

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECURUS TECHNOLOGIES, INC. <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 13-1280 and
)	consolidated cases
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

**OPPOSITION OF THE FEDERAL COMMUNICATIONS
COMMISSION TO MOTIONS FOR A STAY**

The Federal Communications Commission opposes the motions of Securus Technologies, Inc. (Securus), Global Tel*Link (GTL), and CenturyLink Public Communications, Inc. (CenturyLink) for a stay pending judicial review of an FCC order imposing interim caps on rates for interstate payphone service provided to prison inmates.

Providers of prison payphone service have a monopoly in each correctional institution they serve. For years, they have exploited that economic position by charging rates for interstate calls greatly exceeding the cost of providing service, in direct violation of the requirements of Sections 201 and 276 of the Communications Act that those rates be just, reasonable, and fair. Prisoners and their families, some of the most economically disadvantaged people in the country, have no choice but to pay and have for too long suffered the consequences.

In the order on review, the FCC adopted a three-part interim interstate rate framework. First, any provider may initially set its rates at a “safe harbor” level that will be presumed to be a cost-based rate without regard to the costs of service. In most cases, the safe harbor rate likely exceeds costs. Second, if a provider has costs above the safe harbor, it has the option to set a cost-based rate above the safe harbor rate, up to a hard cap. That cap was based on the highest costs reflected in the record. Third, a provider with especially high costs may seek a waiver of the hard cap. The FCC’s multi-tiered approach to inmate calling service rates is a careful interim attempt to ensure that providers recover their costs (and likely more) while reducing unfair overcharges that act as a penalty on prisoners and their families.

Petitioners have sought a stay of the interim rules and a return to the discredited system of monopoly exploitation and overcharges. For the reasons set forth below, petitioners have not met the stringent test for equitable relief, and the Court should deny their motions.

BACKGROUND

Inmates are literally a captive market for the companies that provide payphone service in prisons and jails; no competitive market forces constrain prices. To the contrary, a payphone provider contracts with the operator of an incarceration facility to be the monopoly provider of inmate calling services (ICS) there, often in return for “commissions” paid to the facility. Those commissions are then passed on to end users in calling rates, which accordingly have far exceeded the actual costs of service. In the order on review, *Rates for Inmate*

Calling Services, FCC No. 13-113 (rel. Sept. 26, 2013) (*ICS Order*), the FCC adopted interim rate caps, based on available cost data, to bring interstate rates for ICS closer to the cost of providing service while the agency gathers more data on which to base permanent reform. The Wireline Competition Bureau denied requests by Securus and GTL for a stay of the caps. *Rates for Inmate Calling Services*, No. DA13-2236 (Nov. 21, 2013) (*ICS Stay Order*) (Ex. B to GTL's Motion).

A. Market Failure In The Prison Payphone Marketplace.

The ICS market is the opposite of a competitive market. ICS providers do not compete for end users – the inmates and their families who pay for calls – because each provider is a monopoly in a given facility. No market force keeps rates in check. Worse, because many correctional facilities grant the monopoly franchise partly on the basis of the commission payment offered, competition among providers produces not lower end-user charges but increased commission payments and correspondingly *higher* end-user charges. *ICS Order* ¶41. The provider and the correctional institution split the monopoly profits extracted from inmates and their families who have no choice but to pay in order to speak by telephone. Prison authorities may use some of the funds to pay for prison-related activities, but in many cases, the funds are used to defray ordinary state costs, such as road construction and salaries. *Id.* ¶34.

High prison payphone rates deter communication between inmates and their families, with serious social consequences. The FCC found that a single 15-minute prison call can cost more than a month of regular telephone service. *ICS Order*

¶42. Considerable evidence before the FCC indicated that such rates discourage communication between inmates and their families, many of whom are among “the most economically disadvantaged in our society.” *Ibid.* Such barriers to communication contribute to greater recidivism. *Ibid.* When jailed parents lack regular contact with their children, those children (2.7 million of them nationwide) have higher rates of truancy, depression, and poor school performance. *Id.* ¶2. High ICS rates also burden inmates’ communication with their attorneys and are associated with higher rates of contraband cell phones in prisons. *Id.* ¶44. The long- and short-run costs to society are considerable.

For years, inmates’ families have asked the FCC to address prison payphone rates. Current and former inmates and their families, known as the “Wright petitioners,” petitioned the agency in 2003 to take action. They proposed a ban on exclusive payphone contracts in private prisons, and they asked the agency to create a “safe harbor” interstate rate cap along with the opportunity to charge higher rates if the ICS provider “could show that its costs justified such a rate.” Wright Petition at 19-20 (excerpt attached as Ex. A hereto). The FCC sought and received comment on the petition. *See ICS Order* ¶9. In 2007, the same petitioners asked in the alternative that the FCC cap interstate rates at all facilities. *Ibid.* In 2012, the FCC initiated a proceeding to address the pending petitions. *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629 (2012) (*ICS Notice*).

In the *ICS Notice*, the agency sought comment on a broad array of topics. It asked whether the proposed caps would “ensure just and reasonable rates ...

consistent with sections 201 and 276 of the [Communications] Act,” *ICS Notice* ¶20, and “[w]hat factors ... the Commission [should] consider in determining an appropriate per-minute cap,” *ibid.* The agency sought “specific, detailed cost information and other relevant data” pertinent to rate caps. *Ibid.*; *see also id.* ¶44 (asking whether proposed rate caps were supported by cost data); *id.* ¶7 (questioning “whether ICS rates accurately reflect the costs of providing ICS”); *id.* ¶25 (asking whether a rate proposal was supported by “sufficient cost, demand, and revenue detail to allow the Commission to determine whether the proposed rates are just and reasonable”). “What additional data,” the FCC inquired, “does the Commission require to set rates?” *Id.* ¶23. The agency asked further, “Would a rate cap approach require the Commission to conduct rate cases”? *Ibid.* Seeking input on methodologies other than the specific methodology proposed, the agency inquired into “alternative methodologies supported by sufficiently detailed data.” *Id.* ¶25. The FCC also sought comment on ancillary matters such as per-call charges, *id.* ¶¶18-19, and monthly account fees, *id.* ¶33.

B. ICS Order.

Just, reasonable, and fair rates, the FCC explained, must under established law be based on the costs of providing service. *ICS Order* ¶¶12, 45-46. The FCC thus required that “[a]ll rates charged” for interstate ICS “be based only on costs that are reasonably and directly related to the provision of ICS,” 47 C.F.R. § 64.6010 (*ICS Order* at 89). The record showed that commission payments on inmate calls – which had been determined previously to be not a cost, but simply a sharing of profit, *ICS Order* ¶54 – drive excessive end-user charges. Interstate

rates in states that allow commissions are systematically higher than in states that do not allow them: well over a dollar per minute in some cases (with the commission accounting for up to almost 90 percent of the charge), *see ICS Order* ¶¶34-35, compared with less than five cents per minute in most of the states that have eliminated commissions, *id.* ¶¶37-38 & n.145. Calls from federal immigration detention facilities, which also do not allow commissions, cost 12 cents per minute. *Id.* ¶4. Data provided by Securus showed that costs (excluding commissions) for the majority of its calls were about 4.4 cents per minute, *ICS Stay Order* n.148, but that its rates for those calls average 46 cents per minute, *see Siwek Report Table 10 (Ex. B hereto)*. On that record, the FCC determined that end-user rates far exceed the actual costs of providing service. *See ICS Order* ¶¶34, 45-46; *accord* ¶12.

Such rates, the FCC determined, violate Congress's directives that "[a]ll charges ... for and in connection with [interstate] communication services, shall be just and reasonable," 47 U.S.C. § 201(b), and that owners of payphones be "fairly" – not excessively – "compensated" for calls made from their phones, 47 U.S.C. § 276(b)(1)(A); *see ICS Order* ¶¶12, 45-46; *see also* 47 U.S.C. §201(b) (declaring "unlawful" rates that are "unjust" or "unreasonable"). As explained below, the FCC implemented an interim regime that will bring prices closer to (but still above) cost while the agency gathers more data and public comment to develop a permanent rate regime.

1. *ICS Costs.*

To align rates with costs, the agency had to determine which costs could be recoverable. It decided to permit rates based only on “costs that are reasonably and directly related to the provision of ICS, including a reasonable share of common costs.” *ICS Order* ¶53. Such costs include “the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating ICS calls; and costs associated with security features relating to the provision of ICS.” *Ibid.*; *see id.* n.196.

The FCC disallowed recovery through interstate rates of commissions paid for a provider’s monopoly franchise. As the agency had held previously with respect to those commissions, such costs generally are not “reasonably and directly related to the provision” of service, *ICS Order* ¶53, but in almost all cases represent only an “apportionment of profit” between the ICS provider and the incarceration facility, *id.* ¶54, citing *Inmate Calling Services*, 17 FCC Rcd 3248, 3262 (2002). The FCC accordingly concluded that commissions “are not a ... category of ... costs” recoverable in the rates charged for interstate calls placed from such payphones.¹ *ICS Order* ¶55. In doing so, however, the agency did not prohibit the payment of commissions, *id.* ¶56 – only their recovery through end-user rates.

