

**ORAL ARGUMENT NOT YET SCHEDULED**

Nos. 13-1280, 13-1281, 13-1291, 13-1300, 14-1006

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IN THE  
**United States Court of Appeals  
for the District of Columbia Circuit**

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SECURUS TECHNOLOGIES, INC., *et al.*,  
Petitioners,  
v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,  
Respondents.

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On Petition for Review of an Order of the  
Federal Communications Commission

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**BRIEF *AMICUS CURIAE* OF VERIZON  
IN SUPPORT OF RESPONDENTS**

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MICHAEL E. GLOVER  
CHRISTOPHER M. MILLER  
MARK J. MONTANO  
VERIZON  
1320 North Courthouse Road  
Arlington, Virginia 22201  
(703) 351-3084

JESSICA L. ELLSWORTH  
NATHANIEL G. FOELL  
HOGAN LOVELLS US LLP  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5886  
jessica.ellsworth@hoganlovells.com

Counsel for *Amicus Curiae*

Dated: July 28, 2014

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**CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), Verizon certifies the following:

**Parties and Amici.** a. All parties, intervenors, and *amici* appearing in this Court are listed in the Respondents' brief.

b. Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Verizon respectfully submits the following corporate disclosure statement:

In addition to Verizon Wireless, the Verizon companies participating in this action (Verizon) are the regulated, wholly-owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. is a publicly held company.

Verizon Communications Inc. has no parent company, and no publicly held company has a 10% or greater interest in it. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services.

**Ruling Under Review.** The ruling under review is identified in the Respondents' brief.

**Related Cases.** Counsel are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Jessica L. Ellsworth  
Jessica L. Ellsworth

**CERTIFICATE IN SUPPORT OF SEPARATE BRIEF**

Pursuant to Circuit Rule 29(d), Verizon states that a separate brief is necessary for its presentation to this Court because it stands alone among the *amici* intending to file in support of Respondents in presenting the unique perspective of a former provider of inmate calling services and a current provider of communications services to customers who pay the charges for inmate calling services.

/s/ Jessica L. Ellsworth  
Jessica L. Ellsworth

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES.....	i
CERTIFICATE IN SUPPORT OF SEPARATE BRIEF .....	ii
TABLE OF AUTHORITIES .....	iv
GLOSSARY.....	v
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
THE FCC REASONABLY CONCLUDED THAT SITE COMMISSIONS SHOULD NOT BE COMPENSABLE COSTS .....	4
A.    Excluding Site Commissions From The Category Of Compensable Costs Is An Appropriate Approach To Lowering Rates For Inmate Calling Services .....	5
B.    The FCC Has Adopted A Similar Approach To Revenue Sharing In Other Areas With Success.....	7
CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>STATUTES:</b>	
47 U.S.C. § 201(b) .....	4
47 U.S.C. § 276(d) .....	4
<b>AGENCY RECORD:</b>	
* 26 FCC Rcd 17663 .....	8

\*Authorities chiefly relied upon are marked with asterisks.

## **GLOSSARY**

FCC Federal Communications Commission

ICS Provider Br. Brief for the Petitioners

Resp. Br. Brief for the Federal Communications Commission

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IN SUPPORT OF RESPONDENTS**

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**STATEMENT OF INTEREST OF *AMICUS CURIAE***

Verizon respectfully submits this brief as *amicus curiae*.<sup>1</sup>

Verizon has a unique perspective on the issues presented in this matter that may be of value to the Court. Verizon is both a former provider of inmate calling services and a current provider of communications services to customers who pay the charges for inmate calling services. Verizon (and its predecessor companies)

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<sup>1</sup> Verizon certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than Verizon and its counsel contributed money intended to fund the brief's preparation or submission.

provided inmate calling services for many years, prior to selling this business in July 2007. Verizon today provides communications services to customers who are charged for inmate calling services by the providers of those services. Although Verizon has no responsibility for the amount charged for inmate calling services, Verizon receives complaints and inquiries from its customers regarding the size of these charges. As a communications provider and corporate citizen, Verizon has an interest in the rates its customers are charged for inmate calling services and the consequences that those rates have for inmates, their families, and the general public.

