

Alabama Public Service Commission Ex Parte Presentation Second Further Notice of Proposed Rulemaking

Introduction

The Alabama Public Service Commission (“APSC”) hereby submits an Ex Parte presentation to the Commission to address certain aspects of ancillary charges, recommend a definition for “ancillary services”, and address the Commission’s jurisdiction for both.

Ancillary Charges

Before addressing the definition of ancillary services, it is important to first review the Commission’s definition for ancillary charges:

Ancillary charges mean any charges to Consumers not included in the charges assessed for individual calls and that Consumers may be assessed for the use of Inmate Calling Services. Ancillary Charges include, but are not limited to, fees to create, maintain, or close an account with a Provider; fees in connection with account balances, including fees to add money to an account; and fees for obtaining refunds of outstanding funds in an account;...¹

The APSC agrees with the Commission’s definition but recommends the addition of bill processing fees. ICS providers must pay wireline carriers or third-party bill aggregators for the billing and collection of inmate collect calls assessed to the call recipient’s wireline carrier account. These charges are typically passed on to the call recipient through a bill processing fee which is added to the collect call charge.

¹ See 47 C.F.R. § 64.6000(1).

Inmate collect calls to wireline recipients billed to the recipient by their wireless carrier also have a component applicable to bill processing. For Securus and GTL, it is that portion of the \$9.99 charge for Text2collect (Collect2phone for GTL) that is retained by 3CI. Neither provider has identified the amount paid to 3CI for bill processing. That portion of the \$9.99 total charge returned to the ICS provider represents the applicable calling charges paid by the consumer. Ancillary bill processing charges apply regardless of whether the call recipient is served by wireline or wireless technology.

For single payment inmate collect calls billed to a credit card, both Securus and GTL identify separate call and transaction fee components for the \$14.99 charge assessed to the consumer. The “call fee” is shown as \$1.80, which for a 15-minute call equates to a collect call rate of \$0.12/min. The “transaction fee” component is identified as \$13.19 although neither provider has divulged what they pay 3CI for processing credit card payments applicable to single payment calls. Therefore, one is left with the impression that both ICS providers must pay \$13.19 to process the customer’s credit card payment and that only \$1.80 is retained by Securus and GTL for the call component. By contract, both remit \$1.60 to the facilities for each such single payment call which allegedly leaves Securus and GTL with net revenue of only \$0.20 per call. If their claims with respect to collect call per-minute costs are accepted at face value, both Securus and GTL after deducting calling costs, would be losing money on each credit card-billed single payment call handled by 3CI.

Securus charges consumers \$7.95 for credit card transactions processed through its own call center which is one of, if not *the highest*, credit card processing fees in the industry. What possible rationale could Securus and GTL have for using 3CI to process single payment credit card transactions at a cost to them that is 66% higher than the transaction fee charged consumers by their own call centers? Why would Securus and GTL pay 3CI a transaction fee equivalent to 88% of the call price leaving them with only \$1.80 to cover calling costs and the \$1.60 site commission paid on the call? It is intuitively obvious that the claimed \$13.19 transaction fee is vastly overstated. Based on the Commission’s interim collect call rate cap, the total price for a

15-minute call is \$3.75. Such an allocation is perhaps a disadvantage when offering facilities contractual site commissions of 80% to 96% on call revenue. The site commission payments due the facilities under such contractual arrangements would range from \$3.00 to \$3.60 per credit card-billed single payment call rather than the \$1.60 that is currently paid to the facilities for the calls.

Single payment calls have both a call component and an ancillary charge component. There is no justifiable reason for the minimum call duration for either to be set in excess of the average call duration for other inmate calls. Based on 2012 Alabama ICS call data, the average call duration in Alabama ranged from 9.3 minutes for local calls to 10.4 minutes for toll calls. The APSC imputed 12 minutes as the minimum call duration for single payment service calls which exceeds the national average call duration. Additionally, there is no justifiable reason for pricing the call component for inmate collect calls to wireless recipients any differently than the rate applicable for collect calls to wireline recipients. The remaining portion of the price for single payment calls is the requisite ancillary charge component. There is an associated cost for non-ICS carriers to bill ICS provider collect calls. Furthermore, there is an associated cost for credit card processing. The APSC urges the Commission to apply the call rates and the authorized ancillary charges consistently. Unless ICS providers offering single payment services are able to successfully cost justify why the ancillary charge component of single payment calls should be higher, the maximum ancillary charge authorized by the Commission (bill processing fee or credit card processing fee) should apply to single payment calls as well. Thus far, providers have offered no evidence to the contrary.