¹ Although concluding that commissions, as a general category, are not recoverable through end-user rates, the FCC allowed avenues for recovery to the extent “that some portion of [commission] payments may, in certain circumstances, reimburse correctional facilities for their costs of providing ICS” – a “possibility” the record did not “foreclose.” *ICS Order* n.203.

2. *Interim Rate Structure.*

Rather than adopting a single rate cap, the FCC created a three-part interim rate structure: (1) the “safe harbor” cap, which all providers may use regardless of their costs; (2) the “hard cap,” which serves as presumptive upper limit on permissible rates, but under which rates must be set based on costs; and (3) a process for waiving the hard cap, for providers with especially high costs.

a. *Safe Harbor.*

First, the agency created safe harbor rate caps: 12 cents per minute for debit card and prepaid calls (*i.e.*, calls paid for through an inmate’s prison account) and 14 cents per minute for collect calls (which cost more to provide). *ICS Order* ¶48.

The safe harbor rates operate much like traditional rate caps. An ICS provider may in the first instance establish rates up to the safe harbor caps without regard to its costs; they serve as “an administratively convenient pricing option” for providers. *ICS Order* ¶69. Those rates “will be treated as lawful” and will be presumed just, reasonable, and fair unless proven otherwise. *Id.* ¶60; see 47 C.F.R. § 64.6020 (safe harbor rate is “presumptively in compliance” with cost-based rate requirement) (*ICS Order* at 89). A ratepayer may challenge a safe harbor rate as exceeding the provider’s costs, but to do so, the challenger “must overcome a rebuttable presumption that [the rate is] just, reasonable, and fair.” *Id.* ¶120. That presumption, combined with the FCC’s pleading requirements, “will likely insulate” ICS providers from any challenge to a safe harbor rate. *ICS Stay Order* ¶45; *see id.* ¶13 (it will be “difficult” to successfully challenge a safe harbor rate).

Moreover, in the unlikely event a safe harbor rate is successfully challenged, any relief “will be forward-looking and will not include refunds.” *ICS Order* ¶120.

The FCC based the safe harbor rates on record evidence of rates “from states that have eliminated site commissions and maintained adequate security,” which serves as a “conservative proxy for cost-based rates.” *ICS Order* ¶62; *see id.* ¶63 (setting forth the calculation methodology). The rates are conservative – *i.e.*, they likely exceed reasonable costs – because although they exclude commissions, they do not exclude “other factors driving these rates above ... reasonable cost.” *Id.* n.229. Indeed, rates in most of the states that do not allow commission payments are in the range of 4 to 8 cents per minute, well below the safe harbor. *Id.* nn.235 & 238. Because there is little difference in costs among states, *id.* n.235, the safe harbor rates are likely almost always overcompensatory, often by a large margin.

b. *Hard Cap.*

The FCC “expect[ed] the vast majority of providers” to charge rates “at or below [the] safe harbor rate levels.” *ICS Order* ¶119. The safe harbors were not meant, however, to be “binding rates,” *id.* ¶69; rather, the agency recognized that some providers’ costs may exceed the safe harbor limits. As a safety valve, high-cost providers may charge higher rates based on their costs, up to a hard cap of 21 cents per minute for debit card calls and 25 cents per minute for collect calls. *Id.* ¶48. When pricing above the safe harbor, the service provider may set its own rates, without prior approval.

The FCC based the hard cap rates on “the highest costs in the record.” *ICS Order* ¶74. Specifically, the agency relied on debit call data submitted by ICS

provider Pay Tel, which reflected “the highest total-company costs of any data submission in the record and therefore represent a conservative approach to setting [an] interim ... rate cap.” *Id.* ¶76. The Pay Tel cost figures were “significantly higher” than other data in the record (16.4 cents per minute for a debit call), *id.* ¶77, and far above those of Securus (about 4 cents per minute, *see id.* ¶26 & n.91).

For the collect call cap, the FCC similarly relied on the highest cost data in the record, which came from a study submitted by a group of several ICS providers that included Securus and CenturyLink (then known as Embarq), *id.* n.87, and supported collect call costs of 24.6 cents per minute, *id.* ¶78. The FCC explained that the collect call rate cap probably exceeds “the level [that] can be cost-justified,” *ibid.*, and “likely overstates ICS providers’ costs,” *id.* ¶80.

Rates between the safe harbor and the hard cap must be based on the cost of providing service and will not have the protections of the safe harbor. If challenged, non-safe harbor rates will not be presumed lawful, and the carrier will “bear the burdens of production and persuasion” that its rates are “just, reasonable, and fair” (*i.e.*, that they are cost based). *ICS Order* ¶121. Moreover, if the FCC were to find the rate unjust, unreasonable, or unfair, the service provider could “be ordered to pay refunds.” *Id.* ¶123. In addition, as the agency emphasized, providers will have significant flexibility in justifying their rates. A provider that serves multiple facilities with different cost characteristics may base its cost justification on “groupings” of facilities, as long as the group “reflect[s] reasonably related cost characteristics.” *Id.* ¶123.

c. *Waiver.*

The FCC explained that “the rate caps ... are set at sufficiently conservative levels to account for all costs ICS providers will incur ... pending ... further examination of such costs.” *ICS Order* ¶74. Nevertheless, as an additional safety feature to accommodate any provider with especially high costs, the agency allowed “[a]n ICS provider that believes that it has cost-based rates for ICS that exceed [the] interim rate caps” to file a petition for a waiver. *Id.* ¶82. Waiver requests will be evaluated “at the holding company level,” and not with respect to the costs of any specific facility or group of facilities. *Id.* ¶83.

3. *Ancillary Charges.*

ICS providers charge end users “ancillary” charges for such things as setting up and closing accounts and refunding unused funds. *ICS Order* ¶90. The FCC found that those charges, which in some instances approach five dollars, “do not appear to be cost-based.” *Ibid.* Concerned that providers would “increase their ancillary charges to offset lower rates” under the caps, the FCC ruled that ancillary charges must be based on costs as well. *Id.* n.338.

4. *Data Collection And Further Notice.*

To assure a complete record in support of a permanent regime, the FCC required ICS providers to report data on inter- and intrastate costs and usage for one year. *ICS Order* ¶¶124-125. These requirements take effect only after approval by the Office of Management and Budget. *See id.* ¶182.

In a Further Notice of Proposed Rulemaking, the FCC sought comment on “alternative ways of accomplishing interstate ... rate reforms,” *ICS Order* ¶153, including ways to establish “permanent safe harbors and rate caps,” *id.* ¶154.

ARGUMENT

To obtain a stay, petitioners must show that (1) they will likely prevail on the merits, (2) they will suffer irreparable harm unless a stay is granted, (3) other interested parties will not be harmed if a stay is granted, and (4) a stay will serve the public interest. *WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). A stay is an “intrusion into the ordinary processes of administration and judicial review” and thus “is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted). To merit such an “extraordinary remedy,” petitioners must make “a clear showing” that they are “entitled to such relief.” *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Petitioners have failed to do so.

1. Petitioners Have Not Demonstrated A Likelihood Of Success On The Merits.

a. The FCC Provided Notice Of Its Intent To Require Cost-Based Rates And Did Not Adopt “Rate-Of-Return” Regulation.

All three petitioners claim they had inadequate notice of the FCC’s intention to adopt cost-based rates. GTL Mot. 8-12; Securus Mot. 5-6; CenturyLink Mot. 4-5. The claims are unavailing.

The Administrative Procedure Act (APA) requires an agency to provide “a description of the subjects and issues involved” in a rulemaking proceeding.

5 U.S.C. § 553(b)(3). Accordingly, “an agency may issue rules that do not exactly coincide with the proposed rule so long as the final rule is the ‘logical outgrowth’ of the proposed rule.” *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991). That will be the case so long as the variation is not “so major that the original notice did not adequately frame the subjects for discussion.” *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (quotation marks omitted). The FCC satisfied those standards.

The *ICS Notice* proposed a “per-minute rate cap” approach to “ensure just and reasonable rates ... consistent with sections 201 and 276 of the [Communications] Act.” *ICS Notice* ¶20. Just and reasonable rates under Section 201 have long been tantamount to cost-based rates. *ICS Order* ¶¶12, 45; *see Competitive Telecomms. Ass’n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) (*Comptel*). “Fair” rates under Section 276 likewise have always been evaluated with reference to cost. *ICS Order* ¶46. The agency thus sought “specific, detailed cost information and other relevant data,” *ICS Notice* ¶20, and questioned “whether ICS rates accurately reflect the costs of providing ICS,” *id.* ¶7. Those questions were posed in the context of an inquiry that had been initiated by the 2003 Wright petition, comment on which was already in the record, which had directly proposed a “safe harbor” rate cap, with the possibility that higher cost providers could exceed the cap. *See* 2003 Wright Petition 19-20.

