

ORAL ARGUMENT NOT YET SCHEDULED**No. 15-1461, and consolidated cases****UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GLOBAL TEL*LINK, *et al.*,*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,*Respondents.*

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

**BRIEF OF INTERVENORS NETWORK COMMUNICATIONS
INTERNATIONAL CORP.
IN SUPPORT OF RESPONDENTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenors Network Communications International Corp. (“NCIC”) certify as follows:

A. Parties and Amici

All parties and intervenors appearing before this Court are listed in the petitioners’ briefs. The states of Minnesota, Illinois, Massachusetts, New Mexico, New York, Washington, Washington D.C, the County of Santa Clara, and the City and County of San Francisco are amici curiae in support of respondents.

B. Rulings Under Review

The ruling under review is the FCC’s *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Dkt. No. 12-375, 30 FCC Rcd. 12763 (2015).

C. Related Cases

The consolidated cases in this action are Case Nos. 15-1461, 15-1498, 16-1012, 16-1029, 16-1038, 16-1046, and 16-1057. In addition, a prior related action involves some of the same parties and similar issues: *Securus Technologies, Inc. v. FCC*, No. 13-1280 and consolidated cases (D.C. Cir.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, NCIC hereby submits the following corporate disclosure statement:

NCIC does not have any parent companies and there are no publicly-held companies with a 10% or greater ownership interest in NCIC. NCIC is an inmate calling service provider that participated in and is affected by the underlying FCC rulemaking being challenged by Petitioners.

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GLOSSARY

2013 Order	<i>Rates for Interstate Inmate Calling Services</i> , Report and Order and Further Notice of Proposed Rulemaking, WC Dkt. No. 12-375, 28 FCC Rcd 14107 (2013)
Communications Act	The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 <i>et seq.</i>
FCC	Federal Communications Commission
ICS	Inmate Calling Services
ICS Provider Brief	Joint Brief for the ICS Carrier Petitioners
JA	Joint Appendix
NCIC	Network Communications International Corporation
Order	<i>Rates for Interstate Inmate Calling Services</i> , Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Dkt. No. 12-375, 30 FCC Rcd. 12763 (2015)
Reconsideration Order	<i>Rates for Interstate Inmate Calling Services</i> , Order on Reconsideration, WC Dkt. No 12-375, FCC 16-102, (2016)
State and Local Brief	Brief of State and Local Government Petitioners

STATUTES AND REGULATIONS

Pertinent statutes and regulations have been reproduced in the Joint Brief for the ICS Carrier Petitioners and the Brief for Respondents Federal Communications Commission.

INTRODUCTION AND SUMMARY OF ARGUMENT

NCIC¹ supports the FCC's Order, including the decision to cap rates for intrastate calling and ancillary services.² The rates adopted by the FCC balance the diverse interests of inmates, their families, correctional facilities, and ICS providers, who will continue to receive adequate compensation while ensuring that inmates and families pay reasonable rates. NCIC understands that the vast majority of inmates will rejoin society, which makes rehabilitation an important function of the correctional system. Without rehabilitation, the correctional system is simply a place to warehouse people until they are released into our communities. Communication with loved ones promotes rehabilitation.³ As a result, encouraging inmate communication with loved ones through reasonable rates for communications services is a crucial part of the rehabilitation process.⁴

¹ NCIC, based in Longview, Texas, was established in 1995 and provides inmate calling services in the United States and 12 other countries. In the United States, NCIC provides direct and wholesale services to more than 600 city, county, parish, and state jails in 43 states.

² Revenue from ancillary services, which is used to cover overhead expenses such as credit card transaction fees, customer service, labor costs, and collections, is not shared with correctional facilities. Ancillary fees boost ICS providers' per minute revenue. Based on NCIC's experience, the per-minute value of ancillary fees is \$0.03 - \$0.10 per minute using the Order's ancillary fee structure.

³ See Order, Clyburn Statement at 195, J.A.____.

⁴ See Order ¶¶ 3-5, J.A.____.

