

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

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**RESPONSE OF SECURUS TECHNOLOGIES, INC.
TO PETITION FOR PARTIAL RECONSIDERATION OF MICHAEL S. HAMDEN**

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Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.429, files this Response to the Petition for Partial Reconsideration filed by Michael S. Hamden on January 19, 2016 (“Petition”)¹ which seeks reconsideration or clarification of several aspects of the Second Report and Order issued November 5, 2015 (“*Second Inmate Rate Order*”).² This response regards three items in the Petition: (1) the request for adoption of a “cost-recovery mechanism” to reimburse correctional facilities for the costs they incur to enable Inmate Calling Services (“ICS”); (2) the request to regulate the ancillary charges set and collected by third-party financial vendors; and (3) the request for clarification of the Mandatory Tax or Mandatory Fee defined in Rule 64.6000(n).

BACKGROUND

The Petition was filed on January 19, 2016, during the pendency of several petitions for stay at the Commission³ which were resolved three days later, on January 22, 2016.⁴ The site commission issue was bound up in two of those petitions: Global Tel*Link and Telmate each argued that the FCC erred in failing to address site commissions affirmatively in the new rules. When all petitions were stay were denied, Global Tel*Link and Telmate filed motions for stay at the D.C. Circuit and included site commissions in their lists of questions for the Court of Appeals

¹ The Petition was published in the Federal Register on March 8, 2016. 81 Fed. Reg. 12062. Parties are afforded 15 calendar days to respond to the Petition. *E.g.*, Public Notice, Report No. 3038 (Feb. 11, 2016).

² WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 (rel. Nov. 5, 2015), published at 80 Fed. Reg. 79136 (Dec. 18, 2015).

³ WC Docket No. 12-375, Securus Technologies, Inc. Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136) (Dec. 22, 2016); Petition of Global Tel*Link for Stay Pending Judicial Review (Dec. 22, 2016); Petition of Telmate, LLC for Stay Pending Judicial Review (Jan. 6, 2016).

⁴ WC Docket No. 12-375, Order Denying Stay Petitions, DA 16-83 (Jan. 22, 2016).

to decide.⁵ The Petition asks the Commission to revisit site commissions now.

The Petition also regards Ancillary Charges which were the subject of the Securus and Telmate petitions for stay, and motions for stay, on both jurisdictional and substantive grounds. Mr. Hamden asks the Commission to dictate how third-party entities are permitted to enable transactions.

The Petition also asks the Commission to issue a clarified or amended Mandatory Fee or Tax definition to identify the items it covers. It relays that there is some purported “confusion” on this topic but does not provide any example or instance where the definition was, in anyone’s view, misinterpreted or misapplied.

DISCUSSION

I. SECURUS HAS ALWAYS SUPPORTED A COST-RECOVERY MECHANISM

The Petition asks, as “alternative” relief, that the Commission adopt some form of cost-recovery method for correctional facilities. Petition at 12-13. This position is a marked departure from Mr. Hamden’s initial position that these costs “[m]ust [b]e [b]orne by Correctional Authorities.”⁶ Just prior to the Commission’s vote on the *Second Inmate Rate Order*, however, Mr. Hamden acknowledged that a cost-recovery mechanism “is a comparatively small price to pay” and advocated a tiered structure of \$0.01 to \$0.04 per minute based on jail type.⁷ He now appears to support the very similar cost-recovery mechanism proposed in a joint

⁵ *Global Tel*Link, et al. v. FCC*, Nos. 15-1461 and consolidated cases (D.C. Cir. filed Dec. 28, 2015).

⁶ WC Docket No. 12-375, Comments of Michael S. Hamden at 9 (Jan. 12, 2015).

⁷ WC Docket No. 12-375, Letter from Michael S. Hamden to Commr. Mignon Clyburn at 7-8 (Sept. 23, 2015).

filing by Securus, Pay Tel Communications, Global Tel*Link, and Telmate.⁸ That mechanism was: an added rate of \$0.03 per minute at any facility of 1-299 Average Daily Population; \$0.02 at any facility with 300-999 ADP; and \$0.01 at any facility with 1000+ ADP.⁹ This mechanism would be added to the applicable rate cap for the call itself.

Securus continues to support this proposal as a means of providing clarity and finality for the ICS industry as well as ensuring that correctional facilities can continue making ICS available.

II. THE PETITION ASKS THE COMMISSION TO REGULATE NON-COMMON CARRIERS THAT ARE OUTSIDE ITS JURISDICTION

The Petition asks the Commission to “clarify, and perhaps reconsider” the rules governing what the FCC calls “Single-Call Services.” Petition at 16. As an initial matter, the Petition should be clear about the relief it seeks: does Mr. Hamden want the FCC to explain the Single-Call rate, or reverse it? This lack of clarity significantly impedes parties from providing a thorough response. Securus, by way of response, will reiterate its long-standing position regarding third-party financial transactions.

