

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

In the Matter of Petition for Declaratory
Ruling of Securus Technologies, Inc.

WC Docket No. 09-144

SECURUS TECHNOLOGIES, INC.
APPLICATION FOR REVIEW
(DA 13-1990)

ACCEPTED/FILED

OCT 28 2013

Federal Communications Commission
Office of the Secretary

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SUMMARY

The Commission should set aside the Declaratory Ruling for a number of reasons, each of which is an independent ground for reversal.

First, the Declaratory Ruling contravenes longstanding Commission policy that permits inmate telecommunications providers to prevent inmates' use of alternative phone services without adequate explanation or record support.

Second, Securus is not a local exchange carrier subject to the resale obligations found in Section 251 of the 1996 Act. Yet the Declaratory Ruling in effect would require Securus to offer its service to third-party providers for resale as an input to their "call routing" service.

Third, the Declaratory Ruling lacks statutory authority, because it in effect requires Securus to interconnect with third-party "call routing service" providers. These entities are not entitled to any interconnection rights under any statute or Commission rule.

Fourth, the Declaratory Ruling is arbitrary and capricious, because it requires Securus to provide its finished call platform services to competing entities free of charge. Even where a carrier is required to interconnect with or otherwise provide facilities to its competitors, the Commission has never required the carrier to subsidize its competitors with free service.

Fifth, because the Declaratory Ruling requires Securus to provide its call platform services to third parties for free, the Declaratory Ruling effects a regulatory taking of Securus's property. If permitted to stand, the Declaratory Ruling violates the Fifth Amendment as well as Commission precedent with respect to compensation owed to payphone service providers.

Finally, the Declaratory Ruling would have the effect of abrogating Securus's contracts with correctional facilities. Securus is required by contract to detect dial around, call

forwarding, and any scheme to connect an inmate call to a number other than the dialed number. In the vast majority of Securus's contracts, Securus is obligated to terminate such calls. The Declaratory Ruling purports to prohibit Securus's compliance with those contractual terms. As such, the Declaratory Ruling contravenes the Contract Clause of the U.S. Constitution.

TABLE OF CONTENTS

BACKGROUND 1

 A. The Securus Petition for Declaratory Ruling..... 1

 B. Record Support for the Petition 2

 C. The Securus Application for Approval of Indirect Change of Control and
 Its Relationship to the Securus Petition 2

ARGUMENT 5

I. THE DECLARATORY RULING IS AN UNREASONABLE REVERSAL OF
 LONGSTANDING AGENCY POLICY 5

II. THE DECLARATORY RULING MANDATES, WITHOUT AUTHORITY,
 A SYSTEM OF INTRA-FACILITY COMPETITION THAT IS FREE OF CHARGE
 TO CALL DIVERTERS..... 7

 A. The Declaratory Ruling Unlawfully Imposes a *De Facto* Resale Obligation on
 Inmate Telecommunications Services 8

 B. The Declaratory Ruling Unlawfully Requires Securus to Interconnect with
 Call Diverters 8

 C. The Declaratory Ruling Is Unreasonable, Arbitrary, and Capricious in Requiring
 Securus to Give Use of Its Calling Equipment to Competitors Free of Charge ... 11

III. THE DECLARATORY RULING EFFECTS AN UNCONSTITUTIONAL
 REGULATORY TAKING 12

IV. THE DECLARATORY RULING UNLAWFULLY ABROGATES SECURUS’S
 CONTRACTS..... 15

CONCLUSION..... 18

Attachment WC Docket No. 09-144, Declaratory Ruling and Order, DA 13-1990
 (rel. Sept. 26, 2013)

Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.104, applies to the Federal Communications Commission (the “Commission”) for review of the Declaratory Ruling and Order issued September 26, 2013, by the Wireline Competition Bureau under delegated authority.¹ The Declaratory Ruling contains several errors of law, each of which provides an independent ground to reverse the Bureau’s decision.

BACKGROUND

On July 24, 2009, Securus filed a Petition for Declaratory Ruling (“Petition”) seeking confirmation that inmate telecommunications providers that hold service contracts with correctional facilities may prevent inmates from using automated call-forwarding arrangements in order to reach a terminating phone number other than the one dialed.

A. The Securus Petition for Declaratory Ruling

The Securus Petition relied on longstanding Commission precedent holding that, due to the security and penological concerns in the correctional environment, inmates are not entitled to the same multi-carrier, competitive environment in which public payphones operate.² Since 1991, the FCC has been “persuaded that the provision of such phones to inmates presents an exceptional set of circumstances that warrants their exclusion from” the prohibition on call-blocking that applies to payphones provided to the general public.³ Since 1995, the FCC has

¹ *Petition for Declaratory Ruling of Securus Technologies, Inc.*, WC Docket No. 09-144, *et al.*, Declaratory Ruling and Order, DA 13-1990 (rel. Sept. 26, 2013) (“Declaratory Ruling”).

² Petition at 4-6, 15-16 (citing and quoting *Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators*, CC Docket No. 94-158, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 94-352, 10 FCC Rcd. 1533, 1534 ¶ 15 (1995); *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 (1998) (“*Billed Party Preference Order*”); *Policies and Rules Concerning Operator Service Providers*, CC Docket 90-313, Report and Order, 6 FCC Rcd. 2744 (1991) (“*TOCSIA Order*”).

³ *TOCSIA Order*, 6 FCC Rcd. at 2752 ¶ 15.

been aware of “the practice of prison authorities at both the federal and state levels, including state political subdivisions, to grant an outbound calling monopoly to a single IXC serving the particular prison,”⁴ and has maintained that “[t]his approach appears to recognize the special security requirements applicable to inmate calls.”⁵

The Petition also made clear that “the special security requirements applicable to inmate calls” were the genesis of Securus’s obligation, as demanded by its correctional facility clients, to prevent third parties from diverting a call to an unknown, untraceable number.⁶

B. Record Support for the Petition

As the Appendix to Securus’s Reply Comments show,⁷ dozens of law enforcement agencies as well as seven other service providers filed initial comments in support of the Securus Petition. These filings were in addition to the 11 correctional agencies that had sent Securus letters urging it to block call diversion attempts.⁸ Later in the proceeding, several additional correctional agencies filed *ex parte* letters supporting the Petition.⁹

C. The Securus Application for Approval of Indirect Change of Control and Its Relationship to the Securus Petition

On March 15, 2013, Securus Technologies Holdings, Inc. and T-NETIX Telecommunications Services, Inc., a wholly owned subsidiary of Securus, each filed a Joint

⁴ *Billed Party Preference Order*, 13 FCC Rcd. at 6156 ¶ 57.

⁵ *Id.*

⁶ Petition at 6, 13-14 and Declaration of Robert Pickens ¶¶ 5-12 (July 24, 2009).

⁷ WC Docket No. 09-144, Securus Technologies, Inc. Reply Comments in Support of Petition for Declaratory Ruling (Sept. 10, 2009).

