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July 7, 2008

VIA ECFS

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-128, Martha Wright Alternative Rulemaking Proposal

Dear Chairman Martin:

Securus Technologies, Inc. ("Securus"), by and through counsel, replies to the *ex parte* letter filed June 27, 2008, by counsel for Petitioners in the above-named proceeding ("June 27 Letter"). Petitioners criticize or seek further explication of the points Securus raised in its letter filed May 23, 2008 ("May 23 Letter"). In response, Securus states as follows:

1. Inmate telephone rates at Florida Department of Corrections demonstrate that the Proposal is unnecessary and unfounded.

Petitioners' highlighting of the rates applied at facilities operated by the Florida Department of Corrections ("FL DOC") merits close consideration. June 27 Letter at 5. In fact, the FL DOC example militates against adoption of the rate cap and debit calling proposals for several reasons. First, the Commission should note that the FL DOC rates always include a per-call fee: \$1.20 for collect calls, and \$1.02 for prepaid calls. June 27 Letter at 5. Petitioners advocate, however, in direct contradiction to their Florida example, for a prohibition on per-call charges. The necessity of per-call rates was explained in Securus's May 23 Letter, and is discussed further in Section 5 below.

Secondly, it is noteworthy that the FL DOC does not have a debit calling system. Petitioners' proposal includes mandatory debit calling at every facility from which interstate calls are or could be placed. One of Petitioners' exemplar states, however, has determined that debit calling is inappropriate.

Third, the FL DOC rates demonstrate that inmate telephone rates are decreasing through operation of the market. Rates in other states, such as the Nebraska DOC sites and the New York DOC sites, are dropping significantly as well. This change is occurring through the

confluence of market forces and the policy decisions of individual states in the way their prisons operate. The Commission should note that States' rights to manage correctional policy remain not only intact, but are being used to achieve lower rates and increased inmate access to telephones. These rates also demonstrate, however, that Petitioners' proposed \$0.25 per-minute rate, with a prohibition on per-call charges, is far too low.¹

Fourth, in response to Petitioners' request that Securus "explain how they are able to provide interstate inmate calling services profitably to some prisons," June 27 Letter at 2, a request that presumably applies to the FL DOC example, Securus states that its services installed at the Florida DOC are provided over an innovative network architecture that took years to develop and has been in use for less than two years. This network is particularly suited for high call volume locations with long-term contract arrangements that enable lower transmission costs and the spread of equipment costs over many calls for many years. Securus is working efficiently to deploy this new network throughout the country, wherever possible. However, this system may not be cost-effective at many locations and, as size and call volumes decrease, costs per call will rise. The intensive efforts that Securus took in developing this system demonstrate that the market is working to reduce both costs and rates without any regulatory intervention.

Fifth, FL DOC facilities experience some of the highest call volumes in the country, which dramatically lowers the apportionment of fixed costs on a per-call basis. These high call volumes are not representative of the entire nation, and are particularly not a valid comparison for county jails that, as Securus has stated, comprise 80% of its client base. May 23 Letter at 2.

For all these reasons, the FL DOC rates represent the bottom edge of inmate calling rates, and should not be deemed a benchmark for a nationwide interstate rate cap.

2. The Commission has not held that site commissions in inmate telecommunications are "profit."

Petitioners maintain that the Commission affirmatively held, in the context of inmate telecommunications, that "location rents are not a cost of payphones, but should be treated as profit." June 27 Letter at 11 (quoting *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd. 3248, 3262 (2002)) ("*2002 Inmate NPRM*"). This conclusion is not clear from the face of that Order. Rather, as Securus previously stated, it appears that the Commission put the issue of site commissions out for comment without any proposed conclusion.

The *2002 Inmate NPRM* dealt with a request by the Inmate Calling Services Providers Coalition ("ICSPC") for reconsideration of the Commission's decision not to preempt state rate caps for inmate telephone services. The first area of inquiry was the meaning of the mandate in

¹ Interstate collect calls from Nebraska DOC sites are \$0.20 per minute with a \$0.75 per-call charge. If the per-call charge were eliminated as Petitioners seek to do, it would require a 15-minute call to recover that amount. As Securus explains herein, the average length of interstate inmate calls is less than 15 minutes.

