

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

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

COMMENTS OF SECURUS TECHNOLOGIES, INC.

Stephanie A. Joyce
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

Counsel to Securus Technologies, Inc.

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SUMMARY

Securus appreciates the opportunity to provide additional data to the Commission regarding its rates, cost structure, and the competitive challenges it faces in the inmate telecommunications market. Filed herewith are the Declaration of Curtis L. Hopfinger, Director – Regulatory and Government Affairs, and the Expert Report of Steven E. Siwek, Economists, Inc., who provide factual background and expert cost analysis in support of these Comments.

This market is fiercely competitive. When Securus bids on a contract to provide telecommunications service to a correctional facility, it faces at least four and perhaps seven competitors, and the proposed rates for inmate calls are a focal point of the review process. Bid awards routinely are protested, and Securus actually has had awards overturned on the ground that its rates were higher than another bidder's by a few pennies. The result of this competition is demonstrably lower rates, several examples of which are provided herein.

The Commission asks several questions regarding its jurisdiction and authority in this niche of the market. As a component of correctional operations that is subject to state and local procurement regulations, inmate telecommunications service does not fit foursquare within the Commission's purview. As explained herein, correctional policy, procurement laws, and the Contracts Clause constrain the ability to intervene in service contracts. Thus, though the Commission certainly has jurisdiction over interstate calling rates, a mandate for immediate rate changes or the abolition of site commissions would be problematic. And given that the Commission historically has rejected the imposition of rate regulation in competitive markets, there seems no basis to adopt the drastic rate reformation that the Wright Petitioners request. The fact that those proposed rates would force Securus, and likely the rest of the industry, to provide service below cost renders such intervention all the more imprudent.

With regard to the Commission's questions about prepaid calling options and access for speech-impaired and hearing-impaired persons ("TeleTYpewriter" or "TTY" calls), Securus provides as much detail as it can regarding its role in these offerings. It remains the case, however, that the manner in which these options are provided lies in the discretion of correctional authorities and state utility commissions. Securus cannot force facilities to approve a particular type of prepaid calling and it has no control over how the great majority of TTY calls are provided. Indeed, Securus does not obtain any revenue, from any source, for most TTY calls.

Finally, Securus wishes to emphasize that should the Commission believe that some type of rate structure should be adopted for interstate inmate calls, it must reject Petitioners' position that only per-minute charges – to the exclusion of per-call charges – may be imposed. The cost structure of an inmate call is, as explained herein, significantly front-loaded, such that the full cost of the call cannot be amortized through a pure per-minute rate. This is particularly true given that, as shown in the Siwek Report, the average inmate interstate call is much shorter than what Petitioners assume. Only in facilities that experience astronomical amounts of call volume would such a rate structure be appropriate; it is much more the case that call volumes require the per-call and per-minute rate structure.

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Filed herewith:

Expert Report of Stephen E. Siwek (March 25, 2013), with Appendices 1 and 2

Declaration of Curtis L. Hopfinger (March 25, 2013), with Attachments 1 through 4

Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.415, files these Comments in response to the Notice of Proposed Rulemaking released on December 28, 2012, in this docket (“NPRM”).¹

BACKGROUND

The Commission has demonstrated an understanding of the environment in which inmate telecommunications service providers operate. NPRM ¶¶ 5-6. Securus would like to share its own experience in this market and to describe how the market has evolved over the last 10-15 years.

A. The Contracting Process

The Commission is aware that inmate telecommunications services are provided pursuant to contracts executed between service providers and correctional authorities.² The Commission decided in 1998 not to displace the exclusive-contract mechanism for inmate payphones even as it adopted rules mandating long-distance competition for public payphones.³ It reasoned, based on “comments of the United States Attorney General,” “other federal officials,” and “nearly all who have commented on this issue,” that the “special security requirements applicable to inmate calls” warranted an exemption for inmate payphones.⁴ This

¹ The item was published in the Federal Register on January 22, 2013. <http://www.gpo.gov/fdsys/search/pagedetails.action?browsePath=2013%2F01%2F01-22%5C%2F3%2FFederal+Communications+Commission&granuleId=2013-01154&packageId=FR-2013-01-22&fromBrowse=true>.

² NPRM ¶ 5.

³ *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, FCC 98-9, 13 FCC Rcd. 6122, 6156 ¶ 57 (1998).

⁴ *Id.*

has been the consistent policy for 15 years.⁵

The competition for service contracts is, to put it mildly, robust. Securus estimates that the number of bidders for a state Department of Corrections (“DOC”) contract averages four or five, and for city and county contracts the number is five to seven. Declaration of Curtis L. Hopfinger, Director – Regulatory and Government Affairs, ¶ 4 (March 25, 2013). Bids typically are evaluated, or scored, according to several criteria that include adequacy of security features, availability of trained maintenance and repair personnel, availability of investigative tools, and the level of end user rates. In fact, obtaining low rates is a chief goal among many of the correctional authorities that Securus serves and has attempted to serve.

Securus has seen the emphasis on low rates become more prominent in the last ten years, as correctional authorities increasingly demand that calling rates be affordable for inmates and their families. In fact, end user rates were the entire subject of a protest that was lodged against the New Mexico DOC’s awarding its inmate telephone contract to Securus in 2010. Hopfinger Decl. ¶ 5. There, the DOC stated that the rate criterion would be scored very heavily, such that the carrier with the lowest rates would receive a highly favorable score. A competitor of Securus found that the New Mexico procurement officer had miscalculated Securus’s rates, and that an accurate calculation revealed that the competitor’s rates actually were lower, by a few pennies, and thus the contract should have been awarded to that competitor. As a result of that protest, the bid award was nullified and the New Mexico DOC contract was put out for bid again.

