

**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.  
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

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.*

Dated: December 20, 2013

## SUMMARY

The Commission appears poised, in this phase of the *Interstate Inmate Calling Services* proceeding, to expand the scope and reach of its newly adopted interstate rates, rules, and requirements. This expansion would include the application of the new regime into intrastate calling services as well as the actual setting of transaction fees. The Commission should not take such action for several reasons.

First, the entire *Inmate Rate Order* is under review at the Court of Appeals for the District of Columbia Circuit. The new “rate caps,” “safe harbors”, and the ongoing obligation to prove that rates are “cost-based” all have been challenged in this appeal. The Commission’s assumption of jurisdiction over transaction fees also will be reviewed. The actions proposed in the FNPRM flow directly from these portions of the *Inmate Rate Order* which Securus believes is likely to be vacated or reversed. It would be imprudent for the Commission to build new rules upon the demonstrably shaky foundation of *Inmate Rate Order*.

Second, the Commission lacks jurisdiction and authority over all intrastate calling services, including inmate services. The Supreme Court has been clear and consistent in prohibiting the FCC from setting rates on intrastate items, and Section 276, a provision devoted solely to the provision of payphone equipment, cannot elevate the Commission’s authority to something beyond Sections 201 and 202. Moreover, the Commission has no compulsion to take control over inmate intrastate rates, because several states already have set or are closely reviewing these rates. And many State Commissions have submitted comments asking the FCC not to usurp their authority.

Third, the actions proposed in the FNPRM would intrude directly into correctional operations and penological policy. New intrastate rates – like the interstate rates

presently under review – would impair existing contracts which itself oversteps the Commission’s authority. But the Commission now proposes to go further, by prohibiting exclusive contracts, overwriting correctional policies about inmate telephone usage, and interfering in the ability of correctional agencies to block calls. The Communications Act in no way empowers the Commission to take these actions, and several correctional authorities already have submitted comments urging the Commission not to “micro-manage”, in the words of one Sheriff, the manner in which they operate their facilities.

Fourth, the Commission’s focus on TeleTypewriter (“TTY”) calls for the hearing-impaired also is somewhat outside the purview of this proceeding, because inmate calling service providers do not carry or control the vast majority of TTY calls. As Curtis L. Hopfinger, Director – Regulatory and Government Affairs, explains again in his Declaration filed herewith, Voice to TTY and TTY to Voice calls are carried, controlled, rated, and billed by interexchange carriers (“IXCs”). His testimony has been corroborated by the recent letter from AT&T which explains that it holds contracts with the Telecommunications Relay Service (“TRS”) entities in eight states and the District of Columbia. If the Commission wishes to reform inmate TTY rates, it must consult with the IXCs.

This hasty follow-on proceeding to the *Inmate Rate Order* seems ready to run headlong into the same jurisdictional problems and errors that have made the previous rules vulnerable to reversal. More than that, it is unnecessary given the considerable work that states are doing with regard to intrastate rates. For all these reasons, Securus does not support the actions proposed in the FNPRM.

**TABLE OF CONTENTS**

SUMMARY ..... i

STANDARD OF REVIEW ..... 1

I. THE COMMISSION SHOULD NOT ADOPT RATE REGULATIONS FOR  
INTRASTATE INMATE TELECOMMUNICATIONS SERVICES..... 1

    A. The Commission Lacks Authority Over Inmate Intrastate Telecommunications  
    Rates..... 2

    B. As Securus Already Has Demonstrated, There Is No Market Failure in the  
    Intrastate Calling Market to Warrant Commission Intervention ..... 7

    C. State Commissions Are Demonstrably Willing and Able to Review Intrastate  
    Inmate Calling Rates..... 7

II. THE COMMISSION REMAINS CONSTRAINED FROM INTRUDING ON  
CORRECTIONAL FACILITY OPERATIONS..... 11

III. THE COMMISSION SHOULD NOT TAKE ACTION HAVING THE EFFECT  
OF AMENDING OR NULLIFYING EXISTING SERVICE CONTRACTS ..... 14

IV. AS SECURUS HAS EXPLAINED, ICS PROVIDERS DO NOT CARRY,  
AND THUS DO NOT CONTROL OR SET RATES FOR, THE VAST  
MAJORITY OF TTY CALLS..... 17

V. THE COMMISSION SHOULD TAKE NO FURTHER ACTION ON INTERSTATE  
RATES UNTIL THE PENDING APPEALS ARE RESOLVED ..... 19

VI. THE COMMISSION HAS NO AUTHORITY OVER FINANCIAL TRANSACTIONS... 20

CONCLUSION..... 21

Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.415, files these Comments in response to the Further Notice of Proposed Rulemaking released on September 26, 2013, in this docket (“FNPRM”).<sup>1</sup>

Because the issues presented in the FNPRM are the same as or similar to those raised in the prior Notice of Proposed Rulemaking,<sup>2</sup> Securus incorporates herein its prior Comments, Reply Comments, and letters filed in this docket.