⁸ Securus Petition Exs. 18-28.

⁹ WC Docket No. 09-144, Letter from Jay A. Nolte, Assistant Warden, Columbiana County Jail, to Marlene H. Dortch, FCC (rec’d Sept. 8, 2009, posted Sept. 10, 2009); Letter from Thomas Perrin, Warden, Somerset County Jail, to Marlene H. Dortch, FCC (rec’d Aug. 31, 2009, posted Sept. 8, 2009); Letter from Maj. Roger Paxton, Richland County Jail, to Marlene H. Dortch, FCC (rec’d Aug. 27, 2009, posted Sept. 14, 2009).

Application for Streamlined Consent to Domestic and International Transfer of Control pursuant to Section 214 of the Communications Act (“Applications”). The Applications explained that the majority stakeholder of Securus was selling its interest to an investment firm, and that the transaction would “be seamless and transparent” to end users. They also stated that Securus would make no changes to its services or rates in the immediate term. The Applications also made clear that the transaction would not result in any additional market share for Securus, nor any increased concentration in the inmate telecommunications services market.

The Applications were slightly revised as to the proposed corporate ownership structure by letter dated March 20, 2013.¹⁰ On March 28, 2013, the Applications were put out for public comment with a deadline of April 11, 2013.¹¹

At almost midnight on April 11, 2013, Public Knowledge electronically served Securus with a Petition to Deny Applications (“PK Petition”). It argued that the rates Securus charges for inmate telephone calls are too high and that, despite being a mere sale of stock from one investment group to another, the transaction would result in increased market concentration.

On April 15, 2013, Securus filed an Opposition to the PK Petition. Securus explained that the PK Petition was unfounded and raised matters outside the scope of Section 214. With regard to market share, Securus showed that the Applications on their face disproved any possibility that the indirect transfer of control would gain it any additional market share.

¹⁰ WC Docket No. 13-79, Letter from Paul Besozzi to Marlene H. Dortch (Mar. 20, 2013).

¹¹ WC Docket No. 13-79, *Domestic Section 214 Application Filed for the Transfer of Control of the Operating Subsidiaries of Securus Technologies Holdings, Inc. to Securus Investment Holdings, LLC*, DA 13-578, 28 FCC Rcd. 3402 (2013).

With regard to inmate calling rates, Securus referred to the rate proceeding that was well underway in WC Docket No. 12-375¹² as the proper forum to discuss PK's concerns.

The Applications were removed from streamlined review due to the PK Petition.

On April 25, 2013, Millicorp, which owns and operates the website www.ConsCallHome.com, filed a Reply to the Securus Opposition. Millicorp argued that the Applications should be denied on the ground that Securus had filed the Petition for Declaratory Ruling and was preventing Millicorp from diverting inmate calls.

Also on April 25, Securus met with then-Commissioner Mignon Clyburn about the PK Petition, reiterating the grounds for which it should be rejected.¹³ Securus was told that the Applications would be granted as soon as Securus made an arrangement with Millicorp that would permit its call diversion arrangements to operate so long as the security concerns of Securus and the correctional facilities were addressed.

On April 26, 2013, Securus filed the terms of the arrangement it made with Millicorp the previous evening after meeting with Commissioner Clyburn.¹⁴

On April 29, 2013, the Wireline Competition Bureau granted the Applications.¹⁵

¹² WC Docket No. 12-375, *Rates for Inmate Interstate Calling Services*, Notice of Proposed Rulemaking, 27 FCC Rcd. 16629 (2012). The rate proceeding was concluded, in part, with the release of the Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, released September 26, 2013. The Declaratory Ruling references this order at Footnotes 3 and 10.

¹³ WC Docket No. 13-79, Letter from Monica Desai to Marlene H. Dortch (Apr. 29, 2013).

¹⁴ WC Docket No. 13-79, Letter from Dennis J. Reinhold, Vice President and General Counsel of Securus, to Marlene H. Dortch (Apr. 26, 2013).

¹⁵ WC Docket No. 13-79, *Applications Granted for the Transfer of Control of the Operating Subsidiaries of Securus Technologies Holdings, Inc. to Securus Investment Holdings, LLC*, DA 13-961, 28 FCC Rcd. 5720 (2013).

The Declaratory Ruling acknowledges the Securus-Millicorp arrangement, noting that it occurred “in conjunction with a transfer of control application”.¹⁶ The Bureau “expect[s] that Securus will abide by its commitment” in that arrangement.¹⁷

ARGUMENT

I. THE DECLARATORY RULING IS AN UNREASONABLE REVERSAL OF LONGSTANDING AGENCY POLICY

The Declaratory Ruling reverses the Commission’s longstanding policy that inmate telecommunications carry too important a role in public safety to be supplanted by a multi-provider system.¹⁸ In reversing this position, the Bureau pretends that the precedent which established that policy is inapposite here. That pretention fails, and thus the Declaratory Ruling lacks any basis in law and should be reversed.

As stated above, the Securus Petition relied in part on the Commission’s *TOCSIA* and *Billed Party Preference* orders. In those orders, the Commission exempted inmate telephones from all TOCSIA requirements,¹⁹ and left undisturbed the single-provider contract system for inmate telecommunications.²⁰ The Declaratory Ruling does not reverse or call into question either of those decisions.

Instead, the Declaratory Ruling attempts to distinguish those decisions through unreasonably narrow, and novel, constructions and by ignoring record evidence. First, with

¹⁶ Declaratory Ruling ¶ 7.

¹⁷ *Id.*

¹⁸ *E.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (“an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change”) (vacating order); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”).

¹⁹ *TOCSIA Order*, 6 FCC Rcd. at 2752 ¶ 15.

²⁰ *Billed Party Preference Order*, 13 FCC Rcd. at 6156 ¶ 57.

regard to the *TOCSIA Order*, the Bureau dismissed the penological need for exempting inmate phones from dial-around blocking by making the unsurprising assertion that call diverters do not fit the definition of “operator services providers”.²¹ Securus never pretended the contrary; indeed, part of the inequity of the call diverters’ business plan is that they are not a certificated common carrier of any type, and they cannot and will not provide operator services as correctional facilities require. The point of the *TOCSIA Order* is that operator services providers in the inmate context are permitted to block attempts to use alternate long-distance service providers. Their regulatory classification is irrelevant.

Second, with regard to the *Billed Party Preference Order*, the Bureau distinguishes the inmate-phone exemption from the call-diversion scenario by stating that “[t]hose services are used not by inmates, but by the friends and relatives that” subscribe to call-diversion services.²² That reasoning fails on two grounds: (1) it is a distinction without a difference, because the point of the *Billed Party Preference Order* is its express acceptance of the single-provider system for inmate phones; and (2) record evidence shows that inmates are knowing, deliberate participants in call-diversion arrangements.²³

Call diversion schemes are a means to circumvent the calling system which the correctional facility chose to be the sole provider for a term of years. The *Billed Party Preference Order* could have but did not displace, or even decry, that single-provider arrangement.²⁴ The Declaratory Ruling unavoidably overrules that order *sub silentio* and thus

²¹ Declaratory Ruling ¶ 13.