⁵ The Commission discussed and endorsed the exclusive-contract arrangement when it revisited inmate payphone rates in 2002. CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd. 3248, 3252, 3259-60 ¶ 27 (2002) (“2002 Payphone Order”).

As the Commission knows, inmate telecommunications service contracts are valid for a term of years. In Securus’s experience, term lengths typically are four to five years. In some instances, contracts may be extended for a finite period if the correctional authority deems it necessary.

B. The Security Needs of Correctional Authorities

As the NPRM states, “[s]ecurity considerations also differentiate ICS from public payphone services.”⁶ Correctional authorities demand that an inmate telecommunications service provider be able to capture all called party numbers, to enable officers to hear inmate calls other than calls with their attorneys, to restrict inmates from calling judges and other protected persons, and to impose time limitations on inmate calls. In some instances, correctional authorities have requested biometric security features, such as voice print verification, to ensure that they know exactly which inmate is placing a call.

Several correctional authorities have told the Commission of the importance of telephone security features. The Virginia Department of Corrections,⁷ the National Sheriffs’ Association,⁸ and several county sheriffs⁹ have filed comments in CC Docket No. 96-128 — the proceeding in which inmate payphone issues previously were handled — urging the Commission to ensure their continued access to safety and security controls for inmate telephones. And as the

⁶ NPRM ¶ 6.

⁷ CC Docket No. 96-128, Virginia Department of Corrections Opposition (May 1, 2007) (Exhibit 1).

⁸ CC Docket No. 96-128, Letter from Aaron Kennard, Executive Director of National Sheriffs’ Association, to Marlene H. Dortch (Aug. 11, 2008) (Exhibit 2).

⁹ Exhibit 3 (CC Docket No. 96-128, Letters from Custer County, Buncombe County, and Jackson County).

Pawnee County Sheriffs' Association stated, "security interests are paramount in the unique environment provision of inmate calling services."¹⁰

C. Costs of Service Have Decreased in Some Respects But Increased in Others

Securus's cost of service has increased in the last few years due principally to issues arising from state and federal regulations. As Securus informed the Commission in October 2011, its per-call costs have increased 16.3% since 2008, and its per-minute costs have increased 16.5%.¹¹ That is, although Securus has gained efficiencies through its deployment and use of a centralized, IP-based transmission network, its cost savings has been offset by an increase in the costs arising from regulatory compliance.

The most notable instance of a cost increase regards billing and collection. Ten years ago, the overwhelming majority of Securus calls were billed on the called party's local exchange service bill as collect calls. This arrangement was established through billing and collection ("B&C") contracts. Due to concerns about "cramming" rules, however, which the Commission has enforced with increasing rigor, many local exchange carriers ("LECs") either refuse to bill for Securus or they enforce prohibitive rates, terms, and conditions in billing for Securus. As a general matter, LEC billing fees have increased substantially. Hopfinger Decl. ¶ 16. Some LECs have imposed penalties on Securus that could exceed \$100 for every instance in which an end user claims not to have received or accepted an inmate call. *Id.*¹² In response,

¹⁰ CC Docket No. 96-128, Letter from Sheriff W. Don Sweger, Pawnee County, to Marlene H. Dortch (Mar. 10, 2004) (Exhibit 4).

¹¹ CC Docket No. 96-128, Letter from Stephanie A. Joyce, Counsel for Securus, to Marlene H. Dortch (Oct. 11, 2011) (Exhibit 5).

¹² It is extremely common in this industry for bill payers to dispute inmate phone calls that appear on their LEC bill. This phenomenon is largely attributable to the fact that often the bill payer is simply unaware that a member of the household has been accepting inmate calls. When these disputes arise, Securus's investigations virtually always reveal that indeed an adult in the

Securus has invested a great deal of resources into establishing prepaid and direct billing relationships with called parties — a cost of service that previously Securus did not incur. But to bolster that effort, Securus continues to execute B&C agreements with LECs and pay the fees, and the penalties, that they demand.

Research and development (“R&D”) efforts, which continue to increase as law enforcement officials need more and more investigative tools “to stay one step ahead of criminal activity”, also are raising Securus’s cost of service.¹³ In addition, Securus must update its systems on a continuing basis in order to “address new threats of fraud”.¹⁴ This work caused Securus to spend, in 2012 alone, “over \$4.5 million on the development of safety, security, and investigative software”.¹⁵ This R&D investment, which is an integral part of Securus’s telecommunications service, is a direct and substantial cost of service.

D. Interstate Rates Are Decreasing Steadily

The Commission seeks “concrete examples of decreases in [inmate calling service (ICS)] rates”.¹⁶ As Securus has shown the Commission in recent filings,¹⁷ rates for inmate telecommunications service have decreased steadily over the last ten years. The Florida DOC is a prime example: a 12-minute interstate collect call is only \$1.92. The contract with the Florida

house did accept an inmate collect call. The \$100 penalty, however, still attaches. Hopfinger Decl. ¶ 17.

¹³ *Id.* ¶ 19.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ NPRM ¶ 29.

¹⁷ CC Docket No. 96-128, Letter from Stephanie A. Joyce to Marlene H. Dortch and Attachment (May 10, 2012) (Exhibit 6). Securus notes that the Maryland DOC, for which Securus listed, in this filing, interstate rates of \$2.70 plus \$0.30 per minute, recently re-bid the contract and awarded it to another carrier. On information and belief, the new carrier’s rates are lower than Securus’s rates, with a \$0.20 per-minute charge.