### **STANDARD OF REVIEW**

The Commission must not impose rates that are confiscatory.<sup>3</sup> Rates must enable a regulated carrier to “maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.”<sup>4</sup> Specifically, the rates must 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.”<sup>5</sup> Rates also must include a reasonable profit after accounting for the costs that the carrier incurs in providing service.<sup>6</sup>

#### **I. THE COMMISSION SHOULD NOT ADOPT RATE REGULATIONS FOR INTRASTATE INMATE TELECOMMUNICATIONS SERVICES**

The Commission seeks comment on whether it should adopt a rate regime for

---

<sup>1</sup> The item was published in the Federal Register on November 13, 2013, at 78 Fed. Reg. 68005, available at <<http://www.gpo.gov/fdsys/pkg/FR-2013-11-13/html/2013-26377.htm>>

<sup>2</sup> WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, FCC 12-167 (rel. Dec. 28, 2012) (“NPRM”).

<sup>3</sup> *E.g., In the Matter of Alabama Cable Telecomms. Ass’n, Comcast Cablevision of Dothan, Inc. v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12232 ¶ 51 (2001) (“Alabama Power”).

<sup>4</sup> *Id.* (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 n.5 (1989)).

<sup>5</sup> *Alabama Power*, 16 FCC Rcd. at 12232 ¶ 52.

<sup>6</sup> *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 11754, 11757 ¶ 10 (1996).

intrastate rates such as “safe harbors”, “rate caps”, or “all-distance rates”.<sup>7</sup> Were the Commission to take such action, it asks whether it should create a “tiered structure” for rates that reflects the differences between prisons and jails.<sup>8</sup> For reasons of both legal authority and regulatory prudence, the Commission should not adopt rules that govern the price of intrastate inmate calls.

**A. The Commission Lacks Authority Over Inmate Intrastate Telecommunications Rates**

The Commission has tentatively concluded that it has authority to set inmate intrastate calling rates.<sup>9</sup> Securus maintains that the Commission does not have this authority.<sup>10</sup>

Section 152 of the Communications Act of 1934, 47 U.S.C. § 152,<sup>11</sup> establishes that telephone calls that originate and terminate within the boundaries of one state are under the exclusive jurisdiction of state regulators.

The United States Supreme Court has applied Section 152 strictly, refusing even to permit federal prescription of limits on the cost inputs that factor into ratesetting. “Section 152(b) constitutes, as we have explained above, a congressional **denial of power** to the FCC to

---

<sup>7</sup> FNPRM ¶¶ 154-56.

<sup>8</sup> *Id.* ¶ 159.

<sup>9</sup> *Id.* ¶ 137.

<sup>10</sup> WC Docket No. 12-375, Letter from Stephanie A. Joyce to Marlene H. Dortch, FCC (July 12, 2013).

<sup>11</sup> Section 152(b) states, in pertinent part:

[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

require state commissions to follow FCC depreciation practices for **intrastate** ratemaking purposes.”<sup>12</sup>

Even under the Telecommunications Act of 1996, where Congress has authorized the Commission to regulate intrastate telecommunications matters, the Supreme Court held that the final act of setting prices is outside the bounds of FCC jurisdiction.<sup>13</sup> The *Iowa Utilities* case was about setting rates for Unbundled Network Elements under Sections 251 and 252 of the Telecommunications Act of 1996. The Supreme Court held that it is permissible for the FCC to set a pricing methodology – there it was Total Element Long-Run Incremental Cost (“TELRIC”) – but not the actual price.

The Supreme Court upheld TELRIC, reasoning that:

The FCC’s prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory “Pricing standards” set forth in § 252(d). **It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.**”<sup>14</sup>

It is thus well settled that the Commission cannot set rates for intrastate telecommunications service in the absence of a clear Congressional mandate.

Here the Commission attempts to rely on Section 276 which states:

[T]he Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that (A) 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**, except that emergency calls and

---

<sup>12</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (emphasis added).

<sup>13</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999).

<sup>14</sup> *Id.* at 384 (emphasis added).

telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation . . . .<sup>15</sup>

This provision regards the owners of payphone equipment, called Payphone Service Providers” or “PSPs”, and entitles them to compensation for use of that equipment. Section 276 changed the regulatory landscape for payphones by creating a federal regime specific to the payphone itself, whereas previously “the states ha[d] regulated payphones as part of the LEC’s network-based service.”<sup>16</sup> Indeed, Section 276 enabled the Commission to preempt state regulations that had “prohibit[ed] the provision of payphone service by any entity other than the incumbent LEC.”<sup>17</sup> This new framework thus separated the payphone equipment from the telecommunications services that are provided through them, including, as the Commission itself noted, the operator services provided to payphones which are independently regulated under the Telephone Operator Consumer Services Improvement Act (“TOCSIA”).<sup>18</sup> The point was to introduce competition for the provision of payphone equipment. And thus Section 276 established that PSPs have a right to be paid by the carriers whose calls are initiated by their payphones.

