ATTACHMENT

WC Docket No. 12-375,
Order
DA 14-786
(rel. June 6, 2014)

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

In the Matter of	)	
	)	
Rates for Interstate Inmate Calling Services	)	
	)	
Securus Technologies, Inc. Petition to Expand Pay Tel Waiver	)	WC Docket No. 12-375
	)	
Securus Technologies, Inc. Petition for Leave to Add Fee for Voice Biometrics Technology	)	

ORDER

Adopted: June 6, 2014 **Released: June 6, 2014**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny two petitions by Securus Technologies, Inc. (Securus)[1] seeking waivers of the interim interstate inmate calling services (ICS) rate caps adopted by the Federal Communications Commission (FCC or Commission) in the *Inmate Calling Report and Order and FNPRM*[2] because Securus has failed to meet its burden of proof that granting such waivers is in the public interest.

II. BACKGROUND

2. In 2003, a group of inmates, their friends and families as well as advocacy groups (collectively Wright Petitioners) filed a rulemaking petition with the Commission to address ICS practices.[3] The petition requested that the Commission prohibit exclusive ICS contracts, end the practice of collect-call-only restrictions in correctional facilities, and create a "safe harbor" interstate rate cap that would permit ICS providers to charge higher rates if they "could show that [their] costs justified" doing so.[4] In 2007, the same petitioners filed an alternative rulemaking petition, requesting that the Commission reform high ICS rates by requiring a debit-calling option in correctional facilities,

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[1] Securus Technologies, Inc.'s Petition to Expand Pay Tel Waiver, WC Docket No. 12-375 (filed Feb. 19, 2014) (Waiver Expansion Petition); Securus Technologies, Inc.'s Petition for Leave to Add Fee for Voice Biometrics Technology, WC Docket No. 12-375 (filed Feb. 19, 2014) (Voice Biometrics Petition).

[2] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (*Inmate Calling Report and Order and FNPRM* or *Order*); *pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014) (*Securus Techs. Partial Stay Order*); *pets. for review pending sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Nov. 14, 2013) (and consolidated cases).

[3] *See generally* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 at 3 (filed Nov. 3, 2003).

[4] *Id.* at 3, 19-20.

prohibiting per-call charges, and establishing rate caps for interstate ICS.[5] The Commission sought and received comment on both petitions.[6] In December 2012, the Commission granted the two petitions for rulemaking and adopted a notice of proposed rulemaking seeking comment on their proposals.[7] The Commission released the *Inmate Calling Report and Order and FNPRM* on September 26, 2013.[8] On January 13, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a partial stay of the *Inmate Calling Report and Order and FNPRM*, pending the court's resolution of petitions for review of the *Order*.[9] The *Partial Stay Order* did not stay the interim rate cap rule at issue in this Order.[10]

3. Section 201 of the Communications Act of 1934, as amended (Act) requires that all carriers' interstate rates be just and reasonable.[11] To be just and reasonable, rates must ordinarily be cost-based absent an explanation for a departure[12] as well as include a reasonable return.[13] Section 276 of the Act additionally requires that payphone rates be fair.[14] As part of its analysis in the *Inmate Calling*

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[5] *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Wright Petition).

[6] *See Petition for Rulemaking Filed Regarding Issues Related to Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, DA 03-4027, 2003 WL 23095474 (Wireline Comp. Bur. 2003); *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 4229 (Wireline Comp. Bur. 2007).

[7] *See generally Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629 (2012) (*2012 ICS NPRM*). The *2012 ICS NPRM* incorporated relevant comments, reply comments and *ex parte* filings from the prior ICS docket, CC Docket No. 96-128, into WC Docket No. 12-375. *See 2012 ICS NPRM*, 27 FCC Rcd at 16636, para. 15.

[8] *See generally Inmate Calling Report and Order and FNPRM*.

[9] *See generally Securus Techs. Partial Stay Order*. The following rules are stayed pending resolution of the appeal: 47 C.F.R. §§ 64.6010 (Cost-Based Rates for Inmate Calling Services); 64.6020 (Interim Safe Harbor); and 64.6060 (Annual Reporting and Certification Requirement).

[10] Specifically, the following rules are not stayed by the *Securus Techs. Partial Stay Order*: 47 C.F.R. §§ 64.6000 (Definitions); 64.6030 (Inmate Calling Services Interim Rate Cap); 64.6040 (Rates for Telecommunications Relay Service (TRS) Calling); and 64.6050 (Billing-Related Call Blocking). *See generally id*. The court also did not issue a general stay of the *Order*, leaving in place, for example, the Commission's provision for a one-time, mandatory data collection that will enable the Commission to establish permanent rules.

[11] *See* 47 U.S.C. § 201(b).

[12] *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14131, para. 45 (citing *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606 at 16619-20, para. 44 (1997) (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996))).

[13] *See id*. at 14134, para. 53.