The Commission's ancillary charge definition includes "...fees to add money to an account". Third-party payment transfer services do not fall under the Commission's or the APSC's jurisdiction. Nevertheless, any fees imposed on subscribers in order for them to access regulated services must be scrutinized by regulators to ensure they are just, reasonable, and comparable to the fees generally available to customers of other ICS providers from the third-party payment transfer service. Some ICS providers are assessing customers their own ancillary charge for

payment transfers using the third-party payment transfer service as their collection agent. In our July 7, 2014 and December 9, 2014 ICS Orders², the APSC exhaustively addressed third-party payment transfer fees. The record clearly shows that Western Union and MoneyGram are charging payment transfer fees of \$5.95 and less to the customers of many ICS providers in Alabama. The payment transfer fee is negotiable as evidenced by the fact that Western Union transfer fees for ICS providers in Alabama range from \$5.00 to \$11.95. The record in our proceeding shows that providers whose customers are charged more than \$5.95 for Western Union and MoneyGram payment transfers are participating in a revenue sharing arrangement with the third-party payment transfer service. This “payment transfer fee premium” for adding money to a customer account clearly meets the Commission’s definition of an ancillary charge subject to the Commission’s jurisdiction. The provider’s reliance on a third-party as their agent for collecting and remitting the payment transfer premium does not shield the ancillary charge from Commission jurisdiction.

In response to the APSC’s July 7, 2014 Order, Securus commented:

Western Union and MoneyGram provide different levels of service and have different charges for such services. Securus has negotiated in good faith for a national contract with both Western Union and MoneyGram that Securus cannot adjust for a single jurisdiction like Alabama. Should the Commission seek to exceed its jurisdiction and interfere with Securus' contracts with third parties like Western Union and MoneyGram, Securus may be forced to cause Western Union and MoneyGram to discontinue providing these services to Securus customers in Alabama.³

² Re: Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service, APSC Docket 15957. Order dated July 7, 2014, par. 8.13 thru 8.20 and Order dated December 9, 2014, par. 8.07 thru 8.27.

³ RE: Generic Proceeding Considering the Promulgation of Telephone Service Rules Governing Inmate Phone Service, Comments of Securus Technologies, Inc., dated August 11, 2014 (“Securus Comments”), pages 13-14.

However, as Prison Policy Initiative (“PPI”) astutely observed in their comments⁴ for the Commission’s Second FNPRM:

But that comment [from Securus in the Alabama proceeding] came on the heels of the company renegotiating the same fee for Dallas County, where Securus explained:

“Securus has negotiated the Western Union and MoneyGram fees for Dallas County... We have been able to reduce fees for Dallas County from \$11.95 and \$9.95 down to \$5.95.”⁵

PPI referenced Securus’ 2014 submission for the Dallas County, Texas Request for Proposal⁶, responses to questions 6 through 8. In our December 9, 2014 ICS Order, the APSC requires those providers whose customers are charged third-party payment transfer fees that exceed \$5.95, to justify why they are unable to negotiate lower third-party payment fees for their customers.⁷ As evidenced by the Securus proposal in Dallas County, they are perfectly capable of negotiating fees of \$5.95 or less with Western Union and MoneyGram. Consequently, third-party payment transfer fees that exceed \$5.95 are an unnecessary expense imposed on the provider’s customers. The Commission should note question 8 and the response thereto in the Additional BAFO Questions Securus submitted to Dallas County:

QUESTION 8: What is your revenue sharing agreement with Western Union, MoneyGram or similar companies? Is this revenue subject to the commission?

RESPONSE: Securus negotiated a lower fee on behalf of Dallas County and does not have a revenue share agreement with these companies **for**

⁴ Re: WC 12-375, Comments re Second Further Notice of Proposed Rulemaking §III (C): The urgent need for reforms to ancillary charges, comments of Peter Wagner and Aleks Kajstura, Prison Policy Initiative, dated January 12, 2015, page 4.