The Commission viewed its mandate under Section 276 as “ensuring that all calls are fairly compensated, including those **for which the PSP currently receives no revenue.**”<sup>19</sup>

---

<sup>15</sup> 47 U.S.C. § 276(b)(1)(A) (emphasis added).

<sup>16</sup> CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 96-388, 11 FCC Rcd. 20541, 20546 ¶ 9 (1996) (“*First Payphone Report and Order*”). This order famously was reversed and remanded, with several remands to follow, with regard to the per-call PSP compensation rate.

<sup>17</sup> *First Payphone Report and Order*, 11 FCC Rcd. at 20548 ¶ 13.

<sup>18</sup> Pub. L. No. 101 435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

<sup>19</sup> *First Payphone Report and Order*, 11 FCC Rcd. at 20566 ¶ 48 (emphasis added).

The Commission's implementing rules make that distinction clear:

**§ 64.1300 Payphone compensation obligation**

- (a) For purposes of this subpart, a Completing Carrier is a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes **a local, coinless access code or subscriber toll-free payphone call**.
- (b) Except as provided herein, a Completing Carrier that completes a **coinless access code or subscriber toll-free payphone call** from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract.
- (c) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or **local calls for which the caller has made the required coin deposit**.
- (d) In the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of \$.494.

Section 276 does not apply to long-distance calling rates. PSPs have no right to impose long-distance rates. Rather, it is the interexchange carrier who gets paid by the calling or called party for the completed telephone call itself. Section 276 simply ensures that the PSP gets its fair share for providing the handset and keypad that enabled the call to begin.

For these reasons, the Commission errs in concluding that it has jurisdiction to set intrastate rates on inmate telephone calls.

This analysis is not changed by the fact that Section 276 defines “payphone service” as “the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.”<sup>20</sup> Plainly “inmate telephone service” refers to the provision of the **telephones**, and not calling service, else Congress would have used the term “inmate telecommunications services”.<sup>21</sup> Congress knows

---

<sup>20</sup> 47 U.S.C. § 276(d).

<sup>21</sup> “Congress’ choice of words is presumed to be deliberate ... .” *University of Texas Southwestern Med. Ctr. v. Nassar*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2517, 2529 (2013) (citing *Gross v. FBL Financial Svcs., Inc.*, 557 U.S. 167, 177 n.3 (2009)).

what are “telecommunications services”, having defined them in Section 153 of the Act.

The Commission also relies on *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997).<sup>22</sup> That reliance is misplaced, because *Illinois Public Tel.* did not regard intrastate long distance rates. Rather, that case regarded rates for local calls made from a payphone and paid with coins. The Commission had adopted a “market-based surrogate” for the local coin rate in order to ensure that PSPs receive the per-call compensation to which they are entitled.<sup>23</sup> As the D.C. Circuit observed, “The Commission emphasized, however, that the local coin rate would be only the default rate, from which the PSPs and IXC’s could negotiate a departure.”<sup>24</sup>

The Commission’s “market-based surrogate” was upheld on the following reasoning:

**Because the only compensation that a PSP receives for a local call** (aside from the subsidies from CCL charges that LEC payphone providers enjoy) **is in the form of coins** deposited into the phone by the caller, and there is no indication that the Congress intended to exclude local coin rates from the term “compensation” in § 276, we hold that the statute unambiguously grants the Commission authority to **regulate the rates for local coin calls.**<sup>25</sup>

As the plain language of the opinion shows, *Illinois Public Tel.* is far more narrow than the Commission perceives. That case:

- Regards only local coin calls;
- Relies on the context of public payphones in a multi-carrier environment; and
- Protects the right of those who provide payphones – and nothing else – to be compensated for use of their equipment.

---

<sup>22</sup> FNPRM ¶ 137.

<sup>23</sup> 117 F.3d at 560.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 562 (emphasis added).

Inmate calling service shares none of these characteristics. Inmate calls:

- Cannot be paid with coins;
- Are provided pursuant to exclusive public contracts; and
- Are carried by the owner of the payphone, and thus the payphone owner is otherwise compensated for the use of its equipment.

For these reasons, neither of the Commission’s purported sources of authority will permit it to set intrastate calling rates for inmate services.

**B. As Securus Already Has Demonstrated, There Is No Market Failure in the Intrastate Calling Market to Warrant Commission Intervention**

Securus demonstrated in the prior proceeding that no market failure has occurred in the inmate telecommunications market,<sup>26</sup> and it maintains that position. The same precedent that counseled against the adoption of interstate rates continues to apply here.<sup>27</sup> The record already contains evidence that state rates are quite low.<sup>28</sup> The burdensome ongoing rate review that the Commission adopted for interstate calls in the *Inmate Rate Order*,<sup>29</sup> which itself is unwarranted, would be even more unnecessary in the intrastate context.

