



July 31, 2014

VIA ECFS

Julie Veach
Chief
Wireline Competition Bureau
Federal Communications Commission
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Stephanie A. Joyce

Attorney
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Re: WC Docket No. 12-375, Rates for Interstate Inmate Calling Services

Dear Chief:

Securus Technologies, Inc. (“Securus”), through counsel, provides this additional information regarding the conduct of Praeses, LLC (“Praeses”) that has been raised in previous letters.¹

A county in Pennsylvania, on the advice of Praeses, has sent Securus a demand for payment of site commissions on interstate calls reaching back to February 11, 2014, which is the effective date of the *Inmate Rate Order*.² That demand was accompanied by the opinion letter of outside counsel. See **Attachment A**.

Please do not hesitate to contact me with any questions: 202.857.6081.

Sincerely,

s/Stephanie A. Joyce

Counsel to Securus Technologies, Inc.

¹ WC Docket No. 13-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Julie Veach, Chief, Wireline Competition Bureau, at 4-5 (July 30, 2014); Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC (May 15, 2014).

² *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, FCC 13-113, 28 FCC Rcd. 14107 (rel. Sept. 26, 2013), published at 78 Fed. Reg. 67956 (Nov. 13, 2013) (“*Inmate Rate Order*”).

Arent Fox

Attachment

Cc: Marlene H. Dortch, Secretary, FCC
Commissioner Mignon Clyburn
Rebekah Goodheart, Legal Advisor to Commissioner Clyburn
Deena Shetler, Associate Bureau Chief, Wireline Competition Bureau
Kalpak Gude, Chief, Pricing Policy Division, Wireline Competition Bureau
Lynne Engledow, Assistant Chief, Pricing Policy Division, Wireline Competition Bureau
David Zesiger, Senior Counsel, Pricing Policy Division, Wireline Competition Bureau
Rhonda Lien, Pricing Policy Division, Wireline Competition Bureau

All via electronic mail

ATTACHMENT A

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July 1, 2014

BY EMAIL

Mr. Nil Shah
Chairman
Praeses, LLC
330 Marshall Street
Suite 800
Shreveport, LA 71101

Re: FCC Inmate Calling Services Regulations

Dear Mr. Shah:

You asked us to review the regulations adopted in September 2013 by the Federal Communications Commission (“FCC”) relating to Inmate Calling Services (“ICS”) to determine the compliance with such rules of certain proposed compensation plans between ICS providers and correctional facilities. As further discussed herein, the ICS rules are applicable to ICS providers and are not applicable to correctional facilities, and payments by ICS providers to correctional facilities pursuant to the proposed compensation plans do not violate the FCC’s ICS rules.¹

Background

Compensation Plans. We understand that Praeses, LLC (“Praeses”) has proposed various compensation plans to its correctional facility clients, including, for example: (i) a fixed percentage commission on gross ICS revenue (“Gross ICS Revenue”) generated by an ICS provider from inmates incarcerated at a particular correctional facility; (ii) no commission on Gross ICS Revenue that is *interstate* in nature and a fixed percentage commission on all Gross ICS Revenue less *interstate* Gross ICS Revenue; (iii) in lieu of percentage commission on Gross ICS Revenue, a fixed charge per facility per inmate per month or per facility per ICS “station” per month.

¹ This letter only addresses the legality of commission payments by ICS providers to correctional facilities under the FCC’s rules. It does not address any potential political ramifications of the proposed compensation plans, which may be disfavored by certain FCC staff and/or Commissioners.

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FCC's ICS Order and D.C. Circuit Stay. The FCC adopted its ICS rules in a September 2013 Report and Order ("*ICS Order*").² Some of those rules became effective on February 11, 2014, and others are stayed pending judicial review before the Court of Appeals for the D.C. Circuit ("*D.C. Circuit*").³ Generally, the FCC adopted rules that:

- (i) require ICS rates to be based only on costs reasonably and directly related to the provision of ICS;⁴
- (ii) presume an ICS provider's rates are cost-based if the provider's collect calling rates do not exceed \$0.14 per minute and prepaid calling rates do not exceed \$0.12 per minute;⁵
- (iii) establish interim rate caps that prohibit ICS providers from charging in excess of \$0.25 per minute for collect calls and \$0.21 per minute for prepaid calls;⁶ and
- (iv) require ICS providers to submit annual reports to the FCC detailing rate and call data and certifying compliance with the requirement that rates be cost-based.⁷

² *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) ("*ICS Order*").