Reasonable ICS rates have other public interest benefits as well. They support cost-effective inmate access to counsel,⁵ lead to lower recidivism,⁶ and increase the likelihood that inmates and their families will stay together after reentry into society.⁷ All of these benefits save taxpayer money.⁸

Prior to the Order, ICS providers offered jails and prisons substantial site commissions to win contracts, but continued to make significant profits from exorbitant calling rates and ancillary fees.⁹ While many state public service commissions capped intrastate ICS rates, these caps were often subverted by ICS providers. Indeed, some ICS providers billed calls at rates as high as \$14.99 per call,¹⁰ but by billing the calls through entities that are neither certified nor incorporated in the state, they avoided regulatory scrutiny. Compounding the problem for inmates and their families were ancillary fees that were rarely, if ever,

⁵ See Order ¶ 93, J.A. __.

⁶ See Order ¶ 4, J.A. __.

⁷ See Order ¶¶ 3-4, J.A. __.

⁸ See Order ¶ 4, J.A. __ (“If telephone contact is made more affordable, we will help ensure that former inmates are not sent home as strangers, which reduces both their chances of returning to prison or jail and the attendant burden on society of housing, feeding, and caring for additional inmates.”).

⁹ See Letter from Thomas M. Dethlefs, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, J.A. __ (filed Aug. 28, 2014) (stating as an explanation for its agreement to pay a 96 percent site commission, that “bidders were obliged to utilize ancillary fees to cover costs that otherwise could not be recovered in per-minute rates after deducting the County’s required commissions.”).

¹⁰ Order ¶158, J.A. __.

regulated, by federal or state authorities. The Order provides a regulatory solution for inmates and their families who cannot otherwise choose their communication service provider. It does so in two important and interrelated ways.

First, it provides consumers with reasonable rates and fees, while allowing ICS providers to receive fair compensation. The ICS Provider Brief disagrees, and predicts that the FCC rate caps will result in financial ruin for ICS providers.¹¹ The ICS provider predictions are without merit because increased call volume will mitigate the effects of lower rates. The subsequent actions of ICS providers contrast with their arguments before the FCC and this Court.

ICS providers also predict that they will be locked into financially untenable contracts because they do not include change-of-law provisions. This is also not borne out by the facts. Changes to ICS contracts are relatively common, and these contracts typically include provisions that accommodate renegotiations or amendments.

Second, the rate caps will prevent ICS providers from offering facilities excessive site commissions to win ICS contracts, and passing those costs on to consumers. Instead, facilities will receive *reasonable* compensation under the Order, especially following adoption of the higher rates in the Reconsideration Order.

¹¹ ICS Providers Brief at 19, J.A.____; Securus brief at 5, J.A.____.

ARGUMENT

I. Petitioner Arguments That The Order Prevents ICS Providers From Receiving Fair Compensation Are Without Merit

Section 276 of the Communications Act directs the FCC to ensure ICS providers “are fairly compensated for each and every completed intrastate and interstate call using their payphone.”¹² The Order states that the introduction of rate caps and lower per-minute rates will result in increased call volumes and reported call revenues to jails and prisons, ensuring ICS providers’ continued receipt of fair compensation for the services they provide.¹³ The ICS providers predict that the Order’s rates will not result in fair compensation.¹⁴ As discussed below, the ICS provider predictions are without merit, especially following the FCC’s adoption of the Reconsideration Order, which increased the rate caps by between 18 and more than 40 percent.

A. The Order’s Lower Rates And Fees Will Increase Call Volume And Will Not Reduce Revenue

NCIC is not the largest ICS provider, yet it is able to effectively compete while offering the FCC prescribed lower rates. Indeed, based on NCIC’s experience implementing rate reductions across the country, lower prices lead to increased call volume, which mitigates the effects of lower prices on revenue. For

¹² 47 U.S.C. § 276(b)(1)(A); *see id.* § 276(d).

¹³ Order ¶6, J.A.____.

¹⁴ ICS Providers Brief at 19, J.A.____; Securus brief at 5, J.A.____.

example, in Alabama, where NCIC provides ICS to six of the 16 city jails (37.5 percent of the total) and 17 of the 67 county jails (25 percent of the total), NCIC adjusted ICS rates and fees to be at or below those proposed by the Alabama Public Service Commission (“Alabama PSC”). NCIC lowered rates in Alabama from a flat \$2.70 per call to rates ranging from \$0.21 to \$0.25 per minute. These rates are comparable to the Order’s rates for jails, which range from \$0.14 per minute to \$0.22 per minute depending on the size of the jail.¹⁵ Following the rate reduction, NCIC experienced significantly increased call volumes and revenues were virtually unchanged. The Alabama PSC reported on the results of this rate reduction at the Shelby County Jail in December 2014:

One of the largest jails in Alabama, the Shelby County Jail (located near Birmingham), voluntarily adopted the [Alabama PSC’s] targeted intrastate rates for prisons, \$0.25/min and \$0.21/min on October 1, 2014; a full two years before the rates are applicable in Alabama prisons. We note that the [Alabama PSC’s] targeted rate cap for jails is \$0.25/min for collect, debit and prepaid calls and that Shelby County adopted the lower prison rates.

