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

Rates for Interstate Inmate Calling Services	WC Docket No. 12-375

REPLY COMMENTS OF SECURUS TECHNOLOGIES, INC. ON THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The response to the Third Further Notice of Proposed Rulemaking demonstrates that the Inmate Calling Services ("ICS") industry needs no additional regulation beyond the new rates and rules that the Commission just adopted in the Second Report and Order. The Commission's renewed request for comment on mandatory, intra-facility ICS competition received another resounding No, with new commenters such as the California Sheriffs' Association and the Los Angeles County Sheriff's Office expressing their deep concerns about the security risks and operational obstacles to introducing a multi-provider system to their jails.

Commenters strongly oppose the extension of ICS regulation into video services which are not telephone calls and thus not covered by the Title II of the Communications Act. Commenters also agree that Title II does not extend to financial transactions, and especially does not reach the agreements between ICS companies and third-party financial vendors that enable consumers to use optional payment methods. Nearly every party who demands the regulation of video service and financial transactions fails to explain how these items fall within the Commission's authority; the few who make the attempt simply quote the Communications Act without linking those quotes to the nature of the services at issue. But agency jurisdiction cannot simply be assumed, it must be established. No party comes close to completing that task.

Commenters also rejected the proposed requirements that all ICS contracts be published and that data collections be conducted on an ongoing basis. Several parties demonstrated that these rules are wholly unnecessary, and thus unduly burdensome, when ICS companies already must make annual, certified reports to the Commission and have another Mandatory Data Collection in 2018. Those who demand still more "transparency" simply ignored the existing rules and favor an endless "more is more" regulatory approach without a

thought as to how useful the additional rules are, or how expensive. The Commission has expressly eschewed this approach in favor of a more measured cost-benefit analysis. Undertaking that analysis, it becomes clear that the proposed contract publication and data collection obligations should not be adopted.

Securus Technologies, Inc. ("Securus"), through counsel and pursuant to 47 C.F.R. § 1.415, files these Reply Comments[1] in response to the Third Further Notice of Proposed Rulemaking ("Third FNPRM")[2] regarding several additional proposed rules to govern Inmate Calling Services ("ICS") and other non-communications services to inmates.

I. THE RECORD CONTINUES TO WEIGH OVERWHELMINGLY AGAINST A MANDATE FOR MULTI-PROVIDER ICS ARRANGEMENTS

Commenters strongly disfavor a rule that would create a multi-provider environment for ICS. In addition to every commenting ICS company,[3] law enforcement officials also reject the idea. The California Sheriffs' Association, which comprises 58 Sheriffs from around the state,[4] writes that "[w]e would urge the Commission to refrain from taking such an action," explaining that "removing the ability of a correctional facility to utilize an exclusive contract will create security concerns, impose logistical burdens, increase costs of providing ICS, and perhaps diminish the quality of ICS that are provided."[5] The Los Angeles County Sheriff's Office states that "[m]ultiple providers deployed at seven different custody facilities would create training and validation issues," and that "[a]llowing multiple providers access to sensitive

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1 The time to file Reply Comments was extended through today in DA 16-107 (rel. Jan. 29, 2016).

2 The item was published in the Federal Register on December 18, 2015, at 80 Fed. Reg. 79136, *available at* https://www.federalregister.gov/articles/2015/12/18/2015-31252/rates-for-interstate-inmate-calling-services.

3 WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 1-6 (Jan. 19, 2016); Comments of CenturyLink at 2-5 (Jan. 19, 2016); Comments of Global Tel*Link Corp. at 9-12 (Jan. 19, 2016); Comments of Pay Tel Communications, Inc. at 2-7 (Jan. 19, 2016).

4 California State Sheriffs' Ass'n website, *available at* https://www.calsheriffs.org/about-us/about-cssa-our-mission.html.

5 Letter from Martin Ryan, President, California State Sheriffs' Association, to Marlene H. Dortch, FCC, at 1 (Jan. 19, 2016) ("CSA Letter").

information would also create more security concerns."[6] Securus explained the security and logistical concerns from its point of view as the provider, from both the operational and the financial sides,[7] and they align with the Sheriffs' comments. Mandatory competition is not workable or safe in the ICS industry.

