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VIA ECFS AND ELECTRONIC MAIL

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Re: WC Docket No. 12-375, Rates for Interstate Inmate Calling

Dear Chairman and Commissioners:

Securus Technologies, Inc. ("Securus"), through counsel and pursuant to 47 C.F.R. § 1.1206(a)(1), submits this letter to provide the Commission with additional information as it reviews the issues under consideration in this docket. This letter supplements the Comments and Reply Comments that Securus filed on January 12 and 27, 2015, respectively.

Securus has special expertise in this proceeding, because it serves over one million inmates throughout the United States and has more than 28 years' experience serving the correctional and law enforcement communities.

The Communications Act requires that rates 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.”<sup>1</sup> Rates also must include a reasonable profit after accounting for the costs that the carrier incurs in providing service.<sup>2</sup>

Through the Mandatory Data Collection established in the *Inmate Rate Order*,<sup>3</sup> the Commission has received extremely detailed data about the costs that Inmate Calling Services (“ICS”) providers incur to provide service. According to the *Order*, however, the costs ICS providers incur in the form of site commissions “are not reasonably related to the provision of ICS” and thus “are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families.”<sup>4</sup> As required for the Mandatory Data Collection, the final, per-minute, average costs that ICS providers reported to the Commission made no allowance for site commissions. For ease of reference, Securus will provide again a table of the per-minute, average costs that were publicly reported:

Carrier	Final, Per-Minute ICS Cost
Global Tel*Link	\$0.1341
Pay Tel	\$0.1967
Securus <sup>5</sup>	\$0.1776
Telmate	\$0.1583

Prudent ratemaking methodology instructs that the final Rate Caps be set above the carriers’ average costs. FTI Consulting, who compiled and analyzed Securus’s data for the Mandatory

<sup>1</sup> *Alabama Cable Telecomms. Ass’n v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12232 ¶ 51 (2001).

<sup>2</sup> *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 11754, 11757 ¶ 10 (1996).

<sup>3</sup> WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113 ¶¶ 124-25 (rel. Sept. 26, 2013), published at 78 Fed. Reg. 67956 (Nov. 13, 2013) and 28 FCC Rcd. 14107 (2013) (“*Inmate Rate Order*” or “*Order*”).

<sup>4</sup> *Id.* ¶ 7.

<sup>5</sup> Securus paid more than \$400,000 to FTI Consulting, Inc., an industry-leading firm, to provide what Securus believes is the most detailed and accurate cost study that the ICS industry ever has compiled.

Data Collection, states in its July 17, 2014 Report that “FTI’s analysis has confirmed that price caps cannot be set at average costs and still allow Securus to recover its full costs.”<sup>6</sup> The Confidential Version of the FTI Report states exactly the amount of costs that Securus would fail to recover if the Rate Caps are set at, and not above, Securus’s average costs.<sup>7</sup> The numbers are considerable.

As stated above, the Commission held in 2013 that site commissions are not an ICS cost and must not be paid out of interstate rates. The Commission’s requirement that site commission expenditures be excluded from the carriers’ calculation of their average, per-minute cost reified this holding. As such, any final Rate Cap that either is set below the industry’s reported, average, per-minute costs would be below-cost and unlawful, and any rule that fails to reiterate that site commissions cannot be paid out of those Rate Caps would be reversible error.

Moreover, it must be remembered that this proceeding fundamentally is about calling rates that are subject to Commission jurisdiction and authority pursuant to Sections 201 and 202 of the Communications Act of 1934.<sup>8</sup> These rates are for telecommunications service. The remuneration of correctional facilities for the costs they incur, as well as the funding of inmate welfare programs and the other salutary causes to which site commission funds are devoted, plainly is not a telecommunications service cost. Securus has stated multiple times in this proceeding that it supports the recovery of costs that facilities directly incur related to the provision of ICS, but that any such cost recovery must be additive to the telecommunications Rate Caps set in this proceeding.<sup>9</sup> The ICS carriers’ reported average, per-minute costs, and the ICS Industry Proposal advocating a rate cap of \$0.20 per minute for prepaid calls and \$0.24 for collect calls, likewise all reflect purely telecommunications service costs. That is how the final Rate Caps must be established.

In addition, the Commission’s goal in this proceeding is to “prioritize lower rates and higher service quality as decisional criteria in [ICS] RFPs, thereby giving ICS providers an incentive to offer the lowest end-user rates.”<sup>10</sup> The Commission is concerned about what it calls “reverse competition” arising from the phenomenon of site commissions<sup>11</sup> and thus is focused on setting

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<sup>6</sup> WC Docket No. 12-375, FTI Consulting, Inc., Report Implementing the FCC Mandatory Data Collection on Behalf of Securus Technologies, Inc. at 3 (July 17, 2014) (Public Version) (“FTI Report”). No party attempted to refute this well-settled precept of ratemaking.