⁵ Securus, Additional Questions: Step 3 Best and Final Offer for Dallas County, Texas, (See PPI Comments dated January 12, 2015, Exhibit 1, page 3)

⁶ See URL: RFP No. 2014-017-6399 Request for Proposal Inmate - Securus - Dallas Step 3 Additional BAFO Questions - Final.pdf URL: <http://dctx.siretechnologies.com/sirepub/agdocs.aspx?doctype=agenda&itemid=23411>

⁷ APSC Order for Docket 15957 dated December 9, 2014, par. 8.23 thru 8.27.

Dallas County (emphasis added); therefore, these are non-commissionable.

Not only do the parties to the Proposal of September 15, 2014 seek Commission approval to cap payment transfer fees which are as much as \$6 above what the payment transfer services are willing to charge their customers for the service, they blatantly seek another \$2.50 additive. The APSC urges the Commission not only to reject this ludicrous proposal but to require ICS providers to eliminate the provider ancillary charge premium they assess on top of the \$5.95 payment transfer fee available to their customers from Western Union and MoneyGram.

Ancillary Services

The Commission seeks a definition for “ancillary services”.

While the Commission has previously adopted a definition of ancillary charges, we have not adopted a definition for “ancillary services” and therefore seek comment on such a definition.⁸

The APSC recommends the following definition:

“Ancillary services” means services that are associated with or incidental to the provision of Inmate Calling Service included but not limited to “Video Visitation Service”, “Inmate email”, and content stored on inmate handheld devices.

Incidental is generally defined as “accompanying but not a major part of something”. As shown in the APSC ICS Order dated December 9, 2014, single payment services are a means of billing charges for inmate collect calls. The calls by themselves are exactly the same as other inmate calls and are clearly not incidental as shown in Attachment A to that Order. Those services

⁸ Second FNPRM, par. 85.

considered incidental today may not be incidental later with the rapidly evolving ICS industry. The Commission’s jurisdiction over these services may be inferred from 47 C.F.R. § 64.6000. Inmate Calling Services is defined as “...the offering of interstate calling capabilities from an Inmate Telephone” further defined as “...a telephone instrument **or other device** (emphasis added) capable of initiating telephone calls set aside by authorities of a correctional institution for use by Inmates”. Provider of Inmate Calling Services, or Provider, means any communications service provider that provides Inmate Calling Services, **regardless of the technology used** (emphasis added).⁹

ICS is a payphone service pursuant to 47 U.S.C. § 276(d). ICS providers therefore offer payphone service, not VoIP service, and their customers subscribe to payphone services regardless of the underlying technology used by the provider for transport the payphone stations to their off-site network operations center. ICS does not meet the definition of VoIP service. Therefore, services ancillary thereto are not VoIP enabled services.

Interconnected VoIP service.

An interconnected Voice over Internet protocol (VoIP) service is a service that:

- (1) Enables real-time, two-way voice communications;
- (2) Requires a broadband connection from the user's location;
- (3) Requires Internet protocol-compatible customer premises equipment (CPE); **and**
- (4) **Permits users generally to receive calls that originate on the public switched telephone network** (emphasis added) and to terminate calls to the public switched telephone network.¹⁰

Inmate calling service is outbound only by statute. Therefore, ICS does not permit users to receive calls that originate on the public switched telephone network.

⁹ See 47 C.F.R. § 64.6000

¹⁰ 47 CFR, § 9.3.

With respect to the assertion that “...charges for ancillary services are primarily related to billing and collection and therefore may not be considered to be communications services subject to Commission regulation” as cited in paragraph 86 of the Second FNPRM, the APSC believes that this assertion misinterprets the distinction between ancillary charges and ancillary services. As previously cited from 47 C.F.R. § 64.6000(1):

Ancillary charges mean any charges to Consumers **not included in the charges assessed for individual calls and that Consumers may be assessed for the use of Inmate Calling Services** (emphasis added). Ancillary Charges include, but are not limited to, fees to create, maintain, or close an account with a Provider; fees in connection with account balances, including fees to add money to an account; and fees for obtaining refunds of outstanding funds in an account;...