Section 276 that payphone providers be “fairly compensated for each and every call.” 17 FCC Rcd. at 3254 ¶ 14. In addressing that issue, the Commission harkened to its 1999 discussion of “location rents” that it reached only with regard to public payphones. *Id.* at 3255 ¶ 15 (quoting *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd. 2569, 2562, 2615-16 (1999)) (“1999 Payphone Order”). In full, the 2002 *Inmate NPRM* states:

The Commission has previously described in detail the economic principles that control payphone telephony. Here, it is important to point out that the vast majority of payphone costs are fixed and common, even costs for operator assisted calls. Because of high fixed costs, any specific per call compensation rate will generate a profit or loss depending on how many calls are made from a particular payphone. It is difficult, therefore, to determine “fair compensation” for a particular call from a particular payphone because the “cost” of any call depends on how many other calls are made from that payphone. Finally, the Commission determined a payphone that “earns just enough revenue to warrant its placement, but not enough to pay anything to the premises owner” is “a viable payphone . . . because the payphone provides increased value to the premises.” Therefore, location rents are not a cost of payphones, but should be treated as profit.

17 FCC Rcd. at 3254-55 ¶ 15 (citations omitted).

Nothing in this paragraph indicates that the Commission reached a finding of fact or conclusion of law with regard to the site commissions that correctional facilities obtain in order to defray the costs of administration. Indeed, if the Commission had in fact reached a final conclusion, there would have been no need of the substantial Notice of Proposed Rulemaking that the 2002 *Inmate NPRM* included in which the Commission sought comment on several matters specific to the inmate telecommunications industry:

- “We initiate this rulemaking proceeding to explore whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, ICS providers, and inmates, and, if not, whether and how we might address those unmet needs.” 17 FCC Rcd. at 3276 ¶ 72.
- “On the other hand, higher commissions may give confinement facilities a greater incentive to provide access to telephone services. Commission proceeds may be dedicated to a fund for inmate services or assigned to the state’s general revenue fund. We seek comment on commissions demanded by correctional institutions, whether and how any states have addressed the relationship between these commissions and inmate calling rates, and on any factors unique to the provision of inmate calling services that affect the profitability of ICS operations.” *Id.* at 3276 ¶ 73.

It is thus far from clear that the Commission has issued any ruling on whether site commissions are a cost to inmate telephone service providers. In fact, it appears that the Commission understands that site commissions are among the factors “that affect the profitability of ICS operations,” *id.*, because they are a cost — not a “profit” — to inmate service providers.

To the extent that the Commission is now considering whether to impose the conclusion about “location rents” from the *1999 Payphone Order* onto the inmate telecommunications industry, that action would be inappropriate. The provision of inmate telephone service differs in major respects from the manner in which public payphones are provided. In the public payphone context, as the Commission found, “location rents” are often divided between the premises owner and the payphone owner. *1999 Payphone Order*, 14 FCC Rcd. at 2562 n.72.² In the inmate context, there is no division of site commission funds. Further, the *1999 Payphone Order* found that location rents are imposed “only when a particular payphone location generates a number of calls that exceeds the break-even number of calls[.]” *Id.* No such threshold exists for the payment of site commissions — they are generally calculated as a percentage of gross revenue. As such, they are unavoidable and fixed.

The record in this proceeding and in this docket does not support superimposing the “location rent” analysis regarding public payphones onto the site commission structure of the inmate telecommunications market. The inmate telephone service providers, who are the regulated entities over whom the Commission holds interstate ratemaking jurisdiction, do not “split” site commission revenues with facilities and do not have a revenue threshold below which site commissions are excused. Site commissions are a top-line cost for the entities to which Petitioners’ rate proposal will apply. As such, any rate that is adopted in this proceeding must include recovery of site commissions, or it will be confiscatory and unlawful. *Verizon v. FCC*, 535 U.S. 467, 524 (2001) (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989)).

3. Securus never suggested that rates must be set on a site-by-site basis, but rather it explained that Petitioners’ reliance on large facilities with high call volumes results in an inaccurate understanding of costs.

Petitioners criticize Securus for explaining that jail size and call volume are crucial variable factors in determining cost, arguing that the Commission has held elsewhere that telecommunications charges must not “be based on ... the costs of actual facilities used to provide service to a particular customer.” June 27 Letter at 3 (quoting *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd. 5128, 5130 (2000)).

Petitioners misunderstand Securus’s point. The significance of the wide variance in jail size and call volume was raised not to request adoption of *ad hoc* inmate telephone rates, but rather to show that Petitioners’ cost model is inapposite. Petitioners base their proposed rates on

² “Finally, we note that, when a payphone earns positive profits, it is not clear exactly how the payphone provider and location owner will negotiate the division of those profits.” *Id.*

data obtained in the Wright litigation which regards three very large facilities operated by the Corrections Corporation of America. May 23 Letter at 2-3. This data bears almost no relation to the smaller prisons and jails that comprise 80% of Securus's client base. *Id.* at 2. Accordingly, Petitioners' aggressive proposal for a \$0.20/\$0.25 interstate rap cap is not based on a proper view of the costs of providing inmate telecommunications.