³ On January 13, 2014, the D.C. Circuit stayed certain of the FCC's ICS rules pending the court's resolution of a Petition for Review of the *ICS Order* filed by a national ICS provider, Securus Technologies, Inc. See *Securus Technologies, Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014). Specifically, the D.C. Circuit expressly stayed: (i) Section 64.6010 requiring ICS providers to charge cost-based ICS rates; (ii) Section 64.6020 providing a ICS rate safe harbor; and (iii) Section 64.6060, which requires ICS providers to make annual filings with the FCC. The following rules adopted in the *ICS Order* were not stayed by the D.C. Circuit: (i) the definitions contained in 47 C.F.R. § 64.6000; (ii) the rate caps in 47 C.F.R. § 64.6030; (iii) the provisions relating to Telecommunications Relay Services (*i.e.*, services for the blind and hard of hearing) in 47 C.F.R. § 64.6040; and (iv) the billing-related call blocking restrictions in 47 C.F.R. § 64.6050. Final briefs in the case are due to the D.C. Circuit on October 6, 2014. The oral argument has not yet been scheduled.

⁴ See 47 C.F.R. § 64.6010 ("All rates charged for Inmate Calling Services and all Ancillary Charges must be based only on costs that are reasonably and directly related to the provision of ICS.").

⁵ See 47 C.F.R. § 64.6020.

⁶ See 47 C.F.R. § 64.6030. The FCC established this "interim" rate cap to place a ceiling on ICS rates until such time as the FCC is able to collect the cost data from ICS providers that the FCC needs to establish a permanent rate cap.

⁷ See 47 C.F.R. § 64.6060 (requiring ICS providers annually to file with the FCC, *inter alia*, "[a] certification that the Provider was in compliance during the entire prior calendar year with the requirement that all rates and charges be cost-based"). In addition to these annual reports, the *ICS Order* also requires ICS providers to file with the FCC "data to document their costs for interstate, intrastate long distance and intrastate local ICS for the past year." *ICS Order*, 28 FCC Rcd at 14172 ¶ 125. This

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Items (i), (ii), and (iv) were stayed by the D.C. Circuit, but item (iii) currently is in effect.

The FCC's ICS Rules Do Not Apply to Correctional Facilities

FCC Order does not apply to
correctional facilities or existing contract

As an initial matter, the FCC's ICS rules only govern the relationship between ICS providers⁸ and end-user inmates. These rules are not applicable to correctional facilities or to Praeses in its capacity as a consultant to correctional facilities. Therefore, neither a correctional facility nor Praeses can violate the rules. In fact, the FCC expressly stated in the *ICS Order* that the rules adopted therein are not "directed at the contracts between correctional facilities and ICS providers" and "[n]othing in [the *ICS Order*] directly overrides such contracts."⁹ The *ICS Order* makes clear that the FCC's statutory obligations relate to the rates charged to end users, who consist of the inmates and the parties they call. The *ICS Order* further states that it does not address "how correctional facilities spend their funds or from where they derive" revenue.¹⁰

The FCC's ICS Rules Do Not Prohibit Payments from ICS Providers to Correctional Facilities

The FCC expressly stated in the *ICS Order* that it did not conclude "that ICS providers and correctional facilities cannot have arrangements that include site commissions."¹¹ To the contrary, the *ICS Order* leaves open several means by which ICS providers may continue to pay commissions to correctional facilities.¹²

data collection is intended to enable the Commission to take further action to reform rates, including developing a permanent cap or safe harbor for interstate rates and evaluating other rate reform options. *Id.* at 14172 ¶ 124. This requirement was not stayed by the D.C. Circuit, and ICS providers are required to file the data no later than July 17, 2014 using an FCC form available at www.fcc.gov/encyclopedia/ICS-mandatory-data-collection. The information may be filed on a confidential basis. *See Commission Announces Inmate Calling Services Due Date*, Public Notice, DA 14-829 (rel. June 17, 2014).