The impetus behind the request is that “affiliated third parties” and “unregulated subsidiaries” are not subject to the Credit-Card Fees and thus can charge more for the financial transaction portion of Single-Call Service. The Petition thus expects the Commission to regulate the third parties that enable electronic financial transactions. Mr. Hamden supplies no authority

⁸ Petition at 13 & n.49 (citing WC Docket No. 12-375, Letter from Brian D. Oliver, CEO, Global*Tel Link, Corp., Richard A. Smith, CEO, Securus Technologies, Inc., Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate, LLC, and Vincent Townsend, President, Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC (Oct. 15, 2015)).

⁹ WC Docket No. 12-375, Letter from Andrew D. Lipman to Marlene H. Dortch, FCC, Ex. A at 3-4 (Sept. 28, 2015).

or precedent for that request. Securus, by contrast, has stated several times that it must rely on non-common carriers for many transactions,¹⁰ and that the Commission lacks jurisdiction over such vendors.¹¹ And it is clear from the *Second Inmate Rate Order* that the Commission is aware that it lacks such jurisdiction, because it carefully culls out MoneyGram and Western Union as third-party charges that an ICS provider may pass through in full, without any cap.¹²

The Petition provides no reason or authority to “clarify, and perhaps reconsider” the Ancillary Charge rules. It invites extra-jurisdictional action that would not survive appeal. For these reasons, Mr. Hamden’s request should be denied.

III. NO CLARIFICATION OF “MANDATORY TAX OR MANDATORY FEE” IS NEEDED

The Commission’s inclusion of the “Mandatory Tax or Mandatory Fee” in the *Second Inmate Rate Order* requires no clarification. Mr. Hamden does not seek reconsideration, but rather makes a tenuous request for clarification of the definition:

- n. Mandatory Tax or Mandatory Fee means a fee that a Provider is required to collect directly from Consumers, and remit to federal, state, or local governments

Rule 64. 6000.

The import of this definition is clear: if a governmental entity requires that an ICS consumer should pay any kind of fee or tax on ICS service, the ICS provider must comply with that requirement. The Commission simply is recognizing that state and local authorities may levy taxes or impose fees on their citizenry and on the services provided to their citizenry. In

¹⁰ WC Docket No. 12-375, Reply Comments of Securus Technologies, Inc. at 18 (Jan. 27, 2015) (Public Version); Comments of Securus Technologies, Inc. at 26-28 (Jan. 12, 2015) (Public Version).

¹¹ E.g., WC Docket No. 12-375, Securus Technologies, Inc. Reply Comments in Response to DA 13-1445 at 2-3 (July 24, 2013).

¹² E.g., *Second Inmate Rate Order* pp. 10, 84, ¶¶ 170, 171.

fact, governments' authority to do so exists independently from any utility commission's regulations.

Mr. Hamden's request is, in any event, problematic. He asks the Commission to "clarify exactly what fees and taxes are permitted[.]" Petition at 16. The Commission cannot be expected to list the tax laws and types of fees in every city, county, and state in the country, or even to compile a list of the general purposes for which a tax or fee could be imposed. The Petition, however, purports to require the Commission to compile such a list. Mr. Hamden, for his part, does not identify a single tax or fee for the Commission to consider. The Petition thus places an enormous burden on the Commission.

The Petition also invites a good deal of confusion. If any list of "exactly what fees and taxes are permitted" were created, is it Mr. Hamden's intent that anything not listed there be deemed illegal under federal communications law? The inevitable clash of respective subject-matter jurisdictions are obvious, as are the disputes about conflict preemption. In addition, the operation of the *inclusio unius* principle would come into play,¹³ subjecting ICS carriers to almost limitless litigation about exactly which fees and taxes are permissible under the *Second Inmate Rate Order*. Federal agencies should not adopt rules that, however well intended, place regulated entities in such jeopardy.¹⁴

¹³ "This doctrine decrees that where law expressly describes particular situation [*sic*] to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded." Black's Law Dictionary, 6th Ed. at 763 (citing *Kevin McC. v. Mary A.*, 123 Misc. 2d 148, 473 N.Y.S. 2d 116, 118).

¹⁴ Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrating the notice and predictability purposes of rulemaking.'

On this issue, the Petition requests relief that is impossible to provide and therefore it should be denied.

CONCLUSION

For these reasons, the Commission should grant the Petition in part by adopting an added cost-recovery method for reimbursing the costs that correctional facilities incur in order to make ICS available. The remaining requests in the Petition should be denied.

Dated: March 23, 2016

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Christopher v. SmithKline Beecham Corp., 567 U.S. ___, 132 S. Ct. 2156, 2168, (2012) (citing *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. ___, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

CERTIFICATE OF SERVICE

I hereby attest that on this 23rd day of March 2016, a true and correct copy of the foregoing Response to Petition for Partial Reconsideration of Michael S. Hamden was served on the following persons via First Class * and electronic ** mail:

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