²² *Id.* ¶ 14.

²³ Securus Petition at 7-8.

²⁴ *Billed Party Preference Order*, 13 FCC Rcd. at 6156 ¶ 57.

lacks the “reasoned analysis” that *State Farm* and *Greater Boston* require.²⁵

Inmates are well aware of and participate in the decision to use call diversion arrangements. *The inmates are dialing the phones.* The inmate is actively aware that the “local number” being dialed is not the registered telephone number of their friend or family member.²⁶ In addition, where a correctional facility limits inmates to calling a certain number of terminating phone numbers, and verifies the registrants of those phone numbers, the inmates must change their approved-number list to replace the called party’s true terminating number with the “local number” that the call diverter sold to the called party. To conclude that call-diversion arrangements “are used not by inmates,”²⁷ and thus the *Billed Party Preference Order* has no application to the Securus Petition, is to ignore both record evidence and common sense. Administrative agencies are required to make decisions that are more grounded and sensible than that.

Because it unreasonably departs from and ignores the plainly apposite precedent in the *TOCSIA Order* and *Billed Party Preference Order*, the Declaratory Ruling is flawed and should be set aside by the Commission.

II. THE DECLARATORY RULING MANDATES, WITHOUT AUTHORITY, A SYSTEM OF INTRA-FACILITY COMPETITION THAT IS FREE OF CHARGE TO CALL DIVERTERS

In rejecting the *TOCSIA Order* and *Billed Party Preference Order* and requiring inmate telecommunications service providers to permit call diversion attempts to proceed, the Declaratory Ruling has mandated a multiple-provider service arrangement at each correctional facility where call diverters seek to do business. The Bureau has no authority to impose this

²⁵ See *supra* n.17.

²⁶ See Securus Petition at 7.

²⁷ Declaratory Ruling ¶ 14.

unprecedented regime on the inmate telecommunication industry. Whether it be deemed a resale arrangement, an interconnection obligation, or simply the requirement to offer wholesale service for free, the unprecedented regime created by the Declaratory Ruling is unlawful.

A. The Declaratory Ruling Unlawfully Imposes a *De Facto* Resale Obligation on Inmate Telecommunications Services

The Declaratory Ruling has the effect of imposing on Securus the obligation to make its service available on a wholesale basis to other providers free of charge. Any call diverter now is entitled to use Securus's hardware and software as free wholesale inputs to their call diversion arrangements. The Commission has no authority to impose this *de facto* resale obligation on the inmate telecommunications industry.

Securus is not a local exchange carrier ("LEC"). The local competition provisions of the Telecommunications Act of 1996 ("1996 Act"), including the resale obligation in Section 251,²⁸ thus have no application to Securus. Yet the scheme created by the Declaratory Ruling is undeniably resale. Third parties now would be entitled to use Securus's finished calling service in much the same way that Section 251 requires ILECs to provide finished local exchange service to competitive LECs for resale to retail end users. The Commission has no authority and no precedent to support this regulatory intrusion into the operations of inmate telecommunications providers.

B. The Declaratory Ruling Unlawfully Requires Securus to Interconnect with Call Diverters

The Declaratory Ruling invents a new requirement for inmate telecommunications service providers: mandatory interconnection with multiple third parties. In

²⁸ 47 U.S.C. § 251(b)(1) ("Each **local exchange carrier** has" the "duty to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.") (emphasis added)

refusing to apply the longstanding *TOCSIA* and *Billed Party Preference* policies to call diversion issues, the Bureau unwittingly has made new law.

In effect, the Declaratory Ruling will force Securus and other ICS providers to interconnect with call diverters at their VoIP router, at no cost to them. This uncompensated interconnection requirement is unprecedented. As stated above, Securus is not a LEC subject to the interconnection requirements of the 1996 Act. Nor are the call diverters telecommunications carriers entitled to any interconnection rights under the 1996 Act.²⁹

In an analogous context, the Commission imposed Open Network Architecture (“ONA”) and Comparably Efficient Interconnection (“CEI”) requirements, but only on dominant carriers, *i.e.*, the Bell Operating Companies (“BOCs”) and AT&T.³⁰ These carriers were permitted, of course, to charge interconnection fees to the enhanced service providers.³¹ The Commission later noted that the imposition of ONA requirements likely implicated Section 205 of the Communications Act, requiring a full opportunity for hearing before the Commission.³²

Here, by contrast, the Declaratory Ruling effectively imposes ONA and CEI

²⁹ See 47 U.S.C. § 251(a)(1) (providing that “[e]ach **telecommunications carrier** has the duty to interconnect directly or indirectly with the facilities and equipment of **other telecommunications carriers**”) (emphasis added). There can be no reasonable dispute that the non-interconnected VoIP service provided by the dial-around VoIP providers, *see* 47 C.F.R. § 9.3, is not a telecommunications service, and thus these service providers are not telecommunications carriers entitled to interconnection under the 1996 Act.

³⁰ See, *e.g.*, CC Docket No. 85-229, *In the Matters of: Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Report and Order, 104 FCC 2d 958, 964-65 ¶¶ 4-5 (1986); *see also* 47 C.F.R. § 64.702.

³¹ *Id.*

³² See CC Docket No. 90-368, *Computer III Remand Proceedings*, Report and Order, 5 FCC Rcd. 7719, 7721 ¶ 13 (1990) (“We believe that use of our notice and comment rulemaking procedures fully satisfies the hearing requirement of Section 205.”).

requirements on Securus and other inmate telephone service providers – but without providing for compensation. The call diverters thus will be permitted to free-ride off these carriers’ networks. This new regime is inappropriate for the inmate calling services industry.

Similarly, the D.C. Circuit has held that “if the FCC wants to compel [a carrier] to establish a through route with another carrier, then the FCC must ... order a carrier to establish a through route;” such an order may enter “only after opportunity for a hearing.”³³ In *AT&T*, the court overturned a Commission declaratory ruling that required AT&T to involuntarily interconnect with competitive local exchange carriers (“CLECs”) without a hearing.³⁴ The court credited the Commission’s previous decision that “if a customer could effect the establishment of a through route, this would permit the customer to do at will what this Commission cannot do without a finding, after opportunity for hearing, that such action is necessary or desirable in the public interest and would result in a clear circumvention of the Congressional intent expressed in § 201(a) of the Act.”³⁵

The Declaratory Ruling, however, compels Securus and other ICS providers to effectively establish a through route to the call diverters – without a hearing – based solely on “persons who subscribe to call routing services.”³⁶ As stated above, however, the Commission has long held that a customer cannot effect the establishment of a through route when the Commission itself cannot do so without providing effected carriers with an opportunity for a hearing. The same result should be reached here: Securus and other inmate telephone service providers should not be forced to interconnect with call diverters without a hearing or a

³³ *AT&T Corp. v. FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002).