DOC was signed in September 2007. The New Mexico DOC, which Securus has served since September 2011, has an interstate collect calling rate of just \$0.65, flat-rate, regardless of length. The Missouri DOC contract, which was signed in June 2011, contains an interstate calling rate of \$1.60 for a 12-minute call.

Large county facilities having high call volumes likewise are served at very low rates. Santa Fe County in New Mexico, which Securus has served since 2007, now has an interstate calling rate of \$1.70 for a 12-minute call.

These rates were unheard of at state and county facilities in 2003 when the Wright Petitioners filed their first Petition for Rulemaking.

As the Commission has requested,¹⁸ Securus is providing the Commission with even more examples of actual inmate calling rates. In addition, Securus has retained Steve Siwek of Economists, Inc. to perform rate, cost, and usage analyses.¹⁹ Mr. Siwek's report is based on Securus's service statistics in 30 city and county ("Non-DOC") facilities and all 8 State DOC systems with which Securus holds contracts.²⁰ The Non-DOC facilities are divided into High Volume, Medium Volume, and Low Volume groupings, with volume referring to the number of inmate calling minutes.²¹ Mr. Siwek also provides the actual rates at each of the sites.²²

¹⁸ NPRM ¶ 29.

¹⁹ Expert Report of Steven E. Siwek on Behalf of Securus Technologies, Inc. (March 25, 2013) ("Siwek Report").

²⁰ Siwek Report §§ 2.3-2.4.

²¹ *Id.*, Table 1.

²² *Id.*, Appendix 2.

I. STANDARD FOR COMMISSION RATEMAKING

If the Commission engages in ratemaking, it must not impose rates that are confiscatory.²³ In order not to be confiscatory, the rates must enable a regulated carrier to “maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.”²⁴ The end result of any ratemaking must therefore provide for the “reimbursement [of the carrier’s] operating expenses” as recognized by “generally accepted accounting principles,” and allow the carrier to “attract capital, and compensate its investors.”²⁵ In short, rates set by the Commission must include a reasonable profit after accounting for the costs that the carrier incurs in providing service.²⁶

II. ISSUES REGARDING THE COMMISSION’S JURISDICTION AND AUTHORITY

The Commission seeks comment on its “legal authority ... to address the issues raised by the Petitioners.”²⁷ In addition, the extent of the Commission’s authority has been raised by Commissioners in their review of this proceeding.²⁸ These comments discuss several factors that impact the Commission’s ability to regulate inmate telecommunications service.

²³ *E.g., Alabama Cable Telecomms. Assoc., Comcast Cablevision of Dothan, Inc. v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12232 ¶ 51 (2001) (“*Alabama Power*”).

²⁴ *Id.* (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 n.5 (1989)).

²⁵ *Id.* ¶ 52.

²⁶ *Jersey Central Power & Light Co. v. Fed. Energy Reg’y Comm’n*, 810 F.2d 1168, 1178 (D.C. Cir. 1987) (a carrier’s “return out to be ‘sufficient to ensure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.’ ... ‘it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business[.]’”) (quoting *Fed. Energy Reg’y Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)) (vacating order setting electricity rates).

²⁷ NPRM ¶ 8; *see also id.* ¶¶ 49-50.

²⁸ “As the record develops, I will focus, in particular, on the Commission’s legal authority.” Statement of Commr. Robert M. McDowell (FCC 12-267) (Dec. 28, 2012). “I am open to

A. The Commission Lacks Jurisdiction Over Correctional Facility Operations

The Commission’s charter is limited to “the purpose of regulating interstate and foreign commerce in communication by wire and radio[.]”²⁹ The Commission may not, and does not appear to be attempting to, regulate the operations of any correctional facility. But applicable jurisprudence on the Commission’s role regarding inmate telecommunications may be instructive.

Federal courts have made clear that even where interstate telecommunications are impacted by state correctional policy, the FCC has no jurisdiction to intervene in that policy. In *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001), recipients of collect calls placed from Michigan DOC facilities lodged antitrust claims against the state and the service providers alleging that exclusive service contracts violate Section 1 of the Sherman Act. The claims were dismissed on the ground, among others, that the state was exempt from the prohibition on exclusive contracts where done in furtherance of a valid penological goal. The trial court stated that “[t]he State of Michigan is undoubtedly authorized to act in the ‘subject matter area’ of prison administration.”³⁰ Relying on opinions from other corrections-related civil suits, the court reasoned that “[i]n the exercise of this authority, the state has the power to adopt policies it believes are best suited for managing its prisons and assuring the safety and security of those institutions.”³¹ On this basis, Plaintiffs’ claim that they unlawfully were restricted to receiving

exploring whether there is action we can and should take, consistent with our legal authority, to address the issues[.]” Statement of Commr. Ajit Pai (FCC 12-267) (Dec. 28, 2012).

²⁹ 47 U.S.C. § 151.

³⁰ 141 F. Supp. 2d at 756 (quoting Mich. Comp. Laws § 445.774(3) (providing exemption for state from antitrust laws)).

³¹ *Id.* (quoting *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998)).

only collect inmate calls was dismissed under “the governmental exception to Michigan’s Antitrust Reform Act.”³²

A federal court in Ohio reached the same conclusion in *McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003). Reviewing a similar antitrust claim lodged against an inmate telecommunications service provider, the court stated that “[t]he Director of the [Ohio Department of Rehabilitation and Corrections] is vested with total authority to prescribe the rules and regulations for all correctional facilities in Ohio.”³³ With regard to telephones, it further stated that “when the ODRC establishes a collect calling telephone system in an Ohio correctional institution, that is the clear and articulated policy of Ohio.”³⁴ Plaintiffs’ antitrust claim was dismissed.