<sup>7</sup> FTI Report at 12, 13 (Confidential Version).

<sup>8</sup> 47 U.S.C. §§ 201, 202.

<sup>9</sup> Securus Comments at 11-13; Securus Reply Comments at 1, 3.

<sup>10</sup> WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, FCC 14-158 ¶ 27, published at 79 Fed. Reg. 69682 (Nov. 21, 2014) (“Second FNPRM”)

<sup>11</sup> Second FNPRM ¶¶ 3, 23.

ICS Rate Caps as a “backstop”<sup>12</sup> that will reflect and recover the costs of each actual service.<sup>13</sup> Setting Rate Caps that reflect the telecommunications costs of ICS, rather than site commission costs, will address the Commission’s concern and make its goal attainable.

The Commission has the authority as well as ample discretion to determine what costs may be recovered in regulated rates. For example, in *Sorenson v. FCC*, 659 F.3d 1035 (10th Cir. 2011), an FCC order regarding Telecommunications Relay Service<sup>14</sup> was upheld on the ground that it comported with agency precedent regarding compensable telecommunications costs: “TRS Fund payments are ‘designed to compensate TRS providers for reasonable costs of providing interstate TRS ... based on total monthly interstate TRS minutes of use.’”<sup>15</sup> The Court of Appeals found that the Commission properly “has defined ‘**reasonable costs**’ to be ‘those **direct and indirect costs necessary to provide the service** consistent with ... the TRS mandatory minimum standards.’”<sup>16</sup>

Likewise, the FCC was affirmed in *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344 (D.C. Cir. 1999), in which the Court of Appeals for the D.C. Circuit reviewed an order governing terms of network interconnection.<sup>17</sup> The D.C. Circuit noted that

The FCC **disallowed certain direct costs for physical collocation services**, prescribed maximum permissible overhead loading factors, ordered tariff revisions to correct unreasonable rate structures, and struck down certain tariff provisions on the grounds that they were unjust, unreasonable, discriminatory, and anticompetitive.<sup>18</sup>

After excluding those costs, the Commission “scrutinized any costs exceeding one standard deviation above the industry-wide average” and then “disallowed the cost if it found that it was

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<sup>12</sup> *Id.* ¶¶ 47, 64.

<sup>13</sup> *See id.* ¶ 70 (“if the Commission adopts a market-based approach of addressing site commission payments and allowing competition to drive rates closer to cost, should we consider rate tiers, or should we instead adopt common rate caps for all correctional institutions ... ?”).

<sup>14</sup> *Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 25 FCC Rcd. 8689 (2010).

<sup>15</sup> 659 F.3d at 1039 (quoting 47 C.F.R. § 64.604(c)(5)(iii)(E)).

<sup>16</sup> *Id.* (quoting *Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 19 FCC Rcd. 12475, 12543-44 ¶ 181 (2004)) (emphasis added).

<sup>17</sup> *Local Exch. Carriers’ Rates, Terms, & Conditions for Expanded Interconnection Through Physical Collocation for Special Access & Switched Transp.*, 12 FCC Rcd. 18730 (1997).

<sup>18</sup> 168 F.3d at 1348 (emphasis added).

not justified by the record evidence.”<sup>19</sup> The Court stated that “**we conclude that this methodological choice falls within the FCC's discretion.**”<sup>20</sup> The Court also concluded that “the FCC did not err by disallowing certain direct costs Pacific Bell had incorporated in its rate base.”<sup>21</sup>

Exactly in keeping with that precedent, the Commission held in the *Inmate Rate Order* that

**Site commission payments are not costs that are reasonably and directly related to the provision of ICS** because they are payments made to correctional facilities or departments of corrections for a wide range of purposes, most or all of which have **no reasonable and direct relation to the provision of ICS.**<sup>22</sup>

As stated above, the Mandatory Data Collection was conducted in accordance with this conclusion.

This prior conclusion about site commissions notwithstanding, the Commission has reopened the issue in the Second Further Notice of Proposed Rulemaking.<sup>23</sup> It seeks comment on “prohibiting all site commission payments for interstate and intrastate ICS.”<sup>24</sup> It asks about “costs that facilities bear that are directly related to the provision of ICS” and “how to enable facilities to recover such demonstrated costs.”<sup>25</sup> Finally, it “request[ed] data that demonstrate the costs that facilities bear that are directly related to the provision of ICS.”<sup>26</sup>

Securus is aware that several correctional authorities, as well as contract agent Praeses, LLC, have responded to this call for data by submitting financial figures for the costs that these authorities believe they incur in order to make ICS available for inmates. Securus does not possess such information and is not involved in making or reviewing correctional facility budgets. Further, the question of whether and how to assist correctional facilities in recouping costs and funding penological programs is a public policy matter that is not within Securus’s power to resolve. Having undertaken to “reform” ICS,<sup>27</sup> and specifically to address site

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<sup>19</sup> *Id.* at 1353.