**C. State Commissions Are Demonstrably Willing and Able to Review Intrastate Inmate Calling Rates**

The FNPRM also asks whether the Commission “is compelled to take action” on

---

<sup>26</sup> WC Docket No. 12-375, Comments of Securus Technologies, Inc. at 14-15 (Mar. 25, 2013).

<sup>27</sup> 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 ¶ 39 (1995) (quoting 47 U.S.C. § 332(c)(3)(A)) (rate intervention requires “evidence of systematically collusive or other anticompetitive practices concerning the provision of [the service].”).

<sup>28</sup> WC Docket No. 12-375, Pay Tel *ex parte* presentation, Intrastate Rate Caps (Dec. 9, 2013).

<sup>29</sup> WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Report and Order, FCC 13-113 (rel. Sept. 26, 2013), published at 78 Fed. Reg. 67956 (Nov. 13, 2013). The order is under review in *Securus v. FCC*, Case Nos. 13-1280 and consolidated cases (D.C. Cir.).

intrastate calling rates.<sup>30</sup> The extensive work that many State Commissions already have done with respect to this issue demonstrates that the Commission is not so compelled.

Several State Commissions have commenced investigations or rulemakings into intrastate inmate calling rates and services:

**New Mexico** — As the Commission is aware, having invited former Commissioner Marks of the Public Regulation Commission to speak at the Inmate Rates Workshop on July 10, 2013, New Mexico has adopted an entirely new set of rules to govern inmate telecommunications service providers. These rules include rate caps, certification requirements, service quality criteria, and annual reporting obligations. Case 10-00198-UT, *Petition to Commence Rulemaking Proceeding for Institutional Operator Service Providers*, Final Order and Final Rule (Nov. 8, 2012).

**Alabama** — The Public Service Commission has taken two sets of comments on a proposed \$0.25 rate cap, as well as on transaction fees and videophone service. This rulemaking commenced in 2012. Docket 15957, *Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service*.

**Massachusetts** — The Department of Telecommunications and Cable is investigating several aspects of inmate telecommunications service, including calling rates, service quality, transaction fees, and billing. The proceeding began in 2011. Docket D.T.C. 11-16, *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of Such Calls*.

---

<sup>30</sup> FNPRM ¶ 132.

**Louisiana** — The Public Service Commission adopted rate caps for intrastate long-distance calls in January 2013. Docket No. R-31891. A further rulemaking to review intrastate rates and fees was opened in February 2013. Docket No. R-32777.

**Minnesota** — The Department of Commerce began proceedings to review inmate telecommunications service in 2011. Docket P999/D1-11-435. An additional proceeding regarding fees was opened in 2013. Docket P5188/M-13-786.

These state proceedings, as well as record evidence,<sup>31</sup> demonstrate that the Commission is not in fact “compelled to take action” on intrastate rates. Even assuming that the Commission has jurisdiction or authority to do so, its intervention into intrastate calls is demonstrably unwarranted. And the Commission employs a policy of restraint regarding state matters much like the federal judicial doctrine of abstention.<sup>32</sup> Federal courts apply this doctrine to both state criminal and state civil proceedings in order not to damage the sense of comity with state governmental bodies.<sup>33</sup>

---

<sup>31</sup> Pay Tel *ex parte*, Intrastate Rate Caps.

<sup>32</sup> *E.g.*, CC Docket No. 99-154, *Global Naps, Inc. Petition for Preemption of Jurisdiction of the New Jersey Bd. of Pub. Utilities*, 14 FCC Rcd. 12530, 12538 ¶ 17 (1999) (“Principles of federal-state comity and efficiency lead us to question the merit of assuming jurisdiction over the completed state proceeding under the circumstances presented in this instance.”); CC Docket No. 96-98, NSD File No. L-97-42, *Petition for Declaratory Ruling and Request for Expedited Action*, Memorandum Opinion and Order and Order on Reconsideration, 13 FCC Rcd. 19009 ¶ 35 & n.101 (1998); Docket No. 19168, *Applications of Cowles Florida Bcstg., Inc.*, Memorandum Opinion and Order, 32 FCC 2d 436, 450 ¶ 32 (1971) (noting “Commission policy of abstaining from interpreting alleged violations of state or federal law where the appropriate authorities have not yet acted”).

<sup>33</sup> This concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State’s interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.