4. Rates applied to automated interstate collect payphone calls are an appropriate point of comparison for inmate telephone rates.

Petitioners decry as "bogus" the comparison that Securus has drawn to the rates charged to users of public payphones for automated interstate collect calls. June 27 Letter at 8. Petitioners' analysis, however, fails to support their outlandish rhetoric. The rate comparison that Securus provided (May 23 Letter, Exh. B) demonstrates that long-distance carriers, who do not face the security requirements of inmate phones, are charging up to \$6.40 more for 10-minute interstate calls than T-Netix, and \$5.04 more than Evercom. Petitioners argue that these significantly higher rates "are paying for the convenience of making a call without a cell phone or a calling card," June 27 Letter at 8, but what must be noted is that these higher rates **do not** include site commissions or the increased costs of security features. For Petitioners nonetheless to maintain that inmate service providers are reaping exorbitant profits is comparatively hyperbolic.

Petitioners quote, somewhat curiously, a conclusion from the *CLEC Access Charge Order* stating that carriers had been collecting access charges from "consumers that have no competitive alternative." June 27 Letter at 8 (quoting *Access Charge Reform*, CC Docket No. 96-262, 16 FCC Rcd. 9923, 9938 (2001)).³ Presumably Petitioners are analogizing to the fact that inmates are incarcerated and therefore do not have their own telephones. But Petitioners cannot say that the users of public payphones have any better "competitive alternative" than do inmates — these consumers may not be able to afford "a cell phone or a calling card," June 27 Letter at 8, and may not have sufficient credit to be qualified to obtain residential telephone service. Yet these end users pay rates that are up to 56% higher than Securus's rates for a payphone service that includes none of the specialized security features Securus must provide. Analysis of public payphone rates is thus entirely appropriate when determining whether inmate telephone rates are, as Petitioners argue, disproportionate to costs.

³ Also curious is that Petitioners borrow language from the Commission's International Settlement Rates order in a manner suggesting that the Commission has found that inmate providers "withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates[.]" June 27 Letter at 9 (quoting *Cable & Wireless PLC v. FCC*, 166 F.3d 1224, 1233 (D.C. Cir. 1999)). The Commission has never found that the inmate telecommunications carriers have "withheld" information, and in fact there has been no Notice of Proposed Rulemaking for the Wright Petition by which such information could have been requested. Petitioners in fact recognize that the Commission may need to issue "an order requiring inmate service providers to submit data proving their service costs." Alternative Rulemaking Proposal at 29-30.

5. Petitioners' presumption of the length of inmate calls is not accurate, demonstrating that per-call rates remain appropriate.

Petitioners' proposed rate caps were derived from an analysis that presumes inmate calls to be 20 minutes in duration. Proposal at 19, 21. The Declaration of Douglas A. Dawson, appended thereto, relies on 15-minute calls and 20-minute calls for its analysis. Dawson Dec. ¶¶ 24, 42. For example, Petitioners use the rates applied at Colorado Department of Corrections facilities — \$1.25 surcharge plus \$0.19 per minute — divide by 20, and arrive at a “per minute cost of slightly over \$0.25 for a 20-minute call.” Proposal at 19. Essentially, Petitioners wish to eliminate all per-call charges by apportioning them over long inmate calls, resulting in a per-minute rate that roughly supports, via the rates they especially chose, the proposed rate caps of \$0.20 for debit calls and \$0.25 for collect calls.

One cannot assume such a long duration of inmate calls. The average length of interstate inmate calls is likely closer to 12 minutes, which under Petitioners' analysis would result in carriers being unable to recoup their costs of the call. It is for this reason that Securus has emphasized the need to adopt a per-call call charge, with time-sensitive charges passed through on an additional per-minute basis. The per-call charge is necessary to recover the fixed costs of the calling equipment, software development, and security features that Securus and other inmate telephone providers necessarily incur. May 23 Letter at 5. Moreover, as Securus explained previously, the fact that less than 40% of call attempts result in an accepted, billable call makes it crucial that all billed calls include a fixed per-call rate. *Id.* Petitioners' reliance on 15-minute and 20-minute calls in order to eliminate per-call charges is thus particularly misplaced in this market.