The resulting record included cost data submitted by Securus, *see ICS Order* ¶26, and summary cost information submitted by CenturyLink, *see id.* ¶28. Notably, CenturyLink’s comments advocated a system that would allow ICS

providers “to recover the[ir] costs ... as well as a sufficient return.” CenturyLink Comments 5 (Mar. 25, 2013).

The agency adopted a rate cap of the type proposed: a safe harbor rate, which operates like a traditional price cap and which the agency expected most providers to use. *ICS Order* ¶119. The agency also adopted two safety valves – the hard cap and the waiver process – to accommodate high-cost providers. *See ICS Notice* ¶25 (seeking comment on “alternative methodologies supported by sufficiently detailed data”); 2003 Wright Petition 19-20. The agency thus provided notice of a cost-based rate approach “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.” *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988).

Petitioners nevertheless contend that the ICS rate regime establishes not simply rate caps but “rate of return regulation,” for which the FCC gave no notice. GTL Mot. 8-12; *see* Securus Mot. 6; CenturyLink Mot. 3-4. The gist of the claim is that the rules require ICS providers to set their rates equal to their costs plus a rate of return. *E.g.*, GTL Mot. 8 (providers must “calculate each ... rate on the basis of its costs”), 9 (price caps “do not require that rates be set equal to an individual provider’s costs”); Securus Mot. 8 (“an ICS provider can charge the rate caps only if they can prove those rates are cost-justified”).

That argument misunderstands the operation of the rate cap regime. The safe harbor cap does not require any ICS provider to set its rates at cost plus rate-of-return. To the contrary, the safe harbor serves as an “administratively convenient pricing option,” under which a provider may initially set prices up to

the safe harbor without regard to its costs. *ICS Order* ¶69. Any rate less than or equal to the safe harbor cap will enjoy a “presumption of reasonableness.” *Ibid.*; *see* 47 C.F.R. § 64.6020 (safe harbor rates are “presumptively in compliance with” cost-base rate requirement). That approach – foreshadowed in the 2003 Wright petition – is fundamentally a rate cap methodology.

To be sure, *if* a ratepayer were to file a complaint against an ICS provider’s safe harbor rate, and *if* the complaint were to overcome the presumption that the rate is lawful (a possibility that the Wireline Competition Bureau deemed unlikely, *ICS Stay Order* ¶¶13, 45), *then* the provider would have to demonstrate its costs and the FCC would establish a cost-based rate. Even then, however, the provider would be entitled to keep any previous earnings in excess of cost plus return (thus providing an incentive for providers to reduce their costs). That arrangement amounts at most to a “variant” on rate caps that falls within the terms of the notice. *ICS Order* n.222; *see ICS Notice* ¶25.

Indeed, the idea that rates are subject to challenge is nothing new. Rates not based on cost have always been subject to challenge pursuant to Sections 207 and 208(a) of the Communications Act as a violation of Section 201(b). *See ICS Stay Order* ¶43; *see also id.* ¶12 (“*any* provider may ... be required to show that its rates are based on its costs”). GTL contends that the FCC does not grant complaints that rates exceed costs in *competitive* markets, Mot. 12, but the FCC found – on evidence GTL does not dispute – that from the end users’ perspective, ICS is not competitive. *See ICS Order* ¶41.

Should an ICS provider choose not to avail itself of the safe harbor (which the FCC predicted few would do), rates above that cap must be based on the provider's cost of service. Even then, however, "a carrier need not demonstrate its costs or justify its rates" outside of a complaint proceeding or FCC investigation. *ICS Stay Order* ¶10. Such a safety valve mechanism does not transform the entire regime into a "rate-of-return" scheme. Indeed, within the scope of the *ICS Notice*, the agency could have simply capped rates at the safe harbor level; by allowing providers to exceed those rates at will, the hard cap is a significant benefit to providers. The addition of that safety valve provides no basis to reverse the *ICS Order*. Indeed, the FCC anticipated possible complaint proceedings and asked in the *ICS Notice*: "Would a rate cap approach require the Commission to conduct rate cases?" *Id.* ¶23. There was thus notice of the ramifications of the FCC's cost-based approach.

Finally, the ICS rate caps bear no procedural resemblance to a rate-of-return regime, which involves "a prescribed rate of return, ex ante review [of rates by the FCC], tariff filings, [and] compliance with cost accounting rules." *ICS Order* n.195. Rate-of-return carriers must comply with complex regulations set forth in four intricate and lengthy parts of the FCC's rules. *ICS Stay Order* ¶10. In sharp contrast, ICS providers may set their rates at or below the safe harbor or even the hard cap without prior review by the FCC, without compliance with the rules governing rate-of-return carriers, and without cost-justification. GTL attempts to portray the traditional rate-of-return procedures as merely "features of a filed-tariff regime," Mot. 10, but they are the "integral" hallmarks of rate-of-return regulation

and “cannot be separated from it,” *ICS Stay Order* ¶11. Because the FCC did not adopt rate-of-return regulation, GTL is wrong to contend that the agency erred in using a “disfavored” regulatory methodology. Mot. 13-14.

For the same reason, CenturyLink is wrong that the agency adopted a rate-of-return approach on the basis of a misreading of this Court’s *Comptel* decision. Mot. 9-10. As shown above, the agency adopted no such approach and thus did not read *Comptel* to establish a presumption of rate of return. *Comptel*, however, firmly supports the FCC’s determination that ICS rates should reflect the costs of providing service. The Court stated that under Section 201 of the Communications Act, the FCC must “justify any rate differential that does not reflect cost.” *Comptel*, 87 F.3d at 529.

b. *The Interim Rate Caps Are Not Impermissibly Vague.*

GTL contends that the FCC “withh[eld] from providers critical information they need to ensure compliance” with the alleged rate-of-return approach, “with violators subject to refund obligations and forfeiture penalties.” Mot. 14-15; *see* *Securus* Mot. 6-7 (arguing that the rules are “amorphous”); *CenturyLink* Mot. 4 (asserting that the FCC “fail[ed] to provide meaningful guidance” on the rules’ requirement of cost-based rates).

As explained above, providers may set their rates initially at or below the safe harbor cap without regard to costs or fear of refund obligations or penalties. *See ICS Stay Order* ¶20. There is nothing amorphous about the standard.

For providers that choose not to take advantage of the safe harbor, the FCC provided adequate guidance regarding their obligations. The *ICS Order* specified

the costs that are recoverable and those that are not. Recoverable costs include “the cost of capital (reasonable return on investment); expenses for originating, switching, transporting, and terminating ICS calls; and costs associated with security features relating to the provision of ICS.” *ICS Order* ¶53 & n.196. The list includes advanced security features such as “biometric caller verification,” “sophisticated tracking tools,” “link analysis software,” “audio word search,” “storage of inmate call recordings,” and call “blocking mechanisms,” among many other things. *Id.* n.196. Unrecoverable ones include “site commission payments, costs of nonregulated services, costs relating to general security features of the correctional facility unrelated to ICS, and costs to integrate inmate calling with other services, such as commissary ordering, internal and external messaging, and personnel costs to manage inmate commissary accounts.” *Id.* ¶53. Should specific questions arise concerning the application of this guidance, agency staff routinely “works with providers to help guide them through the implementation” of new rules, and there is little risk of penalties for “good faith efforts to comply.” *ICS Stay Order* ¶20.

c. *The FCC Did Not Improperly Interfere With Existing ICS Contracts.*

CenturyLink incorrectly argues that the FCC failed to explain its decision to apply the interim rules to existing contracts. CenturyLink Mot. 5. The agency explained that decision at length. *See ICS Order* ¶¶98-102. It acknowledged that comments in the record were “mixed.” *Id.* ¶99. Some commenters asked the agency to apply the rules only to contracts entered into after the rules took effect. *Id.* nn.359 & 362. Others, however, asked for the rules to apply to existing

contracts in time periods ranging from immediately to six months or longer. *Id.* ¶¶99 & nn.360-361. For example, the National Association of State Utility Consumer Advocates warned that existing contracts rates would exacerbate the harm to inmates and their families. *Id.* n.361. The Human Rights Defense Center opined that it would be unjust and unreasonable to allow continued overcharges under existing contracts. *Id.* n.360. Even an ICS provider, Telmate, suggested that any new rules apply to existing contracts. *Ibid.*

Further, the FCC explained that many ICS contracts are regularly amended, *ICS Order* ¶102, and that to the extent ICS contracts contain change-of-law provisions (as GTL indicated they “typically” do, *id.* n.367), such provisions may help bring existing contracts into compliance with the new rules, *see id.* ¶102. The FCC accommodated the range of comments by delaying the effect of the rules until 90 days after publication of the *ICS Order* in the Federal Register (which itself took place more than a month after the order was issued). *See ibid.*

Securus is incorrect to contend that the FCC violated the *Sierra-Mobile* doctrine by interfering with its existing ICS contracts. Mot. 12-13. That doctrine prohibits the FCC “from modifying [an established] contract rate ... except where the modification is both required by the ‘public interest’ and upon a showing that the changes are just, reasonable, and nondiscriminatory.” *East Ky. Power Co-op, Inc. v. FERC*, 489 F.3d 1299, 1309 (D.C. Cir. 2007); *accord Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1171 (D.C. Cir. 2005) (agency “may modify a contract rate provision if (but only if) the ‘public interest’ so requires”). The agency determined that the *ICS Order* did not override contracts between providers and prison

authorities, but regulated “only ... the relationship between ICS providers and end users.” *ICS Order* ¶100. Thus, the *Sierra-Mobile* doctrine does not apply. *See ICS Stay Order* ¶23.