Several state commissions already have filed comments asking the Commission to refrain from setting intrastate rates:

- “The [District of Columbia Public Service Commission] encourages the FCC to permit states to have flexibility in determining just, reasonable, and fair intrastate inmate calling rates. ... The rate set by the DC PSC ... is an example of an innovative solution ... .”<sup>34</sup>
- “Given the differences in the confinement facilities among the states ..., the [Alabama Public Service Commission] asserts that **states are in the best position to regulate intrastate ICS.**”<sup>35</sup>
- “Any structure established by the FCC with respect to intrastate ICS rates should, however, be flexible enough to allow **states that do have statutory authority to regulation intrastate ICS rates to do so**, leveraging their expertise and familiarity with ICS rates and practices within their own states.”<sup>36</sup>
- “Many of the issues raised in the Order and FNPRM are similar, if not identical to, those being investigated by the [Massachusetts Department of Telecommunications and Cable]. **The MDTC is uniquely qualified to make a determination on the matters before it.**”<sup>37</sup>

For these reasons, the FCC should not adopt rates for intrastate inmate calls. State Commissions remain the appropriate agencies to review intrastate calling rates, including rates for inmate telephones. Their active involvement in the matter should assuage the Commission’s

---

*Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (federal court should not have heard appeal from Texas state court verdict in case alleging breach of contract filed prior to entry of judgment).

<sup>34</sup> WC Docket No. 12-375, Comments of the Pub. Serv. Comm’n of the District of Columbia at 3 (Dec. 11, 2013).

<sup>35</sup> WC Docket No. 12-375, Comments of the Alabama Pub. Serv. Comm’n at 2 (Dec. 13, 2013) (emphasis added).

<sup>36</sup> WC Docket No. 12-375, Comments of the Minnesota Dep’t of Commerce at 5 (Dec. 13, 2013) (emphasis added).

<sup>37</sup> WC Docket No. 12-375, Comments of the Massachusetts Dep’t of Telecommc’ns and Cable at 5 (Dec. 12, 2013) (emphasis added).

concerns that these rates have not adequately been supervised or somehow thwart a federal interest.

## II. THE COMMISSION REMAINS CONSTRAINED FROM INTRUDING ON CORRECTIONAL FACILITY OPERATIONS

The Commission asks whether it should adopt rules that mandate site-by-site competition in inmate telecommunications services.<sup>38</sup> Such a mandate would directly and necessarily change the way that correctional facilities make telephone service available to inmates. The Commission cannot interpose itself in correctional operations in this manner.

As Securus explained during the previous proceeding,<sup>39</sup> the Commission was established for “the purpose of regulating interstate and foreign commerce in communication by wire and radio[.]”<sup>40</sup> Nothing in the Communications Act authorizes the Commission to regulate the operations of any correctional facility. Here, as the Commission considers whether to adopt even more rules to govern inmate telecommunications service, it should remain mindful of the limits of its authority.

Securus provided examples in which federal courts rejected the action of a utility commission on the ground that it interfered with the authority of correctional agencies. The Initial Comments cited *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001), where the court found the state exempt from the prohibition on exclusive contracts where done in furtherance of a valid penological goal. “The State of Michigan is undoubtedly authorized to act in the ‘subject matter area’ of prison administration.”<sup>41</sup> And “[i]n the exercise of this authority,

---

<sup>38</sup> FNPRM ¶¶ 176-77.

<sup>39</sup> Securus Initial Comments at 10-14.

<sup>40</sup> 47 U.S.C. § 151.

<sup>41</sup> 141 F. Supp. 2d at 756 (quoting Mich. Comp. Laws § 445.774(3) (providing exemption for state from antitrust laws)).

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.”<sup>42</sup>

Securus also cited *McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003), in which antitrust claims against Ameritech were dismissed on the ground 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.”<sup>43</sup> Accordingly, “when the ORDC establishes a collect calling telephone system in an Ohio correctional institution, that *is* the clear and articulated policy of Ohio.”<sup>44</sup>

Site commissions, and their impact on inmate calling rates, also have been deemed outside regulatory purview. “States and other 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.”<sup>45</sup>

The Commission’s purview in this proceeding remains interstate telephone rates. The Commission may not, however, attempt to alter correctional policy or intrude on correctional operations, such as by adopting the following:

- Rules prohibiting correctional facilities from entering into exclusive contracts for the provision of inmate telecommunications service. FNPRM ¶¶ 176-77.
- Rules prohibiting correctional facilities from limiting inmates’ access to telecommunications services for reasons of security or disciplinary action. FNPRM ¶ 141.

---

<sup>42</sup> *Id.* (quoting *In re Wilkinson*, 137 F.3d 911, 914 (6th Cir. 1998)).

<sup>43</sup> 253 F. Supp. 2d at 1007.

<sup>44</sup> *Id.* (emphasis in original).

<sup>45</sup> *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001).

- Rules prohibiting correctional facilities from requiring call blocking to certain numbers or for stated security reasons. FNPRM ¶ 173.

The limits of the Commission’s authority to regulate inmate service, particularly when its actions intrude on the ability of correctional agencies to operate their facilities and ensure security, are among the issues that have been presented to the D.C. Circuit in the ongoing appeal. The precedent cited herein already strongly suggests that the Commission should not attempt to adopt some of the rules proposed in the FNPRM.