The Wright Petitioners' alternative proposal for structural separation is equally untenable. They suggest that the FCC "create two separate classes of ICS – wholesale and retail."[8] This notion is preposterous and unfounded. The ICS industry is harshly competitive – more than 25 companies are out there serving and competing for correctional facilities.[9] This industry is not monopolistic and has no barriers to entry: any company with the means to develop, acquire, or license call-security technology and connectivity to the PSTN can bid for ICS contracts. Those contracts change hands, public bids are won and lost, and installations and de-installations are common for ICS providers.

The drastic remedy of structural separation for ICS providers is unsupportable and would not stand. Even in the presence of true monopolists – the "Baby Bell" companies who acquired exclusive control over the nation's telecommunications network by the stroke of Judge

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6 Letter from Jim McDonnel, Sheriff of Los Angeles County, to Marlene H. Dortch, FCC, at 1 (Jan. 15, 2016) ("L.A. County Letter").

7 Supplemental Declaration of Geoffrey M. Boyd, Chief Financial Officer, Securus (Jan. 14, 2016) (incorporating Declaration dated Dec. 9, 2014); Declaration of David Kunde, Vice President of Operations and Engineering, Securus (Jan. 15, 2016) (incorporating Declaration dated Dec. 9, 2014).

8 Comments of the Wright Petitioners, the D.C. Prisoners' Legal Services Project, and Citizens United for Rehabilitation of Errants, at 5-6 (Jan. 19, 2016) ("Wright Group Comments").

9 In this proceeding alone, Securus, CenturyLink, Global Tel*Link, ICSolutions, Pay Tel Communications, Combined Public Communications, Telmate, Consolidated Telecom, and Network Communications International Corporation all have participated extensively. In addition, Value Added Communications is a nationwide ICS company with several large correctional facility customers. Other ICS providers include City Telecoin, Infinity Networks, and Legacy Inmate Communications.

Greene's pen – Congress refused to impose structural separation. The Commission has far less cause and no antitrust basis to inflict that result on the ICS industry.

II. THE RECORD DEMONSTRATES THAT THE COMMISSION IS NOT EMPOWERED TO REGULATE VIDEO AT CORRECTIONAL FACILITIES

The fact that video visitation is not a Title II communications service subject to Commission jurisdiction featured prominently in the comments. Securus, Global Tel, CenturyLink, and Telmate each demonstrated that video visitation is not telephone service[10] – it is a type of "advanced communications options beyond plain old 'payphone service.'"[11]

Global Tel takes note of the fact that Section 276 "is a limited grant of power to the Commission," not "an unlimited grant of authority over all technology or services provided in correctional institutions."[12] Telmate succinctly states that "video visitation is not ICS," and "[v]ideo services are not 'telephone' services – they do not, for example, use the public switched *telephone* network and do not use *telephone* numbers."[13] CenturyLink states that "video visitation is clearly distinct from ICS," because it "requires different software, different concerns related to security, [and] different devices both at the site and for the end-user[.]"[14] L.A. County adds that "video visitation … does not meet the definition of ICS."[15] The record is thus

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10 Securus Comments at 6-8 (quoting, *inter alia*, American Library Ass'n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005); GN Docket No. 10-127, Framework for Broadband Internet Service, Notice of Inquiry, 25 FCC Rcd. 7866, 7909-10 ¶ 107 (2010)); Global Tel Comments at 2-5; Telmate Comments at 5, 7-9.

11 Global Tel Comments at 2 (citing 47 U.S.C. § 276(d)).

12 Global Tel Comments at 3; *see also id*. ("As Commissioner O'Rielly notes, Section 276 is not 'technology neutral' and does not expand beyond traditional payphone service") (quoting Dissenting Statement of Commr. O'Rielly).