[14] *See* 47 U.S.C. § 276(b). "The Commission has previously found the term 'fairly compensated' permits a range of compensation rates that could be considered fair, but that the interests of both the payphone service providers and the parties paying the compensation must be taken into account." *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14115, para. 14 (internal citation omitted). The Commission has previously addressed section 276 and its application to ICS, noting that "[u]nless an ICS provider can show that (i) revenue from its interstate or intrastate calls fails to recover, for *each* of these services, both its direct costs and some contribution to common costs, or (ii) the *overall* profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls), then we would see no reason to conclude that the provider has not been 'fairly compensated.'" *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, CC Docket No. 96-128, 17 FCC Rcd 3248, 3257-58, para. 23 (2002) (emphasis in original).

Report and Order and FNPRM, the Commission found that "the marketplace alone has not ensured that interstate ICS rates are just and reasonable and that they are fair to consumers, as well as providers."[15] For example, the record in this docket showed that "inmates, or those whom they call, pay as much as $17.30, $10.70 or $7.35 for a 15-minute interstate collect call, depending upon the facility where the inmates are incarcerated."[16] The Commission concluded "that the rate reforms we begin in this Order are necessary to ensure [interstate ICS rates] are just and reasonable"[17] and "necessary to implement section 276(b)(1)'s 'fair compensation' directive."[18]

4. The *Inmate Calling Report and Order and FNPRM* adopted, in relevant part, interim interstate ICS rate caps of $0.21 per minute for debit and prepaid calling and $0.25 per minute for collect calling "to place an upper limit on rates providers may charge for interstate ICS."[19] The Commission determined that the interim rate caps established in the *Order* were "set at sufficiently conservative levels to account for all costs ICS providers will incur in providing ICS."[20] The interim rate caps were set based on cost studies submitted in the proceeding, including a cost study submitted by Pay Tel[21] and another submitted by a group of ICS providers that included Securus.[22] The *Order* also stated that, pursuant to section 1.3 of the Commission's rules, waiver of the interstate ICS rate caps may be sought in those "extraordinary circumstances" where a particular ICS provider "believes that it has cost-based rates for ICS that exceed [the] interim rate caps."[23]

5. ICS provider Pay Tel sought a waiver of the Commission's ICS rate caps on January 8, 2014.[24] In support of its request, Pay Tel submitted, among other things, a detailed cost study of its ICS operations, audited corporate financial statements, and a detailed analysis of the revenue impacts it claimed to experience due to below cost state rates. The Wireline Competition Bureau (Bureau) sought and received comment on Pay Tel's petition[25] and released an order on February 11, 2014 granting a temporary, limited waiver of the rate caps.[26] Specifically, the Bureau found that Pay Tel had demonstrated good cause for such a waiver and allowed Pay Tel to charge $0.46 per minute for all interstate ICS calls for nine months or until the Commission releases final ICS rules, whichever occurs first.[27]

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[15] *Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14131, para. 45.

[16] *Id*. at 14126, para. 35.

[17] *Id*. at 14131, para. 45.

[18] *Id*. at 14131-32, para. 46.

[19] *Id*. at 14147, para. 73.

[20] *Id.* at 14147, para. 74.

[21] *Id.* at 14148, para. 76.

[22] *Id.* at 14150, para. 78.

[23] *Id.* at 14153, paras. 82-83.

[24] Pay Tel Communications, Inc. Petition for Waiver of Interim Interstate ICS Rates, WC Docket 12-375 (filed Jan. 8, 2014) (Pay Tel Waiver Petition).

[25] *Comment Sought on Pay Tel Communications, Inc. Waiver Petition,* WC Docket No. 12-375, Public Notice, 29 FCC Rcd 168 (Wireline Comp. Bur. 2014).

[26] *Rates for Interstate Inmate Calling Services; Pay Tel Communications Inc.'s Petition for Waiver of Interim Interstate ICS Rates*, WC Docket No. 12-375, Order, 29 FCC Rcd 1302 (Wireline Comp. Bur. 2014) (*Pay Tel Waiver Order*).

[27] *See generally id*.

A. Securus' Petitions

6. Securus is an ICS provider that "serves approximately 2,200 correctional facilities in 45 states and the District of Columbia."[28] On February 19, 2014, Securus filed a Petition to Expand Pay Tel Waiver (Waiver Expansion Petition or Petition) and a Petition for Leave to Add Fee for Voice Biometrics Technology (Voice Biometrics Petition or Petition).[29] The Bureau released a Public Notice seeking comment on Securus' Petitions on March 4, 2014.[30]

7. *Waiver Expansion Petition*. In its Waiver Expansion Petition, Securus requests the relief provided Pay Tel in the Bureau's February 11, 2014 *Pay Tel Waiver Order* for "all providers of Inmate Calling Services ('ICS') operating in city and/or county jails located in the 13 states Pay Tel serves."[31] Securus seeks this relief pursuant to section 1.3 of the Commission's rules and the waiver provisions of the *Order*.[32] While Securus seeks the same relief granted Pay Tel – a partial waiver of the Commission's ICS rate caps – nowhere does it specifically cite the Commission's ICS rate caps of $0.21 per minute (debit and prepaid) and $0.25 per minute (collect), identify the relevant rule from which it seeks a waiver, or specifically request relief from a rule or rules. We nevertheless construe Securus' Petition as requesting relief from the Commission's rule mandating interim ICS rate caps.[33] Securus claims that ICS providers will experience a revenue shortfall by complying with the Commission's interim rate caps, not unlike the shortfall the Bureau cited in granting Pay Tel a waiver.[34] Unlike Pay Tel's waiver request, however, Securus' Petition was not supported by a comprehensive cost study, audited financial statements, or a detailed intrastate revenue shortfall analysis. Securus also did not claim that its financial viability was at risk absent a grant of its waiver request.