³⁴ *Id.*

³⁵ *Id.* (citing *American Tel. & Tel. Co. & the Western Union Tel. Co.*, 5 Rad. Reg. (P&F) 639, 659 (1949) (internal citations omitted)).

³⁶ Declaratory Ruling ¶ 15.

Commission determination that such interconnection is in the public interest on a case-by-case basis.

C. The Declaratory Ruling Is Unreasonable, Arbitrary, and Capricious in Requiring Securus to Give Use of Its Calling Equipment to Competitors Free of Charge

The Declaratory Ruling's mandate that Securus give call diverters free use of its equipment is in error for the additional reason that it is simply unreasonable. It has never been the case, even under the 1996 Act, that a carrier is required to provide equipment or services to a competitor for free. For this additional reason, the Commission should overturn the decision.

The outcome wrought by the Declaratory Ruling is, as described above, closely analogous to the local competition provisions of Section 251. For purposes of this issue, the leasing of unbundled network elements ("UNEs") is an appropriate facsimile to the Declaratory Ruling. The Commission of course did not require incumbent LECs to give UNEs to competitive LECs for free. Rather, Section 252 required the Commission to derive a methodology for setting cost-based rates for UNEs. As we know, the result was the Total Element Long-Run Incremental Cost ("TELRIC") methodology.

The U.S. Supreme Court affirmed TELRIC, reasoning that a Section 252 pricing model can be anything "short of confiscating the incumbents' property."³⁷ As explained herein, the Declaratory Ruling certainly fails that standard. And in addition to effecting a taking, the Declaratory Ruling simply is an unreasonable, arbitrary, and capricious decision that warrants reversal.

³⁷ *Verizon v. FCC*, 535 U.S. 467, 489 (2002).

III. THE DECLARATORY RULING EFFECTS AN UNCONSTITUTIONAL REGULATORY TAKING

The Declaratory Ruling purports to force Securus to give call diverters full access to its assets for the purpose of initiating, screening, and monitoring inmate telephone calls. That access would be completely free of charge. As such, the Commission is effecting a regulatory taking of Securus's assets and services in contravention of the Just Compensation Clause of the Fifth Amendment.³⁸

The Just Compensation Clause prohibits uncompensated occupations of an entity's property.³⁹ An uncompensated occupation of property that is enabled by government regulation violates this Clause "without regard to the public interests that it may serve."⁴⁰ "Electronic signals generated and sent by computer" are "sufficiently tangible" to be deemed an occupation.⁴¹

Further, as the Bureau found, the manner in which these call diversion schemes operate is to provide the inmate the ability to call a telephone number that is local to his prison facility.⁴² The record established in this docket and in WC Docket No. 12-375, however, demonstrates that many inmate calling service providers are required to provide free local

³⁸ U.S. Const. amend. V.

³⁹ *E.g.*, *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (striking FCC physical colocation rules).

⁴⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (New York statute requiring landlords to permit CATV installation violated Just Compensation Clause).

⁴¹ *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (unsolicited emails support claim for trespass to chattel); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (Takings Clause implicated by "a physical 'invasion' of" property, "no matter how minute the intrusion") (internal citations omitted).

⁴² Declaratory Ruling ¶ 5.

calling.⁴³ The Declaratory Ruling therefore will force inmate calling service providers to provide full access to their proprietary systems and networks to third-party “call routing services”⁴⁴ providers, leaving them with compensation of, at most, a local calling rate. In the millions of instances in which local calls must be provided for free, the inmate service provider receives zero revenue at all. Setting an effective rate of \$0.00, which the Declaratory Ruling has done, is by definition a confiscatory taking.⁴⁵

Not only does the Declaratory Ruling violate the Just Compensation Clause of the Fifth Amendment, it also contravenes Section 276⁴⁶ and established Commission precedent to ensure that payphone providers be compensated justly.⁴⁷ In the *Payphone Compensation Order*, the Commission held that “considerations of equity require us to prescribe compensation” to payphone providers that were required to provide access to the consumer’s preferred OSP.⁴⁸ The

⁴³ See, e.g., Comments of Human Rights Defense Center, WC Docket No. 12-375, at 10 (Mar. 25, 2013) (noting that Alaska requires free local calls for state prisoners, while in New Hampshire the first five minutes of local calls must be provided at no charge); Securus Technologies, Inc. Notice of *Ex Parte*, WC Docket Nos. 12-375 and 09-144, at 2 & Attachment (May 31, 2013) (stating that Securus must give away 1 million free calls per month, because certain categories of calls must be provided free of charge, such as local calls, under certain contracts); Pay Tel Communications, Inc. *Ex Parte* Presentation, WC Docket No. 12-375, at Attachment 2, *Changes in ICS Costs in Jails: 2008 to Present*, at 1 (July 3, 2013) (highlighting obligation of inmate calling service providers to provide inmates with free local calls).

⁴⁴ Declaratory Ruling ¶ 10.

⁴⁵ See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”).

⁴⁶ “[T]he Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone” 47 U.S.C. § 276(b)(1).

⁴⁷ See CC Docket No. 91-35, *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd. 4736, 4745-46 ¶¶ 33-34 (1991) (“*Payphone Compensation Order*”).

⁴⁸ *Id.* ¶ 34.

Commission reasoned that by

providing the equipment through which the consumer initiates calls to the OSP of choice, the payphone owner is benefiting the public but is not guaranteed any revenue for access code calls. In addition, the payphone owner must expend financial resources to maintain the equipment. It is only fair that these costs be shared by consumers who benefit from the ability to make access code calls and by OSPs who derive revenue from the calls.⁴⁹

An indistinguishable situation presents itself here. Securus has a contractual obligation to provide inmate calling equipment – Securus is a payphone service provider. Securus also must perform all of the necessary call initiation, validation, and security screening required for inmate calls. But the Declaratory Ruling would require Securus to hand an inmate-initiated call off to the call diverter, often with no guarantee that Securus will receive any revenue for that “local” call. This result plainly violates Section 276 and the *Payphone Compensation* rules.

Add to that, Securus is not being compensated to develop and deploy the additional software required for resolving the call diverters’ “local” numbers. Securus’s systems must distinguish between VoIP-diverted calls and the other forms of dial-around and call forwarding. Securus also must coordinate with the call diverters and develop procedures for interacting with their end users. All of this work requires new policies and new work. In this additional way, the Declaratory Ruling requires Securus to incur considerable costs without compensation.

The Declaratory Ruling creates unrecoverable costs and uncompensated obligations for Securus, each of which constitutes a clear regulatory taking. The Commission can reverse the Declaratory Ruling on this independent ground alone.

⁴⁹ *Payphone Compensation Order*, 6 FCC Rcd. 4736 ¶ 34.

