoming a more vital component of Securus’s service as more and more people abandon landline telephones. Text2Connect relies on a third-party vendor which has billing contracts with all of the major wireless carriers. That vendor charges Securus for each inmate call that is completed to a wireless phone.¹²³

PayNow is another calling method that often is erroneously considered an “ancillary charge”. PayNow enables an inmate to place a collect call to a person (a) with whom Securus has no direct billing relationship, and (b) who uses a local exchange carrier that does not

¹²⁰ Rose Decl. ¶ 3.

¹²¹ WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Chairman Tom Wheeler, *et al.* at 5 (Oct. 6, 2014).

¹²² Rose Decl. ¶¶ 4, 6.

¹²³ *Id.* ¶ 4.

accept Securus’s collect calls for billing on customers’ monthly bills.¹²⁴ PayNow gives inmates immediate calling access – they need not set up and fund a prepaid account or get to the commissary to buy a prepaid card; their called party also need not set up and fund a prepaid account. Securus also must rely on a third party to complete PayNow calls, and that vendor charges Securus per completed call.

Both Text2Connect and PayNow impose several types of internal costs on a per-transaction basis; Dennis Rose lists each of these costs in his Declaration.¹²⁵ In addition, in order to set up these services, Securus made a capital expenditure of approximately

****CONFIDENTIAL**** § .¹²⁶

It cannot be emphasized enough that these methods of paying for calls are optional and in addition to the placement of regular, direct-dialed calls to which the forthcoming rate cap will apply. These products are not intended or marketed as a substitution for traditional calls. They are, however, valuable additions to Securus’s panoply of services that did not exist 10 years ago and have materially increased inmates’ ability to complete calls to friends and family. If the Commission takes jurisdiction over these fees and abolishes them or cuts the rates dramatically, inmates and their called parties will lose these optional payment methods. That result seems quite opposite of the Commission’s goal of “making it easier for inmates to stay connected to their families and friends.”¹²⁷

To the extent that some carriers advocate the abolition or drastic rate cut for

¹²⁴ Rose Decl. ¶ 6.

¹²⁵ *Id.* ¶¶ 4, 6.

¹²⁶ *Id.* ¶ 4.

¹²⁷ Second FNPRM ¶ 2; *see also Inmate Rate Order* ¶ 2 (“This Order will promote the general welfare of our nation by making it easier for inmates to stay connected to their families and friends while taking full account of the security needs of correctional facilities.”).

transaction fees, the question must be asked whether these carriers even offer the products about which they are complaining. Securus obtained the third-party services on which it relies via the open market, and any ICS carrier could pursue similar arrangements in order to expand their service offerings. If a carrier chooses not to do so, and to rely on less speedy payment methods like accepting only checks and money orders, that decision lies in the carrier's discretion. ICS providers like Securus should not, however, be penalized for creating these innovative arrangements in the form of being subject to below-cost rates and extra-jurisdictional Commission actions. Again the question of standing arises when carriers opine on the price of items that they themselves choose not to sell.¹²⁸

IV. MANDATORY INTRA-FACILITY COMPETITION WILL ENDANGER SECURITY BUT WILL NOT ENSURE LOWER CALLING RATES

The Second FNPRM reopens the question whether a multi-provider environment, or intra-facility competition, should be adopted for ICS.¹²⁹ Securus has placed in the record a comprehensive one-page chart explaining why intra-facility competition is both infeasible and dangerous, focusing on the security issues inherent on forcing a facility to rely on multiple ICS providers to screen, monitor, and analyze calls.¹³⁰ Securus now provides sworn testimony explaining the problems with intra-facility competition from both a financial and an operational perspective.

Geoffrey M. Boyd, Chief Financial Officer for Securus, states that “creating a multi-provider system for ICS would very likely make it uneconomic for us to serve many

¹²⁸ See *supra* at 18-19.

¹²⁹ Second FNPRM ¶¶ 113-15.