Even if the doctrine did apply, however, the FCC determined that existing rates violated the public interest. *See ICS Order* n.365. In light of the long history of grossly excessive charges for ICS – resulting in rates far out of compliance with the Communications Act’s requirements of just, reasonable, and fair rates, with serious, detrimental social consequences – that determination was sound. The agency properly exercised its “authority under the *Mobile-Sierra* doctrine to proscribe contractual arrangements that contravene the relevant public interests.” *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 306 (D.C. Cir. 2012) (quotation marks omitted).

d. *Petitioners’ Remaining Claims Lack Merit.*

Petitioners raise a hodgepodge of additional claims, none of which has merit.

Compensation. Securus contends that the rates are undercompensatory.

Mot. 8. In fact, Securus’s own cost data, contained in the Siwek Report, show that “costs for 99 percent of [Securus’s] minutes ... come from high volume/low-cost facilities and are significantly below the safe harbor levels.” *ICS Stay Order* ¶36. Excluding commission payments (Securus does not challenge the agency’s finding that they do not represent a recoverable cost), Securus’s average per-minute rate is 4.4 cents, *id.* n.148, well below the 12 cents per minute safe harbor rate for debit calls. Indeed, rates in most states that have eliminated commissions are under 5 cents per minute. *ICS Order* ¶¶37-38 & n.145. Such facts, particularly in

combination with the waiver process, defeat Securus's claim of "confiscatory" rates. Mot. 10; *see Rural Cellular*, 588 F.3d 1095, 1104 (D.C. Cir. 2009) (cost-justified exemption process defeated claim of unlawfully low rate).

Cross-subsidization. Relatedly, Securus and CenturyLink contend that a rate cap that applies to facilities with disparate costs results in "unreasonable cross-subsidization," Securus Mot. 10; CenturyLink Mot. 5, which allegedly violates "longstanding FCC policy," Securus Mot. 11. But the use of "industry-wide averages in setting rates," which is essentially what the FCC has done here, "is not novel." *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999) (quotation marks and citations omitted). Rather, as this Court has recognized, "the Supreme Court has affirmed ratemaking methodologies employing composite industry data or other averaging methods on more than one occasion." *Ibid*. The FCC employed a similar methodology in determining the rate of compensation to be paid by long distance companies to payphone owners. *See APCC v. FCC*, 215 F.3d 51, 54 (D.C. Cir. 2000). "It is a given that when a regulatory pricing structure is established" on an industry-wide basis, "providers subject to those rates will serve higher and lower cost customers." *ICS Stay Order* ¶31. Indeed, ICS providers themselves "typically use uniform rates when they serve multiple ... facilities with differing cost ... characteristics," *ICS Order* n.280, as do many other types of telecommunications providers, *ibid*. By contrast, the FCC policies against cross-subsidization on which Securus and (by extension) CenturyLink rely, *see* Securus Mot. 11 n.33; CenturyLink Mot. 5, concern subsidies from rate-regulated

lines of business to unregulated lines of business, not industry-wide average pricing.

Prison Administration. Securus contends that by “prevent[ing]” ICS providers from paying commissions, the FCC has “chang[ed] the manner in which [incarceration] facilities operate and the services that they can provide,” an action allegedly “beyond the FCC’s purview.” Mot. 14. In fact, the agency did not prohibit commissions, *ICS Order* ¶56, but merely deemed them a cost not recoverable through interstate rates. Securus’s costs are below the safe harbor rates, *see* p. 20, *supra*, and it may continue to pay commissions.

More fundamentally, Congress granted the FCC jurisdiction over “all interstate ... communication by wire or radio,” 47 U.S.C. § 152(a), declared unlawful all rates for interstate service that are unjust and unreasonable, 47 U.S.C. § 201(b), and granted the agency authority to “prescribe such rules and regulations as may be necessary ... to carry out” the provisions of the statute, *ibid.* The FCC has ample authority to regulate interstate payphone rates. That its exercise may affect the ability of prisons to rely on funds generated by unjust intrastate calling rates does not diminish the scope of that authority. *See Cable & Wireless PLC v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (the FCC “does not exceed its authority simply because a regulatory action has ... consequences” on parties beyond the agency’s jurisdiction).

Ancillary Fees. Securus attacks the FCC’s regulation of “financial transaction fees,” by which it appears to mean ancillary charges, on the ground that the agency’s authority “does not extend to financial transactions.” Mot. 14.

Congress required charges “for [or] in connection with” interstate service to be just and reasonable. 47 U.S.C. § 201(b) (emphasis added). Congress also granted the FCC direct authority over “inmate telephone service in correctional institutions, and any ancillary services.” 47 U.S.C. § 276(d) (emphasis added). The agency reasonably explained that regulation of ancillary charges was necessary to ensure ICS providers would not “increase their ancillary charges to offset lower rates” under the rate caps. *ICS Order* n.338; *see id.* ¶91.

GTL asserts in passing that the FCC gave no notice that it would regulate ancillary charges. Mot. 8. That brief mention is inadequate to justify a stay, but if preserved, the argument fails. In fact, the *ICS Notice* sought comment on “how to handle monthly fees; how to load an inmate’s account; and minimum required account balance.” *ICS Notice* ¶33; *see ICS Order* n.338. Those are ancillary charges. The *ICS Notice* also cited comments filed earlier in the proceeding that had similarly addressed ancillary charges. *ICS Notice* ¶33 & n.106; *see ICS Order* n.338; *ICS Stay Order* ¶15. And the *ICS Notice* also sought comment on “any proposals in the record that are not” otherwise addressed in the notice, *ICS Notice* ¶35; such proposals included “a number identifying the need for ... regulation to address excessive fees for ancillary services,” *ICS Order* n.338. The *ICS Order* identified five different proposals directly addressing ancillary charges. *See ibid.* The *ICS Notice* “put interested parties on notice that the FCC wanted ... answer[s]” to particular questions regarding ancillary charges, and “the Order answered [those] questions.” *Covad Communications Co. v. FCC*, 450 F.3d 528, 549 (D.C. Cir. 2006).

2. Petitioners Have Not Demonstrated Irreparable Injury.

“This court has set a high standard for irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). First, the injury “must be both certain and great; it must be actual and not theoretical.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). “[P]rospective monetary loss, while it may be injurious,” is not “in itself an irreparable harm.” *Cities of Anaheim and Riverside, California v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982); accord *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam) (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”). The Court has suggested, for example, that harm tantamount to “destruction of a business” would justify a stay. *Holiday Tours*, 559 F.2d at 843 n.2.

Petitioners have not met that strict standard. GTL and CenturyLink complain that they will lose some revenue as a result of having to charge rates that are closer to their costs. GTL Mot. 9; CenturyLink Mot. 11. Notably, GTL does not claim that the safe harbor rates fail to ensure fair compensation (even if GTL continues to pay commissions). Nor could it contest that fact: before the FCC, GTL claimed that its costs were among the lowest in the industry; data submitted by Securus showed costs far below the safe harbor rates. *ICS Order* ¶80; see p. 20, *supra*. Thus, any revenue GTL may forgo if it sets rates at the safe harbor reflects only its inability under the new rules to collect overcharges imposed on prisoners and their families. Similarly, CenturyLink represented to the FCC that its average

rates (excluding commissions) are below the safe harbor level. *See ICS Order* ¶28 & nn. 98-99. And significantly, neither GTL nor CenturyLink claims that its rates reflect its costs or that the FCC erred, as a factual matter, in finding prevailing rates unjust, unreasonable, and unfair.

Nor does either GTL or CenturyLink show that revenue losses pose a significant threat to its business. GTL represented to the FCC that interstate calls, the only calls at issue here, account for about 10 percent of its traffic. *See ICS Stay Order* ¶35 & n.146. CenturyLink acknowledges that its proportion of interstate calls is even lower, only 7 percent, Mot. Exh. A ¶8, but speculates that the share of interstate traffic will increase as inmates and their families “disguise” higher-priced intrastate calls as interstate calls, Mot. 13. That claim, which is unsupported by data, still demonstrates no loss of revenue that would pose a substantial threat to CenturyLink’s ICS business.

To the degree GTL claims it will be irreparably injured by “the risk of significant penalties” for setting its rates above the safe harbor, the assertion amounts at most to a “mere possibility of harm” that is “insufficient” to justify relief. *Winters*, 555 U.S. at 20. The unsupported speculation that the FCC would impose a penalty for charges imposed in good faith that turn out to be above cost is far from the “actual” and “imminent” harm required for a stay. *Wisconsin Gas*, 758 F.2d at 674. As discussed at page 18 above, the agency has stated that it will cooperate with regulated companies to provide guidance and is especially unlikely to penalize any rate imposed in good faith. *ICS Stay Order* ¶20.