<sup>20</sup> *Id.* at 1353 (emphasis added).

<sup>21</sup> *Id.* at 1354.

<sup>22</sup> *Order* ¶ 54 (emphasis added).

<sup>23</sup> Second FNPRM ¶¶ 21-46.

<sup>24</sup> *Id.* ¶ 27.

<sup>25</sup> *Id.* ¶ 28.

<sup>26</sup> *Id.*; see also *id.* ¶¶ 39-40.

<sup>27</sup> *E.g., id.* ¶¶ 4, 5.

commissions again, the Commission must make the public policy decision on permitting or prohibiting, as to all calls for which Rate Caps are established, the payment of site commissions.

Because this issue regards costs not directly related to telecommunications, and regards data that is not in ICS carriers' possession to provide or expertise to evaluate, any mechanism for providing monetary site commissions to correctional facilities must be via a separate, additive rate.<sup>28</sup> The ICS Industry Proposal, for example, was never meant to include site commission payments within the \$0.20/\$0.24 Rate Cap. In addition, because whatever revenue derived from that additive rate will not belong to – just as site commission funds never have belonged to – the ICS carriers, it must not be counted toward a carrier's compliance with the Rate Cap.<sup>29</sup> This cost recovery mechanism by its nature is separate from telecommunications service, though perhaps ancillary to it, and thus must be treated and accounted separately.

If the Commission fails to adopt an additive rate to act as a cost recovery mechanism, then it must retain and expand its prohibition on paying site commissions.<sup>30</sup> The docket in this proceeding contains several filings recounting the industry's experience with implementing the *Inmate Rate Order*;<sup>31</sup> ICS providers faced a great deal of pressure to continue paying site commissions on interstate calls in contravention of the new rules.<sup>32</sup> Any lack of clarity in the forthcoming rules as to whether and how site commissions may be paid and recovered will increase that pressure tremendously, and likely will result in higher rates to end users.

Even worse would be an order holding that site commissions are now allowed on all calls, but without setting a per-minute additive rate, yet requiring carriers to adhere to a Rate Cap built on the cost data from the Mandatory Data Collection. ICS providers, big and small, will not be able to sustain a business model using rates based on ICS costs but paying out site commissions to

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<sup>28</sup> E.g., Securus Comments at 24; Securus Reply Comments at 4; ICS Industry Proposal at 3 (“the amount or percentage of such payments will have a direct effect on ICS provider's costs to provide ICS, and therefore, the proposed per-minute rate caps may have to be increased”).

<sup>29</sup> E.g., WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, Attachment (Draft Rules) (Feb. 9, 2015) (providing notice of permitted ex parte meeting with Staff of the Pricing Division of the Wireline Competition Bureau).

<sup>30</sup> 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).

<sup>31</sup> Securus Reply Comments at 21 n.104 (citing, e.g., WC Docket No. 12-375, Letter from Cherie R. Kiser, Counsel to Global Tel\*Link Corp., to Marlene H. Dortch, FCC, at 2 (June 3, 2014) (discussing “regulatory uncertainty and competitive distortions created by the *Order and FNPRM*”); Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, at 2 (May 15, 2014)).

<sup>32</sup> As the Commission knows, at least two ICS carriers ignored the *Inmate Rate Order* and the Commission's clarification of the *Order* and continued paying site commissions on interstate calls.

cover non-ICS costs. The impending chaos of cancelled contracts and unchecked site commissions will be devastating to the industry.

Securus has spent a great deal of resources to respond to the Mandatory Data Collection, to provide an accurate, detailed, and reconcilable analysis of its costs, and to address the Commission's questions throughout this proceeding. Securus helped to craft the comprehensive ICS Industry Proposal in order to provide the Commission with rates and rules that are appropriate, agreeable, and fair. We urge the Commission not to brush all of that work aside by adopting Rate Caps that will not enable carriers to recover their costs. We also entreat the Commission to answer the site commissions question affirmatively and clearly: If site commissions are appropriate, tell the industry how they can be provided and to what degree. Put all carriers on a level playing field and make them subject to the same set of clear, strictly enforced rules.

ICS competition already is working, and with final, unambiguous rules it will truly flourish. Should the Commission fail to address the twin ratemaking issues that are inherent in ICS, or subject carriers to below-cost rates with the possibility of unbounded site commissions, Securus will be forced to seek review of the forthcoming order in a federal Court of Appeals.

Thank you for your consideration. Securus welcomes the opportunity to meet with the Chairman, Commissioners, and Staff to discuss this proceeding. Please do not hesitate to contact me with any questions or requests: 202.857.6081.

Sincerely,

s/Stephanie A. Joyce

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*All via electronic mail*