¹³⁰ WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, Attachment (Dec. 8, 2014) (providing notice of meeting with Commissioner O’Rielly and his Legal Advisor, Amy Bender).

facilities.”¹³¹ Mr. Boyd discusses his five core concerns with intra-facility competition:

- **Capital Investment** — ICS involves “many more sunk costs than residential and business service,” and these include “a certain baseline of equipment” as well as “significant incremental cost in adding new correctional facilities ... in terms of both equipment and labor.”¹³² In addition, in a multi-provider environment, multiple sets of circuits must be installed by each ICS provider. “These additional [circuit] costs eventually would need to be passed on to users in the form of higher rates.”¹³³

- **Unpredictable Call Volume** — Mr. Boyd explains that “[p]redictable call volume is one of the most important factors that Securus reviews” when evaluating an RFP.¹³⁴ With intra-facility competition, “no one ICS provider can know how much of the call volume it will handle,” making it “impossible to predict whether service at a particular facility will be above-cost and which rates should be charged.”¹³⁵ And because “[r]ational businesses do not allocate capital where they know they cannot compete profitably,” the “result will be that ICS carriers discontinue service at unprofitable sites.”¹³⁶

- **Lack of Scale** — Knowing the level of achievable scale is another crucial factor for bidding ICS contracts. Under intra-site competition, “scale will be divorced from tangible factors like Average Daily Population. Planning for equipment costs would be a guessing game[.]”¹³⁷ Open questions include “[S]hould any provider install more than [a] minimum level

¹³¹ Boyd Decl. ¶ 5.

¹³² *Id.* ¶¶ 9, 8, 6.

¹³³ *Id.* ¶ 10.

¹³⁴ *Id.* ¶ 11.

¹³⁵ *Id.* ¶ 12.

¹³⁶ Boyd Decl. ¶ 12.

¹³⁷ *Id.* ¶ 13.

of equipment?” and “Will any provider’s equipment be used to a predictable degree?”¹³⁸ These unanswerable questions are huge deterrents to both establishing and maintaining service at any given site.

- **Increased Bad Debt** — A multi-provider environment would allow parties “to run up telephone bills, never pay them, and then start using another ICS provider at the same jail.”¹³⁹ Customers could “hop between carriers” and have “no real consequences.”¹⁴⁰ The natural incentive to avoid payment would largely negate the work that Securus and other carriers have done by “investing heavily in new payment options and in establishing direct-billing relationships.”¹⁴¹ The increased bad debt also would result in higher rates for all customers.

- **Site Commissions In a Multi-Provider Environment** — Having more than one ICS provider at any given site does not answer the question of site commissions. Rather, it raises more questions. If, as Mr. Boyd explains, amortizing costs becomes unpredictable and more difficult, “how could carriers afford to pay the site commissions?”¹⁴² And if the FCC now decides to permit ICS carriers to pay and recover the cost of site commissions, but a multi-provider environment makes it possible for carriers to share them, how can the FCC know that its new rates are appropriate?¹⁴³ Intra-site competition thus raises fundamental, insoluble questions not only for ICS carriers but also for the FCC.

Due to each of these uncertainties, Mr. Boyd concludes that creating intra-facility ICS competition “would result in near-term chaos” followed by “lower capital investment by

¹³⁸ Boyd Decl. ¶ 13.

¹³⁹ *Id.* ¶ 14.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ¶ 15.

¹⁴² *Id.* ¶ 16.

¹⁴³ *See* Boyd Decl. ¶ 16.

carriers accompanied by lower quality service[.]”¹⁴⁴ Most importantly, security would be compromised, because carriers would not be willing or able to maintain investment in research and development when cost amortization becomes “completely variable.”¹⁴⁵

Securus also provides the Declaration of David Kunde, its Vice President of Operations and Engineering, to discuss the operational hazards of establishing a multi-provider system for ICS. Mr. Kunde also divides his concerns into discrete issues:

- **Security Concerns** — Having more than one ICS provider in a facility raises significant security concerns. First, “[t]he officers must be trained to use each different system.”¹⁴⁶ In addition, “when an event occurs in the jail that may involve a called party, the officers must check the call records of every system to find the relevant call(s). That added time will delay the officers’ ability to react.”¹⁴⁷

- **Validation and Call Rating Problems** — Call validation “is a crucial part of call security, and in a multi-provider system it becomes difficult to guarantee.”¹⁴⁸ Inmate calls “require additional call validation beyond what other telephone service providers do for residential and business calls.”¹⁴⁹ Each dialed number must be checked against LIDB and also checked against the list of prohibited numbers such as “judges, prosecutors, and pay-per-call numbers.”¹⁵⁰ In a multi-provider system, “[h]ow will the correctional facility know that each call is being validated, and how will they confirm it?”