NCIC, the ICS provider serving the Shelby County Jail, reports a comparison of the usage between September and October indicates calls have increased by 27% and that revenue is virtually unchanged. NCIC also

¹⁵ Order ¶9, J.A. __.

reports paying reasonable site commissions to the Shelby County Jail. Consequently, the [Alabama PSC] rejects Securus' claim that the concomitant payment of site commissions under our rate caps, which we have no authority to require nor preclude, make it impossible for ICS carriers to provide service under the rate structure the [Alabama PSC] adopts.¹⁶

Following the Alabama PSC's report, the volume of calls at the Shelby County Jail continued to increase and revenue remained steady.¹⁷ Between September 2014 (the month immediately before NCIC introduced the lower rates) and March 2015, the average number of calls nearly doubled, increasing from 33 calls per inmate in September 2014, to 61 calls per inmate in March 2015.¹⁸ Furthermore, average revenue per inmate increased 1.5 percent during this period.¹⁹

¹⁶ Alabama Public Service Commission, *Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Calling Service*, Further Order Adopting Revised Inmate Phone Service Rules, Docket No. 15957, ¶6.20 (Dec. 9, 2014) (emphasis added), attached to Letter from Alabama Public Service Commission to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, J.A.____ (filed Jan. 29, 2015), *also available at* http://www.psc.alabama.gov/telecom/Engineering/documents/APSC%20Docket%2015957_Dec%202014%20Order.pdf.

¹⁷ See Letter from William L. Pope, President, NCIC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 7, J.A.____ (filed April 16, 2015).

¹⁸ *Id.*

¹⁹ *Id.*

The Shelby County Jail example is consistent with NCIC's experience at other Alabama facilities and at facilities around the country. For example, in February 2016, after displacing a competitor at Brazos County Jail in Texas, and lowering rates to \$0.16 per minute, inmate calling increased 247 percent. In addition, at Gregg County Jail in Texas, after displacing a competitor and lowering rates to \$0.21 per minute in April 2015, inmate calling increased by more than 300 percent.

As these examples demonstrate, NCIC's experience is that the lowering rates and fees increases call volume, and does not negatively impact revenue. As a result, NCIC is confident that ICS providers will receive fair compensation under the Order, especially following adoption of the increased rates in the Reconsideration Order.

B. The Actions Of ICS Providers Indicate They Will Be Fairly Compensated Under The Order

The Court should be skeptical of ICS provider predictions of financial ruin if the Order is not overturned. To the contrary, the petitioners continue to actively pursue contracts with bids that are *at or below* the Order's rates and fees. For example, Securus recently won a contract with the Georgia Department of Corrections ("DOC") with a March 1, 2016, bid that offered pre-paid collect and debit rates at \$0.11 per minute for interstate and intrastate calls, the same rates as

those in the Order, and below the rates in the Reconsideration Order.²⁰ The bid also offered ancillary fees at or below the Order's ancillary fee caps, including a \$4.75 live agent fee, which is less than the Order's \$5.95 live agent fee cap.²¹ The bid further contained a 59.6 percent site commission and a \$4 million bonus.²²

Securus' winning bid in Georgia undermines the ICS provider filings before this Court and the FCC, which warn of financial ruin if the Order's rates and fees are implemented. Even Global Tel*Link ("GTL"), a signatory to the ICS Provider Brief, recognized the hypocrisy of Securus' bid. In its appeal and protest of the Georgia DOC's award to Securus, GTL stated that "Securus' bid fl[ies] in the face of its representations to the FCC and the D.C. Circuit." GTL explained that, in an *ex parte* meeting with the FCC, Securus stated that "if adopted, the rates and rules . . . could be 'a business ending event' for the company."²³ GTL also noted that, in Securus' January 27, 2016, Emergency Motion for Partial Stay, which was filed in

²⁰ Securus Technologies, *Revenue Share Proposal – Best and Final Offer*, Proposal No. 46700-DOC0000669, GA Dept. of Corrections at 5 (March 1, 2016) ("Securus' Georgia DOC Bid"), available at <http://ssl.doas.state.ga.us/PRSapp/bid-documents/164670046700-GDC0000669198892.pdf>.