Because of its experience as a provider of inmate calling services, Verizon has a firsthand understanding of how the market functions. This experience includes participating in the bidding process for exclusive contracts for inmate calling services with Departments of Corrections and observing that site commissions are frequently the dispositive factor in determining which provider is awarded those contracts. In Verizon's experience, it is almost always the case that inmates and their loved ones—the people actually paying for inmate calling services—have no say over what provider they are compelled to use or the specific rates that they are charged.

## SUMMARY OF ARGUMENT

In its Order here, the FCC correctly recognized that the market for inmate calling services does not function like most other markets. This is because the rates service providers offer in their bids to Departments of Corrections are not the principal basis on which a provider is selected; instead, site commissions—i.e., payments to the facility of a portion of any rates charged—are the driving factor.

The FCC concluded that this key fact causes the calling rates paid by inmates and their loved ones to be significantly inflated compared to the rates for calling generally. Accordingly, the FCC acted to counter the impact of this unique feature of the inmate calling services market by declaring that site commissions are not compensable costs that automatically can be recouped from end users, but rather are revenue sharing arrangements. But it also made clear that these arrangements are permissible, with the amount of revenues to be shared determined based on commercial negotiations between the service provider and Departments of Corrections, free from the distortion caused by automatically passing on the cost of the commission to consumers.

Verizon's experience in the inmate calling services industry corroborates the FCC's understanding of this unique market. In our experience, the rates that a provider proposes to charge end users are essentially irrelevant to whether that provider is selected for an exclusive contract. Instead, the primary factor in

awarding a contract is the amount of the site commission paid to the Department of Corrections, which can often amount to 40 or 50 percent of amounts billed. Given the unique nature of the inmate calling services market, the FCC acted reasonably by preventing the cost of commissions from automatically being passed on to end users, and instead treating these commissions as revenue sharing arrangements subject to commercial negotiations between service providers and Departments of Corrections. Indeed, the FCC's regulatory approach has been successfully applied in other situations and should be affirmed.

### **ARGUMENT**

#### **THE FCC REASONABLY CONCLUDED THAT SITE COMMISSIONS SHOULD NOT BE COMPENSABLE COSTS.**

The FCC is required to ensure that the charges for interstate telecommunications services are "just and reasonable." 47 U.S.C. § 201(b). This requirement extends to "the provision of inmate telephone service in correctional institutions, and any ancillary services." *Id.* § 276(d). The public, through grandmothers like Martha Wright, had been telling the FCC that rates charged to inmates and their loved ones for inmate calling services were unjust and unreasonable for almost a decade before the agency initiated the rulemaking at issue here. Resp. Br. 5-6.

The record developed in that rulemaking documents the significant distortion that renders the market for inmate calling services different from most

other communication markets. The distortion is a result of the fact that those who choose the service provider do not pay for the service but do often stand to benefit from higher rates being charged, because they stand to receive a portion of the revenues. The Departments of Corrections choose the service provider and receive part of the revenues, while inmates and their loved ones—who are often economically disadvantaged—have no choice but to pay whatever rates the provider charges if they want to stay in touch. In practice, this means that when service providers compete for exclusive contracts, they are not competing to offer the most efficient service to the end users; instead, they are competing to offer a higher site commission. *See* Resp. Br. 3-4.

**A. Excluding Site Commissions From The Category Of Compensable Costs Is An Appropriate Approach To Lowering Rates For Inmate Calling Services.**

Petitioners do not dispute that rates for inmate calling services are significantly higher than the rates for ordinary residential telephone service. They do not dispute that reduced inmate-family communications due to high rates produce ill effects on the public interest, including on the rate of recidivism. And, finally, they do not dispute that site commissions are a significant reason why rates for inmate calling services are inflated. Rather, Petitioners contend that site commissions “are a real cost” of providing service. ICS Provider Br. 26.