In addition, correctional agencies recently have asked the Commission not to encroach upon their authority:

- “[T]he FCC does not need to micro-manage ICS and jail operations . . . .”<sup>46</sup>
- “This [*Inmate Rate Order*] seriously hampers the ability of the Michigan Sheriffs to secure and manage their jails effectively . . . Inmates’ needs must be balanced against the need to protect the public, jail staff and the inmates.”<sup>47</sup>
- “Sheriffs must continue to have control over and the ability to monitor the communications of inmates. . . . Inmate telephone systems are built to reflect the unique needs of each facility and provide a variety of important security components[.]”<sup>48</sup>
- “Sheriffs must continue to have the ability to finance administrative functions and the security measures that they deem necessary to protect the public and the inmate population.”<sup>49</sup>

The FNPRM portends, as shown in the examples cited above, several instances in which FCC policy would intrude upon penological policy and constitute *ultra vires* agency

---

<sup>46</sup> WC Docket No. 12-375, Letter from Col. James C. Willett, Superintendent, Pamunkey Regional Jail (Virginia), to Marlene H. Dortch, FCC, at 2 (Dec. 10, 2013).

<sup>47</sup> WC Docket No. 12-375, Michigan Sheriffs’ Ass’n at 2 (Dec. 13, 2013).

<sup>48</sup> WC Docket No. 12-375, Comments of the National Sheriffs’ Ass’n at 2 (Dec. 18, 2013).

<sup>49</sup> National Sheriffs’ Ass’n Comments at 6.

action.<sup>50</sup> The Commission should not, however, adopt rules that would, as several sheriffs already have warned, intrude upon the ability of law enforcement agencies to operate their facilities.

### **III. THE COMMISSION SHOULD NOT TAKE ACTION HAVING THE EFFECT OF AMENDING OR NULLIFYING EXISTING SERVICE CONTRACTS**

Should the Commission, despite the constraints discussed herein, adopt rates for intrastate inmate calls, Securus maintains that the Commission should not impose those rates on existing service contracts. The public contracts executed between state and local correctional authorities and inmate telecommunications service providers are not federal documents. As Securus previously has argued,<sup>51</sup> these contracts are not akin to Interconnection Agreements that were invented by Congress in the 1996 Act.<sup>52</sup> These contracts are formed under the strictures of state and local procurement regulations.<sup>53</sup> As such, the Commission lacks authority to alter, rewrite, or nullify them.

In fact, the very statute on which the Commission relies in this proceeding includes an express protection for existing contracts. Section 276, insofar as it regulates how payphone providers may enter the market and receive compensation, states that

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.

---

<sup>50</sup> *E.g., EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013) (vacating satellite encoding rules as *ultra vires*); *American Library Ass'n v. FCC*, 406 F.3d 698, 699 (D.C. Cir. 2005) (vacating and reversing broadcast flag rules as *ultra vires*).

<sup>51</sup> Securus Initial Comments at 10-14.

<sup>52</sup> *E.g., Miranda*, 141 F. Supp. 2d at 756.

<sup>53</sup> 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 (2002).

47 U.S.C. § 276(c).

In addition, as Securus has explained, the United States Constitution protects contracts, even contracts with regulated utilities, from being affected by new regulations.<sup>54</sup> This protection was first applied in *Arkansas Natural Gas Co. v. Arkansas R.R. Comm’n*, 261 U.S. 379 (1923),<sup>55</sup> and later in the *Sierra-Mobile* cases.<sup>56</sup> Federal agencies may “review rates” of the regulated entities, but “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.”<sup>57</sup> Interference with these contracts is permissible only 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.”<sup>58</sup>

The Commission relies on *Sierra-Mobile* when asked by a party to amend or alter existing contracts, and held that that the standard of *Sierra-Mobile* “is much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the

---

<sup>54</sup> U.S. Const. Art. 1, Sec. 10.

<sup>55</sup> 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.

261 U.S. at 383.

<sup>56</sup> *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

<sup>57</sup> *Mobile*, 350 U.S. at 343-44.

<sup>58</sup> *Sierra*, 350 U.S. at 355.

[Communications] Act.”<sup>59</sup> The Commission has recognized 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,”<sup>60</sup> and that with regulatory impairment of existing contracts “the market, the industry and ultimately the consumer would suffer.”<sup>61</sup> As such, the Commission has instructed that any complainant seeking to avoid or change an existing contract “faces a heavy burden.”<sup>62</sup>

The Commission has applied this principle to satellite capacity contracts,<sup>63</sup> microwave transmission contracts,<sup>64</sup> 900 transport service,<sup>65</sup> and contracts to buy network programming.<sup>66</sup>

The *Inmate Rate Order* runs afoul of this precedent. The Commission’s defense of the order, including its assertions that its new interstate rules do not in fact abrogate existing contracts, will be reviewed by the D.C. Circuit. Securus believes that it is likely to prevail on its appeal of the *Order* on this ground, among others. The Commission should not compound the error by taking similar action in this follow-on proceeding.