IV. THE DECLARATORY RULING UNLAWFULLY ABROGATES SECURUS'S CONTRACTS

The Declaratory Ruling purports to force Securus to cede its performance of public contracts to third parties – the call diverters – that have neither privity nor any relationship with Securus's correctional facility clients. Indeed, inmate telecommunications service providers are required by contract to, at the least, detect attempts to make dial-around calls or to forward an inmate call. In the vast majority of contracts, the service providers are required to terminate a call when such activity is detected.⁵⁰

The Declaratory Ruling thus prevents Securus from performing its contractual obligations. The United States Constitution, however, protects contracts – even contracts with regulated utilities – from being abrogated or altered by new regulations.⁵¹ 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),⁵² and later in a set of cases establishing what is known as the *Sierra-Mobile Doctrine*.⁵³ 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

⁵⁰ Securus Petition at 8-9, 13.

⁵¹ U.S. Const. Art. 1, Sec. 10.

⁵² 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.

⁵³ *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).

arrangements which all agree is essential to the health of the ... industry.”⁵⁴ 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.”⁵⁵

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.”⁵⁶ As such, the Commission has instructed that any complainant seeking to avoid or change an existing contract “faces a heavy burden.”⁵⁷ For these reasons, the Commission has refused to rewrite or alter satellite capacity contracts,⁵⁸ microwave transmission contracts,⁵⁹ 900 transport service,⁶⁰ and contracts to buy network programming.⁶¹

The same result should hold here. The Declaratory Ruling unlawfully prevents Securus’s ability to comply with its existing contracts. To prohibit Securus from complying with an existing contract has the same effect as nullifying or reforming it. Agencies can take that

⁵⁴ *Mobile*, 350 U.S. at 343-44.

⁵⁵ *Id.* at 355.

⁵⁶ *IDB Mobile Commc’ns, Inc. v. COMSAT Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 11474, 11480 ¶ 15 (2001) (“*IDB*”).

⁵⁷ *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 654 ¶ 17 (1995) (“*ACC Long Distance*”).

⁵⁸ *IDB*, 16 FCC Rcd. at 11486 ¶ 26.

⁵⁹ *ACC Long Distance*, 10 FCC Rcd. 654 ¶ 18.

⁶⁰ *Ryder Communs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd. 13603, 13617 ¶ 31 (2003).

⁶¹ *Echostar Communs. Corp. v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13 FCC Rcd. 21841, 21849 ¶ 20 (1998).

radical action only for truly extraordinary exigent circumstances, and those circumstances are not present here.

Finally, it bears mention that call diverters do not have any contracts with correctional facilities. They do not even bid for the contracts. The correctional facilities are not even aware whether, and if so which, call diverters are re-routing calls from their inmate phones. But Securus, as well as the other service providers that filed comments supporting the Petition, do participate in the public bidding process and expend considerable resources in negotiating and performing the contracts that they win.⁶² On the part of the correctional facilities, the bidding process requires months of work, because each bidder must be closely evaluated in its ability to provide safe, secure, and trackable inmate calling systems. The Declaratory Ruling has the effect of reducing all of that work to naught, because any third party with a VoIP router and a block of numbers can undo all of the work agencies do to operate the contracting process.⁶³ Call diverters benefit, but the public interest will suffer.

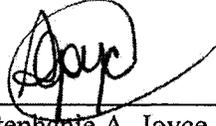
⁶² In related WC Docket No. 12-375, which reviewed interstate inmate calling rates, Securus submitted a sworn declaration demonstrating that “[t]he competition for service contracts is, to put it mildly, robust.” Comments of Securus Technologies, Inc. at 2 (Mar. 25, 2013). Securus explained that “the 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.” *Id.* (citing Declaration of Curtis L. Hopfinger, Director – Regulatory and Government Affairs, ¶ 4 (Mar. 25, 2013)).

⁶³ As stated above and in the Petition, the Commission has refused to displace this contracting process and recognizes its importance to prison security and public safety. *Billed Party Preference Order*, 13 FCC Rcd. at 6156 ¶ 57.

CONCLUSION

For all these reasons, the Commission should grant this Application and set aside the Declaratory Ruling.

By: _____



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Dated: October 28, 2013

CERTIFICATE OF SERVICE

I hereby certify on this 28th day of October, 2013, that the foregoing Application for Review, with the Attachment, was served via First Class and electronic* mail on the following persons:

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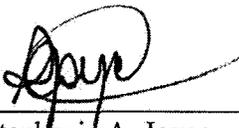
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ATTACHMENT

**WC Docket No. 09-144,
Declaratory Ruling and Order,
DA 13-1990
(rel. Sept. 26, 2013)**

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

In the Matter of)	
)	
Policies and Rules Concerning Operator Service Providers)	CC Docket No. 90-313
)	
Amendment of Policies and Rules Concerning Operator Service Providers and Aggregators)	CC Docket No. 94-158
)	
Petition for Declaratory Ruling of Securus Technologies, Inc.)	WC Docket No. 09-144
)	

DECLARATORY RULING AND ORDER

Adopted: September 26, 2013

Released: September 26, 2013

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, the Wireline Competition Bureau (Bureau) denies the Petition for Declaratory Ruling (Petition) filed by Securus Technologies, Inc. (Securus).¹ In its Petition, Securus requests a declaratory ruling that “call diversion schemes are a form of dial-around calling which Securus is permitted to block” under existing Commission precedent.² We deny the Petition because we conclude that the precedent cited by Securus does not authorize the call blocking practice described in the Petition. As the Commission has previously found, call blocking is largely antithetical to the fundamental goal of ubiquity and reliability of the telecommunications network. We find that this situation is no exception. This Declaratory Ruling and Order furthers the Commission’s goals of ensuring the integrity and reliability of telecommunications networks.³

¹ See Petition for Declaratory Ruling of Securus Technologies, Inc., WC Docket No. 09-144 (filed July 24, 2009) (Petition).

² See *id.* at 1.

³ On August 9, 2013, the Commission adopted a Report and Order and Further Notice of Proposed Rulemaking addressing numerous issues related to calls placed by inmates in confinement facilities, and concluding that, billing-related call blocking by interstate ICS providers that do not offer an alternative to collect calling is an unjust and unreasonable practice under section 201(b). *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, at para. 111 (rel. Sept. 26, 2013) (*Rates for Interstate ICS Order and FNPRM*). In the Further Notice of Proposed Rulemaking, the Commission sought comment on whether it should address call blocking generally, and specifically whether there should be exceptions to the general prohibition on blocking for billing related issues, or for non-geographically based numbers. *Id.* at paras. 172-75.