¹⁴⁴ Boyd Decl. ¶ 17.

¹⁴⁵ *See id.*

¹⁴⁶ WC Docket No. 12-375, Declaration of David Kunde ¶ 6 (Dec. 9, 2014).

¹⁴⁷ Kunde Decl. ¶ 7.

¹⁴⁸ *Id.* ¶ 10.

¹⁴⁹ *Id.* ¶ 9.

¹⁵⁰ *Id.*

- **Auditing Difficulty** — ICS carriers must audit their billing records “to ensure that the billing systems are working properly.”¹⁵¹ With more than one ICS provider in a facility, there are multiple switches, and auditing “becomes very difficult.”¹⁵²

- **Facility Infrastructure Issues** — Mr. Kunde states that “[c]orrectional facilities are not built out for major telecommunications traffic” and thus often require “infrastructure deployment” such as replacing inside wiring and bringing in transport facilities.¹⁵³ When more than one ICS carrier installs equipment, “facility infrastructure will be even more taxed” and duplicative transmission facilities must be installed.¹⁵⁴ “It will be a logistical nightmare.”¹⁵⁵

- **Chain of Custody Issues** — Inmate calls “are very often used as evidence in criminal proceedings” and thus “must be authenticated.”¹⁵⁶ Authentication “requires a secure chain of custody” as well as witnesses to testify in court.¹⁵⁷ In a multi-provider environment, chain of custody will become confusing. “It would be up to the correctional facility and the prosecutor to decide who actually handled the call, and who should testify to authenticate the record.”¹⁵⁸ Intra-facility competition thus would place a new burden on both carriers and the justice system.

Finally, and for many of the reasons that Mr. Boyd and Mr. Kunde explain, correctional facilities never have wanted to deal with more than one ICS provider at a time.

¹⁵¹ Kunde Decl. ¶ 11.

¹⁵² *Id.*

¹⁵³ *Id.* ¶ 12.

¹⁵⁴ *Id.* ¶ 13.

¹⁵⁵ *Id.*

¹⁵⁶ Kunde Decl. ¶ 14.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* ¶ 15.

They decided, using their statutory authority and professional discretion, to employ a competitive RFP process from which to choose the most qualified inmate telecommunications company. Thus, leaving aside the operational and financial “nightmare” that ICS providers would experience, intra-facility competition would contravene correctional facility policy. And it would not eliminate the biggest issue related to calling rates: site commissions. Therefore, although Securus appreciates the Commission’s willingness to consider other types of action other than setting rates, demanding intra-facility ICS competition would not be a reasonable or successful decision.

V. THE COMMISSION SHOULD ADOPT A REASONABLE TRANSITION PERIOD FOR THE FORTHCOMING PERMANENT RATES

As discussed in Section I above, correctional facilities at this time rely on the site commission revenue and in-kind contributions that they receive from ICS. A flash-cut effective date for the forthcoming rates, which contemplate reduced site commissions that are not tied to gross ICS revenue, would bring an abrupt halt to correctional facilities’ ability to maintain operations and fund inmate welfare programs. For these reasons, a more gradual transition period, such as those discussed in the ICS Industry Proposal, should be adopted.¹⁵⁹ Allowing facilities at least one budget cycle, during which they continue to receive previously-arranged site commissions while seeking other funding sources, is the appropriate solution. Securus therefore supports the Commission’s suggested “two-year transition away from site commissions.”¹⁶⁰

Securus reiterates that any action regarding site commissions (1) should not include the provision of security features and equipment, *see* Section I above, and (2) should not

¹⁵⁹ *See* Second FNPRM ¶¶ 128-32.