8. *Voice Biometrics Petition*. In its Voice Biometrics Petition, Securus seeks "leave to add a per-minute fee of $0.02 to its interstate calls in order to cover the cost of providing voice biometric technology."[35] Securus' Voice Biometrics Petition seeks this relief pursuant to section 1.3 of the Commission's rules and the waiver provisions of the *Order*.[36] While this Petition also does not request a waiver of any specific Commission rule, we nonetheless construe it to be a request for waiver of the Commission's interstate ICS rate cap rule. Securus claims that the "cost of biometrics is among the grounds for which Pay Tel got [its] waiver"[37] and that granting the relief it seeks is a "competitive necessity" and that failing to grant the relief would "skew the competitive landscape."[38] Again, unlike

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[28] Securus 2013 Comments, Expert Report of Stephen E. Siwek, WC Docket No. 12-375 at 2 (filed Mar. 25, 2013) (Siwek Report).

[29] *See supra* note 1.

[30] *Comment Sought on Securus Technologies, Inc. Inmate Calling Services Petitions,* WC Docket No. 12-375, Public Notice, 29 FCC Rcd 2141 (Wireline Comp. Bur. 2014).

[31] Waiver Expansion Petition at 1.

[32] *See id*.

[33] 47 C.F.R § 64.6030.

[34] *See id.* at 6-7; Securus supplemented its Waiver Expansion Petition with an *ex parte* filing on March 4, 2014 quantifying its estimated annual shortfall. *See* Letter from Stephanie A. Joyce, Counsel for Securus, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Mar. 4, 2014) (Securus Mar. 4, 2014 *Ex Parte* Letter) ("Securus will incur . . . a shortfall of 'approximately **$1.5 Million**' annually under the Interim Rate Caps as opposed to the $0.46 per minute rate that Pay Tel may charge.") (emphasis in original). As explained below, Securus attempts to cast a decline in revenues as an inability to recover its costs. *See infra* para. 20 & note 84.

[35] Voice Biometrics Petition at 1.

[36] *See id.*

[37] *Id*. at 3.

[38] *Id.* at 4.

Pay Tel's waiver request, Securus' Voice Biometrics Petition is not supported by data and does not make specific claims about its continuing financial viability for example.

9. Comments on Securus' Petitions were filed by several parties. The Wright Petitioners submitted an opposition to Securus' Voice Biometrics Petition[39] and comments on both Petitions.[40] The Wright Petitioners state that Securus' Waiver Expansion Petition fails to provide "any foundational cost data, or even [address] the fundamental basis for Pay Tel's waiver request" and that Securus "has steadfastly refused to provide any actual cost data to the FCC."[41] The Wright Petitioners further note that Securus has "utterly failed to provide any factual basis for its 'Me Too' waiver request for an additional $0.02 Voice Biometric fee."[42] Daniel Ream opposes Securus' Voice Biometrics Petition, stating that "Securus has produced no evidence to justify its request" and contrasted Securus' failure to support its waiver request with Pay Tel's extensive support for its waiver request.[43] Global Tel*Link (GTL) submitted reply comments opposing any extension of the Bureau's original grant of waiver to Pay Tel to Securus or other ICS providers, stating that "extending the waiver to all ICS providers is not in the public interest."[44] Other commenters support Securus' Petitions. CenturyLink supports the granting of both Petitions "[t]o ensure that all ICS providers compete on a level playing field and to ensure that high cost city and county jails are served."[45] Network Communications International Corp. (NCIC) also submitted reply comments supporting Securus' Petitions and seeks grant of them to "all providers of Inmate Calling Services serving county facilities located in the same states as Pay Tel."[46] Securus subsequently replied, responding to certain assertions made by other commenters and reiterating its claims for relief from the Commission's ICS rate caps.[47]

10. *Applicable Waiver Standard.* As previously discussed, we treat Securus' Petitions as requests to waive the Commission's rule mandating interim interstate ICS rate caps under the Commission's general waiver rule and the waiver provisions of the *Order*.[48] Section 1.3 of the

[39] Martha Wright, et al. Opposition to Petition for Leave to Add Fee, WC Docket No. 12-375 (filed Feb. 28, 2014) (Wright Petitioners' Opposition).