13 Telmate Comments at 8 (emphasis in original).

14 CenturyLink Comments at 3.

15 L.A. County Letter at 2.

consistent that, as Securus stated, "[i]nmate video systems are not 'calling' services at all."[16] For these reasons, the Commission does not have jurisdiction to regulate the prices, terms, or conditions of video visitation services. That jurisdictional bar applies doubly to demands that the FCC prohibit correctional facilities from using the same company for video and for ICS,[17] as if the Communications Act could be ported into state and local procurement law.[18]

Those who seek such regulation do not even attempt to provide any jurisdictional basis for their demand; the sole exception are the Wright Petitioners. They praise the value of video services for inmate visitation, and no provider of this service would disagree,[19] but cannot show that these services are within the Commission's purview.[20] For its part, the Human Rights Defense Council ("HRDC") compares providers of video visitation to "kidnappers and

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16 Securus Comments at 7.

17 WC Docket No. 12-375, Comments of iWebVisit at 4 (posted Jan. 20, 2016). iWebVisit appears to provide only "remote video visitation" service to jails (*id*. at 1); its business goals in seeking anti-bundling rules are obvious, but it fails to explain why the FCC has the jurisdiction or the authority to prohibit correctional facilities from using the vendors of their choice.

18 The Commission does not have the power to dictate the choices of services or of vendors that correctional authorities make. *E.g.*, *McGuire v. Ameritech Services, Inc*., 253 F. Supp. 2d 988, 1007 (S.D. Ohio 2003) ("Thus, when the ORDC establishes a collect calling telephone system in an Ohio correctional institution, that is the clear and articulated policy of Ohio."); *Miranda v. Michigan*, 141 F. Supp. 2d 747, 756 (E.D. Mich. 2001) ("The State of Michigan is undoubtedly authorized to act in the 'subject matter area' of prison administration. … [i]n the exercise of this authority, the state has the power to adopt policies it believes are best suited for managing its prisons and assuring the safety and security of those institutions.").

19 *E.g.*, Global Tel Comments at 2 ("The 'value' of these advanced inmate communications services that can provide inmates and their families additional and timelier methods of communication has been recognized by the Prison Policy Initiative.").

20 WC Docket No. 12-375, Comments of American Council of Chief Defenders at 1-2 (Jan. 19, 2016); Comments of the Electronic Frontier Foundation at 2-4 (Jan. 19, 2016); Comments of Human Rights Defense Center at 4-8 (Jan. 19, 2016); Letter titled "Comments re Third Further Notice of Proposed Rulemaking ¶¶ 296-307, video visitation" from Bernadette Rabuy, Prison Policy Initiative, to Marlene H. Dortch, FCC (Jan. 19, 2016).

extortionists," substituting incendiary rhetoric for legal analysis.[21]

The Wright Group's showing on jurisdiction is unavailing.[22] They rely on a patchwork-quilt of statutory provisions – Sections 201, 205, and 276 of the Communications Act – stitched together with an unreasonably expansive reading of "ancillary" that *Comcast v. FCC*[23] would never permit. They begin by ***assuming***, not demonstrating, that video visitation is "interstate communications" and invoke Section 201's mandate "to ensure that 'charges, practices, classifications, and regulations' are 'just and reasonable.'"[24] Then they add Section 205, which regards rate oversight, and Section 276, which governs Payphone Service Provider compensation, which, cobbled together, purportedly extend to video service. Having already thus categorized video visitation as "communications" under Title II, it is quite easy for the Wright Group then to jump to *American Library Association* and decide that Congress has delegated regulatory authority over video visitation to the FCC such that ancillary authority under Section 154(i) can be invoked.[25] But the Wright Group never attempts to show that video visitation ***works or looks like telephone service*** which is the irreducible minimum of Title II jurisdictional analysis. Nor ***could*** the Wright Group make that showing, because the fact is that the equipment, software, and operation of video visitation is nothing like telephone service. The Wright Group's comments simply assert that which they cannot prove, and as such they provide the FCC no basis from which to start regulating video service.

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21 HRDC Comments at 4.