II. BACKGROUND

A. The Inmate Calling Services Industry

2. Section 276 of the Communications Act of 1934, as amended (the Act), classifies inmate calling services (ICS) as payphone service.⁴ However, ICS is different from the public payphone services that non-incarcerated individuals use. For example, each correctional facility is typically served by a single ICS provider, which receives an exclusive contract to serve that facility after a competitive bidding process.⁵ Consequently, inmates only have access to payphones operated by a single provider for all available services at that payphone.⁶

3. ICS also differs from public payphone services because of security concerns. In light of those concerns, calls from correctional facilities often are limited to pre-approved numbers; prison security rules typically require that a special automated voice-processing system, rather than a pre-subscribed operator service provider (OSP), process inmate collect calls so that prison authorities can screen the calls; and those calls are monitored and recorded.⁷ In addition, ICS providers may employ blocking mechanisms to prevent inmates from making direct-dialed calls, access code calls, 800/900 number calls, or calls to individuals not on the inmates' approved contact lists.⁸

4. ICS rates generally are much higher than rates for public payphone services, and rates for ICS long distance calls, both intrastate and interstate, are usually higher than rates for local ICS calls. In 2012, the Commission initiated a separate rulemaking proceeding to "consider whether changes to our rules are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities."⁹ In the Report and Order released today in that proceeding, the Commission required ICS rates to be cost-based and adopted safe harbor rate levels that will be presumed to meet that requirement as well as overall rate caps for interstate collect and debit/prepaid ICS calling to ensure just, reasonable, and fair interstate ICS rates.¹⁰ The Commission also initiated a Further Notice of Proposed Rulemaking seeking comment on refining the rates and reforming intrastate rates, among other issues.

B. Petition for Declaratory Ruling

5. In 2008, a company called Teleware, LLC, which was purchased by Millicorp in April 2009, began offering a Voice over Internet Protocol ("VoIP") service called ConsCallHome ("CCH").¹¹ This service provides pre-paid VoIP service to customers who wish to communicate with an incarcerated

⁴ "As used in this section, the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services." 47 U.S.C. § 276(d).

⁵ See *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16632, para. 5 (2012) (*2012 ICS NPRM*).

⁶ See *id.*

⁷ See *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 para. 9 (2002) (*Inmate Calling Order on Remand and NPRM*).

⁸ See *id.*

⁹ See *2012 ICS NPRM* at 16630, para. 1.

¹⁰ See generally *Rates for Interstate ICS Order and FNPRM*; see also *supra* note 1 (noting that the Further Notice also seeks comment on blocking issues).

¹¹ Millicorp Comments, WC Docket No. 09-144, at 2 n.1 (filed Aug. 28, 2009).

friend or family member.¹² Each CCH customer is assigned a telephone number “that is a ‘local dial number’ in the community where the inmate with whom the customer wants to communicate is incarcerated.”¹³ When an inmate dials the local number assigned to a CCH customer, Millicorp “routes the call to the CCH customer’s designated location via its IP-based network.”¹⁴ Millicorp “charges its customers for [this] service,” and each CCH customer “must have a separate pre-paid account with the [correctional facility’s] selected ICS provider . . . to cover the local call charges assessed for the call” by that provider.¹⁵ By using CCH, the friends and relatives of inmates have, as a practical matter, been able to pay rates for local ICS calls and avoid paying the higher rates for long distance ICS calls.¹⁶

6. On July 24, 2009, shortly after it learned of the availability of the CCH service, Securus, an ICS provider, filed the Petition that is the subject of this Order.¹⁷ Securus contends that CCH and similar services are “[c]all diversion schemes” that “re-route inmate-initiated calls to unknown terminating telephone numbers.”¹⁸ Securus requests “a declaratory ruling that [such] call diversion schemes are a form of dial-around calling which Securus is permitted to block under” Commission precedent governing operator services.¹⁹ Securus seeks confirmation that the Commission’s 1991 Order implementing the Telephone Operator Consumer Services Improvement Act (*TOCSIA Order*) and the Commission’s 1998 Billed Party Preference Order (*BPP Order*) authorize Securus to block calls from inmates to CCH customers and subscribers to similar call routing services. The *TOCSIA Order*, among other things, adopted rules to prohibit aggregators from blocking calls to 1-800 and 1-950 telephone numbers used to access alternative service providers, but concluded that ICS providers did not meet the definition of aggregator and, therefore, could block such calls.²⁰ The *BPP Order* declined to adopt billed party preference, which would permit a consumer to choose its operator service provider, for outgoing calls by prison inmates.²¹

7. Earlier this year, in conjunction with a transfer of control application filed with the Commission, Securus made a commitment “to cease and desist any and all blocking of inmate-initiated calls to Millicorp Numbers except to the extent permitted” under certain procedures developed jointly by Securus and Millicorp.²² Although we expect that Securus will abide by its commitment to discontinue

¹² *Id.* at 5.

¹³ *Id.* at 6.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 6.

¹⁶ See Citizens United for Rehabilitation of Errants (CURE) Comments, WC Docket No. 09-144, at 1 (filed Aug. 31, 2009) (noting that consumers have an “incentive to use . . . call routing services” such as CCH in order to avoid paying the “exorbitant rates” for long-distance calls made by inmates); see also 2012 ICS NPRM, 27 FCC Rcd at 16644 para. 41 (citing evidence that recipients of calls from inmates “are obtaining telephone numbers, from wireless or VoIP providers, that are local to the prison to take advantage of lower local calling rates”).

¹⁷ Petition at 2.

¹⁸ Petition at 6.

¹⁹ *Id.* at 1 (citing *Policies and Rules Concerning Operator Service Providers*, CC Docket 90-313, Report and Order, 6 FCC Rcd 2744 (1991) (*TOCSIA Order*)).

²⁰ *TOCSIA Order*, 6 FCC Rcd at 2751-52, paras. 14-15.

²¹ *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6156, para. 57 (1998) (*BPP Order*).

²² Letter from Dennis J. Reinhold, Vice President, General Counsel, and Secretary, Securus, to Julie Veach, Chief, Wireline Competition Bureau, Federal Communications Commission, WC Docket No. 13-79, at 1 (filed Apr. 26, 2013).

the blocking of inmates' calls to CCH customers, Millicorp has asserted that at least one other ICS provider, Global Tel*Link Corp. (GTL), is blocking calls from inmates to Millicorp's customers.²³ Moreover, several ICS providers have filed comments supporting Securus's Petition.²⁴ Because a number of ICS providers have taken the position that Commission precedent permits the blocking of inmate calls to persons who use call routing services such as those described in the Petition, we believe that it is necessary to address the interpretation of that precedent at this time.