[40] Martha Wright, et al. Consolidated Comments, WC Docket No. 12-375 (filed Mar. 11, 2014) (Wright Petitioners' Consolidated Comments); Martha Wright, et al. Consolidated Reply Comments, WC Docket No. 12-375 (filed Mar. 18, 2014) (Wright Petitioners' Consolidated Reply Comments).

[41] Wright Petitioners' Consolidated Comments at 2-3.

[42] *Id.* at 1.

[43] Daniel Ream, et al., Opposition to Petition for Securus Technologies, Inc. Leave to Add Fee, WC Docket No. 12-375 at 1 (filed Mar. 7, 2014) (Ream Opposition) ("Paytel, Inc. [sic] . . . was required by the FCC to submit audited financial statements and a detailed cost study in addition to its request for the waiver. Securus, has not submitted any such cost studies, any such analysis, and simply wishes to piggyback off of the waiver granted to Paytel.").

[44] Reply Comments of Global Tel*Link Corporation on Securus Technologies, Inc.'s Inmate Calling Services Petitions, WC Docket No. 12-375 at 4 (filed Mar. 18, 2014) (GTL Reply).

[45] Comments of CenturyLink Regarding Securus Technologies Inc.'s Inmate Calling Service Petitions, WC Docket No. 12-375 at 4 (filed Mar. 11, 2014) (CenturyLink Comments).

[46] Network Communications International Corp. Comments on Additional Requests for Limited Waiver of Its Inmate Calling Service Rate Caps, WC Docket No. 12-375 at 1 (filed Mar. 18, 2014) (NCIC Reply).

[47] Securus Technologies Reply in Support of Petition to Expand Pay Tel Waiver, WC Docket No. 12-375 (filed March 17, 2014) (Securus Waiver Expansion Petition Reply); Securus Technologies Reply in Support of Petition for Leave to Add Fee for Voice Biometrics Technology, WC Docket No. 12-375 (Mar. 17, 2014) (Securus Voice Biometrics Petition Reply).

[48] 47 C.F.R. § 64.6030; *see also* Waiver Expansion Petition at 1; Voice Biometrics Petition at 1.

Commission's rules states that the Commission's rules may be waived for good cause shown.[49] Waiver of the Commission's rules "is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[50] In the *Order*, the Commission stated that "the petitioner bears the burden of proof to show good cause exists to support the request" and identified factors that "may be considered" in reviewing a waiver request.[51] It further stated that ICS providers "will have opportunities to seek waivers to the extent the framework adopted in this Order does not adequately address their legitimate costs of providing ICS."[52] The Commission noted that "petitions for waiver of the interim rate caps would account for extraordinary circumstances."[53] The Commission concluded that, for both substantive and administrative reasons, it would evaluate waivers at the holding company level.[54] It delegated authority to the Bureau to "request additional information necessary for its evaluation of waiver requests and to approve or deny all or part of requests for waiver of the interim rate caps adopted herein."[55]

11. Pay Tel sought a waiver of the Commission's interim rate caps based on the impact of below-cost state rates in certain states.[56] In the *Pay Tel Waiver Order,* the Bureau determined that Pay Tel demonstrated good cause for a temporary waiver by providing data sufficient to demonstrate its total company costs, identifying the below-cost intrastate rate mandates it faced and their financial impact on its revenues, providing data showing that its intrastate revenue shortfall threatened its financial viability, and showing that the grant of its request was in the public interest.[57]

III. DISCUSSION

12. We conclude that Securus failed to meet its burden of proof to establish good cause for grant of waiver of the Commission's ICS rate cap rule for either of its Petitions. Securus failed to make an adequate showing for waiver in either Petition and also fails to provide sufficient cost and revenue data to support its claims. We therefore deny without prejudice Securus' requests for waiver of the Commission's ICS rate caps.

A. Waiver Expansion Petition

13. We find that Securus' Waiver Expansion Petition fails to establish good cause to waive the Commission's rate cap rule. Specifically, the Petition fails to provide sufficient evidence to establish that Securus' costs of providing ICS on a total company basis are higher than the Commission's rate caps

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[49] 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[50] *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular* 897 F.2d at 1166. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

[51] *Inmate Calling Report and Order and FNPRM,* 28 FCC Rcd at 14153, para. 82.

[52] *Id.* at 14164, para. 105. The factors are "costs directly related to the provision of interstate ICS and ancillary services; demand levels and trends; a reasonable allocation of common costs shared with the providers' non-inmate calling services; and general and administrative cost data." *Id*. at 14153, para. 82.

[53] *Id*. at 14153, para. 83.

[54] *See id.*

[55] *Id*. at 14154, para. 84.

[56] *See generally* Pay Tel Waiver Petition.

[57] *See generally Pay Tel Waiver Order*.

or that it operates under state rate mandates that do not allow the company to recover its costs. Securus also fails to claim or demonstrate that its financial viability would be at risk absent a waiver or to demonstrate that not granting a waiver would undermine competition in the ICS market, and does not otherwise demonstrate good cause to grant the requested waiver.