All three petitioners suggest they will be irreparably harmed by having to undertake what GTL characterizes as the “impossible task” of renegotiating every contract “in less than three months” to modify commission payments. GTL Mot. 17; *see* Securus Mot. 15; CenturyLink Mot. 11. The *ICS Order* requires no such thing, and petitioners do not demonstrate otherwise (they provide no contracts for inspection). The order permits ICS providers to continue to pay commissions under their existing contracts (and it does not affect at all commissions on intrastate calls, which are the vast majority of calls), and the generous safe harbor rate will in many if not all cases ensure sufficient compensation for interstate calls even with a commission. GTL, for example, expressly told the FCC that because of economies of scale and the efficiency of its operations, it could both maintain low rates and pay commissions. *ICS Order* n.166. If necessary, petitioners can renegotiate their contracts over time, either when they expire, pursuant to change-of-law clauses, or over a period of time longer than three months. Any contract adjustments that may be necessary do not amount to “a ‘clear and present’ need for equitable relief,” *England*, 454 F.3d. at 297, but constitute only “something merely feared as liable to occur at some indefinite time,” *Wisconsin Gas*, 758 F.2d at 674 (quotation marks omitted).

CenturyLink’s contention that some state agencies may be unable or unwilling to renegotiate existing contracts, *see* Mot. 12-13, does not change that analysis. Even if that were true – which CenturyLink has not demonstrated – CenturyLink does not show it could not maintain safe harbor rates at the relevant facilities and still pay commissions. For example, it asserts that Texas law requires

ICS providers to pay 40 percent of their gross revenue to the state in the form of commissions, but it does not contend – let alone demonstrate – that charging allowable rates for interstate calls in Texas would prevent it from recovering recoverable costs plus a reasonable return on investment. *See* Mot. 12.

Securus contends that if a consumer should lodge a rate complaint, Securus will have to defend itself, thereby incurring various expenses. But staying the *ICS Order* would provide no relief from that cost – Securus and all other ICS providers always have been, and remain, liable to a complaint charging that their rates are unreasonable, even in the absence of the specific inmate rate rules. *See ICS Stay Order* ¶43. If anything, the safe harbor rule, which shifts the ordinary burdens of production, gives Securus significant additional protections.

Securus also argues that it will be “forced to provide below-cost service,” Mot. 15, a claim that CenturyLink echoes in passing, Mot. 11 (asserting that safe harbor rates would “require [CenturyLink] to serve many accounts at a loss”). According to Securus’s cost study, however, more than 99 percent of Securus’s traffic has costs (excluding commission) significantly below the safe harbor cap. *ICS Stay Order* ¶36 & n.148; *see* p. 20, *supra*. Moreover, Securus’s higher-cost local jails “have an especially low volume of interstate calls.” *Id.* ¶36. In any event, interstate calls account for only 15 percent of Securus’s call volume. *Id.* ¶35. CenturyLink did not provide cost data but did represent to the FCC that its average per-minute costs are below the safe harbor levels. *ICS Order* ¶28; *see* pp. 24-25, *supra*. And as already noted, p. 25, *supra*, interstate calls account for only about 7 percent of CenturyLink’s call volume, Mot. Exh. A ¶8. Moreover, to

the degree that higher-cost facilities constitute a business grouping that “reflect[s] reasonably related cost characteristics,” *ICS Order* ¶123, Securus and CenturyLink will likely be able to justify charging rates above the safe harbor in those facilities, up to the hard cap. Under the circumstances, any harm resulting from any below-cost rates does not merit the extraordinary relief of a stay.

3. A Stay Would Harm Third Parties And Disserve The Public Interest, And The Balance Of Equities Strongly Disfavors A Stay.

The “parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders.” *Nken*, 556 U.S. at 427. The order under review “take[s] critical, and long overdue, steps to provide relief to the millions of Americans who have borne the financial burden of unjust and unreasonable interstate inmate phone rates.” *ICS Order* ¶1. The FCC’s efforts to reform the inmate calling system are intended to make it easier for inmates to stay connected to their families and friends, to lessen the negative impact on the millions of children with an incarcerated parent, to reduce recidivism (with its attendant savings in the cost of incarceration), and to improve communication between inmates and their legal representatives. *Id.* ¶¶2, 42-44.

Petitioners claim that a reduction in commissions paid to state prison authorities will result in reduced services to inmates. *GTL Mot.* 19; *Securus Mot.* 19; *CenturyLink Mot.* 16-17. But the FCC found that in many cases, the funds are used for state expenses with no direct connection to prison operation, such as road construction and state employee salaries. *ICS Order* ¶¶3, 34. CenturyLink admits that in Texas a substantial portion of commissions go into the state’s “general

revenue fund.” Mot. Ex. A ¶16. Indeed, the “inmate welfare fund” in one prison expends less than 1 percent of its budget on prisoner services. *ICS Order*. n.13. To the degree the money is spent on prisoners through services such as Alcoholics Anonymous and educational programs, not all inmates take advantage of or benefit from such services. More important, there is no reason why users of inmate calling services should bear the costs of unrelated services through overcharges on telephone calls that impose a serious hardship on their ability to communicate. It is telling in that regard that entities representing prisoners and their families before the FCC did not advocate retention of the prior rates and have informed us that they will oppose a stay of the *ICS Order* in this Court. Finally, nothing in the order prevents a state or locality from replacing any diminution in commission revenue through taxpayer revenues or other funding mechanisms.

Securus and CenturyLink speculate that the new rules will force service providers to terminate service to high-cost facilities. Securus Mot. 17-18; CenturyLink Mot. 14-15. But the hard cap rates are based on the highest costs in the record, and there is no indication that those rates are insufficient to support service in high-cost facilities. In any event, the possibility that some providers might decide to withdraw service to a few high-cost facilities does not outweigh the certain and immediate harm to millions of prisoners and their families from a stay.

Staying the *ICS Order* and reverting to the prior rates practices will significantly harm millions of third parties and substantially disserve the public interest. The balance of equities in this case compels denial of a stay.

CONCLUSION

For the foregoing reasons, the Court should deny the motions for a stay.

Respectfully submitted,

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December 16, 2013

EXHIBIT A

(Excerpt of 2003 Wright Petition)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	
)	
Martha Wright, Dorothy Wade, Annette Wade,)	
Ethel Peoples, Mattie Lucas, Laurie Nelson,)	
Winston Bliss, Sheila Taylor, Gaffney &)	
Schember, M. Elizabeth Kent, Katharine Goray,)	
Ulandis Forte, Charles Wade, Earl Peoples,)	File No. _____
Darrell Nelson, Melvin Taylor, Jackie Lucas,)	
Peter Bliss, David Hernandez, Lisa Hernandez)	
and Vendella F. Oura)	
)	
Petition for Rulemaking or, in the Alternative,)	
Petition to Address Referral Issues In Pending)	
Rulemaking)	

PETITION FOR RULEMAKING OR, IN THE ALTERNATIVE,
PETITION TO ADDRESS REFERRAL ISSUES IN PENDING
RULEMAKING

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Dated: October 31, 2003

Petitioners suggest that the Commission impose a “safe harbor” benchmark rate analogous to the benchmark established for competitive local exchange carriers (“CLECs”) in the *Access Charge Reform Order*.⁴⁶ Just as the access service market “does not appear to be structured in a manner that allows competition to discipline rates,” enabling CLECs “to impose excessive access charges,” a prison telephone system provider could charge competing carriers excessive rates to interconnect with the system in order to carry inmate long distance calls.⁴⁷ It would therefore be appropriate to establish a benchmark rate above which the system provider may not charge an interconnecting long distance carrier unless the carrier agrees to a higher negotiated rate.⁴⁸ In the absence of an agreed-upon higher charge, the system provider would be required to allow a long distance carrier to interconnect with the prison system and pay the benchmark rate, which would be presumed reasonable and would be tariffed.

In the *Access Charge Reform Order*, the Commission initially pegged the benchmark access rate at 2.5 cents per minute, gradually declining to the composite switched access rate charged by the incumbent local exchange carrier (“ILEC”) with which the CLEC competes.⁴⁹ In the case of prison telephone systems, there is no comparable valid service rate that could be used as a benchmark. Based on the cost showing in the Dawson Affidavit, however, the Commission should set the benchmark rate at seven cents per minute, which is about one cent per minute

⁴⁶ *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001) (“*Access Charge Reform Order*”).

⁴⁷ *See id.* at 9935-36.

⁴⁸ *Id.* at 9925, 9938-40.

⁴⁹ *Id.* at 9941.

above the high end estimate in the Dawson Affidavit for total prison telephone system costs, not including the long distance segment.⁵⁰

In the alternative, if a prison telephone system provider did not want to be subject to the benchmark limit, it would be allowed to charge a rate higher than the benchmark if it could show that its costs justified such a rate. The Commission might also consider alternative measures to help ensure reasonable prison telephone system rates.