III. DISCUSSION

8. The "ubiquity and reliability of the nation's telecommunications network" are critical to ensuring the nationwide availability of dependable telephone service.²⁵ One of the seminal objectives of the Communications Act is "to make available, so far as possible, to all the people of the United States, ... a rapid, efficient, Nation-wide and world-wide wire and radio communication services with adequate facilities."²⁶ The blocking of telephone calls is antithetical to this fundamental goal. The Commission has long recognized that the refusal to deliver voice telephone traffic "risks degradation of the country's telecommunications network."²⁷ Call blocking poses a serious threat to "the ubiquity and seamlessness" of the network.²⁸ Without a general ban on call blocking, "callers might never be assured that their calls would go through."²⁹

²³ See Millicorp Comments at 8 (Millicorp has asked "the FCC's Enforcement Bureau to investigate the unlawful call blocking practices of Securus and GTL"); see also Letter from Phillip R. Marchesiello, Counsel to Millicorp, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144, at 2 (filed Apr. 26, 2013); Letter from Phillip R. Marchesiello, Counsel to Millicorp, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144, at 2-3 (filed July 12, 2013) (Millicorp July 12th *Ex Parte* Letter) (highlighting recent instances of GTL blocking calls to CCH customers).

²⁴ See Pay Tel Communications Comments, WC Docket No. 09-144, at 1 (filed Aug. 31, 2009) ("Pay Tel fully supports the Petition and urges the Commission to expeditiously grant the relief requested by Securus."); CenturyLink Comments, WC Docket No. 09-144, at 1 (filed Aug. 31, 2009) ("CenturyLink fully supports the Petition."); CenturyLink Comments; Inmate Calling Solutions Comments, WC Docket No. 09-144, at 3 (filed Aug. 24, 2009) ("ICS supports the Petition's request to obtain the clarification being sought."); see also Letter from Kermit D. Heaton, Value-Added Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144 (filed Aug. 21, 2009); Letter from Paul Jennings, AGM, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144 (filed Aug. 28, 2009); Letter from Stephanie B. Jackson, Network Communications International Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144 (filed Aug. 28, 2009); Letter from Tommie E. Joe, Public Communications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144 (filed Aug. 28, 2009); Letter from Anthony R. Bambocci, Inmate Telephone, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-144 (filed Aug. 31, 2009).

²⁵ *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11629, para. 1 (Wireline Comp. Bur. 2007) (2007 *Declaratory Ruling*).

²⁶ 47 U.S.C. § 151; see also 47 U.S.C. § 254(b)(1)-(7) (directing the FCC to adopt policies that preserve and advance universal access to reliable and affordable telecommunications and information services).

²⁷ *Connect America Fund et al.*, WC Docket No. 10-90 et al., 26 FCC Rcd 17663, 18029, para. 973 (2011) (*USF/ICC Transformation Order*) (internal quotation marks omitted), *petitions for review pending In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

²⁸ *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9932-33, para. 24 (2001).

²⁹ *Id.*

9. In order to safeguard the integrity of the national telecommunications network, the Commission has largely prohibited call blocking.³⁰ In general, “Commission precedent provides that no carriers . . . may block, choke, reduce or restrict [telecommunications] traffic in any way.”³¹ In particular, in its November 2011 order reforming universal service and intercarrier compensation, the Commission made clear that the broad prohibition on call blocking applies to VoIP calls that are exchanged over the Public Switched Telephone Network (PSTN).³² The Commission has allowed call blocking “only under rare and limited circumstances.”³³ As we explain further below, we conclude that Securus has identified no exception to Commission precedent that would permit it to block calls from inmates to subscribers of call routing services.³⁴

10. Securus claims that the blocking of inmates’ calls to call routing services, such as calls to Millicorp’s CCH customers, falls within one of the narrow exceptions to the Commission’s general prohibition on call blocking. In particular, Securus maintains that the call blocking practices described in its Petition are permissible under the Commission’s 1991 *TOCSIA Order*.³⁵ We disagree.

11. As a threshold matter, call routing services like Millicorp’s CCH services are not expressly addressed by the *TOCSIA Order*. By its terms, the *TOCSIA Order* is limited in scope. It was issued solely for purposes of implementing the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).³⁶ Congress’s purpose in enacting TOCSIA was “to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices.”³⁷ Congress directed the Commission to conduct a rulemaking to implement the requirements of TOCSIA.³⁸ The Commission issued the *TOCSIA Order* in order to fulfill this statutory mandate. The *TOCSIA Order* imposes requirements on aggregators in how they treat providers of “operator services” as defined by Section 226 of the Act.³⁹ Section 226 defines

³⁰ See *Rural Call Completion*, WC Docket No. 13-39, Notice of Proposed Rulemaking, 28 FCC Rcd 1569, 1572-73, paras. 7-11 (2013) (summarizing actions by the Commission and its staff to bar the blocking of phone calls).

³¹ *2007 Declaratory Ruling*, 22 FCC Rcd at 11631, para. 6. This ban on call blocking is nothing new. The Commission has acted to prohibit the blocking of phone calls for many years. See, e.g., *Blocking Interstate Traffic in Iowa*, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987).

³² See *USF/ICC Transformation Order*, 26 FCC Rcd at 18028-29, paras. 973-74.

³³ *2007 Declaratory Ruling*, 22 FCC Rcd at 11631 n.20. We recognize that there are certain instances in which the Commission has permitted call blocking. For example, the Commission concluded that it was reasonable for AT&T to block calls to a chat line that was engaged in an arbitrage scheme with a competitive access provider to artificially inflate the access fees charged to AT&T. See *id.* at 11631-32 n.20 (citing *Total Telecommunications Services, Inc., and Atlas Telephone Co., Inc. v. AT&T Corp.*, File No. E-97-003, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001)).

³⁴ As we note above, legitimate security concerns may justify ICS providers blocking calls in certain circumstances. For example, for security reasons, ICS providers may block attempts by inmates to call victims, witnesses, prosecutors and judges. See *supra* para. 3; CenturyLink Comments at 2. We conclude here, however, that the precedent cited by Securus does not provide ICS providers the ability to unilaterally block all numbers of a particular provider as the petitioners claim. We further note that neither petitioners nor commenters have supported their generalized allegation of security concerns with specificity in this record. This Order should not, however, be interpreted to prevent ICS providers from blocking due to legitimate security concerns.

³⁵ Petition at 1 (citing *TOCSIA Order*, 6 FCC Rcd 2744 (1991)).

³⁶ Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

³⁷ S. Rep. No. 101-439, at 1 (1990).

³⁸ 47 U.S.C. § 226(d).

³⁹ See *TOCSIA Order*, 6 FCC Rcd at 2753-55, paras. 18-21.

“operator services” as “any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than – (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.”⁴⁰ Those services would include calls using a calling card from a public payphone, or from a hotel.