Based on its experience, Securus can state that the majority of its calls are much shorter than 15 minutes. In fact, Securus has found that inmates often attempt to avoid telephone charges by speaking for a matter of seconds, then hanging up, in hopes that the system would not have commenced billing for the call. This activity results in a significant proportion of calls being one minute in duration. Adoption of a \$0.25 per-minute rate and a prohibition on per-call charges, as Petitioners advocate, would entitle Securus to a mere \$0.25 for a completed one-minute inmate call.

In addition, call duration varies widely among types of correctional facilities. For example, calls from county jails are apt to be short, because those persons are detained for mere hours and generally use the telephone simply to arrange bail and legal representation. In state DOC facilities, by contrast, inmates will often speak for as long as permitted by the warden. It would be extremely difficult for the Commission to adopt a nationwide number for the duration of interstate calls such that it could ensure that carriers recover their costs via only a per-minute rate. And in fact the record demonstrates that per-call charges are the norm for interstate inmate calling rates, with the exception of Indiana Department of Corrections (“DOC”) rates for prepaid calls.⁴

⁴ All collect calls from Indiana DOC facilities include a per-call charge; at the \$0.25 per-minute rate, the per-call charge is \$1.50. See May 23 Letter at 4; Proposal, Exh. 13. The per-call charge was removed only for prepaid

Given the high fixed costs of inmate telecommunications service, and the tendency of inmate calls to be short and thus render fixed costs more difficult to recover, any rate that the Commission adopts should include a per-call charge. Time-sensitive cost components, such as transmission costs, would be appropriately recovered in the subsequent per-minute rate. This structure will better ensure cost recovery and is in keeping with the Commission's preference for separating the recovery of fixed versus time-sensitive costs in explicit rates. *E.g.*, 1999 *Payphone Order*, 14 FCC Rcd. at 2587-88 ¶¶ 97-99; *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd. 15,982 ¶¶ 9, 16 (1997)

6. Allegations of disconnected calls provide no basis to eliminate per-call charges.

Petitioners raise the spectre of alleged "dropped" or disconnected calls as grounds to prohibit all "surcharges," or fixed per-call rates, for inmate calls. June 27 Letter at 7-8. These allegations are unfounded and uninformed.

Securus's inmate calling technology does not unwarrantedly disconnect calls. Rather, the technology was developed and is continually refined to ensure that inmates and their called parties do not make three-way calls or chain calls — such calls circumvent the security feature that prevents from calling protected persons such as judges, jurors, and witnesses. *See* May 23 Letter at 3. Securus's technology will "listen" for certain "events" that indicate that someone is attempting to engage a second line or to forward a call to another number. It is a specific combination of "events" that the system is geared to detect, not a mere pause in conversation as some have claimed. These events include lack of all ambient noise and transmission energy, and a spike in energy that indicates the pressing of the keypad or "clicking over" to a conferenced line. A combination of these events must occur, close in time, for the system to determine that unlawful call activity has taken place and disconnect the call.

Calls are not disconnected on mere whim. It is Securus's understanding that other inmate service providers, such as Pay Tel Communications, take similarly stringent precautions to ensure that inmate calls are not disconnected without reason. Accordingly, the instances in which a call is disconnected without cause are truly rare.

In addition, if a party believes that an inmate call was disconnected improperly, Securus has standard procedures for contesting a call charge and requesting a refund. When a billed party contests a charge on the ground that a call was disconnected and required the inmate to re-dial, Securus will investigate the call to discern whether the disconnection was appropriate. In Securus's experience, the vast majority of investigations reveal that in fact the inmate or the called party was attempting to make a three-way or forwarded call, and thus the disconnection was warranted. In the event that the call evidence does not support such a finding, Securus refunds the per-call charge of the second call.

calls. This rate change was not evident from Petitioners' Exhibit 13, and in fact required an email from Petitioners' counsel to the Indiana DOC for confirmation. June 27 Letter, Att. B.

Allegations of disconnected calls therefore do not justify the elimination of per-call charges for interstate inmate calls. In all but a *de minimis* amount of cases, disconnected calls do not result in improper per-call charges. To prohibit per-call charges entirely would be a grossly disproportionate response and would preclude appropriate cost recovery for the vast majority of calls.

7. Petitioners are mistaken about the proportion of inmate calls that are interstate.

Petitioners assert, based on the 2002 *Inmate NPRM*, that “most calls from city and county facilities are local or intraLATA toll.” June 27 Letter at 3-4 (citing 2002 *Inmate NPRM*, 17 FCC Rcd. at 3253). They postulate that only “[t]he occasional interstate call” will be placed from “a jail or small prison.” *Id.* at 4. On this premise, Petitioners argue that the interstate calls to be affected by the rate cap will come from large state prisons that often entail “lower costs” — actually, the proper metric is higher call volume — and thus the low rate cap will permit appropriate cost recovery. From this flawed basis, Petitioners conclude that the drastically low \$0.25 per-minute cap will enable carriers to recover their costs for interstate calls. June 27 Letter at 4.