⁸ The FCC's rules use the term "Provider of Inmate Calling Services," which is defined to mean any communications service provider that offers interstate calling capabilities from a telephone or other device that is set aside by authorities of a correctional institution for use by inmates, regardless of the technology used. *See* 47 C.F.R. § 64.6000.

⁹ *ICS Order*, 28 FCC Rcd at 14162 ¶ 100.

¹⁰ *Id.* at 14137 ¶ 56.

¹¹ *Id.*

¹² The analysis set forth herein is not dependent on whether a payment to a correctional facility by an ICS provider is a percentage commission or a fixed payment based on the number of phones, inmates, beds, or stations at a particular facility. The *ICS Order* treats all "payments in money or services from ICS providers to correctional facilities or associated government agencies" as commissions "regardless of the terminology the parties to the agreement use to describe them." *Id.* at 14135 ¶ 54 n.199; *see also id.* at

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First, the Commission determined in the *ICS Order* that commission payments are not costs that can be recovered through interstate ICS rates.¹³ Thus, ICS providers must be able to justify their interstate ICS rates as being cost-based without considering any costs associated with the payment of commissions to correctional facilities. Provided that they can do so, however, nothing in the FCC's rules prevents an ICS provider from paying commissions to correctional facilities – for example, from other revenue sources available to the ICS provider. Moreover, even cost-based ICS rates may include at least a “reasonable profit”¹⁴ and ICS providers are not prohibited by the *ICS Order* from sharing their profits with correctional facilities.¹⁵

Second, the *ICS Order* does not purport to regulate intrastate ICS rates—*i.e.*, rates for inmate calls that are local to the correctional facility.¹⁶ Accordingly, there currently is no rate regulation of intrastate rates and no requirement that intrastate rates are cost-based. As a result, ICS providers may charge inmates intrastate rates that incorporate a commission to be paid by the ICS providers to the correctional facility.

Third, the FCC acknowledged in the *ICS Order* that at least some payments by ICS providers to correctional facilities “reimburse correctional facilities for their costs of providing ICS.”¹⁷ For this reason, an ICS provider seeking a waiver of the rate cap or seeking to demonstrate that its interstate ICS costs are between the safe harbor and the interim rate cap may provide specific details about payments to correctional facilities that it contends are compensable as costs as set

14137 ¶ 56 (“We note that we would similarly treat ‘in-kind’ payment requirements that replace site commission payments in ICS contracts.”) (citation omitted).

¹³ *Id.* at 14137 ¶ 56 (“We conclude only that, under the [Communications Act of 1934], such commission payments are not costs that can be recovered through interstate ICS rates.”).

¹⁴ *See, e.g., id.* at 14141 ¶ 61 (holding that “fair compensation” of ICS providers includes a “reasonable profit”); *see also id.* at 14136 ¶ 54 n.203 (noting that the FCC used an “11.25% rate of return to determine the cost of capital” when establishing ICS rate caps).

¹⁵ *Id.* at 14135 ¶ 54 (“The Commission has previously held that site commissions are ... an apportionment of profit, not a cost of providing ICS.”) (citation omitted).

¹⁶ In a further notice of proposed rulemaking attached to the *ICS Order*, the FCC requested public comment on whether it has authority to, and, if so, whether it should, regulate intrastate ICS rates in the future. *See id.* at 14173-76 ¶¶ 129-135.

¹⁷ *Id.* at 14135 ¶ 54 n.203 (“Although it is clear that site commissions are a revenue stream to the correctional facility, we cannot foreclose the possibility that some portion of payments from ICS providers to some correctional facilities may, in certain circumstances, reimburse correctional facilities for their costs of providing ICS.”).

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forth in the *ICS Order*.¹⁸ If the FCC determines that such payments to a correctional facility legitimately offset compensable costs of the correctional facility related to the provision of ICS, then the ICS provider may consider the payments to be part of the ICS providers' reasonable costs when the ICS provider establishes its cost-based ICS rates.