¹⁶⁰ Second FNPRM ¶ 28.

be abolished if correctional facilities demonstrate a quantifiable set of costs for which they deserve reimbursement.¹⁶¹ Just as carriers must recover their costs of service, so must correctional facilities. At present, federal law does not permit carriers to include site commissions in interstate rates.¹⁶² Should that rule change, and the Commission enables carriers to pay monetary site commissions, the Industry Proposal of \$0.20/\$0.24 per minute becomes unworkable. None of the carriers' cost data, and certainly not the Securus Cost Data, made any allowance at all for monetary site commissions. However, if the FCC chooses to make monetary site commissions compensable, it must adapt the forthcoming rate cap to ensure ICS carriers recover those payments. This mechanism should be in place during the transition period — Securus reiterates its support for the two-year proposal — in order that carriers suffer no delay or gap in recouping payments. That is to say, if site commission payments are reinstated, then the cost recovery method must be effective immediately, and any tapering effect on those payments should be reflected in the cost recovery method; carriers should neither under-recover nor over-recover permissible monetary site commissions.

VI. THE COMMISSION SHOULD NOT APPLY DIFFERENT ICS RATES TO TTY CALLS

The Second FNPRM renews the Commission's request for comment on the rates that should be adopted for inmate-initiated TeleTypewriter ("TTY") calls.¹⁶³ Securus believes that the Commission should simply apply the forthcoming ICS rates to these calls, and to leave

¹⁶¹ Industry Proposal at 3-4.

¹⁶² *E.g.*, WC Docket No. 12-375, Wireline Competition Bureau Addresses the Payment of Site Commissions for Interstate Inmate Calling Services, DA 14-1206 (Aug. 20, 2014).

¹⁶³ Second FNPRM ¶¶ 133-44.

existing Rule 64.6040 intact.¹⁶⁴

Securus has explained previously in this proceeding that there are three types of TTY calls, and Securus carries only one of them: “Only inmate-dialed TTY to TTY calls are actually carried by Securus, because they are direct-dialed like a voice call.”¹⁶⁵ The attached Further Declaration of Curtis L. Hopfinger, dated December 10, 2014,¹⁶⁶ includes a table summarizing the call paths and applicable rates for all TTY calls. As we show, the other two types of TTY calls, each of which is a Voice call at one end, are carried and billed “by the long-distance carrier holding the contract with state Telecommunications Relay Service (‘TRS’) entity.”¹⁶⁷ Accordingly, Securus confines these further comments to issues regarding TTY to TTY calls.

The Commission should not impose a discount on TTY calls or set rate any calling rate other than the rate it adopts for Voice calls. As Mr. Hopfinger explains, a TTY discount raises three fundamental problems. First, the technology to implement a discount does not exist. A pure TTY call “can be placed to any non-restricted number and has a call path the same as any voice call,” and thus the “telephone system does not, and has no reason to, differentiate those calls from other calls.”¹⁶⁸ Securus cannot cull out the TTY calls it carries from the non-TTY calls. To do so, Securus “would have to create new software and new coding

¹⁶⁴ “No Provider shall levy or collect any charge in addition to or in excess of the rates for Inmate Calling Services or charges for Ancillary Charges for any form of TRS call.” 47 C.F.R. § 64.6040.

¹⁶⁵ Securus December 2013 Comments at 17.

¹⁶⁶ WC Docket No. 12-375, Further Declaration of Curtis L. Hopfinger, Director – Regulatory Affairs (Dec. 10, 2014) (“Hopfinger Dec. 2014 Decl.”).

¹⁶⁷ Securus December 2013 Comments at 17 (citing Declaration of Curtis L. Hopfinger ¶¶ 6-13 (Mar. 22, 2013, amended Mar. 25, 2013)).

¹⁶⁸ Hopfinger Dec. 2014 Decl. ¶ 8.

to make that differentiation.”¹⁶⁹ That work would be a considerable burden and impose a new, quite large cost element. “These costs were not considered or included in the cost data provided to the FCC in July 2014.”¹⁷⁰

Second, inherent in a TTY discount is the likelihood of fraud. A discounted or special TTY rate would give the parties “an incentive to use TTY-to-TTY for their calls,”¹⁷¹ even if neither person is hearing impaired. As Mr. Hopfinger explains, anyone can buy a TTY machine, and they are only \$99 new and even less for used models.¹⁷² The temptation for arbitrage is simply too great.