14. Securus characterizes its Petition as a request to "expand" relief granted to Pay Tel to itself and other ICS providers.[58] Under the circumstances here, we find Securus' request inconsistent with the Commission's historical approach to waivers. Although the Commission has granted blanket waivers in certain circumstances, it has recognized that such waivers may not be appropriate where there are material differences in the individual circumstances facing different companies.[59] In this context, we find that a persuasive waiver request is likely to involve evidence specific to individual circumstances, and thus find a case-by-case approach generally warranted here. To justify the grant of a waiver, an ICS provider must provide sufficient evidence to carry its burden of proof by, for example, submitting company-specific financial and operational data sufficient to demonstrate the need for a waiver and not relying on another provider's demonstration of costs. A waiver for one provider based on such a showing cannot simply be extended to another without an independent examination of the requesting provider's financial data. Each waiver petition must stand on its own merits and be justified by its own data as needed. Moreover, the *Order* expressly contemplated that a provider would have to make its own, individualized showing of good cause to justify a waiver.[60] The relief granted Pay Tel in the *Pay Tel Waiver Order* was predicated on Pay Tel's cost and revenue data.[61] Securus' Petition must be judged on a similar basis and its submission fails to carry this burden of proof

15. Securus' Waiver Expansion Petition also seeks relief from the Commission's interstate ICS rate caps on behalf of "**all** providers of Inmate Calling Services ('ICS') operating in the . . . states Pay Tel serves."[62] Securus, however, fails to submit company-specific financial data for other ICS providers to substantiate that the ICS rate caps are below their costs or that the combination of interstate rates based on its average costs and below-cost state rates would prevent them from being financially viable or to otherwise justify a waiver on their behalf. Nor did any other ICS providers submit such data. As a result, there is no evidence in the record to justify granting a blanket, industry waiver of the interim rate caps.

16. *Cost Showing.* The waiver provisions of the *Order* identified several types of financial and operational data the Commission could consider in evaluating a waiver request from an ICS provider.[63] The principal source of data Securus cites in support of its Petition – a report by Stephen Siwek that it submitted with its initial comments in response to the NPRM in this proceeding[64] – fails to provide most of these data and is generally insufficient to support its Waiver Expansion Petition.[65]

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[58] *See generally* Waiver Expansion Petition.

[59] *See, e.g.*, *Federal-State Joint Board on Universal Service*, Order on Reconsideration, 23 FCC Rcd 7333, 7334-35, paras. 6-10 (2008).

[60] *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14153-54, paras. 82-83 ("An ICS provider that believes that it has cost-based rates for ICS that exceed our interim rate caps may file a petition for a waiver.").

[61] *See Pay Tel Waiver Order*, 29 FCC Rcd at 1305-07, paras. 11-18.

[62] Waiver Expansion Petition at 1 (emphasis added); *see also* CenturyLink Comments at 3; NCIC Reply at 1.

[63] *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14153, para. 82.

[64] *See generally* Siwek Report. The Commission declined to rely on these data in the *Inmate Calling Report and Order and FNPRM*. *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14145, para. 68 ("While Securus' data provide some insight into the costs of its ICS operations, we have concerns about relying entirely on these data to calculate rates, in part because Securus did not provide the disaggregated data used to derive the report's total cost results, and the data it submitted did not distinguish between collect, debit, or prepaid calls.").

[65] It is well established that "a heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those which have been carefully considered at the rulemaking

(continued….)

Securus claims that data from that report demonstrate that the rates proposed by Wright Petitioners, which we assume also includes the Commission's rate caps – are too low.[66] To support this claim, Securus cites selected data from the report that states costs for some of the facilities included in the report to be higher than the interim rate caps.[67] But, what Securus fails to highlight is that its average total cost per minute of all the facilities included in the report is significantly lower than the interim ICS rate caps from which Securus seeks relief – $0.04 per minute without commission revenues.[68] Put another way, while the cost of serving some of its locations may be higher than the ICS rate caps, its average cost per minute is approximately 81 percent lower that the Commission's debit and prepaid rate cap and 84 percent lower than its collect rate cap. Even with site commissions, the average cost of $0.124 per minute is still significantly below the Commission's rate caps.[69]

17. Given that the Commission will review waiver requests at the holding company level,[70] we find Securus' reliance on select data for a small number of facilities from the study to be insufficient to support its waiver request. Wright Petitioners assert that "the Siwek study, which did not address intrastate price caps, and failed to provide detailed cost information, simply cannot serve as the sole basis for granting the broad relief requested in the Petition."[71] We agree and therefore conclude that the evidence included in the Siwek Report fails to provide an adequate basis from which to derive Securus' total company costs or to identify potential revenue shortfalls that might occur due to below-cost state rates, necessary information for analyzing Securus' waiver request.