22 Wright Group Comments at 10-14.

23 *Comcast Corp. v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010) (vacating BitTorrent Order on the ground that FCC failed to find "express statutory delegation of authority found in Title II, III, VI, or, for that matter, anywhere else … to which the authority must ultimately be ancillary.").

24 Wright Group Comments at 10-11 (quoting 47 U.S.C. § 201).

25 *Id*. at 12 (quoting *American Library Ass'n*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

Finally, both of the law-enforcement organizations that filed comments urge the Commission not to adopt rules for inmate video visitation.[26] They fear that expanding the ICS rules into video service would be "unwieldy" and could "impede[] or disadvantage[]" innovation.[27] Pay Tel agrees that "the Commission should not rush to regulate products and services it admits it does not understand well," including video visitation services.[28] Thus, not only is there a jurisdictional problem with the proposed video regulation, but a public policy reason to avoid squelching these valuable, new services.

For all these reasons, the Commission should not attempt to regulate the terms, conditions, or prices under which video visitation services are provided at correctional institutions.

III. COMMENTERS AGREE THAT AN ONGOING MANDATORY DATA COLLECTION RULE IS UNNECESSARY AND BURDENSOME

The response to the proposed ongoing, mandatory data collection rule was overwhelmingly opposed.[29] With a data collection just having occurred in July 2014, and a second collection scheduled for 2018, added to the annual reporting requirement in new Rule 64.6060, the Commission is going to have "a tremendous amount of information from this industry."[30] An ongoing mandatory data collection would be, to borrow Telmate's phrase, "heavy-handed."[31]

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26 CSA Letter at 1-2; L.A. County Letter at 2-3.

27 CSA Letter at 2; *see also* L.A. County Letter at 3 (citing "the infrastructure, security, and operational costs for these types of technologies" which must be recouped).

28 Pay Tel Comments at 9.

29 Third FNPRM ¶ 309.

30 Securus Comments at 9.

31 Telmate Comments at 14.

Only two comments support this onerous, unending requirement: the Human Rights Defense Council and the Wright Group. These parties, as shown in their response to this issue and to the contract publication rule discussed in Section IV. below, seem to support any idea that would mean more work and more cost for the ICS industry. They fail to acknowledge the already onerous reporting requirements that the industry faces, and thus likewise fail to show what incremental, added benefit the public would receive from piling on still more obligations. Applying the Commission's focus on "cost/benefit analysis"[32] for this phase of the ICS proceeding, the proposed permanent data collection rule must be rejected.

IV. THE RECORD DOES NOT SUPPORT THE ADOPTION OF A REQUIREMENT TO FILE OR POST ICS CONTRACTS

The record also weighs overwhelmingly against HRDC's request for a requirement that all ICS contracts be posted or publicly filed.[33] Only two commenters, HRDC and the Wright Group, support that idea, whereas the entire industry as well as law-enforcement officials oppose it.

CenturyLink notes that "requiring the production of ICS contracts could likely contravene federal and state disclosure statutes," and that it "is typically prohibited from disclosing the contract to third parties without the correctional institution's written consent."[34] Like Securus,[35] Global Tel, Telmate, and Pay Tel stated that the quite onerous reporting requirements already adopted by the Commission render the proposed rule superfluous: "the information garnered through these filings would largely duplicate rate and fee information that

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32 Third FNPRM ¶ 327.

33 *Id.* ¶ 311.

34 CenturyLink Comments at 10.

35 Securus Comments at 9-11.

the Commission has already required providers to make public."[36]

HRDC and the Wright Petitioners push for this additional disclosure rule without acknowledging that the Rule 64.6060 ("Annual Reporting and Certification Requirement") even exists. They do not admit that the information they claim to need, such as "the amount of the kickback [the provider] gives the facility, as well as any in-kind payments such as campaign donations, equipment, etc.,"[37] are already covered in the new rule. Having forgotten or ignored Rule 64.6060, HRDC and the Wright Petitioners necessarily have failed to engage in the "cost/benefit analysis" that the Commission seeks for this phase of the proceeding.[38] These parties simply take the tack that more regulation and more burden should be loaded onto the ICS industry, regardless of whether any public good will be achieved. The Commission should be more discerning and restrained than that, and the contract publication concept should not be adopted.