Another fraud-related concern is that hearing- or speech-impaired inmates could face intimidation or exploitation: being forced “to set-up TTY-to-TTY calls for non-impaired inmates in order to receive the discount.”¹⁷³ Mr. Hopfinger testifies that these calls are carried like any voice call, and so after the call is set up via TTY, a regular voice conversation is enabled.¹⁷⁴ The TTY discount thus becomes an issue of inmate safety. Perhaps a new monitoring/verification system could be employed to protect hearing-impaired inmates, but any system can be circumvented with the coerced cooperation of the inmate.

Third, a TTY discount easily can render rates below cost, because of the additional development costs it would necessitate. For the reasons just explained, implementing a special TTY rate would require Securus “to incur the cost to develop and maintain new

¹⁶⁹ Hopfinger Dec. 2014 Decl. ¶ 8.

¹⁷⁰ *Id.* ¶ 10.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Hopfinger Dec. 2014 Decl. ¶ 9.

detection and monitoring software and systems.”¹⁷⁵ Those costs would be both substantial and new, and of course were not included in the July 2014 cost data. Unforeseen research-and-development costs easily could push the cost of service over the \$0.20 rate offered in the Industry Proposal. And if an appropriate waiver mechanism is adopted, as several carriers believe is required, the TTY discount would either be nullified via waiver or force a carrier to provide below-cost ICS service in contravention of the fundamental precept of ratemaking.¹⁷⁶

In addition to seeking comment on a TTY discount, the Commission now asks whether TTY calls can be tracked as to length.¹⁷⁷ As Mr. Hopfinger explains and has explained, tracking of TTY is not possible. In December 2013, Securus stated that culling out calls would require Securus “to write a new computer application for its billing system” and establish “separate databases at each correctional facility to identify inmates that may use a TTY device or call friends or family that require the use of a TTY or similar device.”¹⁷⁸ The problem would be compounded for any facility that “does not ‘use Prisoner Identification Numbers (PINs) in association with the inmate telephone system.’”¹⁷⁹

Mr. Hopfinger now adds the following analysis on this question:

- **TTY to TTY Calls** — “There would be no way for Securus to cull out these calls and examine their call duration statistics.”¹⁸⁰

- **Voice to TTY // TTY to Voice Calls** — Securus “does not carry, control, or bill

¹⁷⁵ Hopfinger Dec. 2014 Decl. ¶ 10.

¹⁷⁶ *E.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 n.5 (1989); *Alabama Power*, 16 FCC Rcd. at 12232 ¶ 52.

¹⁷⁷ Second FNPRM ¶ 136.

¹⁷⁸ Securus December 2013 Comments at 18 (quoting Declaration of Curtis L. Hopfinger ¶ 10 (Dec. 19, 2013) (“Hopfinger Dec. 2013 Decl.”))

¹⁷⁹ Securus December 2013 Comments at 19 (quoting Hopfinger Dec. 2013 Decl. ¶ 10).

¹⁸⁰ Hopfinger Dec. 2014 Decl. ¶ 12(a).

for the call from TRS to the called party,” and thus “does not know how long the inmate’s conversations last for these calls.” Securus “has no billing record for that leg of the inmate’s TTY call.”¹⁸¹ To cull out these calls from within Securus’s records “would be insurmountably difficult,” because it “would need to research every TRS number in each of the 47 states (including the District of Columbia)” and then “compare the TRS set of records to the remaining universe of records in order to compare the call durations.”¹⁸²

It bears repeating that correctional facilities, and not Securus, “set correctional facility policy as to the amount of access that hearing-impaired inmates (or any inmates) have to telecommunications services.”¹⁸³ To the extent that some carrier is able to provide information about TTY call duration, and that evidence demonstrates TTY calls are longer than pure Voice calls, it is not within an ICS provider’s power to dictate to correctional facilities that time limits on TTY calls should be waived or extended.

Finally, Securus reiterates that “Securus imposes no additional fees, connection charges, or any other accretive rate” for TTY calls other than the rates Mr. Hopfinger has identified.¹⁸⁴ That is, Securus imposes no special TTY connection fee, TTY technology fee, or apply any calling rate other than its tariffed calling rate. For interstate calls, that TTY rate is the \$0.21/\$0.25 per minute rate that became effective February 11, 2014. Absent grant of a waiver, *see* Section VII below, Securus will apply the Commission’s forthcoming rate caps to its TTY calls.

¹⁸¹ Hopfinger Dec. 2014 Decl. ¶ 12(b).