18. In support of its Petition, Securus does not discuss the 2008 ICS Provider Data Submission, a study Securus and other ICS providers previously submitted in this proceeding that quantified the average cost of providing interstate debit and collect ICS.[72] That study found that, based on a 15-minute call, the average cost of a prepaid ICS call was $0.164 per minute and the average cost of a collect ICS call was $0.236 per minute.[73] The Commission relied on this study to establish one of the rate

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proceeding." *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970). Here, Securus' main source of data for the waiver is a filing that was already carefully considered by the Commission when it adopted the ICS rules. *See, e.g., Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14120-21, para. 26. For this reason alone, Securus has not met its "heavy burden."

[66] Waiver Expansion Petition at 3-4 (citing the Siwek Report); *see also* Securus Waiver Expansion Petition Reply at 1 (Securus "had proved with its own expert report that the Rate Caps are too low . . . ."); *see also* Securus Mar. 4, 2014 *Ex Parte* Letter (Securus' "costs of service are in many cases much higher than Pay Tel's."). We note that comparing Securus' costs to those of another provider is not relevant to the question of whether Securus' costs are greater than the Commission's interim interstate ICS rate caps or state rates.

[67] *See* Waiver Expansion Petition at 4-5.

[68] *See Inmate Calling Report and Order and FNPRM,* 28 FCC Rcd at 14120-21, para. 26, 14148, para.75 n.277 (describing the methodology used to calculate the report's average per minute cost of $0.044).

[69] *Id.*, 28 FCC Rcd at 14120-1, para. 26. The $0.124 per minute average represents the total average cost per interstate minute of use, including commissions and weighted by call volume for the facility groups included in the study. *See* Siwek Report at 3, 8 (tables 2 and 9).

[70] *See Inmate Calling Report and Order and FNPRM*, 28 FCC Rcd at 14153, para. 83.

[71] Wright Petitioners' Consolidated Comments at 3.

[72] *See generally* Don J. Wood, Inmate Calling Services Interstate Call Cost Study (WOOD & WOOD 2008) CC Docket No. 96-128 (filed Aug. 15, 2008); Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Aug. 22, 2008) (Joyce Aug. 22, 2008 *Ex Parte* Letter) (attaching supplemental cost and usage data); Record submission by "several providers of inmate telephone service," CC Docket No. 96-128 (filed Oct. 15, 2008) (amending supplemental cost and usage data) (collectively 2008 ICS Provider Data Submission).

[73] *See generally id*.

caps that Securus challenges here.[74] Both of these average costs from the 2008 ICS Provider Data Submission are below the Commission's interim rate caps, and are considerably lower than the higher rates sought by Securus here. Securus makes no attempt to reconcile the information in the 2008 ICS Provider Data Submission, which included Securus' own cost data, with its request for the considerably higher rates it seeks in its Waiver Expansion Petition.[75]

19. *Impact of Below-Cost Intrastate Rates.* We also find that Securus fails to provide any analysis of the impact of specific state rates on its ability to recover its costs.[76] In requesting the same relief granted to Pay Tel, Securus attempts to rely on Pay Tel's intrastate shortfall analysis, which compared *Pay Tel's* average per minute cost to below-cost state rates to quantify its revenue shortfall. But Pay Tel's costs and revenues are not Securus'. A below-cost state rate for Pay Tel is not necessarily below-cost for Securus. In fact, given Securus' considerably larger size and consequently greater scale efficiencies,[77] its average per-minute cost of providing ICS would likely be lower than Pay Tel's.[78] Given that Securus has failed to submit any analysis of its costs and the revenue impacts of state rate mandates, it has not met its burden of proof. Indeed, because Securus has failed to submit sufficient data, we have no way of knowing whether Securus experiences any shortfall at all.[79]

20. Securus does not allege , let alone demonstrate, that whatever revenue shortfall it may experience threatens its financial viability.[80] Pay Tel quantified the revenue shortfall it faced due to below-cost state rates and provided audited corporate financial statements to confirm that the shortfall would make it financially unsustainable.[81] Securus has neither made such a claim nor provided the requisite financial data to substantiate such a claim. Instead, it merely asserts that "[a]ll ICS carriers are losing a good deal of revenue by cutting their rates down to the Interim Rate Caps. . . . They all will suffer a huge 'shortfall.'"[82] In fact, reducing unreasonably high interstate ICS rates was the central goal of the *Order* and the interim rate caps it established.[83] Pay Tel did not base its request for a waiver on the

[74] *See Inmate Calling Report and Order and FNPRM,* 28 FCC Rcd at 14150, para. 78, 14148, para. 75 n.274.

[75] Pay Tel also provided to the 2008 ICS Provider Data Submission data on a small number of facilities it served. For the purposes of the *Pay Tel Waiver Order,* the Bureau was able to rely instead on Pay Tel's subsequent submission of total company cost data, which provided a more comprehensive and recent assessment of its costs. *See Pay Tel Waiver Order*, 29 FCC Rcd at 1306, para. 14.

[76] *See also* Wright Petitioners' Consolidated Reply Comments at 3 ("Simply put, nowhere in Securus' submissions did Siwek address the impact of below-cost intrastate rate caps imposed by state regulatory bodies.").

[77] *See Inmate Calling Report and Order and FNPRM,* 28 FCC Rcd at 14183 n.500.