Finally, as noted above, the FCC rule requiring ICS rates to be based on costs that are reasonably and directly related to the provision of ICS, Section 64.6010, has been stayed by the D.C. Circuit. Consequently, there is no FCC regulation currently in effect that requires ICS rates to be cost-based, and, depending on the outcome of the D.C. Circuit proceeding, the rule may never become effective. During any period in which ICS rates are not required to be cost-based, there does not appear to be a prohibition preventing ICS providers from incorporating commissions paid to correctional facilities into the ICS providers' rates.¹⁹

* * * * *

¹⁸ *Id.*

¹⁹ The FCC adopted new regulation Section 64.6010 to implement its determination in the *ICS Order* that two statutes in the Communications Act of 1934, as amended (the "Act"), required ICS rates to be cost-based – the "fair compensation" provision in Section 276 of the Act and the "fair and reasonable" provision in Section 201(b) of the Act. See 47 U.S.C. §§ 201(b), 276. The D.C. Circuit stayed the effectiveness of newly adopted Section 64.6010 of the FCC's rules, but it did not expressly stay the FCC's underlying finding in the *ICS Order* that Sections 276 and 201(b) of the Act require ICS rates to be cost-based. Therefore, an argument can be made that ICS rates are required to be cost-based under the FCC's interpretation of Sections 276 and 201(b) of the Act despite the D.C. Circuit's stay of the rule adopted by the FCC to implement Sections 276 and 201(b) of the Act. We believe, however, that the better argument is that the D.C. Circuit's stay of Section 64.6010 of the FCC's rules also was intended by the D.C. Circuit to stay the effectiveness of the FCC's underlying determination regarding Sections 276 and Section 201(b) of the Act and that therefore ICS rates are not required to be cost-based during the effectiveness of the D.C. Circuit's stay.

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In summary, the FCC did not adopt an express prohibition on the payment of commissions by ICS providers to correctional facilities. Such commission payments are not in violation of any FCC regulation. Instead, the FCC merely promulgated a regulation that requires ICS providers to charge cost-based interstate ICS rates to inmates, and the FCC stipulated in the *ICS Order* that commissions are not compensable costs of providing ICS. However, the FCC rule requiring cost-based ICS rates currently is stayed by the D.C. Circuit. Even if the rule was effective, however, as discussed herein, there still would be several means available for ICS providers to pay commissions to correctional facilities.

Please do not hesitate to contact us if you would like to further discuss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip R. Marchesiello", written over a horizontal line.

Phillip R. Marchesiello

cc: Ann O'Boyle

County: Interstate Commission Summary

Interstate Traffic Summary

	Average Monthly Revenue	Average Monthly Commissions Paid	Average Monthly Revenue Retained by Securus
Pre FCC Order	\$ 10844.47	\$ 6870.20	\$ 3974.27
Post FCC Order	\$ 11421.28	\$ -	\$ 11421.28

YTD Unpaid Commissions on Interstate Revenue	40521.89
\$	\$

Interstate Traffic Summary By Month

	CONTRACTUAL			ACTUAL	
	Revenue	Commission Due to County	Revenue Due to Securus	Commission Paid to County	Revenue Retained by Securus
Feb-14	\$ 7806.81	\$ 6331.32	\$ 1475.49	\$ 2860.05	\$ 4946.76
Mar-14	\$ 10916.88	\$ 8853.59	\$ 2063.29	\$ -	\$ 10916.88
Apr-14	\$ 11890.90	\$ 9643.52	\$ 2247.38	\$ -	\$ 11890.90
May-14	\$ 11968.35	\$ 9706.33	\$ 2262.02	\$ -	\$ 11968.35
Jun-14	\$ 10908.98	\$ 8847.18	\$ 2061.80	\$ -	\$ 10908.98
Total	\$ 53491.92	\$ 43381.94	\$ 10109.98	\$ 2860.05	\$ 50631.87

Intersate Commissions Due AC \$ 43381.94
 Less Commissions Paid -2860.05
 Net Commissions Payable thru Jun-14 **\$ 40521.89**