Undoubtedly, site commissions are an expensive component of a provider's contract. When Verizon provided inmate calling services, site commissions tended to range from 40 to 50 percent of amounts billed, and bore little or no relation to the cost of providing services. Site commissions are this large because most of the bidders can meet the security and other technical requirements included in a typical request for proposal. So the factor that differentiates one provider from another is usually how large of a site commission each provider is willing to pay. Most importantly, in Verizon's experience the calling rates that a provider proposes to charge end users are virtually irrelevant to which provider is selected for the contract. To be clear about what this means, the provider offering to charge inmates and their families the lowest calling rates is not more likely to win the contract. And because contracts are exclusive (i.e., allowing only a single provider at each institution), inmates cannot select another, lower-priced provider if they want to place less expensive calls to their families.

The standard way that service providers have looked to recoup the expense of paying site commissions is to increase the calling rates charged to inmates and their friends and family. Site commissions are therefore a principal cause of inflated rates for inmate calling services, which is why the FCC focused on site commissions and excluded them from the category of compensable costs in a cost-plus rate formula. The FCC determined that commissions should instead be treated

as revenue sharing arrangements, which it made clear are permissible, subject to commercial negotiations without the distorting effect of automatically being recoverable in rates charged to end users.

Given the record evidence of the many prison and non-prison related programs (e.g., drug addiction counseling services) that are funded by site commissions, the FCC acted within its discretion in concluding that site commissions are not reasonably and directly related to the provision of inmate calling services and thus are not recoverable through the rates charged to end users. Even though such programs can be beneficial to inmates, they often have nothing to do with the communications services at issue. Using site commission revenue to fund these programs is a choice by the Departments of Corrections to spend their profits from the inmates' calls in a certain way.

**B. The FCC Has Adopted A Similar Approach To Revenue Sharing In Other Areas With Success.**

The FCC's approach to site commissions or revenue sharing arrangements in this situation was informed by its experience addressing the collateral impact of revenue sharing arrangements in other areas. For example, the FCC successfully addressed so-called "traffic pumping" arrangements, in which some telephone companies charged unreasonably high rates to other carriers (e.g., wireless and long distance providers) that were obligated to deliver calls to these companies. For the calls at issue, the telephone companies had entered into revenue sharing

arrangements with companies such as conference call and chat line providers to route their traffic through the telephone companies in exchange for a portion of the revenues that the telephone companies charged to handle the traffic.

In the traffic pumping situation, the FCC did not ban these commissions or revenue sharing arrangements, but did consider the presence of these arrangements to be evidence that rates were too high. If a revenue sharing arrangement existed and certain traffic criteria were met, the FCC required the rates to be benchmarked to the lower rates of a larger telephone company in the state. This action now helps prevent much of the cost of traffic pumping and the related revenue sharing arrangements from being borne by end users. *See Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, ¶¶ 656-701 (2011).

The FCC took a similar step here to protect end users from funding providers' revenue sharing arrangements (or commissions) with Departments of Corrections. Although the FCC's mechanisms varied due to differences in the markets (e.g., the availability of a benchmark rate), in both contexts, the FCC effectively did not allow commissions/shared revenue to be treated as a cost of providing service that could be included in the end users' rates.

## CONCLUSION

For the foregoing reasons, the FCC's treatment of site commissions was reasonable and should be affirmed.

Respectfully submitted,

/s/ Jessica L. Ellsworth

JESSICA L. ELLSWORTH

NATHANIEL G. FOELL

Hogan Lovells US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5886

jessica.ellsworth@hoganlovells.com

MICHAEL E. GLOVER

CHRISTOPHER M. MILLER

MARK J. MONTANO

VERIZON

1320 North Courthouse Road

Arlington, Virginia 22201

(703) 351-3084

Counsel for *Amicus Curiae*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 1,706 words.

/s/ Jessica L. Ellsworth  
Jessica L. Ellsworth

**CERTIFICATE OF SERVICE**

I certify that on July 28, 2014, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Jessica L. Ellsworth  
Jessica L. Ellsworth