[78] *See also* Wright Petitioners Consolidated Reply Comments at 3 ("Presumably, if Securus or CenturyLink could demonstrate that their cost of providing intrastate service in the 13 states covered by the Waiver Order were above the rate caps imposed by those states, they would have done so.").

[79] Instead of comparing its costs to state rate mandates as Pay Tel did, Securus attempts to justify its waiver request by comparing its post-*Order* rates with the rate Pay Tel obtained through its waiver request. To that end, it provided a declaration by its Chief Financial Officer asserting that "[o]n an annual basis, comparing the revenue that Securus will realize under the Interim Rate Caps versus what it would realize at $0.46 per minute, I calculate that Securus will incur a revenue shortfall on interstate calls from jails in the above-listed states of approximately $1.5 Million, based upon historical call volumes." Securus Mar. 4, 2014 *Ex Parte* Letter at Attach. (Declaration of Geoffrey Boyd). This confuses the waiver analysis required.

[80] The Commission interpreted sections 201(b) and 276 of the Act to require that interstate ICS rates be just, reasonable and fair. *See Inmate Calling Report and Order and FNPRM* at 14114-16, paras. 13-15. Demonstrably below-cost rates that threaten a provider's financial viability would generally provide a basis for finding that the ICS provider will not be "fairly compensated" in its provision of ICS. *See* 47 U.S.C. § 276(b)(1)(A).

[81] *See Pay Tel Waiver Order*, 29 FCC Rcd at 1306, para. 15.

[82] Waiver Expansion Petition at 6.

[83] *Inmate Calling Report and Order and FNPRM,* 28 FCC Rcd at 14109, para. 2.

fact that its revenues would be lowered by the Commission's ICS rate caps; it claimed that state rate mandates combined with the Commission's rate caps would make it unprofitable, at the holding company level.[84] Securus has failed to make such a claim or such a showing.

21. We find that granting Securus' Waiver Expansion Petition would not be in the public interest. We are not convinced that failure to grant the requested relief to other providers will have the impact on competition that Securus claims.[85] Pay Tel was granted a temporary waiver in part because it claimed and demonstrated that a failure to grant a waiver "threatens to put Pay Tel out of business and to, therefore, reduce both competition among ICS providers and the widespread deployment of ICS" – the dual goals of section 276.[86] The Bureau concurred, stating that granting the waiver "will ensure that Pay Tel continues to provide highly-secure ICS to inmates and their families at the facilities which it serves."[87] Securus has not met the burden of making a similar claim or a similar showing, either for itself or for all other ICS providers. Without data, we cannot evaluate Securus' costs to determine the impact of the Commission's interim rate caps on Securus, let alone evaluate their claim about the impact on competition. Pay Tel a temporary waiver was based on the evidence presented, evidence and costs that have not been presented here.

22. For the reasons above, we find Securus' Waiver Expansion Petition fails to justify a waiver of the Commission's interim rate cap rule and therefore deny this Petition. We deny Securus' Petition without prejudice.

B. Voice Biometrics Petition

23. We similarly find that Securus' Voice Biometrics Petition fails to establish good cause for a waiver of the Commission's rate cap rule. As discussed further below, the Petition fails to acknowledge that the Commission's interim rate caps already are designed to provide for recovery of a fee for continuous voice biometrics, and fails to establish that Securus is unable to recover the cost of providing continuous voice biometric technology through its rates.

24. We reject Securus' contention that "the cost of biometrics is among the grounds for which Pay Tel got [its] waiver."[88] This is an incorrect reading both of Pay Tel's waiver petition and of the *Pay Tel Waiver Order*. Pay Tel did not cite the cost of continuous voice biometrics as a reason for its waiver and never requested additional revenue to offset such costs.[89] Rather, Pay Tel's waiver request

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[84] Securus states that "this issue is really about revenue, not costs" and that "the *Waiver Order* is predicated on Pay Tel's 'revenue shortfall' rather than its costs." Securus Waiver Expansion Petition at 6. The Bureau's review of Pay Tel's waiver request, however, required the analysis of both costs and revenues. The Bureau first had to ascertain Pay Tel's total company costs and compare them to Pay Tel's revenues to determine whether there was good cause for a waiver. *See Pay Tel Waiver Order*, 29 FCC Rcd at 1306, paras. 14-15. The Bureau then had to assess Pay Tel's revenue shortfall calculation and its claim for additional revenues in order to determine an appropriate remedy for Pay Tel. *See id.* at 1307, paras. 17-18.

[85] *See* Waiver Expansion Petition at 7; *see also* CenturyLink Comments at 2 (CenturyLink asserts that "as a result of the Pay Tel Waiver, all ICS carriers that compete with Pay Tel now have been significantly injured in their ability to compete for contracts and to serve existing sites."); GTL Reply at 3-4 ("the Commission has put all other ICS providers attempting to compete with Pay Tel at a competitive disadvantage.").

[86] Pay Tel Waiver Petition at 24.