---

<sup>59</sup> *IDB Mobile Communs., Inc. v. COMSAT Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 11474, 11480 ¶ 15 (2001) (“*IDB*”).

<sup>60</sup> *IDB*, 16 FCC Rcd. at 11481 ¶ 16 (citing *Mobile*, 350 U.S. at 344).

<sup>61</sup> *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)).

<sup>62</sup> *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 654 ¶ 17 (1995) (“*ACC Long Distance*”).

<sup>63</sup> *IDB*, 16 FCC Rcd. at 11486 ¶ 26.

<sup>64</sup> *ACC Long Distance*, 10 FCC Rcd. 654 ¶ 18.

<sup>65</sup> *Ryder Communs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd. 13603, 13616 ¶ 31 (2003).

<sup>66</sup> *Echostar Communs. Corp. v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13 FCC Rcd. 21841, 21849 ¶ 20 (1998).

#### **IV. AS SECURUS HAS EXPLAINED, ICS PROVIDERS DO NOT CARRY, AND THUS DO NOT CONTROL OR SET RATES FOR, THE VAST MAJORITY OF TTY CALLS**

The FNPRM continues the Commission’s inquiry into TeleTypewriter (“TTY”) calls.<sup>67</sup> But as Securus has explained in close detail, the majority of inmate TTY calls are not handled by the inmate service provider, but rather by the long-distance carrier holding the contract with state Telecommunications Relay Service (“TRS”) entity.<sup>68</sup> Only inmate-dialed TTY to TTY calls are actually carried by Securus, because they are direct-dialed like a voice call.

The Commission now asks whether TTY calls can be tracked as to length. As Mr. Hopfinger explains in the new Declaration attached to these Comments, such tracking is not available at this time.

In a previous Declaration, Mr. Hopfinger described the three types of TTY calls: Voice to TTY; TTY to Voice; and TTY to TTY.<sup>69</sup> Securus is the actual carrier of only TTY to TTY calls when the call does not use a TRS entity. As he explains in his latest Declaration, those calls “are indistinguishable from standard voice calls” because “the inmate is dialing the called party directly, using the called party’s terminating phone number, and thus the call data looks identical to the call data from a typical voice call.”<sup>70</sup>

For Voice to TTY and TTY to Voice calls, Securus is not the carrier that completes the call.<sup>71</sup> Rather, the inmate dials a 1-800 number to the state TRS entity, and

---

<sup>67</sup> FNPRM ¶¶ 142-47.

<sup>68</sup> Securus Initial Comments at 23-24 & Declaration of Curtis L. Hopfinger ¶¶ 6-13 (Mar. 22, 2013, amended Mar. 25, 2013) (“Hopfinger March Dec.”).

<sup>69</sup> Hopfinger March Dec. ¶ 7 & Attachments 1, 2, and 3.

<sup>70</sup> Declaration of Curtis L. Hopfinger ¶¶ 4, 7 (Dec. 19, 2013) (“Hopfinger December Dec.”).

<sup>71</sup> Hopfinger March Dec. ¶¶ 10, 13; Hopfinger December Dec. ¶ 5.

Securus carries that call “free of charge”.<sup>72</sup> The interexchange company holding the TRS contract carries the call to the called party.<sup>73</sup> “Securus receives no payment and does not carry the calls from the TRS entity to the called party, and thus does not track those calls.”<sup>74</sup>

On December 5, 2013, AT&T filed a letter in this docket that comports with Mr. Hopfinger’s Declarations.<sup>75</sup> AT&T tells the Commission that it is the TRS entity in eight (8) states and the District of Columbia. As the TRS entity, AT&T charges all collect calls “at the tariffed rate for the call”, and bills all inmate-initiated TTY calls as “interexchange collect” calls.<sup>76</sup> Inmate-initiated TTY calls “will be treated and charged in the same manner” as any other collect TTY call.<sup>77</sup> AT&T’s letter appends a network diagram “that looks very similar to [Mr. Hopfinger’s] Attachment A.”<sup>78</sup>

With regard to the proposed TTY-related reporting requirements,<sup>79</sup> Securus has no ability to track TTY calls at this time. Were such a requirement adopted, “Securus would have to write a new computer application for its billing system.”<sup>80</sup> That task could require the “establishment of separate databases at each correctional facility to identify inmates that may use a TTY device or call friends or family that require the use of a TTY or similar device[.]”<sup>81</sup> And

---

<sup>72</sup> Hopfinger March Dec. ¶ 8; Hopfinger December Dec. ¶ 5.

<sup>73</sup> Hopfinger March Dec. ¶ 10; Hopfinger December Dec. ¶ 5.

<sup>74</sup> Hopfinger December Dec. ¶ 9.