The establishment of a benchmark rate, cost justification requirement or other pricing requirement for the underlying telephone system should eliminate any need for price regulation of the long distance segment of the inmate service or of overall inmate service rates. If a long distance provider charges more than its actual costs, including profit, other long distance providers will request interconnection until competition reduces long distance rates to actual costs. In order to ensure that there are no impediments to competition, the underlying system provider at each prison facility should be required to permit a reasonable number of competitive carriers to interconnect and offer the long distance segment of the inmate service. The underlying provider should be permitted to offer the long distance segment as well, but if it does so, it should be required to offer exactly the same interconnection terms and technical conditions to other competitive carriers as it provides to its own long distance operation at a given facility. The underlying system provider should also be required to charge itself the same underlying system rate that it charges to the other long distance competitors, whether that is a benchmark

⁵⁰ Dawson Affidavit at ¶¶ 50-71.

EXHIBIT B
(Siwek Declaration)

Expert Report of Stephen E. Siwek

On Behalf of

Securus Technologies, Inc.

WC Docket No. 12-375

March 25, 2013

1.0 Introduction and Background

- 1.1 My name is Stephen E. Siwek. I am a Principal at Economists Incorporated, a research and consulting firm with offices in Washington D.C. and in San Francisco. I have been active in research and consulting for over 30 years. During this period, I have frequently been asked to analyze economic, financial and accounting issues that arise in regulatory hearings, arbitrations and court proceedings. I have testified as an expert witness before such bodies on more than 80 occasions. My business address is Suite 1100, 2121 K Street, NW Washington, D.C. 20037.
- 1.2 I have been continuously involved in economic consulting since 1975. My areas of specialization include the assessment of commercial damages; the economic analysis of U.S. media and related industries that depend on copyright protection and the economic and financial assessment of rates for regulated services including telecommunications, public utility and postal services.
- 1.3 With respect to the telecommunications industry, I have testified on more than eighteen occasions before state public service commissions on issues relating to the costing and pricing of telecommunications facilities and services. I have also testified in arbitration and rate hearings relating to carrier interconnection, access charge levels and rate design. In addition, I have also participated in proceedings before this Commission's Markets Disputes Resolution office that focused on telecommunications issues.
- 1.4 With regard to inmate calling services ("ICS"), I have previously testified in a 2009 proceeding before the Public Regulation Commission of New Mexico. In that case, I pre-filed direct testimony with the New Mexico Commission and I participated directly in hearings as well.¹ My CV is attached herewith as Appendix I.
- 1.5 I have been retained by Securus Technologies, Inc. ("Securus") to present cost and traffic data from sites that Securus served in 2012. Securus installs and manages call management and communications systems for use by correctional facilities throughout the United States. Headquartered in Dallas, Texas, Securus employs more than 900

¹ New Mexico Public Regulation Commission, In the Matter of the Commission Inquiry into the Rates and Charges of Institutional Operator Service Providers, Case No. 07-00316-UT.

employees nationwide. The company serves approximately 2,200 correctional facilities in 45 states and the District of Columbia and more than 850,000 inmates nationwide.

2.0 Facility Groups

- 2.1 In the United States, Securus serves both state Department of Corrections (“DOC”) facilities and a variety of county and local detention facilities and jails (“non-DOC”). Securus maintains data that includes costs incurred, revenue brought in, and call traffic volumes such as number of minutes and number of distinct calls.
- 2.2 In order to present this data, the following procedure was established.
- 2.3 I reviewed Securus’s data, and determined that it would be useful to divide the non-DOC facilities into three groups. Each group contains ten facilities for which Securus provided ICS services in 2012. The three groups included the ten highest volume non-DOC customers (“High 10”), the ten medium volume non-DOC customers (“Medium 10”) and the 10 lowest non-DOC volume customers (“Low 10”) (collectively, the “10-10-10” methodology). For each customer, the volume used to determine membership in each group was based on total minutes.
- 2.4 In addition to these three groups, a fourth group was created consisting of all DOC facilities that Securus served in 2012, of which there are eight (8).
- 2.5 After review of the data provided for the 10-10-10 groups, it was decided to adjust the data as follows: First, a minimum contract revenue of \$1,000 was adopted for the Low 10 group. This adjustment removed facilities with extremely low revenue totals that likely reflected measurement periods of less than one year. Second, outlier facilities in the original High 10 group were replaced by alternative facilities. The three outlier facilities reported volume and/or ICS revenue data that for known reasons are not representative of the High 10 Group.
- 2.6 The actual facilities included in each of the four facilities groups are identified in Appendix II. This Appendix also reports interstate calling rates and the site commission percentages that were in effect for each of these facilities in 2012. Finally Appendix II identifies DOC and non-DOC facilities to which Securus made cash or prepaid payments to the facility in question.
- 2.7 The highest and lowest volumes in each of the 10-10-10 groups and in the DOC group are shown in Table 1. The annual number of minutes for the High 10 facilities ranged from a low of 6.1 million up to a high of 26.1 million minutes. Calling volumes for the High 10 group ranged from a low of 281,000 calls to a high of 1.19 million calls.

Table 1: Highest and Lowest Volumes by Facility Group				
Category	Highest Total Minute Volume	Lowest Total Minute Volume	Highest Total Number of Calls	Lowest Total Number of Calls
High 10	26,119,012	6,134,884	1,186,473	281,011
Medium 10	69,859	67,105	8,088	4,702
Low 10	1,668	885	284	113
State DOC	120,643,191	2,488,244	9,134,770	242,657

- 2.8 For the Medium 10 group, the differences between high and low minute and calling volumes were less dramatic than in the High 10 group. The highest minute volume reported in the Medium 10 group was 70,000 minutes while the lowest minute volume was 67,000 minutes. Similarly, the highest call volume in the Medium 10 group was 8,000 calls while the lowest call volume was 4,700 calls.
- 2.9 For the Low 10 Group, minute volumes range from a high of 1,668 minutes to a low of 885 minutes. For the Low 10 Group, the highest calling volume was 284 calls while the lowest calling volume was 113 calls.
- 2.10 For the DOC facilities, the lowest volume institution recorded nearly 2.5 million minutes while the highest volume DOC facility generated nearly 120.6 million minutes. Calling volumes for the DOC institutions ranged from a low of 242,000 calls to a high of 9.1 million calls.
- 2.11 As these statistics make clear, the facilities served by Securus differ dramatically in terms of the total ICS minutes and calls that they generate each year. For example, in the High 10 Group, the number of minutes generated by the highest volume customer (26.1 million minutes) is more than **four times** the number of minutes processed by the lowest volume customer in the High 10 Group (6.1 million minutes).
- 2.12 For the DOC facilities, the number of minutes generated by the highest volume customer (120.6 million minutes) exceeds the number of minutes processed by the lowest volume DOC customer by an even greater margin. At 120.6 million minutes, the highest volume DOC customer's volume exceeded that of the lowest volume DOC customer (2.49 million minutes) by more than **118 million** minutes.

3.0 Average Costs Per Minute and Per Call

- 3.1 The costs incurred by Securus for the provision of ICS services to a typical institution in each facility group are summarized in Table 2. The ICS cost figures reflect the average costs incurred by Securus to provide ICS service. The costs include site commissions, bad debt, billing and collection, telecom facilities and services, validation, field technicians, and customer services.²

Table 2: ICS Costs per Minute			
Category	ICS Costs	Total Minutes	ICS Costs per Minute
High 10 Simple Average	\$ 1,759,901	10,068,670	\$ 0.1748
Medium 10 Simple Average	\$ 34,258	68,403	\$ 0.5008
Low 10 Simple Average	\$ 2,207	1,290	\$ 1.7106
State DOC Simple Average	\$ 4,605,001	43,083,108	\$ 0.1069

- 3.2 In order to serve the average High 10 facility in 2012, Securus incurred ICS costs of nearly \$1.8 million. As shown in Table 2, the average High 10 facility would also have

² For purposes of Table 2, no distinction is made between correctional facilities where Securus paid site commissions and correctional facilities where Securus paid no site commissions. Site commissions are addressed directly later in this report.

generated calling demand of more than 10 million minutes in 2012. To put this figure in context, recall from Table 1 that the highest volume High 10 institution served by Securus generated 26.1 million minutes while the lowest volume High 10 facility processed 6.1 million minutes.