This authority demonstrates that inmate telephone systems are irrefutably a component of prison operations which are provided at the discretion of the resident correctional agency.³⁵ As such, the choice to impose site commissions on inmate telephone systems is also within the agency’s discretion. According to the U.S. Court of Appeals for the Seventh Circuit, “[s]tates and public agencies ... have to get revenue somehow, and the ‘somehow’ is not the business of the federal courts unless a specific federal right is infringed.”³⁶ With regard to inmate phones, higher calling rates has not been deemed to infringe any constitutional right,

³² *Id.*

³³ 253 F. Supp. 2d at 1007.

³⁴ *Id.*

³⁵ *See also Ivey Walton, et al. v. New York State Dept. of Correctional Svcs.*, 921 N.E. 2d 145, 893 N.Y.S. 2d 453, 485 (N.Y. Ct. App. 2009) (“the DOCS commission ... fell into this other permissible category of governmental activity.”).

³⁶ *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001).

including the First Amendment.³⁷ In fact, one court has stated that “there is no constitutionally guaranteed right of inmates to use a telephone.”³⁸

The Commission’s purview in this case remains interstate telephone rates. The Commission may not, however, attempt to alter the manner in which correctional authorities conduct the contracting process nor prohibit them from relying on site commissions to generate the funds they require. These jurisdictional complexities are often ignored or misunderstood by those who seek the Commission’s intervention.

B. The Constitution’s Jurisdiction Over Service Contracts Is Constrained by the Authority of Correctional Authorities and by the United States Constitution

The Commission asks several questions regarding its ability to require a change to or renegotiation of inmate telecommunications service contracts.³⁹ Its inquiry stems from Petitioners’ demand for a “one-year fresh look, transition period for existing ICS contracts.”⁴⁰ As Securus has stated previously, however, the Commission’s jurisdiction and authority over inmate telecommunications contracts is extremely limited:

[Petitioners’] use of the term “fresh look” (*id.*) suggests counsel believes that contracts for inmate calling service are legally similar to Interconnection Agreements that are executed or arbitrated pursuant to Sections 251 and 252 of the 1996 Telecommunications Act, 47 U.S.C. §§ 251, 252. They are not the same. And in fact, Interconnection Agreements are themselves “creatures of state law” despite being instruments established in a federal statute. *Global NAPs California, Inc. v. Public Utilities Comm’n of State Of Cal.*, 624 F.3d 1225, 1228 (9th Cir. 2010) (citing *Ill. Bell Tel.*

³⁷ *E.g.*, *Arsberry*, 244 F.3d at 565-66 (rejecting inmates’ due process claim); *Walton*, 921 N.E. 2d 145, 893 N.Y.S. 2d at 491-92.

³⁸ *Walton*, 921 N.E. 2d 145, 893 N.Y.S. 2d at 491 (citing *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000); *Arsberry*, 244 F.3d 558)).

³⁹ *NPRM* ¶¶ 45-46.

⁴⁰ *Id.* ¶ 45.

Co. v. Global NAPs Ill., Inc., 551 F.3d 587, 591 (7th Cir. 2008);
Verizon Cal., Inc. v. Peevey, 462 F.3d 1142, 1152 (9th Cir.
2006)).⁴¹

The public contracts executed between state and local correctional authorities and inmate telecommunications service providers are not instruments of federal law. Unlike Interconnection Agreements that were created out of whole cloth by Congress in the 1996 Act, inmate telephone service contracts are created pursuant to the plenary jurisdiction that correctional authorities have over their own operations.⁴² These contracts are formed under the strictures of state and local procurement regulations.⁴³ In sharp contrast to Interconnection Agreements, nothing in state or local inmate telecommunications service contracts effectuates a federal mandate. As such, the “fresh look” concept on which Petitioners rely is misplaced.

Even if the concept of “fresh look” were lawful and appropriate for inmate telecommunications contracts, it would be unreasonable for the Commission to impose such a rule. Securus holds approximately 1,800 service contracts covering roughly 2,200 city, county, and state correctional facilities around the country.⁴⁴ It would be impossible for Securus to re-negotiate 1,800 contracts in one year, as Petitioners propose,⁴⁵ or even two years. Moreover, such a rushed approach is unnecessary when one considers that all inmate service contracts are for a term of years. It is entirely reasonable, if not legally prescribed, for the Commission to allow the longstanding contracting process in this industry to run its course.

In addition, the United States Constitution protects contracts – even contracts with

⁴¹ CC Docket No. 96-128, Letter from Stephanie A. Joyce to Marlene H. Dortch at 2 (Oct. 31, 2012) (Exhibit 7).

⁴² *E.g.*, *Miranda*, 141 F. Supp. 2d at 756.

⁴³ *2002 Payphone Order*, 17 FCC Rcd. at 3252, 3259-60.

⁴⁴ Hopfinger Decl. ¶ 3.

⁴⁵ NPRM ¶ 45.

regulated utilities – from being abrogated or altered by new regulations.⁴⁶ The Supreme Court first applied that protection to regulated industries in *Arkansas Natural Gas Co. v. Arkansas R.R. Comm’n*, 261 U.S. 379 (1923),⁴⁷ and later in a set of cases establishing what is known as the *Sierra-Mobile* Doctrine.⁴⁸ In brief, federal agencies are empowered “to review rates” of the entities they are authorized to regulate, “and there is nothing to indicate that they were intended to do more. ... By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the ... industry.”⁴⁹ Existing contracts may be altered by subsequent regulation if they “adversely affect the public interest – as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.”⁵⁰

The Commission assiduously comports with *Sierra-Mobile* when asked by a party to amend or alter existing contracts. It has held that the threshold for satisfying the public exigency standard of *Sierra-Mobile* “is much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the [Communications] Act.”⁵¹

⁴⁶ U.S. Const. Art. 1, Sec. 10.