<sup>75</sup> WC Docket No. 12-375, Letter from William L. Roughton, Jr., AT&T Inc., to Marlene H. Dortch, FCC, at 1 (Dec. 5, 2013); *see also* Hopfinger December Dec. ¶ 6.

<sup>76</sup> AT&T Letter at 1.

<sup>77</sup> *Id.*

<sup>78</sup> Hopfinger December Dec. ¶ 6.

<sup>79</sup> FNPRM ¶ 149.

<sup>80</sup> Hopfinger December Dec. ¶ 10.

<sup>81</sup> *Id.*

because TTY tracking would require Securus to identify the hearing-impaired inmates, tracking “would be even more problematic” if the correctional facility does not “use Prisoner Identification Numbers (PINs) in association with the inmate telephone system.”<sup>82</sup>

In addition, Securus wishes to emphasize that it does not set correctional facility policy as to the amount of access that hearing-impaired inmates (or any inmates) have to telecommunications services. If the Commission is concerned that TTY calls are longer than voice calls, a conclusion that Securus does not dispute, that issue is not within Securus’s power to solve.<sup>83</sup> It may also be outside the Commission’s authority to regulate.

#### **V. THE COMMISSION SHOULD TAKE NO FURTHER ACTION ON INTERSTATE RATES UNTIL THE PENDING APPEALS ARE RESOLVED**

The FNPRM seeks comment “on additional reforms and alternative ways of accomplishing interstate and intrastate rate reforms[.]”<sup>84</sup> It asks whether it should “maintain[] the interim rate caps and safe harbor levels adopted in the [*Inmate Rate Order*],” and whether those rules should be adopted for intrastate calls.<sup>85</sup>

As explained in Section I above, the Commission should not attempt to set rates for intrastate inmate calling services. With regard to interstate calls, all of the findings, conclusions, rates, and rules in the *Inmate Rate Order* have been appealed on several grounds including that they are arbitrary, unreasonable, and in violation of law. To port them into the intrastate context now, with so many questions unresolved, would be unhelpful.

---

<sup>82</sup> Hopfinger December Dec. ¶ 10.

<sup>83</sup> *See id.* ¶ 11.

<sup>84</sup> FNPRM ¶ 153.

<sup>85</sup> *Id.* ¶ 154.

## VI. THE COMMISSION HAS NO AUTHORITY OVER FINANCIAL TRANSACTIONS

The FNPRM asks “how the Commission can ensure, going forward, that ancillary charges are just, reasonable, and cost-based.”<sup>86</sup> It further asks whether it “should identify certain ancillary charges that are unreasonable practices and therefore prohibited under the Act?”<sup>87</sup>

These questions suggest that the Commission is considering setting caps for the fees that ICS providers charge for financial transactions. These transactions include credit card processing fees, check-by-phone processing fees, and fees to use Securus’s premises-based kiosks where available.<sup>88</sup> Securus maintains that the Commission does not have authority to regulate these items.

In its Reply Comments on the NPRM, Securus asked the Commission to “decline requests to expand the scope of this proceeding to include charges applied to items other than interstate inmate calls.”<sup>89</sup> It explained that fees for financial transactions are outside the agency’s mandate for “regulating interstate and foreign commerce in communication by wire and radio.”<sup>90</sup> The Commission nonetheless held in the *Inmate Rate Order* that it has jurisdiction and authority over complaints regarding the fees charged for financial transactions. The

---

<sup>86</sup> FNPRM ¶ 168.

<sup>87</sup> *Id.*

<sup>88</sup> With its Reply Comments in Response to DA 13-1445 filed July 24, 2013, Securus filed an Appendix identifying the transaction fees that it has tariffed and those it applies. The Reply Comments explain that Securus does not charge a fee for payments by cash, check, or money order.

<sup>89</sup> WC Docket No. 12-375, Reply Comments of Securus Technologies, Inc. at 17 (Apr. 22, 2013); *see also* Reply Comments in Response to DA 13-1445 at 2-3.

<sup>90</sup> *Id.* at 16 (quoting 47 U.S.C. § 151).

Commission also added “ancillary charges” to the annual reporting requirement.<sup>91</sup>

The question whether these actions exceed the Commission’s jurisdiction and authority has been presented for appeal. The Commission should not adopt additional rules on transaction fees until the appeal is resolved.

### CONCLUSION

For all these reasons, the Commission should not adopt rate regulations or rate caps for intrastate inmate telephone services. The Commission lacks jurisdiction over these rates, and the new regime for interstate rates, which the Commission here would import to the intrastate market, has been appealed on several grounds.

Similarly, the Commission should not take further action with regard to interstate rates until the appeals from the *Inmate Rate Order* are resolved.

The Commission lacks jurisdiction and authority over financial transactions and should not attempt to set rates or rules governing them.

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.*

Dated: December 20, 2013

---

<sup>91</sup> *Inmate Rate Order* ¶ 125; see also *id.* ¶ 93 (“and identify the cost basis for such charges”).