Petitioners are mistaken in believing that only “the occasional interstate call” will come from county and city jails. Often county jails agree to house inmates from other counties, even across state borders. Those inmates will be placing interstate calls. Securus, for example, serves over 80 county facilities where more than 50% of all inmate calls are interstate calls. In addition, Securus serves hundreds of county facilities where over 25% to 30% of inmate calling is interstate in nature. Further, interstate calling is prevalent in many county and city facilities along the nation’s southern border and in numerous counties located close to state lines. To claim that interstate calling from county and city jails is *de minimis* or insignificant is thus simply wrong. Therefore, it would be unfounded for the Commission to conclude that only large, high-volume facilities initiate the vast bulk of interstate calling.

Further, it would be improper for the Commission to impose the \$0.25 per-minute rate on smaller facilities that, as Petitioners implicitly concede, do not exhibit the economics to support it. See June 27 Letter at 3. In fact, Petitioners’ misconception of the amount of interstate calling from county and city jails would impose two concurrent negative impacts on cost recovery at these facilities. First, virtually all of these facilities will have considerably less overall call volume, compared to the huge facilities used in Petitioners’ analysis, which to spread the fixed cost of the inmate telephone system. Secondly, and as a result, Petitioners expect this low volume of intrastate calls, which are already extremely costly on a per-call, to recoup the cost of extremely below-cost interstate calls at \$0.25 per minute with no per-call charge.

Finally, Petitioners’ facile treatment of smaller facilities invites the Commission to force carriers to use large facilities to subsidize smaller ones. They state that if “[t]he occasional interstate call” is “made from a jail or small prison,” and the \$0.25 rate is below cost, the Commission need not be concerned because “a service provider, such as Securus ... enjoys economies of scale from serving state prison systems and other large facilities.” June 27 Letter at 4. In other words, the Commission should impose disproportionate costs on large facilities

and expect them to subsidize interstate calls from smaller ones. This argument runs directly contrary to the disdain for implicit subsidies that is clear in the last decade of the Commission's wireline regulation. *E.g.*, *Access Charge First Report and Order*, 12 FCC Rcd. 15,982 ¶¶ 9, 16; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 ¶ 2 (1997). In fact, this call for subsidies contravenes the Commission's conclusion in this very docket that, for public payphones, compensation rules must not "unfairly require one segment of payphone users to disproportionately support the availability of payphones to the benefit of another segment of payphone users." *1999 Payphone Order*, 14 FCC Rcd. at 2570 ¶ 57.⁵

8. Petitioners are mistaken about the frequency with which service contracts are renegotiated shortly after execution.

Petitioners assert that their proposed 12-month transition period is appropriate, June 27 Letter at 12, despite Securus's explanation that this period is far too short to enable the renegotiation of the more than 2,000 contracts it presently holds throughout the country. May 23 Letter at 9. Petitioners attempt to refute Securus's argument with a sweeping generalization that inmate telephone service contracts are "being renegotiated" with lower rates soon after their initial execution, such that "it seems unlikely that" amending 2,000 contracts "would be unmanageable" for Securus. June 27 Letter at 12.

Inmate contracts are not "being renegotiated" unless they are close to expiry. The one exception to this rule is that in Indiana, the DOC agreed to accept new rates for debit calls after execution of the contract with T-Netix. *See* June 27 Letter at 6. At the time of contract, the Indiana DOC could not accommodate debit calling. After the debit systems were in place – three years later – the contract was amended slightly to adopt specific rates for these calls. *See id.* This situation is far from the norm in the inmate telecommunications industry. Moreover, the Indiana DOC arrangement represents not a contract renegotiation but simply a service addition. No other call rates were changed.

The rates in Securus's contracts are not routinely being changed prior to expiration, and to do so now would create an enormous disruption in the performance of its contracts. Entire contracts, and possibly the public bidding process, would have to be re-opened. To perform this onerous task in a mere 12 months would be impossible.

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Thank you for your consideration of this matter. Please do not hesitate to contact me with any questions or concerns you may have: 202.857.4534.

⁵ The June 27 Letter may also be suggesting that intrastate rates should subsidize the proposed \$0.25/\$0.20 per-minute interstate rate at facilities that experience "[t]he occasional interstate call." That result would likewise be inappropriate.

Very truly yours,

s/Stephanie A. Joyce
Counsel for Securus Technologies, Inc.

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
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