⁴⁷ The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution.

Id. at 383.

⁴⁸ *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Svc. Corp.*, 350 U.S. 332 (1956).

⁴⁹ *Mobile*, 350 U.S. at 343-44.

⁵⁰ *Sierra*, 350 U.S. at 355.

⁵¹ *IDB Mobile Communs., Inc. v. COMSAT Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 11474, 11480 ¶ 15 (2001) (“*IDB*”).

Harkening to the Supreme Court in *Mobile*, the Commission has stated that “the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of carrier-to-carrier contracts,”⁵² and that with regulatory impairment of existing contracts “the market, the industry and ultimately the consumer would suffer.”⁵³ As such, the Commission has instructed that any complainant seeking to avoid or change an existing contract “faces a heavy burden.”⁵⁴

For these reasons, the Commission has refused to rewrite or alter satellite capacity contracts,⁵⁵ microwave transmission contracts,⁵⁶ 900 transport service,⁵⁷ and contracts to buy network programming.⁵⁸

Here, two types of contract terms could be affected in this proceeding: (1) the rates applied to inmate telephone calls; and (2) the obligation to pay site commissions, whether as a percentage of revenue or a guaranteed amount. These terms are included in the service contracts that are executed pursuant to the public bidding process.⁵⁹ Adopting unprecedented rate caps – certainly the caps Petitioners propose – is very likely to affect both terms. It would nullify existing, contracted rates in direct contravention of *Sierra-Mobile*.

⁵² *IDB*, 16 FCC Rcd. at 11481 ¶ 16 (citing *Mobile*, 350 U.S. at 344).

⁵³ *Id.* (quoting *San Diego Gas & Elec. Co. v. Federal Energy Reg’y Comm’n*, 904 F.2d 727, 730 (D.C. Cir. 1990) (affirming FERC refusal to reform electricity contract)).

⁵⁴ *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 654 ¶ 17 (1995) (“*ACC Long Distance*”).

⁵⁵ *IDB*, 16 FCC Rcd. at 11486 ¶ 26.

⁵⁶ *ACC Long Distance*, 10 FCC Rcd. 654 ¶ 18.

⁵⁷ *Ryder Communs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd. 13603, 13617 ¶ 31 (2003).

⁵⁸ *Echostar Communs. Corp. v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13 FCC Rcd. 21841, 21849 ¶ 20 (1998).

⁵⁹ Hopfinger Decl. ¶ 21.

Further, the Commission would render it impossible for Securus to comply with its site commission obligations if it adopted rate caps that prevented recovery of site commission costs. To prohibit Securus from complying with an existing contract has the same effect as nullifying or reforming it. Agencies can take that radical action only for truly extraordinary exigent circumstances, and those circumstances are not present here.

C. The Commission May Intercede in Service Rates Only Where a Market Failure Is Demonstrated

Retail rates for interstate long-distance calls have been detariffed since 1996.⁶⁰

The relief that Petitioners seek – imposition of a rate cap for interstate inmate calling rates – would be a startling reversal of Commission policy. The fact that, as explained above, competition among inmate telecommunications providers is so robust militates against taking the Petitioners’ proposed drastic, retrograde action.

According to the Commission, rate regulation should be imposed if a demonstrable market failure has occurred. Petitioners therefore must prove in this proceeding that ““market conditions with respect to such service fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.””⁶¹ Petitioners also must show “evidence of systematically collusive or other anticompetitive practices concerning the provision of [the service].”⁶² Absent meaningful evidence of systemic, price-inflating harm to the inmate telecommunications market, Petitioners do not warrant the imposition of new rate regulation, much less the drastic, one-size-fits all rate caps they seek.

⁶⁰ CC Docket No. 96-61, *Policy and Rules Concerning the Interstate Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd. 20730 (1996) (“1996 Detariffing Order”).

⁶¹ PR Docket No. 94-109, *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd. 7842, 7851 ¶ 37 (1995) (quoting 47 U.S.C. § 332(c)(3)(A)) (“Ohio CMRS Order”).

⁶² *Ohio CMRS Order*, 10 FCC Rcd. at 7852 ¶ 39.

When the Commission detariffed retail, interstate calling services in 1996, it stated that

we find it is highly unlikely that interexchange carriers that lack market power could successfully charge rates ... for interstate, domestic, interexchange services that violate Section 201 or 202 of the Communications Act, because any attempt to do so would cause their customers to switch to different carriers.⁶³

Thus, the Commission reasoned that “market forces will generally ensure that the rates, practices, and classifications of nondominant interexchange carriers ... are just and reasonable and not unjustly or unreasonably discriminatory.”⁶⁴ On these grounds, the Commission ceased regulating interstate calling rates.

Here, the Commission has actual evidence that calling rates are coming down as a result of quantifiable, meaningful competition. Securus competes with as many as seven other service providers when it bids on a service contract.⁶⁵ There is no evidence of market failure.⁶⁶ Were the Commission to re-institute interstate rate regulation, it would commit a drastic policy reversal and mire the industry in a regulatory morass that has not been seen in almost 20 years. And it would do so in the face of demonstrated competitive pressure on rates that has benefited consumers tremendously in the last 10 years.