- 3.3 Based on the figures in Table 2, the average cost per minute incurred by Securus to serve a High 10 facility in 2012 was **\$0.1748** per minute.
- 3.4 Moving to the Medium 10 facility group, the average cost incurred by the company to serve a Medium 10 customer in 2012 was \$34,258 (See Table 2). Since the average number of minutes generated by a Medium 10 customer was 68,403, the average cost per minute incurred by Securus to serve a Medium 10 customer was **\$0.5008** per minute. This value is more than twice the average cost per minute reported above for the High 10 facilities.
- 3.5 For the Low 10 facility group, average costs per minute are higher still. In order to serve the average Low 10 institution, Securus incurs an average cost of \$2,207 (Table 2). In 2012, the average volume generated by a Low 10 facility was only 1,290 minutes. These figures imply that the average cost per minute needed to serve a Low 10 customer was **\$1.7106** per minute. This figure is nearly ten times the cost per minute required to process one minute of calling traffic from a High 10 customer.
- 3.6 For the DOC facilities served by Securus, the average cost incurred for a typical facility was \$4,605,001 (Table 2). On average, a DOC facility processes 43 million minutes per year. Taken together, these figures suggest that Securus incurs costs of **\$0.1069** per minute to provide ICS services to the average DOC facility.
- 3.7 As shown in Table 2, the average cost of ICS services varies significantly as calling volume changes. The costs per minute incurred by Securus to provide ICS services to high volume DOC and non DOC facilities range between \$0.11 and 0.18 per minute. By contrast, the costs per minute needed to serve Medium 10 and Low 10 facilities are between three and ten times higher.
- 3.8 The costs faced by Securus in providing ICS services can also be assessed on a per-call basis. As shown in Table 3, Securus incurred total ICS costs of **\$2.53** per call in serving the average High 10 facility. For Medium 10 facilities, the company incurred costs of **\$5.48** per call. For Low 10 institutions, on average, Securus faced ICS costs per call of **\$11.54** per call. Finally, for DOC facilities, the company's average ICS cost per call came to **\$1.51**.

Table 3: ICS Costs per Call			
Category	ICS Cost	Total Calls	ICS Cost per Call
High 10 Simple Average	\$ 1,759,901	694,324	\$ 2.53
Medium 10 Simple Average	\$ 34,258	6,251	\$ 5.48
Low 10 Simple Average	\$ 2,207	191	\$ 11.54
State DOC Simple Average	\$ 4,605,001	3,048,531	\$ 1.51

4.0 Site Commissions

- 4.1 The costs referenced thus far in this report comprise the costs incurred by Securus to provide ICS services to inmate facilities. These data include the costs of the site commissions that Securus must pay in order to remain competitive in the bidding process to serve inmate facilities. Securus must generate sufficient revenue to recover its site commission costs and all of the other costs needed to provide ICS services. In this section of the report, the magnitude of the site commissions that Securus pays to non-DOC and DOC facilities will be documented in detail.
- 4.2 In Table 4, the site commissions paid by Securus are presented for the four facility groups identified previously. For the average High 10 facility, the average site commission paid in 2012 was **\$1,326,530**. For the average Medium 10 facility, the average site commission paid out by Securus was **\$23,098**. For the average Low 10 facility, the typical site commission cost was **\$409**. Finally, for the average DOC facility, the average site commission paid by Securus in 2012 was **\$2,750,105**.

Category	Site Commission
High 10 Simple Average	\$ 1,326,530
Medium 10 Simple Average	\$ 23,098
Low 10 Simple Average	\$ 409
State DOC Simple Average	\$ 2,730,105

- 4.3 In Table 5 the average site commissions reported in Table 4 are divided by the total average costs required to provide ICS services for the facilities in each facility group. The ICS cost figures were previously reported in Table 2.

Category	Site Commission	ICS Costs	Site Commission as Percent of ICS Costs
High 10 Simple Average	\$ 1,326,530	\$ 1,759,901	75.4%
Medium 10 Simple Average	\$ 23,098	\$ 34,258	67.4%
Low 10 Simple Average	\$ 409	\$ 2,207	18.5%
State DOC Simple Average	\$ 2,730,105	\$ 4,605,001	59.3%

- 4.4 As shown in Table 5, for High 10 facilities, site commissions averaged **75.4%** of the total costs incurred by Securus to provide ICS services. For Medium 10 institutions, site commissions comprised **67.4%** of all ICS costs. In contrast to these figures, the site commission percentage for Low 10 facilities was only **18.5%**. Finally, for DOC facilities, site commissions averaged **59.3%** of total ICS costs.
- 4.5 In Table 6, the average site commissions from Table 4 are divided by the average ICS revenue generated by inmate facilities in each of the four facility groups. The resulting percentages demonstrate the magnitude of site commissions as a function of the average calling revenue earned by Securus in each facility group.

Category	Site Commission	ICS Revenue	Site Commission as Percent of ICS Revenue
High 10 Simple Average	\$ 1,326,530	\$ 2,260,788	58.7%
Medium 10 Simple Average	\$ 23,098	\$ 29,465	78.4%
Low 10 Simple Average	\$ 409	\$ 1,204	33.9%
State DOC Simple Average	\$ 2,730,105	\$ 5,742,182	47.5%

- 4.6 The site commission percentages reported in Table 6 are weighted averages. For each facility group, total site commissions for all facilities are summed and divided by total ICS revenue for the same facility. These site commission percentages are quite significant.
- 4.7 For High 10 Facilities, site commissions make up, on average, **58.7%** of revenue. For the Medium 10 Facilities, site commissions comprise **78.4%** of ICS revenue while for the Low 10 facilities site commissions represent **33.9%** of revenue. With respect to the DOC facilities, site commissions for the average facility comprise **47.5%** of total ICS revenue.
- 4.8 The significance of site commissions to the company can also be seen in the amount of ICS revenue that Securus must earn in order to pay for these costs. In fact, the impact of site commissions on the company would be devastating if Securus could no longer offset these costs in telephone rates. In Tables 9a and 9b, the impact of site commissions without revenue offsets is provided for DOC facilities (Table 7a) and for non-DOC facilities (Table 7b). With no revenue recovery of site commission costs, the gross margins earned from each facility group turn sharply negative.
- 4.9 In Table 7a, an amount equal to the site commission paid by the average DOC facility is subtracted from average DOC revenue. This calculation causes average DOC revenue to decline from \$5.7 million to \$3.0 million. This revenue decrease in turn results in a significant change in the average gross margin earned on these DOC customers. For the average DOC facility, gross margin falls from \$1.137 million to (\$1.593 million).

Category	ICS Revenue	ICS Costs	Gross Margin	Gross Margin as Percent of ICS Revenue
State DOC Simple Average	\$ 5,742,182	\$ 4,605,001	\$ 1,137,181	19.8%
Category	Adjusted ICS Revenue (ICS Revenue less Site Commission)	ICS Costs	Adjusted Margin*	Adjusted Margin* as Percent of Adjusted ICS Revenue*
State DOC Simple Average	\$ 3,012,078	\$ 4,605,001	\$ (1,592,924)	-52.9%

- 4.10 Similar calculations for the non-DOC customers are provided in Table 7b. For each facility group, the loss of revenue to cover site commissions results in significant changes in gross margins. For High 10 facilities, the average margin declines from \$500,888 to (\$825,643). For Medium 10 and Low 10 facilities, the loss of site commission revenue transforms relatively modest losses into significant losses.

Table 7b: Average Gross Margins with and without Recovery of Site Commissions				
Category	ICS Revenue	ICS Costs	Gross Margin	Gross Margin as Percent of ICS Revenue
High 10 Simple Average	\$ 2,260,788	\$ 1,759,901	\$ 500,888	22.2%
Medium 10 Simple Average	\$ 29,465	\$ 34,258	\$ (4,793)	-16.3%
Low 10 Simple Average	\$ 1,204	\$ 2,207	\$ (1,003)	-83.3%
Category	Adjusted ICS Revenue (ICS Revenue less Site Commission)	ICS Costs	Adjusted Margin*	Adjusted Margin* as Percent of Adjusted ICS Revenue*
High 10 Simple Average	\$ 934,258	\$ 1,759,901	\$ (825,643)	-88.4%
Medium 10 Simple Average	\$ 6,367	\$ 34,258	\$ (27,891)	-438.0%
Low 10 Simple Average	\$ 796	\$ 2,207	\$ (1,411)	-177.3%

4.11 As Tables 9a and 9b demonstrate, site commissions still comprise a major cost for ICS providers like Securus. From the company's perspective, these costs, like all other ICS costs, must be recovered in rates. If Securus were precluded from rate recovery of site commission costs, the financial impact of such a policy on the company, as shown in Tables 9a and 9b would be catastrophic.

5.0 Other Calculations

Bad Debt Costs

- 5.1 The analysis above demonstrates the significance of site commissions from the point of view of ICS providers like Securus. Site commissions are not, however, the only significant cost borne by ICS providers. Bad Debt is another significant cost element for ICS service.
- 5.2 Data on the bad debt expenses incurred by Securus for the provision of ICS services are provided in Table 8. For High 10 facilities, bad debt averages 3.8% of ICS revenue. This percentage rises with Medium 10 and in particular for Low 10 facilities. For Low 10 facilities, bad debt averages 17.6% of total ICS revenue. For DOC facilities, bad debt expenses average nearly 3.0% of ICS revenue.