[87] *See Pay Tel Waiver Order*, 29 FCC Rcd at 1307, para. 16; *id.* ("We further note that a waiver will be consistent with our statutory obligation under section 201(b) of the Act and, pursuant to section 276, will 'promote competition' and 'promote the widespread deployment of pay phone services to the benefit of the general public.'") (citations omitted).

[88] Voice Biometrics Petition at 3.

[89] *See generally* Pay Tel Waiver Petition. Securus correctly states that Pay Tel's waiver petition made a reference to the costs it incurs in providing voice biometric service. *See* Voice Biometrics Petition at 2 (citing Pay Tel Waiver

(continued….)

was based on its assertion that below-cost state rate mandates combined with the Commission's interim rate caps (set at Pay Tel's average cost) ensured that Pay Tel would experience an intrastate revenue shortfall that it could not offset except through a waiver of the rate caps.[90] Further, the *Order* expressly acknowledged that continuous voice biometric costs were included in the portion of Pay Tel's cost study that the Commission relied on to establish its interstate rate caps.[91] Since the ICS rate caps already accommodate the continuous voice biometric fee cited by Pay Tel, we do not believe further adjustments to the caps are necessary. We also reject Securus' assertion that "through the *Waiver Order*, Pay Tel has been given extra interstate calling revenue to pay [voice biometric technology vendor] JLG."[92] The higher interstate ICS rate Pay Tel requested and was temporarily allowed to charge was to offset the intrastate revenue shortfall that Pay Tel documented it faced as a result of below-cost state rate mandates, not to compensate a security software vendor.

25. We disagree with Securus' claim that granting its Petition "is not only appropriate but is necessary in order 'not to skew the competitive landscape in the ICS market.'"[93] By expressly incorporating the cost of this service in its rate caps, the Commission has already designed its interim caps to ensure that all ICS providers will be able to recover the costs of employing continuous voice biometric technology and Securus does not demonstrate otherwise in its request.

26. Finally, we note that Securus does not allege that it will not be financially viable if it fails to obtain the relief requested. Pay Tel made such an assertion to justify the extraordinary circumstances it faced and the relief it sought.[94] Citing a public statement by Securus' Chief Executive Officer, Wright Petitioners state that "the imposition of the price caps will not have the same severe financial impact referenced in Pay Tel's waiver request, and Securus 'can live with' the reduction in revenue."[95] The Ream Opposition notes that Securus "included the biometric service at no charge to a customer in a proposal to the Florida DoC" which "directly contradicts the notion that Securus is unable to continue without such a waiver."[96] If Securus desires to make such an assertion, it has only to do so and provide sufficient evidence to support it.

(Continued from previous page)
Petition at 7 n.25). Pay Tel did not, however, cite this as a basis for its waiver request but merely affirmed that Pay Tel's voice biometric cost had already been included in the cost study on which the Commission's rate cap was set.

[90] *See* Pay Tel Waiver Petition at 2.

[91] The Commission included the costs of voice biometric technology in calculating the interim debit and prepaid ICS rate cap. *See Inmate Calling Report and Order and FNPRM* at 14148, para. 76 ("We establish an interim rate cap for debit and prepaid interstate ICS calls of $0.21 per minute based on the public debit call cost data included in Pay Tel's cost submission. . . . Specifically, Pay Tel reported that the average of its actual and projected 2012-2015 debit calling costs, excluding commissions and *including continuous voice biometric identification fees*, is $0.208 per minute.") (emphasis added). For collect calls, we note that the $0.25 per minute rate cap for collect calls set by the Commission was higher than the rate Pay Tel cited in its cost study for collect calls with voice biometric technology. *See* Letter from Marcus W. Trathen, Counsel for Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at Attach. (Worksheet Set A) (Pay Tel Cost Summary) (filed July 23, 2013) (citing an average total company cost for collect ICS calls with voice biometric technology of $0.225 per minute). We therefore believe that the Commission's rate cap for collect calls is also set at sufficiently conservative level to accommodate the voice biometric fee Securus has requested here.

[92] Voice Biometrics Petition at 4.

[93] Securus Voice Biometric Petition Reply at 2 (citations omitted).

[94] *See, e.g.,* Pay Tel Waiver Petition at 2.

[95] Wright Petitioners Opposition at 2 (quoting Exh. A at 2 (Statement by Securus' CEO as cited in Bryce Baschuk, *Court Partially Denies Appeal to Block FCC Prison Call Rate Caps*, BLOOMBERG BNA, Jan. 15, 2014)).

[96] Ream Opposition at 2; *see also* Wright Petitioners' Opposition at 3.

27. For the reasons above, we find Securus' Voice Biometrics Petition fails to justify a waiver of the Commission's interim rate cap rule and therefore deny this Petition without prejudice.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 5(c), 201, and 276 and of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 276, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the Petition to Expand Pay Tel Waiver and the Petition for Leave to Add Fee for Voice Biometrics Technology filed by Securus Technologies, Inc. on February 19, 2014 ARE DENIED without prejudice.

29. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau