Human Rights Defense Center

DEDICATED TO PROTECTING HUMAN RIGHTS

February 8, 2016 **Submitted Online Only**

The Honorable Tom Wheeler, Chairman
Federal Communications Commission
445 12th St. S.W.
Washington, DC 20554

Re: Reply to Third Further Notice of Proposed Rulemaking, WC Docket 12-375

Dear Chairman Wheeler:

The Human Rights Defense Center (HRDC) appreciates the opportunity to submit this reply concerning the Federal Communications Commission's (FCC or the Commission) Third Further Notice of Proposed Rulemaking on WC Docket No. 12-375, with respect to Inmate Calling Services (ICS).

They Just Don't Get it

Not surprisingly, the ICS providers that filed comments on this Docket in response to the Commission's Third Further Notice of Proposed Rulemaking (3rd FNPRM)[1] do not support the Commission's continuing work to ensure that rates and fees for ICS and other advanced technologies charged to prisoners and their families are fair, just and reasonable. Specifically, Securus Technologies, Inc. (Securus) believes that "the additional measures now contemplated [by the FCC] are simply excessive."[2] Telmate, LLC (Telmate) opines that "the questions the Commission presents in this *FNPRM* appear focused on expanding the heavy-handed price regulation adopted in the previous ICS Orders."[3] Pay Tel Communications, Inc. (Pay Tel) is "disappointed" that the Commission "did not take any action to reform the site commission payment system,"[4] while Global Tel*Link Corporation (GTL) recommends the Commission

[1] *Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015).
[2] Comments of Securus Technologies, Inc. on Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, January 19, 2016 at i.
[3] Comments of Telmate, LLC, WC Docket No. 12-375, January 19, 2016 at 4.
[4] Comments of Pay Tel Communications, Inc. in Response to Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, at i.

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delay the implementation of additional ICS rules "in light of the shaky foundation upon which the Commission's ICS policies currently rest,"[5] and CenturyLink "recommends against further regulation at this time."[6]

Having reviewed the comments filed by these providers in response to the Commission's 3rd FNPRM, it is apparent that *they just don't get it.* Or to quote Upton Sinclair, "It is difficult to get a man to understand something when his salary depends upon his not understanding it." As the record in this proceeding reflects, ICS providers have been allowed to prey upon prisoners and their families for decades because the prison phone industry was almost entirely unregulated and lacked any measure of transparency. Kickbacks negotiated with detention facilities were (and sometimes remain) shrouded in secrecy, as were the rates and fees charged for calls made from prisons and jails. ICS providers and corrections agencies conspired to take in as much money as they could, which they did with great success, at the expense of prisoners and their families.

As this reply is being written, a 15-minute intrastate call through Securus from the Cowlitz County Jail in Longview, Washington costs $12.94 ($4.09 connection charge + $0.59/min.). **(Attachment 1)**. The Cowlitz County jail currently houses 271 prisoners **(Attachment 2)** and prisoner calls will cost $0.22/min. (based on the Commission's analysis of confidential cost data) after the FCC *Order* goes into effect in March 2016. Thus, in approximately 1.5 months, the very same phone call will cost $3.30. Securus is and has always been aware that the rates they charge for ICS phone calls are unfair, unjust and unreasonable; calls from the Cowlitz County Jail are approximately 300% more than the "cost" of the call with room for profit, as calculated by the FCC when determining the rate caps in the 3rd FNPRM. Three hundred percent. And this is in the context that no one else in America is paying $0.22 per minute for telephone service.

Securus clearly has no problem continuing to price gouge prisoners and their families for every rated minute until the bitter end. Yet after they lost the long-fought battle to retain their ability to exploit consumers and there was a public outcry after more people became aware of what ICS providers had been doing for decades, Securus executives had the nerve to infer (through an improperly filed document on this Docket that violated *ex parte* rules)[7] that negative comments and alleged "threats" (about which no independent evidence, such as a police report, exists) concerning their business practices were the result of comments made by Commissioner Clyburn.[8] GTL made the same claim (also through an improperly filed document that violated the *ex parte* rules and with no supporting independent evidence)[9] the next day.[10] ICS providers *just don't get* that the situation in which they now find themselves is the direct result of their

[5] Comments of Global Tel*Link Corporation on Third Further Notice of Proposed Rulemaking, WC Docket 12-375, January 19, 2016 at 1-2.
[6] Comments of CenturyLink, WC Docket 12-375, January 19, 2016 at 1.
[7] DA 15-1341 – Notice of Prohibited Presentations in the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al. (WC Docket No. 12-375), November 20, 2015.
[8] Letter from Securus Technologies, Inc., WC Docket 12-375, October 26, 2015.
[9] DA 15-1341 – Notice of Prohibited Presentations in the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al. (WC Docket No. 12-375), November 20, 2015.
[10] Letter from Global Tel*Link Corporation, WC Docket 12-375, October 27, 2015.

own unscrupulous business practices, including price-gouging consumers for decades. They are simply reaping what they have sown, yet ignore their own culpability.

The telecoms have been allowed to develop an ICS business model designed to entice greedy corrections officials to give them monopoly contracts with the promise of large kickbacks, and then saddled prisoners and their families with the expense. Now that the FCC has mandated fair, just and reasonable phone rates, the ICS providers *just don't get* that the Commission is not responsible for fixing the ICS business model they created. Some ICS providers are still asking the FCC to eliminate site commissions.[11] However, ICS providers created this monster by inventing and then willingly participating in it, and after pocketing obscenely excessive profits for years they cannot expect the Commission to get rid of it for them because the business model is no longer as profitable if the rates charged for ICS are fair, just and reasonable. The capped ICS rates still allow for profit, just not the obscene profits the providers are used to.

ICS providers *just don't get* that the prison and jail phone industry has changed, and neither the Commission nor consumers and their advocates are going to continue to simply believe the lies, half-truths and obfuscations put forth by these companies. We read that "Telmate thus strongly supports reforms that will rely on competition, not price regulation, to discipline the ICS market,"[12] while at the same time Securus informs us that the ICS market "has been fiercely competitive all along."[13] Which is it?

They *just don't get* that a "fiercely competitive" market that charges prisoners and their families billions of dollars which are deposited into the bank accounts of privately-held, hedge fund-owned companies and used to subsidize government agencies is not fair, just or reasonable. Competition, if it exists, has not and will not discipline the ICS market if the market is left unchecked. Market competition should benefit the end-using consumer; the ICS market does not, as to this day ICS providers do not view prisoners or their family members as their customers – only corrections agencies. If those agencies were the ones footing the bill and paying for ICS services that might be appropriate, but they are not. Mostly, prisoners' families are paying.

At least Pay Tel is honest enough to admit, in part, the proclivity of the ICS industry: "Even failing that, additional regulatory actions must be taken in order to build upon the Second Inmate Rate Order's efforts and close loopholes that, currently, offer opportunities that certain ICS providers will likely exploit if left as-is."[14]

They Do Get It

Conspicuously absent from substantive comment in response to the Commission's 3rd FNPRM are the local sheriffs and the National Sheriffs' Association.[15] The California State Sheriffs' Association filed a brief letter urging the FCC to refrain from banning exclusive ICS contracts,

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[11] Comments of Telmate, LLC at 14; Comments of Pay Tel Communications, Inc. at i, 1 and 3.
[12] Comments of Telmate, LLC at 6.
[13] Comments of Securus Technologies, Inc. at 2.
[14] Comments of Pay Tel Communications, Inc. at 1.
[15] While the National Sheriffs' Association filed a Reply Comment on Docket 12-375 on February 8, 2016, it lacked any supporting documentation and can be described as self-serving at best.

regulating video visitation and making any changes to international phone rates.[16] Notably, Los Angeles County receives $15 million in annual ICS commission kickbacks.[17] In his filing, Los Angeles Sheriff Jim McDonnell also supports maintaining the status quo with one ICS provider under a monopoly contract.[18] He claims that video visitation and inmate email do not meet the definition of ICS and should not be regulated by the Commission, and cites international calling rates for 15-minute calls made from the LA County Jail at $5.00 for calls to Canada ($0.33/min.), $8.00 for calls to Mexico ($0.53/min.) and $19.25 for calls to European and Asian countries ($1.28/min.).

Prior to October 22, 2015, this docket was filled with filings from sheriffs across the country speaking to costs that they couldn't quantify and threatening to eliminate ICS altogether if they weren't allowed to continue to profit off the backs of prisoners and their families. With their kickback money intact for now, they have little more to say. They do get it – literally.

A. Promoting Competition

As the Commission is aware, HRDC has long advocated for the elimination of monopoly contracts in detention facilities, allowing the consumer to select the carrier most appropriate for their circumstances. This is the only way true competition can exist. The ICS providers make a point of telling us in this round of comments that multiple carriers cannot service the same correctional facility, but they don't consistently explain why. The reality is that none of the existing ICS providers could exist in a truly competitive market where consumers select their carriers based on cost and quality of service. They can only exist in the current artificially-constructed environment whereby monopoly contracts are awarded by government agencies based on legal – and in at least some cases illegal – monetary kickbacks.

GTL informs us that "a single provider for ICS is the most cost-efficient and effective way to maintain the safety and security measures unique to the correctional setting,"[19] but then adds, "GTL is not aware of any instance in which there are multiple entities providing ICS or other types *of the same services* within a single correctional facility."[20] HRDC finds this statement fascinating in addition to not being true. GTL, in fact, is one of four service providers that provide money transfer services to prisoners in the Illinois Department of Corrections (IL DOC). In addition to using GTL, money can be sent to IL DOC prisoners through JPay, Western Union or MoneyGram.[21]

As the bundling of ICS services with other services (such as video visitation, email, tablets, money transfers, etc.) can make it difficult to ascertain the actual costs for each separate service, HRDC is concerned that bundling in a single contract contributes to the lack of transparency and accountability that is prevalent in the ICS industry, and advocates that such bundling of services be restricted or banned.

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[16] Comment of California State Sheriffs' Association Re: Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket No. 12-375, January 19, 2016.
[17] https://www.prisonphonejustice.org/media/phonejustice/LA%20Amended%20contract.pdf.
[18] Comment of Los Angeles County Sheriff Re: Docket No. 12-375, January 19, 2016.
[19] Comments of Global Tel*Link Corporation at 10.
[20] *Id*. at 11.
[21] https://www.illinois.gov/idoc/aboutus/Pages/faq.aspx#qst11 **(Attachment 3)**.

Securus says "The Commission should not believe that a multi-provider system would mean the introduction of competition to the ICS Industry; *it has been fiercely competitive all along*"[22] (emphasis added). Given that the end-user consumer who pays the bill does not actively participate in the ICS market and has no say in it, it is irrelevant to them whether there is competition between providers. In fact, competition between providers is harmful to prisoners and their families because in this context "competition" means which carrier will give the biggest kickback to the detention facility in exchange for a monopoly contract, which generally results in an increased kickback percentage (as corrections officials want to take in as much revenue as possible) – and it is well documented that kickbacks artificially inflate the cost of phone calls to the consumer. Market competition should have some benefit to the consumer; ICS market competition as it exists today does not. To the contrary, it financially harms and victimizes the end users of ICS services, who tend to be some of the poorest people in America.

Pay Tel recognizes this fact in its comment: "The ICS industry, however, is unique in that the end-user consumer – for legitimate reasons relating to the security needs of confinement facilities – does not have the ability to influence pricing decisions. As a result, under the special circumstances here, regulation, unfortunately, is needed in order to promote a properly functioning market and protect consumers."[23] HRDC must, however, disagree with Pay Tel's assessment that our argument that consumers ought to be afforded choice when selecting telecommunications providers in order to allow a free and competitive market is "misguided."[24] Pay Tel supplements this characterization by noting that "ICS is a privilege and not a right," adding that prisoners "are not like the average person who gets to comparison shop around for phone services at Verizon, AT&T, and T-Mobile."[25] Pay Tel fails to recognize that while ICS calls are initiated by prisoners, the actual consumers in most cases are non-incarcerated family members and friends who pay for the calls and are in fact able to comparison shop. There is no legitimate technical or security reason why the consumers who pay the bills should not be able to shop for the carrier that will let them communicate with their loved one in jail or prison. The FCC effectively deregulated the phone industry in this country when it broke up the AT&T monopoly on telephone services. It can do the same here.

It is remarkable to us that in this age of information technology, with increasingly sophisticated IT capabilities, and in a country that has put men on the moon, ICS providers contend it is not possible to introduce competition into the ICS market for end users by providing prisoners and their families with choice as to the ICS provider they use.

B. Video Calling and other Advanced Inmate Communications Services

GTL believes "the Commission should encourage the development and distribution of new products and technologies to inmates not stifle their innovation and deployment by unnecessarily regulating or restricting them."[26] HRDC respectfully requests that we take a moment to reflect on the fact that the Commission did not "unnecessarily regulate or restrict" the ICS industry for

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[22] Comments of Securus Technologies, Inc. at 2.
[23] Comments of Pay Tel Communications, Inc. at 2.
[24] *Id*. at 6.
[25] *Id.* at 6-7.
[26] Comments of Global Tel*Link Corporation at 4.

decades, which resulted in insidious and unregulated price gouging by ICS providers, including GTL, while no one was watching. Furthermore, we should all be clear that after the FCC took the first steps to reign in what had become an out-of-control market by setting modest rate caps on interstate calls, the ICS providers responded – as we would expect – by increasing unregulated intrastate rates and ancillary fees to replace lost revenue.[27] History tells us that this particular group of predatory hedge fund-owned service providers cannot be left unregulated.

We noted concerns with the digital divide and advanced technologies in our initial comment.[28] CenturyLink also points out that "Many parties communicating with inmates don't have access to a computer or high speed video connection."[29] This is exactly why in-person visitation must not be eliminated. Families without the financial resources required to connect through video visits or other technology could be faced with the prospect of not being able to see their loved ones during an entire period of incarceration. Pay Tel says that it "agrees with Prison Policy Initiative that failure to regulate video services would lead to the elimination of both traditional telephone ICS and in-person visitation."[30] The Commission must regulate video visits and other emerging technologies so they do not become the cash cow that ICS became; failure to do so could cut off all communication for poor families during times of incarceration.

CenturyLink also believes that the Commission should not regulate video visitation because it is in the early stages of development, and cites to "the Commission's general preference to rely on market forces, rather than regulatory intervention, wherever reasonably possible."[31] It is HRDC's position that it is not reasonably possible to rely solely on ICS market forces – we know what will happen based on what has happened in the past and ICS providers' current comments.

Contrary to the positions of GTL and CenturyLink, Pay Tel and Verizon do a good job in their comments filed on this Docket of explaining why the Commission must adopt policies regarding the regulation of video visitation and other advanced communications technologies:

- **Pay Tel:** "The Commission should regulate these services, including, eventually, adopting rate caps and reforms to ancillary service charges, and it has the authority to do so. The Commission ought to learn from its experience with traditional ICS phone calling over the past fifteen years and recognize that the 'same perverse incentives' that have harmed the traditional ICS market exist and will infect the video visitation and other advanced ICS markets if left unchecked. The Commission should regulate these services on the front end and foreclose opportunities for service providers to gouge consumers before exploitation using these services becomes standard operating procedure."[32]

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[27] *Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) at ¶ 2.
[28] Human Rights Defense Center Comment in Response to Third Further Notice of Proposed Rulemaking, WC Docket 12-375, January 19, 2016 at 6.
[29] Comments of CenturyLink at 6.
[30] Comments of Pay Tel Communications, Inc. at 8.
[31] Comments of CenturyLink at 8.
[32] Comments of Pay Tel Communications, Inc. at 8.

- **Verizon: "**[The Commission] should not allow the high rates that were characteristic of ICS before the Second ICS Order and Third NPRM to return through video communication and other services that newer technologies may enable."[33]

As noted in our comment filed in response to the 3rd FNPRM, examples exist of low or no-cost video visitation services for prisoners. Most of these examples are in countries that do not have an ICS industry with a history of price gouging and financial collusion with corrections agencies, including Ireland, India and the Philippines.

HM Prison Magilligan in Northern Ireland is just one example of a prison system that allows prisoners to use Skype to contact their families.[34] The fact that "when prisoners have strong family support they're in better shape for reintegration to family and community" knows no national boundaries. According to David Eagleson, the Governor of Magilligan Prison, "we launched Skype as a pilot scheme at the end of last year. Apart from the initial cost in installing the equipment, it is free to use. The link is set up in a safe and secure environment for a prisoner to make personal video calls to loved ones for up to 30 minutes each week. The suite is completely sound-proof, but security cameras monitor the calls." *Id.*

HRDC reiterates our position that video visitation services should be provided at no cost to prisoners or their families, and should be funded by corrections agencies as part of their general budgets – just as in-person visits are provided at no cost to prisoners' family members.

C. Recurring Data Collection

ICS providers should be required to submit cost data in annual mandatory data collections for a minimum of five years and the FCC should use its subpoena power to obtain this information.[35]

GTL disagrees with this approach and tells us "There is no reason for the Commission to adopt a recurring data collection requirement."[36] As we are all aware, the record in this proceeding is replete with reasons why the Commission should adopt a mandatory data collection requirement and we will not spend time going over each one of them here. According to Securus, mandatory data collection "seems more punitive than beneficial."[37] HRDC finds it sadly ironic that Securus objects to what they consider "punitive" treatment, but as a company they have had no trouble subjecting prisoners and their families to punitive price gouging for decades.

Pay Tel supports mandatory data collection two years from the Order's effective date,[38] but calls for changes in format and instructions to make the process more meaningful and to provide more useful data. HRDC supports all efforts to improve the mandatory data collection process, and to

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[33] Comments of Verizon at 2.
[34] http://limavady.thechronicle.uk.com/articles/news/49849/magilligan-prisoners-using-skype-to-contact-families **(Attachment 4)**.
[35] Human Rights Defense Center Comment in Response to Third Further Notice of Proposed Rulemaking, WC Docket 12-375, January 19, 2016 at 8.
[36] Comments of Global Tel*Link Corporation at 12.
[37] Comments of Securus Technologies, Inc. at 9.
[38] Comments of Pay Tel Communications, Inc. at 9.

make it more reliable and to eliminate gamesmanship on behalf of some ICS providers. The data should be made public to allow for greater transparency in the ICS industry.

CenturyLink "does not believe that the benefits of such submissions justify the costs."[39] HRDC reminds the Commission that it was only able to obtain any level of cost data in this proceeding through a mandatory data collection; most ICS providers have not voluntarily provided their cost data required for the FCC to ensure that ICS rates and fees are fair, just and reasonable. HRDC believes that the economic and emotional costs to prisoners and their families that result from the egregious business practices created when ICS providers are not required to submit their actual cost data far outweigh this modest imposition on the telecoms. These supposedly high-tech companies should not have such a difficult time quantifying their costs to the Commission. To suggest that for-profit companies do not have their cost and profit data readily available defies belief; certainly such data is available internally and to their investors.

D. Contract Filing Requirement

The comments of the ICS providers with respect to a contract filing requirement mirror their feelings about recurring data collection: they don't want to do it and don't see any benefit. The benefit, however, is to consumers and the organizations that advocate on their behalf. Prior to 2009 when HRDC began the tedious and time-consuming effort of collecting ICS contracts through public records requests at the state and federal prison system levels, the data contained in the contracts had never been made publicly available. Prison phone rate and fee data is critical to prisoners and their families; many families must make choices between paying rent, buying groceries, paying utility bills or being able to let children speak to an incarcerated parent. It was only after HRDC publicly posted the data it had collected at considerable time and expense[40] that the Commission, consumers and other advocacy organizations could begin to see how prisoners and their families were being financially exploited.

There is still a deficit of data in the public realm about ICS contracts and kickbacks relative to jails. While ICS providers have this information easily available to them, no one outside the government has the ability or resources to obtain over 3,000 ICS contracts from all the jails across the country. This when the National Sheriffs' Association and its members come to the FCC to complain about having their stream of ICS kickbacks impeded, though there is no real information in the public record about just how large that stream of kickbacks actually is. This lack of transparency must end.

GTL comments that the burden imposed on ICS providers to file their contracts with the FCC "overwhelmingly outweighs any purpose or anticipated consumer benefit of such a requirement."[41] GTL also states that the Commission concluded that the data and contract filing requirement "serves no useful purpose commensurate with the costs of compliance."[42] HRDC submits that while that may have been a reasonable conclusion in 1980, it is not a reasonable conclusion in 2016 given the systemic abuses in the prison phone industry over the last two

[39] Comments of CenturyLink at 9.
[40] *See* www.prisonphonejustice.org.
[41] Comments of Global Tel*Link Corporation at 5.
[42] *Id*. at 7.

decades. Securus writes, "The risk and burden that these rules would impose far outweighs any possible public benefit of such superfluous disclosures," and adds, "The entreaties of a few ICS providers, which would seem to stem from competitive envy more than anything else, should not persuade the Commission to overstep its jurisdictional bounds into these private contractual arrangements."[43]

However, the cost of each ICS provider publicly posting all detention facility phone contracts, along with kickback and rate data, would be minimal in every sense of that word. More so in the context of telecom companies with massive revenues. They have hundreds of millions of dollars to give to detention facilities as kickbacks in exchange for monopoly contracts but they claim not to have the resources to publicly disseminate on a website the contracts, kickback data and rates that allow them to generate those massive profits in the first place? For an informed democracy, especially in small rural communities where many jails are located, this is realistically the only way local citizens will know how their community is being financially exploited by both ICS providers and their elected officials, and enable them to do something about it.

Setting aside the hypocrisy of Securus warning the FCC not to "overstep its jurisdictional bounds into these private contractual arrangements" by requiring the public filing of ICS contracts, while simultaneously asking the Commission to eliminate commission kickbacks from those private contractual arrangements, we must insist that these contracts are not "superfluous disclosures." In many cases, the data contained in these contracts have not been available through any other source. The contracts may well be the only future source available containing data regarding new technologies that are not contemplated in the 3rd FNPRM. While Securus also contends that its "bevy of active service contracts ... should be treated as a trade secret,"[44] utility contracts with government agencies are not "trade secrets." Nor is exploiting the public and bribing government officials through kickbacks, legal or otherwise. The public is entitled to know the depth and breadth of the financial exploitation of its poorest citizens and the greed of their elected officials. Exploitation of the poor and legalized bribery of government officials is not, and can never be, a "trade secret" despite Securus' protestations to the contrary.

Pay Tel also opposes the filing of ICS contracts, explaining that "ICS contracts are public documents, and they can be obtained through routine public records requests when necessary."[45] While Pay Tel's statement is factually correct in theory, and contracts between ICS providers and detention facilities are public documents that should be accessible to consumers through each state's public records laws, ICS providers frustrate the disclosure of these contracts – which typically include details about commission kickbacks – to prevent transparency of the terms under which they contract with government agencies. For some states, such as Alabama and Arizona, a personal representative of HRDC has had to physically go to the appropriate office to obtain the contract information. In 2015, those agencies claimed they could not fax, e-mail or photocopy and mail the ICS contracts.

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[43] Comments of Securus Technologies, Inc. at 3.
[44] *Id.* at 10.
[45] Comments of Pay Tel Communications, Inc. at ii.

In other cases public officials deliberately frustrate public records requests; for example, in 2009 the Alabama Sheriffs Association sent a letter to all sheriffs in the state, recommending that they not respond to records requests submitted by the Southern Center for Human Rights.[46]

The Pennsylvania DOC produced a heavily-redacted ICS contract with Securus in response to a public records request made by HRDC in April 2015.[47] HRDC filed a formal appeal for the unredacted contract and Securus intervened, seeking to prevent disclosure of the ICS records. Securus' actions demonstrate not only a lack of transparency but also intentional interference with the production of documents under state public records laws, specifically ICS contracts. The contract was ordered released by the Office of Open Records on August 12, 2015 with minimal redactions, but the Pennsylvania DOC has not yet complied with the order. GTL intervened in our public records suit, too, which we will address in a future filing on this Docket.

Seemingly to support our argument that government agencies often make it difficult to obtain public records that should be disclosed, CenturyLink noted in its comment that "In a recent procurement, ICE would not even provide access to the current rates in response to vendor questions."[48] HRDC has had the same problem. In April 2014 we were required to file a lawsuit against the Department of Homeland Security/ICE as the direct result of its failure to produce an unredacted copy of its contract for phone services executed with Talton Communications, Inc.[49] The case resolved on June 18, 2015 when the Honorable Marsha Pechman entered an order granting HRDC's motion for summary judgment and ordering the government to produce the unredacted contract. **(Attachment 5)**. While government documents "should" be produced under public disclosure laws when properly requested, the reality is they are not. In this case, we were required to spend the time to initiate legal action and follow it through to obtain a document the telecoms are telling the Commission they shouldn't have to post because people can get them through public records requests.

As previously reported on this docket, this is not the first time HRDC has been required to take legal action to obtain ICS contracts that "should" be readily available through public records requests. When GTL and the Mississippi Department of Corrections refused to produce ICS contracts and related records under the guise of a protective order, HRDC was forced to file a lawsuit in order to obtain those records.[50] The case settled in May 2009 and the records were finally produced.[51] Perhaps not coincidentally, it was Mississippi where former Department of Corrections Commissioner Charles Epps pleaded guilty to taking bribes from, among others, Sam Waggoner, a GTL consultant, in exchange for giving GTL the monopoly contract for ICS services in the Mississippi DOC. The FCC cannot ignore the long legacy of corruption that accompanies the lack of transparency in the ICS industry. Every step of this proceeding has exposed the massive information deficit between ICS companies and the general public, consumer advocates and the Commission itself.

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[46] http://www.al.com/opinion/birminghamnews/editorials.ssf?/base/opinion/1236071713202760.xml&coll=2.
[47] Human Rights Defense Center Comment for WC Docket 12-375, July 14, 2015, Attachment 2.
[48] Comments of CenturyLink at 11.
[49] *Prison Legal News v. U.S. DHS*, U.S.D.C. Western District of Washington, Case No. 2:14-cv-00479-MJP.
[50] *Prison Legal News v. Mississippi Department of Corrections and Global Tel*Link Corporation*, Hinds County, Mississippi, Civil Action No. G2009-391 T/1.
[51] Human Rights Defense Center Comment for WC Docket 12-375, July 14, 2015, Attachment 1.

Sadly, detention facilities have shown themselves to be concerned only about maximizing their own kickbacks and have totally abrogated their duties to the public and common decency on this issue. The FCC must step in and do what the ICS industry and its detention facility collaborators refuse to do: make public the means by which consumers have been price gouged for decades by requiring the public posting of all ICS and video visitation contracts, including the rates charged for such services and the kickbacks paid to obtain the monopoly contracts. The ICS industry cannot have it both ways and claim it is technologically impossible to allow consumers to choose their own phone service carrier and then claim the monopoly contracts and what they officially pay in kickbacks to get them are "trade secrets."

Further, HRDC supports the comment filed on this Docket by the Electronic Frontier Foundation (EFF) on Jan. 19, 2016 with respect to the need for greater data security and privacy protections for ICS customers.[52] It is imperative that the FCC not only investigate "whether Securus violated any agency rules and/or the Communication Act's protections," but also establish better policies governing the collection and storage of ICS calling records and the contents of those records. *Id.* at 4-5. The recent leak of more than 70 million Securus ICS records is yet another example of ICS industry "partners" not taking the true consumers – prisoners and their family members – into consideration, in this case with respect to protection of their personal information.

In summary, ICS providers have much more in the way of financial resources to meet contract filing requirements than prisoners' families have to pay the exorbitant rates and fees that result when the prison phone industry lacks transparency. ICS providers should be required to publicly post all their contracts and related data on their websites within 30 days of execution.

E. International Calling Rates

HRDC continues to call for a two-pronged approach to international ICS calls:

> 1. After the Commission has reviewed sufficient cost data for international calls, it should set rate caps for such calls that are fair, just and reasonable, as it did with domestic ICS rates; and
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> 2. As an interim measure, the rates for international calls should be capped at the current rates charged by the ICS provider for ICE facilities, with no ancillary fees or charges.

A comment made by Pay Tel is worth noting because it reflects a continued focus by ICS providers on their business and not on the consumer market they serve (but fail to recognize): "Pay Tel does not believe the Commission needs to address international rates at this time. International calling represents a minimal percentage of calling in jails and prisons nationwide, and just a fraction of Pay Tel's aggregate minutes of use."[53] An immigrant detainee being held in a county jail who is unable to afford to contact her family in another country to obtain the documents required to prove her case, or to be able to speak with her children, is not likely to

[52] Comments of the Electronic Frontier Foundation, WC Docket 12-375, January 19, 2016 at 4.
[53] Comments of Pay Tel Communications, Inc. at 14.

care what percentage of Pay Tel's aggregate minutes that critical phone call represents. The ICS market is solely focused on the service providers and detention facilities, and totally disregards the true consumers due to lack of industry regulation and transparency.

F. Third-party Financial Transaction Fees

Securus takes the most obvious position with respect to third-party transaction fees: "Finally, the Commission should not attempt to regulate, let along prohibit, revenue-sharing arrangements with third-party financial vendors."[54] With Securus' acquisition of JPay in 2015, any action taken by the Commission to appropriately regulate third-party transaction fees would cut into Securus' profit margin.

Pay Tel supports the Commission's prohibition of any ICS mark-up of fees assessed by third parties, and both Pay Tel and CenturyLink request that the FCC monitor and apply rules with regard to financial companies that are affiliated in some way with ICS providers:

> **Pay Tel:** "On that note, the Commission must also monitor closely situations where a 'third-party' money transfer or payment processing company is affiliated with an ICS provider (whether the ICS provider owns it, or the two companies share the same parent company). For example, Securus owns JPay, Inc.; Global Tel*Link owns Touch Pay; and the same parent company, Keefe Group, owns ICSolutions and Access Corrections. JPay, Touch Pay, and Access Corrections provide, among other things, payment processing services for unregulated services such as trust fund and commissary payments. Fees assessed by such affiliated companies for all practical purposes, end up in the same bucket as the affiliated ICS providers' revenues. They are not 'third parties' in the way that Western Union or Money Gram are."[55]
>
> **CenturyLink:** "The Commission should also apply its rules so that a financial company that is party to a revenue sharing agreement is not regarded as a third party because of the financial arrangement it has with the ICS provider."[56]

HRDC fully supports the Commission's decision not to allow additional fees or markups that the ICS providers might impose on end users, and to require ICS providers to pass third-party transaction fees to end users with no additional markups.[57]

Conclusion

A competitive ICS market will only exist when the rate- and fee-paying consumer is allowed to utilize the prison phone carrier of their choice through the existence of multiple service providers

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[54] Comments of Securus Technologies, Inc. at ii.
[55] Comments of Pay Tel Communications, Inc. at 16.
[56] Comments of CenturyLink at 13.
[57] *Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) at ¶ 324. Note that HRDC opposes the imposition of all ancillary ICS fees, including third-party fees.

in detention facilities. If the Commission is persuaded by any of the ICS providers' arguments to the contrary, it should call for extensive further comment to explain why the technology exists to provide prisoners with tablets that can access content and communicate outside prison walls,[58] but the technology does not exist to allow for multiple ICE providers within a facility.

HRDC continues to call on the Commission to implement the same comprehensive reforms for prison video visit services as it has for the ICS industry. Video visitation should be provided at no cost with no ancillary fees, considering it is a service that is free to non-incarcerated persons (e.g., via Skype), and in-person visits at prisons and jails are free. Further, in-person visitation should **not** be eliminated to increase the volume of video visits; prisoners being allowed to have in-person visits to see their families during times of incarceration is just as important as being able to talk with them on the phone.

Just as critical to comprehensive reform is transparency. The FCC should utilize its subpoena power to uncover the true costs of ICS and advanced technology services. The disparity in the form and details of the cost data produced by ICS providers pursuant to the Mandatory Data Collection justifies why this measure is necessary. ICS providers and detention facilities were allowed to create the perverse ICS business model because there was no transparency, and if left unchecked will do the same with video visitation and other advanced technology services.

Last week's filing on this Docket by Lee Petro, the attorney for the Wright Petitioners, citing "a letter that was sent to correctional authorities urging governmental agencies to adopt mandatory fees that would then be passed on to [ICS] consumers by the provider" in an effort to circumvent the FCC's *Order* when it goes into effect, is just additional justification for the critical need for the Commission to require full transparency in the ICS industry.[59]

The Commission has both the authority and responsibility to mandate fair, just and reasonable costs for all aspects of the prisoner communications market, and we urge the immediate implementation of such reforms. Prisoners and their families, especially those with children, should not be required to suffer for decades while privately-held companies and corrections agencies use them to generate profit, as was the case with ICS.

Comprehensive reform is needed now in the form of a robust response by the Commission to existing and emerging issues in the ICS market, as set forth above and in our prior comments.

Respectfully submitted,

Paul Wright
Executive Director, HRDC

Attachments

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[58] *See*, e.g., http://wfxl.com/news/local/new-device-helps-inmates-learn-and-communicate.
[59] Wright Petitioners *Ex Parte* Submission – Further Developments in ICS Industry, WC Docket 12-375, February 4, 2016.

Attachment 1

(https://securustech.net/call-rate-calculator?
p_p_auth=o1D4Ekmf&p_p_id=49&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&_49_struts_action=%2Fmy_sites%2Fview&_49_groupId=104052&_49_privateLayout=false)

Log in to Securus Online: Email Address: Type your email address Password: Remember Me

Log In | Enroll Now (https://securustech.net/web/securus/enroll) Friends and Family Correctional Staff

Forgot Username or Password? (https://securustech.net/web/securus/forget-password)

Live Chat (https://securustech.net/web/securus/live-chat)

Home (https://securustech.net/home1) | Phone Services | Video Services | Email Services | Facilities We Serve (https://securustech.net/facilities-we-serve) | Customer Care | What is Securus Online? (https://securustech.net/web/securus/securus-online-overview)

Rate Calculator

Use Securus' Rate Calculator to quickly and easily find out the cost of a call or another Securus service.

First, be sure that Securus services the correctional facility you would like to communicate with by checking our Facilities We Serve (/facilities-we-serve) page.

Please select a service below, complete the required information, and click submit.

Choose a Service: AdvancedConnect

Your Country: United States

Your Phone Number: 1 2064895604

Facility State: WA

Facility Name: COWLITZ COUNTY JA

Call Date: 01/24/201 Time: 10:00 PM Duration: 15 minutes

SUBMIT RESET

The estimated cost of your call is $ 12.94

Facility: COWLITZ COUNTY JAIL

Call Duration: 15 Minutes

Connection Charge: $ 4.09

Rated Cost: $ 8.85

Total Cost: $ 12.94

Breakdown of Call Rate per Minute

Time	Day	Evening	Night
	(08:00-16:59)	(17:00-23:00)	(23:01-07:59)
Initial Amount	$ 0.59	$ 0.59	$ 0.59
Additional Amount	$ 0.59	$ 0.59	$ 0.59

Rate periods are based upon the time of the day a call is accepted.

International Calling may not be permitted at all Securus serviced Correctional Facilities.

Please note that facilities may have a connection charge per call, an initial rate for the first minute of call, and then a different rate for each minute after the first minute of a call. Rates are subject to change.

This rate quote is valid at Sun Jan 24 2016 20:13:12 GMT-0800 (Pacific Standard Time).

In addition to the quoted rate of the call, applicable taxes and fees may apply. Please refer to our Terms and Conditions (/web/securus/terms-and-conditions).

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(https://securustech.net/ask-a-question)

Submit a question to our Customer Care team.

FAQ

(https://securustech.net/faqs1)

Have a question? Search our extensive knowledge base for an answer.

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Attachment 2

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Probation Services
Offender Services
Mental Health Court
Inmate List
Inmate Visit/Phone/Email
Send Funds to an Inmate Account
Victim Notification
Directions
Community Re-Entry Program
Employment Opportunities
Frequently Asked Questions
Pay Probation Fees
PREA

Assessor's Parcel Search
Parcel & Map Info

Notify Me
Receive Email Notifications

Mount St. Helens
Where Nature Erupts

Connect With Us
Citizen Engagement

Inmate List

COWLITZ COUNTY CORRECTIONS DEPARTMENT

Arresting Agency - All Agencies
Holding Authority - All Authorities
Court - All Courts
Booked Within - All Hours

Data Posted :01/24/2016 20:00
Total In Custody :271
* Data Is Posted Every Hour *

Excel Format

Name	Booked On	Charges	Visitation	Notify On Release
ADAMS, SHAUNA LEE	01/23/2016 00:37	List	Times	VINE
ALLEN, JEREMY WILLIAM CURTIS	01/23/2016 21:55	List	Times	VINE
ANDERSON, ANTHONY ADAM	01/21/2016 13:49	List	Times	VINE
ANDERSON, JEFFREY PAUL	01/22/2016 19:53	List	Times	VINE
ANDERSON, JEREMIAH JAMES	01/20/2016 14:37	List	Times	VINE
ANDREWS, JACOB WAYNE	01/13/2016 10:11	List	Times	VINE
ARCHER, DEBRA MAXINE	01/20/2016 10:47	List	Times	VINE
ARQUETTE , CHARLTON WILLARD	01/12/2016 17:34	List	Times	VINE
BAKER, TONI MARIE	01/11/2016 13:05	List	Times	VINE
BANUELOS, RICHARD BENNY	11/05/2015 11:22	List	Times	VINE
BARNES, MATTHEW SCOTT	06/29/2015 11:46	List	Times	VINE
BARTLETT, MIKE WAYNE	08/24/2015 13:45	List	Times	VINE
BARTO, MICHAEL DOUGLAS FRANCIS	01/20/2016 23:48	List	Times	VINE
BAZAN, BIANCA ALICIA	12/02/2015 02:39	List	Times	VINE
BEJOVICH, LARRY JOSEPH	01/23/2016 08:30	List	Times	VINE
BELGARD, CHARLES REX	10/01/2015 12:16	List	Times	VINE
BELL, HEATHER LEEANNE	01/22/2016 12:46	List	Times	VINE
BEMIS, ARTHUR TRUETT	01/13/2016 16:28	List	Times	VINE

BERNERT, JUSTIN JERO	12/23/2015 20:29	List	Times	VINE
BEYNON, KENNETH JAMES	01/21/2016 21:07	List	Times	VINE
BIGBEAVER, JAMES EDWARD	01/08/2016 16:07	List	Times	VINE
BISHOP, MARK FIELDING	01/08/2016 17:20	List	Times	VINE
BLAIR, RICK RAY	12/04/2015 21:28	List	Times	VINE
BOFFING, TONYA MICHELLE	01/15/2016 08:15	List	Times	VINE
BONE, RICHARD BRIAN	01/05/2016 16:28	List	Times	VINE
BOUNDS, RORY DAVID	01/13/2016 14:34	List	Times	VINE
BOWLES, ERIC BRANDON	01/07/2016 20:40	List	Times	VINE
BRECH, ALISSA MARIE	01/23/2016 08:30	List	Times	VINE
BREIDT, CORY BRENT	01/19/2016 13:35	List	Times	VINE
BRESE, BEAU LAWRENCE	01/15/2016 10:21	List	Times	VINE
BROCKETT, JENNIFER ANN	10/18/2015 23:19	List	Times	VINE
BROWN, CHARLENE SUE	01/14/2016 09:22	List	Times	VINE
BROWN, JOEL KEVIN	01/13/2016 07:59	List	Times	VINE
BUCK, HUNTER WILLIAM	01/07/2016 03:24	List	Times	VINE
BUGG, JEFFREY SCOTT	01/12/2016 02:37	List	Times	VINE
BUXTON, ELLEN ROSE	01/12/2016 10:45	List	Times	VINE
CADENA-MARQUEZ, MIGEL	01/22/2016 09:53	List	Times	VINE
CAILLOUETTE, VINCENT CHARLES	12/23/2015 12:48	List	Times	VINE
CAMPBELL, STEVEN TODD	12/14/2015 18:24	List	Times	VINE
CANALES, WILLIAM RAYMOND	01/03/2016 04:39	List	Times	VINE
CHAMP, JOSHUA JAMES	10/27/2015 12:07	List	Times	VINE
CHANDLER, JONATHAN JAY	12/20/2015 19:54	List	Times	VINE
CHILDS, DAVID RANDEL	01/11/2016 17:00	List	Times	VINE
CLARK, CLIFFORD MAX	01/14/2016 05:56	List	Times	VINE
CLIFFTON, CONNOR BLAIKE	11/11/2015 17:36	List	Times	VINE
CLINE, ALAN LEE	01/04/2016 06:41	List	Times	VINE
COCHRAN, TIMOTHY ALLEN	01/17/2016 23:24	List	Times	VINE
COGDILL, THOMAS E	01/08/2016 17:15	List	Times	VINE
CONRADSON, RONALD JAMES	01/15/2016 13:23	List	Times	VINE
COOP, PAMELA SUE	01/15/2016 13:03	List	Times	VINE
COURSER, MORISA ANNEMICHELE	01/22/2016 13:55	List	Times	VINE
CRONK, SUNNY DAVID	01/05/2016 13:41	List	Times	VINE
DAVIS, BRANDON JAMES	11/05/2015 20:52	List	Times	VINE
DEAN, KAREESA MAY	01/24/2016 09:32	List	Times	VINE
DIAZ-LARA, ROBERTO	01/08/2016 12:01	List	Times	VINE

DIXON, KEITH RAYMOND	12/19/2015 10:31	List	Times	VINE
DOANE, GREGORY ALLEN	01/15/2016 17:35	List	Times	VINE
DOANE, TRAVIS AARON	12/28/2015 18:20	List	Times	VINE
DOBBS, TIMOTHY JOHN	11/06/2015 03:01	List	Times	VINE
DRAKE, SAMUEL WESLEY	01/08/2016 02:29	List	Times	VINE
DRISCOLL, MICHAEL SHAWN	01/12/2016 15:18	List	Times	VINE
DUNN, BRIAN KEITH	01/19/2016 16:45	List	Times	VINE
EDEN, CHARLES ALLEN	12/15/2015 22:46	List	Times	VINE

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Attachment 3

Printed January 25, 2016

https://www.illinois.gov/idoc/aboutus/Pages/faq.aspx#qst11

How can I send money to an inmate?

Inmates may receive money via JPAY, Western Union or money order. (A money order must be sent directly to the lockbox, NOT to the facility; see information below regarding money orders.)

Electronic Payments: Funds up to $5,000 may be sent to inmates via the following methods.

- Global Tel*Link at www.gtl.net/ilstate
- JPAY at www.jpay.com
- Money Gram locations using the Blue Money Gram Express Payment Form - receiving code is 7364
- Western Union at www.westernunion.com or at locations using the Quick Collect Form - code city and state are ILDOC IL

For all electronic transfer of funds, the inmate IDOC number and incarcerated last name must be used. Funds sent via GTL, JPAY and Western Union are anticipated to be applied to the inmate's account within 24-48 business hours. Funds sent via Money Gram are anticipated to be applied to the inmate's account within 72 to 96 business hours. Funds sent during an inmate transfer between facilities may take longer than 24 - 96 business hours.

Money Orders: Inmates may receive money orders not to exceed $999.99. The money orders must be sent with the lockbox deposit slip and must be complete with the inmate name, IDOC inmate number, sender's name and address. Deposit slips can be obtained at each facility and from the following link:https://www.jpay.com/moneyorder.aspx. The money orders should be made payable to JPay and sent with the deposit slip to: PO Box 260250 Hollywood, FL 33026.

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Attachment 4

The Causeway Coast's leading local newspaper. ABC certified.

The Limavady Chronicle

Telephone (028) 7776 2130

NEWS

Magilligan prisoners using Skype to contact families

Thursday, 3 December 2015

Skype is now being made available to inmates at Magilligan Prison as part of a new rehabilitation project.

INMATES in Magilligan Prison near Limavady are being given access to Skype for personal video calls to family as part of a new rehabilitation project.

More than 70 approved prisoners have access to the Skype audio visual technology from inside the prison, the first in the United Kingdom to introduce the facility. Governor of Magilligan David Eagleson explained that the project could help with prisoners transitions after release.

“The audio visual Skype link allows prisoners to make personal video calls to loved ones. We know that when prisoners have strong family support they're in better shape for reintegration to family and community and we see this as an important part of the rehabilitation process."

“We launched Skype as a pilot scheme at the end of last year. Apart from the initial cost in installing the equipment, it is free to use. The link is set up in a safe and secure environment for a prisoner to make personal video calls to loved ones for up to 30 minutes each week. The suite is completely sound-proof, but security cameras monitor the calls."

The prison are planning to make the service available to more prisoners in future: "The uptake among the prison population was slow to start but it is being used by more and more prisoners, including foreign nationals, who are husbands and fathers and those who wish to maintain a good relationship with their families. We are now also planning to roll it out to more prisoners in the future."

“One of the most serious aspects of being in prison can be the sense of isolation and even abandonment; and one of the most effective support that can be given to prisoners is the assurance that they are not forgotten.

The project could also have positive effects for the prisoners families.

“Moreover, imprisonment may also have a devastating effect on the development of

Click he

For

relationships between a child and father. Being able to interact in 'real time' with their father, in their own home, helps children to understand he is engaged with their lives, interested in their achievements, and is there to support them in times of difficulty. This interaction also helps foster a sense of security, mitigate any negative social and developmental aspects on the children, and ease the reintegration of the father into the family home following release."

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Attachment 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PRISON LEGAL NEWS, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	CASE NO. C14-479 MJP ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Parties' cross-motions for summary judgment. (Dkt. Nos. 24, 28.) Having considered the Parties' briefing and the related record, the Court hereby GRANTS Plaintiff's Motion for Summary Judgment (Dkt. No. 24) and DENIES Defendants' Cross-Motion for Summary Judgment (Dkt. No. 28).

Background

Plaintiff Prison Legal News, a monthly news magazine dedicated to reporting and advocacy concerning the elevated telephone rates that prisons and contractors charge incarcerated people, brings suit against the Department of Homeland Security ("DHS") and

Immigration and Customs Enforcement ("ICE") alleging that various actions taken by Defendants have violated the Freedom of Information Act ("FOIA"). (Dkt. No. 33.)

Prison Legal News is a project of the Human Rights Defense Center ("HRDC"), a nonprofit charitable organization that focuses on "public education, prisoner education, advocacy and outreach in support of the rights of prisoners and in furtherance of basic human rights." (Dkt. Nos. 24 at 7, 25 at 1-3.) For several years, Plaintiff and HRDC have been gathering information through public records requests about prison phone policies and practices, with special focus on identifying where prisoners are charged high rates for basic telephone services. (Dkt. No. 25 at 1-3.) In 2013, HRDC staff members testified before the Federal Communications Commission ("FCC") about capping prison phone rates, and the FCC cited Plaintiff and HRDC more than forty-five times in its report and order implementing new regulations of prison telecommunications companies. (Dkt. No. 25 at 59-189.) Plaintiff's FOIA records requests in this case also sought information related to telephone practices and policies as part of the same investigative project, this time targeted towards ICE's federal immigration detention centers. (Dkt. Nos. 24 at 7-9, 25 at 1-3.)

Plaintiff's first FOIA request was mailed to Defendants on July 30, 2013, and was signed for by Defendants on August 5, 2013. (Dkt. No. 25 at 3, 213-17.) Plaintiff asserts that it never received a response to this request. (Id. at 3.) Defendants assert that they issued a request acknowledgment letter on August 7, 2013, and have produced evidence that a responsive letter was generated, though not that it was mailed. (Dkt. Nos. 29 at 4, 29-1.) Regardless of whether the response letter was sent or not, Plaintiff informed Defendants by letter dated December 21, 2013, that Plaintiff had not received any response but remained interested in the information.

(Dkt. No. 25 at 3, 219.) It is uncontested that Defendants received but did not respond to the second letter. (Id.)

On April 2, 2014, Plaintiff filed this suit, alleging that Defendants were violating FOIA by failing to respond to its two requests. (Dkt. No. 1.) Plaintiff then received the first round of responsive records from ICE on August 1, 2014. (Dkt. Nos. 25 at 3-4, 29.) In the months between September 2014 and February 2015, ICE produced several additional rounds of records and several rounds of reprocessed and corrected records. (Id.)

Portions of the produced records were redacted pursuant to FOIA Exemptions 4 (confidential commercial information), 6 (personal privacy), 7(C) (law enforcement personal privacy), and 7(E) (law enforcement techniques and procedures). (Dkt. Nos. 25 at 3-4, 29 at 12.) In January 2015, Plaintiff amended its complaint to clarify that it sought to challenge not only ICE's failure to timely respond to its FOIA requests (the only disputed issue at the time the suit was filed), but also ICE's Exemption 4 and 7(E) redactions in the documents produced by ICE between August and December 2014. (Dkt. Nos. 24 at 11, 33.)

After Plaintiff amended its complaint and filed its motion for summary judgment arguing that Defendants had failed to properly respond to its FOIA requests and had improperly redacted non-exempt public information under Exemptions 4 and 7(E), ICE determined that information redacted pursuant to Exemption 7(E) "had previously been publicly disclosed," and thus produced the unredacted documents in full. (Dkt. No. 28 at 2 n.1.)

Accordingly, the only remaining issue regarding redactions involves ICE's Exemption 4 redaction of Talton Communications, Inc.'s performance incentive rate, which reflects a percentage of revenue earned by the phone services contractor that is set aside in escrow and only paid to the contractor upon ICE's determination that Talton has performed the contract

successfully. (Dkt. Nos. 28, 36.) ICE redacted the incentive rate used by Talton in its successful 2009 contract bid because it determined that disclosing the rate would result in competitive harm to Talton when it bids for subsequent contracts, including the contract to be bid for in 2015. (Dkt. Nos. 28, 37.) Plaintiff contends the rate was improperly redacted because this information is not exempt under proper application of Exemption 4. (Dkt. Nos. 24, 36.)

Discussion

I. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In assessing whether a party has met its burden, the underlying evidence must be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Court conducts a de novo review of an agency's response to a FOIA request. 5 U.S.C. § 552(a)(4)(B); U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989). When presented with a summary judgment motion in a FOIA case, courts follow a two-step inquiry. See, e.g., Los Angeles Times Commc'ns, LLC v. U.S. Dep't of the Army, 442 F. Supp. 2d 880, 892-94 (C.D. Cal. 2006). First, courts evaluate whether the agency has met its burden of proving that it fully discharged its obligations under FOIA. Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985) (citing Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350-1351 (D.C. Cir. 1983)). To do this, the agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents. Id. Second, if the agency satisfies its initial burden, courts determine whether the agency has proven that the information

that it did not disclose falls within one of the nine FOIA exemptions. Dobronski v. FCC, 17 F.3d 275, 277 (9th Cir. 1994). In meeting its burden, the government may not rely on conclusory and generalized allegations of exemptions. Church of Scientology of Cal. v. U.S. Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980) (citing Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973)). Furthermore, these exemptions "must be narrowly construed" so as not to undermine FOIA's basic purpose: "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (internal quotation marks and citations omitted).

In sum, in order to prevail on summary judgment, the agency must prove "it has fully discharged [these burdens] under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." Miller v. U.S. Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985) (citing Weisberg, 705 F.2d at 1350); see also Zemansky, 767 F.2d at 571.

II. Redactions Pursuant to Exemption 4

Plaintiff argues that Defendants cannot meet their burden of proving that Talton Communications is likely to suffer substantial competitive harm if the performance incentive rate from its successful 2009 detainee telephone services contract bid is disclosed, and therefore that the performance incentive rate is not exempt from disclosure. (Dkt. Nos. 24 at 16, 36 at 5-8.)

The trade secret exemption to FOIA states, "[t]his section does not apply to matters that are (4) trade secrets and commercial or financial information obtained from a person and privileged and confidential." 5 U.S.C. § 552(b). "In order to invoke Exemption 4 in the Ninth Circuit, the government agency must demonstrate that the information it sought to protect is (1)

commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential." Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1194 (9th Cir. 2011) (internal quotations marks omitted). Commercial or financial information is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id.

Where, as here, resolution of the issue before the Court turns on the "substantial harm" prong, the government need not show that releasing the information would cause "actual competitive harm." Watkins, 643 F.3d at 1194. Rather, the government need only show that there is: "(1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released." Id. "Competitive harm analysis is ... limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position.... Although the court need not conduct a sophisticated economic analysis of the likely effects of disclosure[,] ... [c]onclusory and generalized allegations of substantial competitive harm ... are unacceptable and cannot support an agency's decision to withhold requested documents." Id. at 1195 (internal quotation marks and citations omitted).

Defendants argue that disclosure of the performance incentive rate would result in substantial competitive harm to Talton Communications and would undermine the integrity of the bidding process for ICE's future telephone services contracts because Talton's competitors could use the information to underbid Talton. (Dkt. No. 28 at 13-16.) Defendants contend that ICE considered three factors in awarding the 2009 telecommunications contract—(1) technical

and management capabilities, (2) past performance, and (3) price—and that Talton was successful in securing the 2009 contract because it offered the lowest price proposal that was technically acceptable. (Dkt. Nos. 28 at 14, 32 at 2-7, 38 at 6-8.) Included in the price proposal were the telephone rates to be charged to detainees—which are now posted publicly at ICE's Northwest Detention Center and which were already disclosed to Plaintiff—and the performance incentive rate. (Id.) Defendants submit that because Talton's telephone rates are available to its competitors, the "only competitive edge Talton still has over its competitors in future bids is its strategy regarding the percentage of the revenue the company agreed to set aside as a performance incentive in order to win the current Detainee Telephone System contract." (Dkt. No. 32 at 7.) Defendants also note that Talton invested considerable resources, including hiring an outside consultant, to develop an attractive bid for the 2009 contract, which included developing a "risk allocation approach" that Defendants contend would be revealed if the performance incentive rate were disclosed. (Dkt. Nos. 28 at 14-15, 31 at 1-6.)

Defendants have not met their burden of demonstrating a likelihood of substantial competitive injury to Talton upon disclosure of its 2009 performance incentive rate, and therefore the performance incentive rate is not exempt from disclosure under FOIA. Defendants base their arguments on the theory that disclosing Talton's 2009 performance incentive rate would expose Talton's current risk tolerance, without reciprocal disclosures from its competitors, therefore providing competitors with an unfair advantage in the bidding process for upcoming contracts by allowing them to estimate and undercut Talton's bids. (Dkt. Nos. 28 at 14, 31 at 3-6, 32 at 5-7, 37 at 4, 38 at 6-8). But the performance incentive rate to be disclosed would reveal only Talton's risk tolerance in 2009, based on the state of the company then, as evaluated by a consultant hired to craft a bid specifically for the 2009 contract. (See Dkt. No. 31.) There is no

indication in the record that Talton Communications in 2015 is in exactly the same financial position as it was in 2009; Talton today may have a higher or lower risk tolerance than it did in 2009. Because Talton is free to determine its current risk tolerance separate from its 2009 risk tolerance, disclosure of the 2009 rate will not provide Talton's competitors with insight into its future bids for future contracts. In other words, disclosure of the 2009 rate, without more, does not allow competitors to "estimate and undercut" Talton's 2015 bid because there is no indication that Talton will use the same rate in 2015.[1] Furthermore, Defendants have provided neither evidence nor argument to explain how disclosure of the 2009 rate would allow competitors to reverse engineer Talton's entire business strategy or its current or future risk tolerance.

Moreover, the record does not support Defendants' contentions that the performance incentive rate was the "single distinguishing and important element of Talton's 2009 [detainee telephone services] proposal which allowed Talton to win the award and will likely be just as significant should Talton choose to compete for the follow-on [detainee telephone services] contract." (Dkt. No. 37 at 4.) Rather, the record shows that price was the deciding factor in 2009, and that the performance incentive rate was one piece of Talton's price proposal. (Dkt. Nos. 32 at 2-7, 38 at 6-8.) The record also shows that ICE evaluates a variety of factors when choosing between proposals, and that the importance of any one of the factors fluctuates according to ICE's evaluation of the proposal's other factors and sub-factors. (Id.) ICE has identified eight sub-factors for the technical and management capabilities category alone. (Dkt.

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[1] Furthermore, it is unclear from the record when bidding for the 2015 contract is expected to take place, and in fact it may have already occurred. The Parties have specified that Talton's 2009 contract expired on May 12, 2015, (Dkt. No. 38 at 5), but have not specified when a new contract will be bid for or will enter into effect.

No. 32 at 4.) That a contractor's performance incentive rate will be the single determinative factor in a future bidding process is pure speculation, and, in light of "the strong public interest in favor of disclosure," GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994), cannot support a finding that Talton is likely to sustain substantial competitive harm from disclosure of the performance incentive rate.

In sum, the Court finds that Talton's performance incentive rate is not exempt from disclosure under FOIA because Defendants have not demonstrated a likelihood of substantial competitive injury to Talton if the rate were disclosed. Defendants must therefore disclose the rate to Plaintiff.

III. Excessive Delay in Responding to Requests

Plaintiff argues that, in addition to improperly redacting documents, Defendants violated FOIA by failing to timely respond to its FOIA requests. (Dkt. Nos. 24 at 11-13, 36 at 3-5.) Plaintiff requests that the Court declare that ICE's delay in responding has violated the letter and spirit of FOIA. (Id.) Defendants admit that they failed to timely respond to Plaintiff's requests, but argue that that failure was inadvertent and that Plaintiff has already availed itself of the proper remedy for that failure—filing suit for immediate judicial review without having to exhaust administrative remedies. (Dkt. Nos. 28 at 16-17, 37 at 7-8.)

FOIA requires an agency to, within twenty days of receiving a record request, (1) determine whether it will comply with a record request, and (2) notify the requester of its determination and its reasoning. 5 U.S.C. § 552(a)(6)(A)(i). The determination response must include: (1) a statement of what the agency will and will not release; (2) the agency's rationale for any withholdings; and (3) notice of the requester's right to appeal. Id. Where "unusual

circumstances" exist, the Act allows agencies to extend that deadline by as many as ten days. 5 U.S.C. § 552(a)(6)(B)(i).

Declaratory judgment, the granting of which is within the discretion of the Court, is proper when there are purely legal questions at issue and if the judgment will clarify the legal issues and provide clarity to the parties and the public. Natural Res. Def. Council, Inc. v. EPA, 966 F.2d 1292, 1299 (9th Cir. 1992) (granting declaratory relief because the agency "does not have the authority to ignore unambiguous deadlines set by Congress" in Clean Water Act case).

Defendants correctly note that where an agency fails to respond within the statutory time period, the requestor is deemed to have constructively exhausted his or her administrative remedies and may file suit in federal court. (Dkt. No. 37 at 7) (citing 5 U.S.C. § 552(a)(6)(C) and Citizens for Responsibility and Ethics in Wash. v. FEC, 711 F.3d 180, 188 (D.C. Cir. 2013).) Exhaustion of administrative remedies aside, "[i]t seems fair to say that in the Ninth Circuit, courts sometimes enforce FOIA's timeliness requirements independent of the underlying disclosure issues, at least when the violation is 'egregious' or when there is a 'pattern or practice' of delay." Munger, Tolles & Olson LLP ex rel. Am. Mgmt. Servs. LLC v. U.S. Dep't of Army, 58 F. Supp. 3d 1050, 1054-55 (C.D. Cal. 2014) (collecting cases). See, e.g., Oregon Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d 1237, 1247-48 (D. Or. 2006) (holding that an eight month delay was "a violation of FOIA, regardless of the final outcome of the request").

The Court finds the delay in responding to Plaintiff's requests to be egregious. It is uncontested that Plaintiff did not receive ICE's first production of documents (or any other determination) until 361 days after mailing its first FOIA request letter, seven months after mailing its second request letter, and almost four months after filing this lawsuit. (Dkt. Nos. 25 at 2-4, 29 at 12-14.) Production of the remainder of the requested documents was not completed

for several additional months. (Id.) Response times of this sort clearly exceed the unambiguous time allowance contemplated by Congress. See 5 U.S.C. § 552(a)(6)(A)(i). Consequently, the Court hereby declares that, independent of the exemption issues, Defendants violated FOIA by failing to make a timely determination on Plaintiff's requests.

IV. Attorney's Fees

As the prevailing party, Plaintiff is eligible for reasonable attorney's fees and costs. 5 U.S.C. § 552(a)(4)(E); Church of Scientology of Cal. v. U.S. Postal Serv., 700 F.2d 486, 489 (9th Cir. 1983). The Court finds that an award of fees and costs is appropriate in this case, and that Plaintiff is entitled to such an award. See Church of Scientology of Cal., 700 F.2d at 492-93. Therefore, Plaintiff is hereby awarded reasonable attorney's fees and costs, and must petition the Court for a determination of fees and costs within thirty (30) days of the date of this order, if the Parties are unable to agree on a determination.

Conclusion

Because Defendants have violated FOIA by failing to timely respond to Plaintiff's requests and have failed to prove that Talton's performance incentive rate falls within one of FOIA's exemptions, the Court GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendants' Cross-Motion for Summary Judgment. Plaintiff is awarded reasonable attorney's fees and costs, in an amount to be determined later should the Parties be unable to agree on a determination.

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The clerk is ordered to provide copies of this order to all counsel.

Dated this 18th day of June, 2015.

Marsha J. Pechman
Chief United States District Judge