III. THE COMMISSION SHOULD NOT ADOPT THE RATE CAPS THAT PETITIONERS PROPOSE

Petitioners ask the Commission to adopt one set of rates: \$0.20 per minute for prepaid calls; \$0.25 per minute for collect calls; and no per-call charge will be permitted.⁶⁷ The

⁶³ 1996 *Detariffing Order*, 11 FCC Rcd. at 20743 ¶ 21.

⁶⁴ *Id.*

⁶⁵ Hopfinger Decl. ¶ 4.

⁶⁶ Siwek Report §§ 5.7-5.8.

⁶⁷ NPRM ¶ 17.

Siwek Report demonstrates that these rates are unreasonable and actually confiscatory in many instances.

A. A Per-Call Charge Is Necessary to Ensure Recovery of Service Costs

As Securus has shown previously, permitting carriers to charge only a per-minute rate would force them to provide service below their costs.⁶⁸ The largest cost burden of an inmate call occurs before the call is connected, and eliminating the per-call charge would preclude Securus from recovering those initial costs.

Mr. Hopfinger explains the validation process for an inmate telephone call.⁶⁹ That process occurs for every inmate call attempt. Securus only may bill the call, however, if it is positively accepted by the called party, even if the call is a prepaid call.⁷⁰ Approximately **3 out of 10** inmate call attempts result in a billable call. Securus therefore has no charge to impose for the work it does to enable **7 out of 10** inmate call attempts. That is a revenue structure unique to the inmate telecommunications industry. For this reason alone, it is foolish for any party to assert that inmate telephone service is no different from residential telephone service.

The Siwek Report states the average per-call costs of interstate, inmate-initiated telephone calls in the High Volume, Medium Volume, Low Volume Non-DOC facilities and the DOC facilities. It is clear from these figures that the total cost, particularly in the lower-volume sites, is much higher than Petitioners' proposed rate cap would cover.

⁶⁸ CC Docket No. 96-128, Letter from Stephanie A. Joyce to Marlene H. Dortch at 1 (Sept. 20, 2011) (Exhibit 8); Letter from Stephanie A. Joyce to Marlene H. Dortch at 1-2 (Dec. 17, 2008) (Exhibit 9); Letter from Stephanie A. Joyce to Chmn. Kevin J. Martin at 6-7 (July 7, 2008) (Exhibit 10); Letter from Stephanie A. Joyce to Chmn. Kevin J. Martin at 4-5 (May 23, 2008) (Exhibit 11).

⁶⁹ Hopfinger Decl. ¶ 32.

⁷⁰ *Id.* ¶ 31; *see also* 47 C.F.R. § 64.705(a)(1) (“(a) A provider of operator services shall: (1) Not bill for unanswered telephone calls in areas where equal access is available”).

In addition, Petitioners unreasonably assume that inmate interstate calls are 20 minutes in length,⁷¹ when in fact Securus's average interstate call length is 7 to 13 minutes, depending on the type of facility.⁷² Thus, where Petitioners assert that their proposed rates will result in a guaranteed \$4.00 for prepaid calls and \$5.00 for collect calls, the actual effect of their rate cap would be **\$1.40 to \$2.60 for prepaid calls** and **\$1.75 to \$3.25 for collect calls**. Securus would be under water at the overwhelming majority of its sites.

Petitioners' opposition to per-call charges seems to arise from unfounded allegations of so-called "dropped calls", or calls that are suddenly disconnected for no reason. Some have argued that inmate telephone service providers deliberately disconnect calls for the sole purpose of imposing the additional per-call charge when the inmate calls back. That argument is baseless.

As Mr. Hopfinger explains in his Declaration, it has been the policy of correctional authorities for decades that inmates cannot make three-way calls and cannot allow their calls to be forwarded to another number.⁷³ Securus is required to implement security features to prevent this activity, and its technology in this regard is "state of the art."⁷⁴ Securus's calling systems can "hear" attempts to dial additional numbers over a connected inmate call. At the request of the correctional authority, Securus will engineer the system to detect these

⁷¹ CC Docket No. 96-128, Petitioners' Alternative Rulemaking Proposal at 19 (March 1, 2007).

⁷² Siwek Report § 5.5 & Table 10. These numbers comport with Securus's usage statistics from 2008, during which 96% of its facilities had average interstate call lengths of 14 minutes or less, and 57% of its facilities had average interstate call lengths of 9 minutes or less. CC Docket No. 96-128, Letter from Stephanie A. Joyce to Marlene H. Dortch at 1 (Decl. 17, 2008) and Declaration of Curtis L. Hopfinger ¶ 3 (Dec. 17, 2008) (collectively, Exhibit 9).

⁷³ Hopfinger Decl. ¶ 34; *see also* CC Docket No. 96-128 and WC Docket No. 09-144, Letter from Stephanie A. Joyce to Marlene H. Dortch at 1 (Feb. 10, 2010) and Attachment (Federal Bureau of Prisons telephone regulations) (Exhibit 12).

⁷⁴ Hopfinger Decl. ¶ 35.

attempts and, most often, to disconnect the inmate's call. If the inmate or called party attempts to circumvent the detection system by making loud noises, the system will take the same action. Complaints of "dropped calls" are revealed to be the result of this kind of behavior.⁷⁵

The fact that inmate calls may be of short duration is likewise no evidence of "dropped calls". Inmates often make multiple short telephone calls to the same number purposely, in hopes that none of the calls will result in actual billed charges.⁷⁶ Thus, the fact that a bill may show a group of successive one-minute inmate calls in no way demonstrates that calls have been "dropped", but rather are the result of the inmate's deliberate attempt to avoid being charged for the service being provided. For these reasons, demands for a prohibition on per-call charges based on purported "dropped calls" are baseless and should be rejected.