Table 8: Average Bad Debt Costs as a Percent of ICS Revenue			
Category	Total Bad Debt Costs	ICS Revenue	Bad Debt as a Percent of ICS Revenue
High 10 Simple Average	\$ 85,090	\$ 2,260,788	3.8%
Medium 10 Simple Average	\$ 1,725	\$ 29,465	5.9%
Low 10 Simple Average	\$ 212	\$ 1,204	17.6%
State DOC Simple Average	\$ 167,573	\$ 5,742,182	2.9%

Average Duration of Interstate Calls

- 5.3 The Securus customer data base used in this presentation was not designed to record costs as a function of jurisdiction. For this reason, only certain, more limited calculations can be developed from jurisdictional data for interstate calling from Securus facilities. One of the more limited jurisdictional calculations that can be derived from the Securus data is an estimate of interstate call duration.
- 5.4 As shown in Table 9, the total number of interstate calls from all Securus facilities nationwide in 2012 was 9,122,432 calls. For the same year, the company processed 106,082,679 interstate minutes. Based on these two figures, the average length of an interstate call from a Securus facility in 2012 was **11.63** minutes.

Table 9: Interstate Calls, Minutes, and Minutes per Call			
	Total Interstate Calls	Total Interstate Minutes	Interstate Minutes per Call
High 10 Simple Average	198,407	2,080,285	10.48
Medium 10 Simple Average	532	5,561	10.45
Low 10 Simple Average	104	738	7.10
State DOC Simple Average	490,533	6,137,602	12.51
All Facilities Total	9,122,432	106,082,679	11.63

- 5.5 Table 9 also includes calculations of the average number of interstate minutes per call reported for the four facilities groups. These average call durations were: **10.48**, **10.45**, **7.10**, and **12.51** minutes per call for High 10, Medium 10, Low 10, and State DOC facilities, respectively.

Table 10: Tariffed Prices for Interstate Calls of Average Duration		
Category	Assumed Call Duration (minutes)	Calculated Price per Call
High 10 Simple Average	11	\$ 12.03
Medium 10 Simple Average	11	\$ 11.88
Low 10 Simple Average	8	\$ 8.77
State DOC Simple Average	13	\$ 6.02

- 5.6 Table 10 reports the calculated price per call that would apply for an interstate call of average duration that was generated by an average facility in one of the four facility groups. Note that the average call lengths assumed in Table 10 closely track the calculated average call lengths for the four facility groups.

Competition

- 5.7 In deciding how to respond to a Request for Proposal (“RFP”) from an inmate facility, Securus must carefully evaluate the technical and financial specifications that are set forth in the RFP. In addition to telecommunications features and functions, these specifications generally include requests that the successful ICS bidder provide site

commissions to the inmate facility in question. These requirements are made available to all bidders and potential bidders as part of the competitive process. In his proposal, a bidder may choose to disregard RFP requirements knowing that this decision may well serve to eliminate that bidder from the contract award. For any given RFP, a bidder can also decide to ignore the RFP process entirely. Nevertheless, as explained in the Declaration of Mr. Hopfinger, Securus typically faces many other bidders as it seeks to provide ICS services to states, county and city inmate facilities.³ In my opinion, this vigorous and well attended bidding process provides good evidence that ICS services in the United States are generally provided competitively.

- 5.8 A competitive bidding system ensures that high quality ICS services are provided at low cost. Even the most competitive bidding system however, is not likely to permit bidders to ignore the bid specifications that were set forth in the facility's RFP. If those specifications had included a requirement that the provider pay site commissions, the bids generated through the competitive process would specify the site commissions that the bidder was willing to pay. These competitive bids would also permit bidders to recover their cost outlays for site commissions. A competitive bidding system provides for the efficient selection of ICS providers at low cost. Such a system however, is not intended to force bidders to propose ICS service offerings at below cost prices.

³ Declaration of Curtis L. Hopfinger, WC Docket No. 12-375, Para. 4-5.

APPENDIX 2

Calling and Site Commission Rates

Appendix 2: List of Facilities by Group

Category	Facility Name	Interstate Rate per Minute	Interstate Rate per Call	Stated Site Commission Rate	Flat-Rate Commission Payment
High 10	Broward County*	\$ 0.89	\$ 3.95	0.0%	\$ 172,145
High 10	Cook County Illinois*	\$ 0.20	\$ 1.00	57.5%	\$ 300,000
High 10	Orleans Parish*	\$ 0.89	\$ 3.95	59.0%	\$ 1,039,588
High 10	Palm Beach County	\$ 0.69	\$ 3.80	68.0%	\$ -
High 10	Louisville / Jefferson County Metro Govt Parent*	\$ 0.89	\$ 3.95	64.0%	\$ 397,400
High 10	Suffolk County Sheriff'S Department	\$ 0.89	\$ 3.95	50.0%	\$ -
High 10	Allegheny Parent	\$ 0.59	\$ 3.00	0.0%	\$ -
High 10	East Baton Rouge	\$ 0.89	\$ 3.95	0.0%	\$ -
High 10	Suffolk County Sheriff'S Department	\$ 0.89	\$ 3.98	50.0%	\$ -
High 10	Hampden County	\$ 0.89	\$ 3.95	52.0%	\$ -
Medium 10	Teller County Jail	\$ 0.20	\$ 2.54	44.0%	\$ -
Medium 10	Parke County Jail*	\$ 0.89	\$ 3.95	45.0%	\$ 10,000
Medium 10	Wilkes County Sheriff'S Office- (HLS)	\$ 0.89	\$ 3.95	44.0%	\$ -
Medium 10	Gilpin County Jail	\$ 0.15	\$ 2.54	38.0%	\$ -
Medium 10	Ravalli County Sheriff'S Department	\$ 0.89	\$ 4.09	45.0%	\$ -
Medium 10	Jennings County Jail	\$ 0.69	\$ 3.95	50.0%	\$ -
Medium 10	Heart Of America Correctional & Treatment Center*	\$ 0.89	\$ 4.05	30.0%	\$ 7,000
Medium 10	Carbon County Jail	\$ 0.89	\$ 3.95	30.0%	\$ -
Medium 10	Tunica County County Sheriff'S Dept - JSI*	\$ 0.89	\$ 3.95	0.0%	\$ 20,000
Medium 10	Bibb County Commission	\$ 0.89	\$ 3.95	58.0%	\$ -
Medium 10	Titus County Jail*	\$ 0.89	\$ 3.95	58.0%	\$ 20,000
Low 10	Walla Walla County Juvenile	\$ 0.35	\$ 2.25	0.0%	\$ -
Low 10	Aurora City Police Department	\$ 0.65	\$ 2.60	5.0%	\$ -
Low 10	Keweenaw County Jail	\$ 0.89	\$ 3.95	35.0%	\$ -
Low 10	Marion County Juvenile Detention Facility	\$ 0.50	\$ 2.50	28.0%	\$ -
Low 10	Oakview Juvenile Residential Center	\$ 0.89	\$ 3.95	40.0%	\$ -
Low 10	Furnas County Jail	\$ 0.65	\$ 3.50	30.0%	\$ -
Low 10	Edwards County Jail	\$ 0.50	\$ 3.50	20.0%	\$ -
Low 10	Midlothian City - Northern Ellis Emergency Dispatch	\$ 0.89	\$ 3.95	30.0%	\$ -
Low 10	Sheridan County Jail	\$ 0.89	\$ 3.95	30.0%	\$ -
Low 10	Monett City Police Dept	\$ 0.65	\$ 2.60	0.0%	\$ -
State DOC	Florida DOC	\$ 0.06	\$ 1.20	35.0%	\$ -
State DOC	Maryland DOC ¹	\$ 0.30	\$ 3.00	0.0%	\$ -
State DOC	Missouri DOC	\$ 0.05	\$ 1.00	0.0%	\$ -
State DOC	Arizona DOC*	\$ 0.40	\$ 2.40	0.0%	\$ 1,797,978
State DOC	Connecticut DOC	\$ 0.32	\$ -	68.8%	\$ -
State DOC	Kentucky DOC*	\$ 0.30	\$ 2.00	54.0%	\$ 80,000
State DOC	Louisiana DOC ²	\$ 0.17	\$ 2.15	70.0%	\$ -
State DOC	Alaska DOC	\$ 0.89	\$ 3.95	7.0%	\$ -

¹ For MD DOC, \$0.30 per minute rate does not apply to first minute.

² LA DOC reports two per minute rates--\$0.17 and \$0.27. Here, \$0.17 is listed.

* The following facilities have required Securus to pay a flat-rate commission payment: Broward County, Cook County Illinois, Orleans Parish, Louisville / Jefferson County Metro Govt Parent, Parke County Jail, Heart Of America Correctional & Treatment Center, Tunica County County Sheriff'S Dept - JSI, and Titus County Jail; Arizona DOC and Kentucky DOC.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SECURUS TECHNOLOGIES, INC. <i>et al.</i>,)	
)	
Petitioners,)	
)	
v.)	No. 13-1280 and
)	consolidated cases
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on December 16, 2013, I electronically filed the foregoing Opposition Of The Federal Communications Commission To Motions For Stay with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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