Indeed, ancillary services are associated but entail separate and distinct services offered by the provider. For wireline telephony, ancillary services include directory assistance, vertical services such as call waiting, caller I.D., etc., conference bridging service and voice mail service. Ancillary charges may apply to ancillary services but the two terms are not interchangeable. The Commission has general authority under sections 201 and 276 to set rates for ICS that provide for recovery of all provider related expenses to include billing and collection expenses with or without ancillary charges. Further, the Commission has the obligation to ensure that charges assessed to ICS customers are fair and reasonable. Ancillary charges are a component of the total price consumers must pay for ICS and are, therefore, subject to the Commission’s jurisdiction.

ICS providers do not offer a billing and collection (“B&C”) service to their end users as provided in the Commission Order that de-tariffed such services¹¹. That Order was primarily directed at local exchange carrier billing and collection for interexchange carrier (“IXC”) services in consideration of the competitive B&C alternatives available to IXCs. ICS providers are, instead,

¹¹ 102 F.C.C. 2d 1150 (1986).

customers for de-tariffed billing and collection services and utilize such services for carrier billing of inmate collect calls. ICS providers should be allowed recovery for the costs associated therewith. The Commission is not considering any action in this proceeding to cap those de-tariffed B&C charges and is, therefore, not contradicting its previous Order(s). The Commission is considering caps on ICS end user ancillary charges that constitute a significant portion of the price end users must pay for access to ICS.

The preponderance of existing ICS ancillary charges are for providing consumer access to inmate calling, which from the end user perspective is a non-competitive marketplace. Payments by certified check, money order, or online banking, although provided at no charge, have inherent latency issues with respect to establishing service and are not always a viable payment alternative, particularly in jails where the majority of inmates are released within 72 hours. Typically, ancillary charges for funding end user ICS accounts are used to substantially inflate the price consumers pay for ICS. The record in the Alabama proceeding shows that inflated ancillary charges are indeed being used to subsidize excessive site commission payments and to otherwise significantly enhance provider profits. The August 28, 2014 CenturyLink Ex Parte filing with the Commission in relation to the 96% site commission offered to Escambia County, FL further substantiates the assertion that providers inflate ancillary charges:

Escambia County's Invitation to Bid was structured so that the bidder with the highest offered commission rate would be selected. Consequently, bidders were obliged to utilize ancillary fees to cover costs that otherwise could not be recovered in per-minute rates after deducting the County's required commissions.¹²

The Commission has an obligation to ensure these ancillary fees are just, reasonable and accurately reflect provider costs not otherwise considered a component of normal ICS operating overhead.

¹² Re: *Rates for Interstate Inmate Calling Service*, WC Docket No. 12-375, CenturyLink Ex Parte Letter to Marlene Dortch from Thomas M. Dethlefs, dated August 28, 2014.

Commission Jurisdiction for Wireless Instruments Used to Provide ICS

Providing wireless devices to inmates merely enhances the mobility of the instruments used to provide ICS payphone service. The instruments communicate wirelessly with routers whose reach is constrained to a very small area within the confinement facility rather than broadly over the public wireless network. The instruments serve only to provide inmates with connection to ICS payphone service and do not result in a mobile phone service offering any more than wireline customer use of a cordless telephone inside their home or business makes the service to which they subscribe mobile phone service. Indeed, inmates are prohibited from using cell phones within confinement facilities and corrections personnel expend a great deal of resources and time attempting to locate and confiscate cell phones in order to prevent direct inmate communications over the public wireless network. Wireless devices whose purpose is restricted to localized communications with the payphone service network are simply an alternative means of providing ICS payphone service.

The Commission's definitions under 47 C.F.R. § 64.6000 clearly establish that the terms "Provider of Inmate Calling Services", or "Provider", means any communications service provider that provides Inmate Calling Services, **regardless of the technology used** (emphasis added). The Commission has authority under section 276 of the Telecommunications Act to set rates for inmate calling service and the use of wireless instruments with limited range and wireless functionality for providing payphone service within the confinement facility in no way alters the Commission's jurisdiction.