12. Among other things, TOCSIA required each “aggregator” to “ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use ‘800’ and ‘950’ access code numbers to obtain access to the provider of operator services desired by the consumer.”⁴¹ To implement this statutory requirement, the Commission adopted a rule that bars aggregators from blocking “800” and “950” access number calls.⁴² For purposes of this rule, the Commission adopted the definition of “aggregator” set forth in TOCSIA: “any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.”⁴³ In the *TOCSIA Order*, however, the Commission clarified that this “definition of ‘aggregator’ does not apply to correctional institutions in situations in which they provide inmate-only phones.”⁴⁴ The Commission concluded that “the provision of . . . phones to inmates presents an exceptional set of circumstances that warrants their exclusion from” the Commission’s regulation of aggregators under TOCSIA.⁴⁵ The Commission, therefore, declined to require correctional institutions to offer inmates the choice of operator services providers. Thus, as Securus’s Petition observes, ICS providers are not prohibited by the *TOCSIA Order* from blocking “800” and “950” access calls because the TOCSIA ban on such blocking – a prohibition applicable to all aggregators – does not apply to correctional institutions insofar as they provide inmate-only phones.⁴⁶ This does not lead to the conclusion, however, that ICS providers also are not prohibited from blocking other services, such as the CCH call routing service, that were not addressed in the *TOCSIA Order*.

13. We also examine whether the CCH service falls within the scope of the underlying statutory category of services at issue in the *TOCSIA Order* such that it would follow from the logic of that order—if not its express terms—that such services may be permissibly blocked. Securus’s Petition attempts to draw an analogy between the operator services addressed by the *TOCSIA Order* and the call routing service offered by Millicorp. The Petition notes that under the *TOCSIA Order*, “inmates can be blocked from using 1-800 or 1-950 dial-around services in order to use an alternative service provider.”⁴⁷ Securus contends that CCH and similar “[c]all diversion” schemes “are simply dial-around in another –

⁴⁰ 47 U.S.C. § 226(a)(7).

⁴¹ 47 U.S.C. § 226(c)(1)(B).

⁴² See *TOCSIA Order*, 6 FCC Rcd at 2761-62, paras. 42-46; see also 47 C.F.R. § 64.704(a).

⁴³ 47 C.F.R. § 64.708(b); 47 U.S.C. § 226(a)(2).

⁴⁴ *TOCSIA Order*, 6 FCC Rcd at 2752, para. 15.

⁴⁵ *Id.*

⁴⁶ See Petition at 4-5. In 1995, the Commission issued a Notice of Inquiry seeking comment on whether it should change the rules applicable to inmate-only telephones in correctional institutions. *Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators*, CC Docket No. 94-158, Notice of Proposed Rulemaking and Notice of Inquiry, 10 FCC Rcd 1533, 1534-35 paras. 8-10 (1995). The Commission has never adopted any such changes.

⁴⁷ Petition at 15 (citing *TOCSIA Order*, 6 FCC Rcd at 2752, para. 15).

illicit – form.”⁴⁸ We find no merit in this assertion. Rather, we agree with another commenter that the call routing services at issue here are “fundamentally different” from the legal category of “operator services” covered by the *TOCSIA Order*.⁴⁹ We conclude that the call routing services described in the Petition are not “operator services” under section 226 of the Act because they do not include “any automatic or live assistance to a consumer to arrange for billing or completion . . . of an interstate telephone call.”⁵⁰ The call routing services are not initiated by the calling party, as in the case of “operator services,” but rather are subscribed to by the party being called. The calling party does not have to engage any automatic or live assistance in order to complete the call: indeed, for the calling party, the routed call is completed in a seamless manner.

14. For similar reasons, we reject Securus’s claims that the blocking of call routing services such as CCH is authorized by the *BPP Order*.⁵¹ The *BPP Order*, like the *TOCSIA Order*, pertains to operator services, which are plainly distinguishable from call routing services such as CCH. BPP is simply a method of offering consumers initiating a call a choice of operator services: “[u]nder BPP, operator-assisted long-distance traffic [is] carried automatically by the OSP preselected by the party being billed for the call.”⁵² BPP would permit the customer initiating the call to choose the OSP to carry its traffic when it used a calling card.⁵³ In the *BPP Order*, the Commission declined to implement “BPP for outgoing calls by prison inmates,” in part because the agency did not want to undermine “the practice of prison authorities at both the federal and state levels . . . to grant an outbound calling monopoly to a single IXC [interexchange carrier] serving the particular prison.”⁵⁴ Essentially, the Commission was concerned that if it gave inmates the ability to use BPP to select alternative operator services providers when placing long-distance calls from prison payphones, correctional facilities could no longer restrict inmates to a single provider of phone service.⁵⁵ Such a development could compromise the ability of prison officials to monitor inmates’ calls.⁵⁶ The same concern justified the Commission’s decision in the *TOCSIA Order* to permit blocking of inmates’ “800” and “950” access calls.⁵⁷ That rationale for call blocking, however, does not apply to the call routing services at issue here. Those services are used not by inmates, but by the friends and relatives that are the recipients of inmate-initiated calls. Even when an inmate’s relatives subscribe to a service like CCH, the inmate must still use his prison’s ICS provider to call his family.

15. Securus has identified no Commission precedent that would authorize the blocking of calls from inmates to persons who subscribe to call routing services, regardless of whether those routing services offer local or non-local numbers to their customers. The Commission orders on which Securus bases its Petition carved out a limited exception to the call blocking prohibition in order to allow ICS providers to prevent inmates from obtaining operator services from alternative providers. As we have explained, however, this narrow exception to the ban on call blocking does not apply to the call routing services described by the Petition. Those services are not operator services. The exception established in

⁴⁸ *Id.*

⁴⁹ See CURE Comments at 13.

⁵⁰ 47 U.S.C. § 226(a)(7).

⁵¹ See Petition at 5-6 (citing *BPP Order*, 13 FCC Rcd at 6156, para. 57).

⁵² *BPP Order*, 13 FCC Rcd at 6142-43, para. 35.

⁵³ *Id.*

⁵⁴ *Id.* at 6156, para. 57.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *TOCSIA Order*, 6 FCC Rcd at 2752, para. 15.

the *TOCSIA Order* was designed with a specific purpose in mind: to permit call blocking in order to prevent inmates from using alternative providers of phone service to place outgoing calls. That justification for call blocking does not apply to the calls at issue here. The call routing services described in the Petition are not used by inmates placing phone calls, but by persons who receive calls from inmates.

IV. CONCLUSION

16. For the reasons discussed above, we deny Securus's Petition. We find that the Commission precedent permitting ICS providers to block inmates from using operator services under Section 226 of the Act does not authorize the blocking of inmates' calls to persons who subscribe to call routing services such as Millicorp's CCH service.⁵⁸

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201 and 202, and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, this Declaratory Ruling and Order in CC Docket No. 90-313 and 94-158 and WC Docket No. 09-144 IS ADOPTED.

18. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by Securus Technologies, Inc. on July 24, 2009 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief, Wireline Competition Bureau

⁵⁸ Under this Order, blocking is not authorized regardless of the jurisdiction of the number being blocked – whether the number is a local number or a non-local number to the correctional facility. See Millicorp July 12th *Ex Parte* Letter at 4 (explaining that in certain instances Millicorp will assign customers non-local numbers, for example international customers or instances where the facility is blocking all inmate calls to certain NPA-NXX codes local to the facility).