²¹ *Id.* at 6.

²² *Id.*

²³ Global Tel*Link ("GTL"), Appeal and Protest of GA Dept. of Corrections E-Request for Proposal No. 46700-DOC0000669 at 34 (quoting *Notice of Permitted Ex Parte meeting*, WC Docket No. 12-375, J.A. __ (filed Oct. 7, 2015)) available at <http://ssl.doas.state.ga.us/PRSapp/bid-documents/164670046700-GDC0000669198595.pdf>.

the D.C. Circuit only a month before its Georgia DOC bid, Securus claimed that, under the Order's rates and fees, it would not be able to provide certain ancillary services such as online and automated telephone credit card processing.²⁴ Despite its claim, Securus included these ancillary services in its winning bid.²⁵

In short, Securus' actions do not match its words. If Securus truly believes that its business would be ruined by implementation of the Order, its bid would not have relied on rates and fees at or below those of the Order or included ancillary services it claimed were impossible to provide. Its actions reveal that, despite the fervent arguments to the contrary, ICS providers will be fairly compensated under the Order.

**C. ICS Provider Arguments That Predict Harm From A Lack Of
Change-Of-Law Provisions In ICS Contracts Are
Unsubstantiated**

The Order states that the new rates and fees will trigger change-of-law provisions in ICS contracts that will allow providers to modify contracts to comply with the new rate caps and to relieve providers from site commissions that would be unduly onerous once the new rates and fees take effect.²⁶ The ICS Provider Brief argues that some ICS contracts do not contain change-of-law provisions, and

²⁴ *Id.* (citing Securus Technologies, Inc. Emergency Motion for Partial Stay of FCC Order 15-136 Pending Review, *Global Tel*Link v. FCC*, Nos. 15-1461 *et al.*, at 15-17, J.A.____ (Jan. 27, 2016)).

²⁵ Securus' Georgia DOC Bid at 5.

²⁶ Order ¶213, J.A.____.

that ICS providers bound to such contracts would be forced to “operate at a loss or face potential liability for breach of contract.”²⁷ As an ICS provider with more than two decades of experience with ICS contracts, NCIC can attest that this argument grossly inflates the potential problems with changing existing contracts to comply with new rates and fees.

Regulatory changes, whether at the state or federal level, are simply a part of doing business for ICS providers. Amendments to contracts that result from regulatory changes are relatively common. As a result, ICS contracts typically include provisions that accommodate renegotiations or amendments.²⁸

Renegotiations by ICS providers following release of the Order are evidence of this reality.

For example, in an affidavit, Securus’ CEO stated that “when the [Order] was released, Securus renegotiated approximately 1500 contracts as to rates, rate structure, surcharge elimination, and site commissions.”²⁹ Based on Securus’ ability to renegotiate contracts, Standard and Poor’s Global Ratings raised its financial outlook for Securus, stating that “Securus is in a better position to

²⁷ ICS Provider Brief at 24, J.A. __.

²⁸ Comments of GTL, WC Docket No. 12-375, at 29, J.A. __ (filed Mar. 25, 2013) (ICS contracts “typically include change of law provisions.”).

²⁹ Securus Technologies, Inc., Petition for Partial Stay of Order on Reconsideration Pending Appeal, Affidavit of Richard A. Smith, WC Docket No. 12-375, at 1, J.A. __ (filed Aug. 25, 2016).

weather FCC regulation after renegotiating its customer contracts to raise call rates and lower [site] commission payments made to facilities.”³⁰ ICS providers that have entered into contracts without change-of-law provisions have done so at their own risk, and have done so with specific notice of this proceeding, which began in 2012.³¹

In addition, the ICS Provider Brief does not provide any specific examples of providers that would be harmed by contracts that do not have change-of-law provisions. At least one example of this type of contract would be expected to prove the point. The absence of such evidence indicates that the argument is unsubstantiated.