B. The Commission Should Adopt a Rate Variance Mechanism to Enable Carriers to Serve High-Cost and Low-Volume Facilities

In the NPRM, the Commission refers to the recent rate proceeding before the New Mexico Public Regulation Commission ("NMPRC") in which a tiered rate structure was considered.⁷⁷ It is important to note that the NMPRC did not adopt a tiered rate structure. That proceeding is, however, instructive with regard to the Rate Variance procedure that the NMPRC adopted.

Securus maintains that federal rate caps are neither reasonable nor warranted for the inmate telecommunications industry. Should the Commission nonetheless adopt some type of rate regulation, it should expressly include an administrative vehicle to allow a service

⁷⁵ Hopfinger Decl. ¶ 35.

⁷⁶ *Id.* ¶ 36.

⁷⁷ NPRM ¶ 28.

provider to impose higher rates where low call volumes and/or high costs of service would otherwise prevent it from offering service.

As the Commission is aware, a “one-size-fits-all” solution is not possible for the inmate telephone market.⁷⁸ The broad spectrum of facility size, service characteristics, and call volume make the adoption of one, fixed rate cap unreasonable. For purposes of these Comments, Securus has relied on call volume as the defining factor in order that Mr. Siwek could manageably analyze and report Securus’s cost structure, but call volume is not the only factor in determining what is an appropriate inmate calling rate.⁷⁹ Any rate regulation adopted in this proceeding should provide the Commission with the flexibility to consider these other factors.

A rate variance process will provide that needed flexibility. As drafted and presented to the NMPRC, a rate variance can be requested by a service provider that would like to respond to an RFP but could not meet the required terms of service under the prevailing rate cap. That service provider would propose to the Commission a different rate, and would provide its basis for seeking that rate. That basis could be call volume, transmission costs, or hardware costs.

The alternative to instituting a variance procedure is to preclude a carrier from bidding on certain contracts, quickly resulting in an aggregate decrease in the competition that the industry now experiences. No interested party could want that result.

⁷⁸ NPRM ¶ 22 (citing APCTO Alternative Wright Petition Comments at 5; CCA Alternative Wright Petition Comments at 6-7; GEO Group Alternative Wright Petition Comments at 10; Securus June 22, 2012 *Ex Parte* Letter at 1).

⁷⁹ Letter from Stephanie A. Joyce to Chmn. Kevin J. Martin at 3, 6 (May 23, 2008) (Exhibit 11).

IV. ADDITIONAL ISSUES

The NPRM poses questions about several other discrete issues that Securus will address briefly in turn.

A. The Commission Should Not Impose a Requirement for Free Inmate Telephone Calls

The Commission asks whether it should grant Petitioners' demand for "a certain amount of no-cost calling per inmate per month in each of the facilities they serve[.]"⁸⁰ This request should not be granted, for two reasons.

First, mandatory free calls would be the very definition of a regulatory taking. It would force carriers to provide use of their assets without compensation in violation of the Fifth Amendment.⁸¹ At a minimum, mandatory free calling would effect an unlawful confiscatory rate.⁸² Petitioners' offer to permit a \$0.22 per-minute rate cap "in exchange for" free calls,⁸³ even if that rate were sufficient to recover costs of service, would not make it lawful to force any telephone company to provide free service.

Secondly, implementing Petitioners' demand for free calls would be "next to impossible."⁸⁴ It would require Securus to create "a completely new billing application" (*id.*) that must track each inmate's interstate calls — taking out the in-state calls — and keep a running total of how much those call minutes should cost. The actual billing functionality could not begin for that inmate until the dollar amount threshold is reached. That cycle would repeat for every inmate, in each of the 2,200+ facilities Securus serves, every month. At the least, such

⁸⁰ NPRM ¶ 39.

⁸¹ *E.g.*, *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994).

⁸² *E.g.*, *Alabama Power*, 16 FCC Rcd. at 12232 ¶ 51.

⁸³ NPRM ¶ 39.

⁸⁴ Hopfinger Decl. ¶ 27.

a system would require a staggering amount of work. The resources needed to create that system, added to the lost revenue from giving mandatory free calls, would be prohibitive. It would exacerbate the regulatory taking exponentially.

The Commission should not grant Petitioners' demand for free calls. That action would be both unlawful and unprecedented, and would cripple the inmate telecommunications industry.

B. Debit and Prepaid Account Options Are Increasingly Prevalent, But Their Availability Lies in the Discretion of the Resident Correctional Authority

The Commission asks several questions related to the provision of prepaid call options, such as debit cards and debit accounts.⁸⁵ Securus employs several types of prepaid options, including actual, physical cards and prepaid accounts. Hopfinger Decl. ¶¶ 23-24.

Calling cards, where available, are sold in the facility's commissary and act as cash on any inmate telephone call. They hold specific dollar amounts of worth which typically in \$10.00 increments and is decremented on a minute-of-use basis at the rates which the correctional authority has chosen and approved for that facility. *Id.* ¶ 23. Securus sells the cards to the facility, and then the facility sells them and retains that revenue. Some correctional facilities do not permit calling cards due to the administrative burden and some others do not permit calling cards for their inmates – which can be used by anyone holding the card – due to concerns about violence. *Id.* ¶ 25.

The majority of prepaid calling is done via prepaid accounts. Where permitted by the correctional authority, inmates can hold their own prepaid accounts with Securus. *Id.* ¶ 24. These accounts are typically referred to as “inmate debit” accounts. Otherwise, called parties can establish prepaid accounts with Securus. Accounts can be set up and maintained by

⁸⁵ NPRM ¶ 33.

transactions conducted over the telephone via a 1-800 call, via the Securus website, or by talking with a live Securus representative who are available 24 hours a day, seven days a week, 365 days a year.⁸⁶

Ten years ago, prepaid calling was very rare. At that time, physical calling cards were the only options available, and many correctional authorities declined to use them. Since then, service providers, and especially Securus, have devoted a great deal of time and resources to create workable, safe, and convenient prepaid calling mechanisms. The goal of this effort is to connect inmates to the outside world and facilitate as many telephone calls as possible.