¹⁸² *Id.*

¹⁸³ Securus December 2013 Comments at 19 (citing Hopfinger Dec. 2013 Decl. ¶ 11).

¹⁸⁴ Hopfinger Dec. 2014 Decl. ¶ 13.

VII. WAIVERS SHOULD BE AVAILABLE ON A SITE-BY-SITE BASIS WHERE DEMONSTRABLE ICS COSTS EXCEED THE RATE CAP

The Commission revisits the concept of rate waivers in the Second FNPRM, asking whether continued reliance on that process is preferable to adopting a tiered rate structure.¹⁸⁵ Securus continues to support the notion of waivers as a means of ensuring that correctional facilities having particularly challenging cost structures can be served.¹⁸⁶ The existing waiver process unfortunately is not well-suited to this purpose.

Waivers should be available on a site-by-site basis, particularly if the Commission adopts the unified, nationwide rate caps that the Industry Proposal sets forth (\$0.20 prepaid/\$0.24 collect). Those rates will be closely tied to proven ICS costs and, as explained in Section II above, competition will drive down rates even lower at sites that can support lower rates. And just as some sites can support below-cap rates, other sites have costs well in excess of the proposed caps. It remains the case that, as Securus has explained for years, a “one-size-fits-all” regime is not appropriate for the ICS industry which continues to operate on a site-by-site, contract-by-contract basis.¹⁸⁷ And again, the Commission’s goal in this proceeding is to facilitate and improve inmates’ access to telephones — every correctional facility matters in achieving that goal.

The harsh standard adopted in the *Inmate Rate Order* requires a company to prove that its entire business would be unprofitable were it confined to the Interim Rate Caps at just one site.¹⁸⁸ It seems the Commission was concerned that carriers enjoyed enormous profit on

¹⁸⁵ Second FNPRM ¶ 58.

¹⁸⁶ Securus March 2013 Comments at 18-19 (proposing a “variance” process).

¹⁸⁷ *E.g.*, Securus March 2013 Comments at 18; CC Docket No. 96-128, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, at 1 (June 22, 2012).

¹⁸⁸ *Inmate Rate Order* ¶¶ 82-83.

calling rates in general and thus should be expected to provide below-cost service at some facilities. That concern should be abated now. Carriers more than ever must ensure that rates at each of their sites are at cost. But to force carriers to conduct a company-wide cost analysis is needlessly burdensome, expensive, and has deterred carriers from seeking a waiver at all. They simply choose not to compete for the contract. When the goal is to foster competition and rely on a “market-based” solution¹⁸⁹ subject to a regulatory “backstop”¹⁹⁰ — an approach that Securus wholeheartedly supports — the waiver process should assist carriers in bidding on contracts rather than dissuade them.

¹⁸⁹ *E.g.*, Second FNPRM ¶¶ 6, 27, 47 (“A goal of ICS reform is to move to a market-based solution to reduce rates.”).

¹⁹⁰ Second FNPRM ¶ 47.

CONCLUSION

For all these reasons, the Commission should:

- 1) Hold that monetary site commissions will be permitted in order to recover direct, quantifiable costs that correctional facilities incur when making telecommunications available to inmates. A cost recovery mechanism should be added to the forthcoming rate caps to ensure that ICS providers recoup the cost of monetary site commissions. The provision of security-related equipment, features, and software should be excluded from the definition of “site commissions”;
- 2) Adopt, as the “backstop”, the rates in the Industry Proposal of \$0.20 per minute for all debit/prepaid calls and \$0.24 per minute for all collect calls. Additive security features such as voice biometrics, which are not included in the typical suite of services but often are required by correctional facilities, warrant an additive per-minute rate;
- 3) Reject pleas to abolish or impose below-cost caps on transaction fees, and should adopt the Industry Proposal regarding “ancillary fees”;
- 4) Decline to adopt intra-facility competition for ICS services;
- 5) Adopt a reasonable transition period regarding monetary site commissions and the method by which carriers can recoup them;
- 6) Reject proposals for a special or discounted rate for TTY calls; and
- 7) Amend the process and standard of review for waivers to enable carriers to obtain rate relief on a site-by-site showing of need.

Dated: January 12, 2015

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