The ICS Provider Brief also ignores the smooth transition that took place following the implementation of the 2013 Order’s interstate rate caps.³² There, ICS providers were able to adapt to the new rates with little contractual difficulty.³³ There is no reason to believe that implementation of the Order will be any different.

³⁰ S&P Global Ratings, Securus Holdings Inc. 'B' Rating Outlook Revised To Stable From Negative; Ratings Affirmed (Aug. 19, 2016.)

³¹ *See Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, WC Docket No. 12-375, 27 FCC Rcd 16629, J.A. __ (2012).

³² *See Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107, J.A. __ (2013).

³³ Order ¶213, J.A. __.

II. Facility Costs Are Sufficiently Built Into The Rate Caps

The State and Local Brief argues that facility compensation will be greatly reduced, if not eliminated, by the FCC's decision not to include site commissions in its determination of the rate caps.³⁴ It states that “without receiving any revenue from ICS, some jails and prisons may greatly reduce ICS or eliminate it entirely.”³⁵ The Brief conveniently ignores the reality that site commissions were *excessive* prior to the Order and that facilities will receive *reasonable* compensation from ICS providers under the Order, especially following adoption of the higher rates in the Reconsideration Order.³⁶

Site commissions by themselves do not lead to unreasonable ICS rates and fees. They are simply profit sharing arrangements, where the ICS provider agrees to provide the facility with a percentage of its profits.³⁷ In NCIC's experience, facilities do not ask ICS providers to pay more than what is economically feasible. However, in the unbalanced, anti-consumer regulatory environment that existed prior to the Order, ICS providers competed against each other by offering increasingly high site commissions, sometimes as high as 96 percent, in order win

³⁴ State and Local Brief at 48, J.A.____.

³⁵ *Id.* at 52, J.A.____.

³⁶ Order ¶127, J.A.____.

³⁷ *Id.* ¶120, J.A.____.

contracts with facilities.³⁸ To make up the cost of paying high site commissions, providers charged consumers high rates and fees, charging as much as \$14.99 per call.³⁹ Having no choice in their ICS provider, consumers were forced to pay these inflated prices.

The Order balances the ICS market. While the rate and fee caps will likely have the effect of reducing the percentage of profits that ICS providers are able to offer facilities through site commissions,⁴⁰ facilities will still receive reasonable compensation.⁴¹ For example, Securus' March 1, 2016, winning bid with the Georgia DOC, which offered rates and fees at or below those in the Order, and below the rates in the Reconsideration Order, contained a 59.6 percent site commission with a minimum monthly guaranteed payment of \$325,000 (\$3.9 million per year).⁴² The bid also included a \$4 million bonus payable upon

³⁸ See Letter from Thomas M. Dethlefs, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, J.A.____ (filed Aug. 28, 2014) (stating as an explanation for its agreement to pay a 96 percent site commission, that "bidders were obliged to utilize ancillary fees to cover costs that otherwise could not be recovered in per-minute rates after deducting the County's required commissions.").

³⁹ *Id.*; Order ¶158, J.A.____.

⁴⁰ Order ¶128, J.A.____ ("[W]e have addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps and caps on ancillary service charges that may limit providers' ability to pass site commissions through to ICS consumers.").

⁴¹ *Id.* ¶127, J.A.____.

⁴² Securus' Georgia DOC Bid at 6, J.A.____.

execution of the contract.⁴³ Such compensation is sufficient to meet the costs of providing ICS, which, according to the State and Local Brief, can average “over \$100,000 per month.”⁴⁴

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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⁴³ *Id.*

⁴⁴ State and Local Brief at 52, J.A. __; The Order cites further examples, including Pennsylvania and New Hampshire, where rates are under \$.06 (well below the Order’s rate caps) yet these states are able to impose 35 percent and 20 percent site commissions respectively. Order ¶128, J.A. __.

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Glenn S. Richards

Glenn S. Richards

CERTIFICATE OF SERVICE

I, Glenn S. Richards, hereby certify that I have on this 29th day of September, 2016, electronically filed the foregoing Brief of Intervenors by using this Court's Case Management/ Electronic Case Files system, which served a copy on all counsel of record in these cases.

/s/ Glenn S. Richards

Glenn S. Richards