V. THE RECORD FAILS TO DEMONSTRATE THAT THE COMMISSION CAN REGULATE ARRANGEMENTS BETWEEN ICS CARRIERS AND FINANCIAL VENDORS

Securus explained why the Commission should not attempt to regulate the arrangements between ICS providers and financial vendors, largely because it lacks jurisdiction to do so.[39] CenturyLink agrees that no such action should be taken, because these matters "were

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36 Telmate Comments at 14; *see also* Global Tel Comments at 6-7; Pay Tel Comments at 14 ("the Commission's annual reporting requirement ensures that ICS providers will already be reporting the 'guts' of what one might want to discover in an ICS contract").

37 HRDC Comments at 9. It bears mention that it is highly unlikely that campaign contributions are secured by public contracts.

38 Third FNPRM ¶ 327.

39 Securus Comments at 11-12 (incorporating Securus Technologies, Inc. Petition for Partial Stay of Order FCC 15-136 Pending Review at 8 (Dec. 22, 2015) (citing, *inter alia*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961); *American Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

already amply addressed in the *Second Report and Order*."[40]

Parties who nonetheless call for additional, unprecedented regulation of these financial-service arrangements provide the Commission with no lawful basis to do so. Pay Tel asks the Commission to "prohibit revenue-sharing agreements between ICS providers and financial companies" without first explaining how financial companies can be subject to Communications Act-based regulation.[41] The Wright Petitioners seek the same relief, focusing on the guarantee in Section 276 that payphone owners obtain "'fair' compensation,"[42] but they do not realize that Section 276 cannot reach the "third parties"[43] – the financial "vendors"[44] – which necessarily would be severely affected by the proposed prohibition. Here, again, those who support even further regulation of everything to do with inmate services are unable to give the Commission a reasonable basis to do so.

The Prison Policy Initiative resorts to fabricating facts as a means of convincing the Commission that it can regulate financial transactions. Attacking financial transactions in the context of "single-call programs," PPI asserts that "Securus actually owns 3CI."[45] **That statement is false.** PPI cites to a "Q2 2013 Investment Update" from "North Sky Capital," which it purports to have appended as Exhibit 2 to the PPI "Comments re: Second Further Notice of Proposed Rulemaking ¶¶ 98-102."[46] Securus has read all of PPI's eight (8) filings in response

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40 CenturyLink Comments at 12.

41 Pay Tel Comments at 16.

42 Wright Group Comments at 21.

43 *Id*.

44 *Id*. at 22.

45 WC Docket No. 12-375, PPI Comments titled "Single-Call loophole persists in new regulations" at 5 (Jan. 19, 2016).

46 *Id*. at 5 n.10.

to the Second Further Notice of Proposed Rulemaking, and does not see such a document. In fact, PPI's "Comments re: Second Further Notice of Proposed Rulemaking ¶¶ 98-102" have no exhibits at all. In total, PPI filed 13 exhibits among its 8 separate docket entries regarding the Second Further Notice of Proposed Rulemaking, and none of them are a document from "North Sky Capital." In any event, PPI is incorrect, and Securus does not own 3Ci. If PPI's aim was to convince the Commission to regulate 3Ci as a subsidiary of an ICS company, that ploy fails.

Lacking any delegation of power from Congress to regulate financial companies, which necessarily includes the contracts with financial companies that enable financial transactions, the Commission should reject any proposal to monitor, regulate, or dictate the terms of these arrangements.

CONCLUSION

For all these reasons, the Commission should:

1) Reject pleas and proposals to mandate a multi-provider system for Inmate Calling Services ("ICS");
2) Refrain from attempting to regulate video services which are outside the bounds of its jurisdiction and authority;
3) Limit the Mandatory Data Collection obligation to one additional filing in 2018;
4) Reject requests to force ICS providers to post or file service contracts; and
5) Refrain from regulating financial transactions and the arrangements between ICS providers and financial vendors.

Dated: February 8, 2016

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