C. Inmate Telecommunications Services Present Unique Billing Difficulties

The Commission expresses concern that inmate telecommunications service providers are blocking inmate collect calls placed to a person with whom there is no billing relationship.⁸⁷ The industry has already in large part resolved this issue, however, to enable inmates to reach their intended called party even absent prior billing relationships.⁸⁸

As Securus explained in Section I.C above, it is increasingly difficult and expensive for inmate service providers to obtain billing and collection agreements with LECs, and as a result Securus has developed methods for establishing prepaid and direct billing arrangements with called parties.⁸⁹ These arrangements can be a monthly billing arrangement, for collect calls, or some type of prepaid account that the called party establishes with Securus.⁹⁰

⁸⁶ Accounts that are created through the Securus products described in Section IV.C below are set up during the initial inmate collect call.

⁸⁷ NPRM ¶ 40.

⁸⁸ Hopfinger Decl. ¶¶ 18, 22-24.

⁸⁹ *Id.* ¶¶ 16-18.

⁹⁰ *Id.* ¶ 18.

In addition, Securus has developed new products that — where the correctional facility permits it — enable an inmate to call someone (other than a protected individual or entity) on a collect basis even if that person has no billing relationship with Securus and even if their LEC has no B&C agreement with Securus. The inmate is permitted a short conversation with the called party, and then the called party is invited to set up a billing arrangement with Securus. The called party is orally given instructions on how to do this. These products help to ensure that inmates reach their intended parties regardless of their billing status.

Wireless phones present a different challenge with regard to completing inmate calls. Some correctional authorities, including the Alaska DOC, prohibit calls to cellular phones due to security concerns. Still other correctional authorities, such as the Florida DOC and Texas Department of Criminal Justice, prohibit calls to “pre-paid” (sometimes called “burner”) cellular phones.⁹¹ These prohibitions have nothing to do with the question whether the called party has an established billing relationship with any telephone company.

Thus, with some exceptions as explained herein, it is increasingly rare that an inmate call is blocked due to a lack of billing arrangement.

D. Inmate Telecommunications Service Providers Have No Control Over the Rates Charged for the Majority of TeleTYpewriter (TTY) Calls

The Commission seeks information “on the types of ICS access” provided to disabled inmates and their called parties and the rates charged for those calls.⁹² Mr. Hopfinger’s Declaration explains in detail the three methods by which a speech-impaired or hearing-impaired person can make and/or accept an inmate-initiated phone call.⁹³

⁹¹ Hopfinger Decl. ¶ 19.

⁹² NPRM ¶ 42.

⁹³ Hopfinger Decl. ¶¶ 6-13.

There are three types of TTY calls: TTY to Voice; TTY to TTY; and Voice to TTY.⁹⁴

TTY to Voice is the most common type. These calls begin by the inmate dialing a 1-800 number to reach the Telecommunications Relay Service (“TRS”) provider in that state. Securus does not charge any fee to any entity for this call to the TRS provider. The TRS provider then establishes a call to the called party over the telephone network via the interexchange carrier (“IXC”) with which it holds a service contract. That call may be charged at the IXC’s regular public payphone collect call rates. AT&T’s rate for such calls is \$5.99 plus \$1.49 per minute — \$20.89 for a 10-minute call.⁹⁵ None of that revenue comes to Securus.

TTY to TTY is the next type of TTY call. Those calls are handled and carried by Securus, because they are a direct-dialed call just like a non-TTY call. If a charge applies, it is Securus’s prevailing rate for inmate calls from that facility.⁹⁶

Voice to TTY is the next and least common type of TTY call. The call path begins with the inmate dialing a 1-800 number to reach the TRS entity. The call to the TRS provider, as with TTY to Voice calls, is completely free of charge and Securus obtains no revenue from it. The TRS entity then establishes the call to the called party via the contracted IXC. The call may be charged at the IXC’s rates for collect calls from a public payphone.⁹⁷

As this evidence shows, Securus has a limited role in TTY calls. Securus earns no revenue on TTY to Voice calls or Voice to TTY calls which comprise the overwhelming majority of calls for speech- and hearing-impaired persons. The state TRS entity, typically

⁹⁴ Hopfinger Decl. ¶¶ 8, 12, 13.

⁹⁵ *Id.* ¶ 11 & Att. 4.

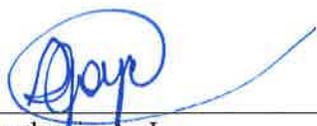
⁹⁶ *Id.* ¶ 12.

⁹⁷ *Id.* ¶ 13.

regulated by the state utility commission, controls both of these types of TTY calls, and the IXC to whom the TRS entity awards the public contract carries the TRS-to-end user portion of the call which may be charged at the IXC's public payphone collect call rates.

CONCLUSION

For all these reasons, the Commission should not adopt the rate caps proposed by the Wright Petitioners. Were the Commission to take any action with regard to inmate calling rates, the results should not be applied to existing service contracts, should ensure that service providers recover all of their costs of service, and should provide the Commission with flexibility to review and approve rates for high-cost, low-volume facilities that service providers otherwise could not serve.

By: 
Stephanie A. Joyce
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

Counsel to Securus Technologies, Inc.

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