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

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| Rates for Interstate Inmate Calling Services | WC Docket No. 12-375 |

**SECURUS TECHNOLOGIES, INC. PETITION TO HOLD FURTHER RULEMAKING PROCEEDING IN ABEYANCE**

Securus Technologies, Inc. ("Securus"), through counsel and pursuant to 47 C.F.R. § 1.43, hereby files this Petition asking that the Commission hold in abeyance the further rulemaking proceeding initiated by the Further Notice of Proposed Rulemaking included in *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 13-113, released September 26, 2013 ("FNRPM"). At this time, taking and considering comments on the FNPRM, the great majority of which is expressly premised on the findings and conclusions in the Report and Order, would not be an appropriate use of Commission resources for the reasons described below.

Due to the time sensitivity of the relief sought, Securus respectfully requests that the Commission resolve this Petition by **November 8, 2013**.

## I. BACKGROUND

The FNPRM seeks comment on several matters arising from inmate telephone rates. Initial Comments are due 30 days after Federal Register publication, and Reply Comments are due 45 days after publication.

Contemporaneous with this filing, Securus is submitting a Petition for Stay of the Report and Order in FCC 13-113 pending its forthcoming appeal of the findings, conclusions, rates, and rules contained therein. As demonstrated in that petition, Securus is likely to prevail

on the merits of its appeal on any of several independent grounds.

## II. THE FCC SHOULD HOLD THE FURTHER PROCEEDING IN ABEYANCE PENDING APPEAL FROM THE REPORT AND ORDER

The FNPRM presents questions and tentative conclusions for comment that rest expressly on the findings and conclusions of the Report and Order, many of which will be challenged before a federal court of appeals. Indeed, the very lens through which the Commission looks at this market is likely to be altered by the appeal. Whatever data and analysis that now would be responsive to the FNPRM therefore may be rendered useless. For these reasons, the Commission should hold the further proceeding in abeyance until the appeal is resolved.

### A. Standard for Granting an Abeyance

The Commission holds matters in abeyance when they involve or rest on Commission rules that remain unsettled. The purpose of an abeyance is to "avoid unnecessary expenditure of time and resources by the parties and [the] Commission[.]"[1]

For example, the Commission has held a petition for preemption of state law in abeyance where the request for relief involved "certain outstanding issues regarding the operation of the new federal universal service program."[2] It also has held petitions for reconsideration of various rules in abeyance where they "may be rendered moot by the rules"

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1 *Donald J. Elardo, Esq. and Stephen C. Garavito, Esq*., File No. E 92 88S, Letter, 9 FCC Rcd. 7912 (1994) (granting MCI's motion to hold damages phase of enforcement proceeding in abeyance pending review of MCI's Application for Review of liability findings entered against it).

2 *American Commc'ns Svcs., Inc. and MCI Telecomms. Corp*., CC Docket No. 97-100, Memorandum Opinion and Order, 14 FCC Rcd. 21579, 21581 ¶ 3 (1999).

under consideration in a related proceeding."[3] Thus, where a proceeding begins from a predicate finding, rule, or policy that is under review, the Commission finds an abeyance appropriate.

### B. The FNPRM Builds on Findings and Conclusions That Will Be Appealed, Creating the Strong Likelihood of a Waste of Resources Should Comment Be Taken At This Time

The FNPRM creates a follow-on proceeding that expressly incorporates and builds on the rules adopted in the Report and Order. Many of those rules, and indeed their entire underpinning, will be challenged on appeal and are likely to be remanded, if not vacated. To take comment on the follow-on questions in the FNPRM now would invite an "unnecessary expenditure of time and resources by the parties and this Commission[.]"[4]

Several portions of the FNPRM build directly off the "cost-based" policy adopted in the Report and Order that led to the "safe harbors" and "interim rate caps", all of which will be reviewed. They include:

- "We tentatively conclude that site commissions should not be recoverable through intrastate rates[.]" ¶ 133.
- "Will the cost based rates required by the Order create a market-based solution for driving intrastate rates to cost-based levels absent further regulatory action?" ¶ 134.
- "Given the very small number of deaf and hard of hearing inmates relative to the overall prison population, are the safe harbor rates adopted in today's Order sufficient to allow recovery of the discount?" ¶ 146.

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[3] *Rules and Policies on Foreign Participation in the U.S. Telecomms. Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, 12 FCC Rcd. 7847, 7849 n.2 (1997); *see also Amendment of Parts 15 and 90 of the Commission's Rules to Provide Additional Frequencies for Cordless Telephones*, ET Docket No. 93-235, Report and Order, 10 FCC Rcd. 5622, 5627 ¶ 30 (1995) (noting that two petitions for reconsideration of the "offset channel rule" had been held in abeyance "pending our determination on providing additional cordless telephone channels in this proceeding.").

[4] *Elardo/Garavito*, 9 FCC Rcd. 7912.

- "We seek comment on maintaining the interim rate caps and safe harbor rate levels adopted in the Order and expanding that structure to encompass intrastate ICS rates." ¶ 154.

- "Should we maintain the current safe harbors and make them permanent or should they be reduced over time given that they were set at conservative levels? ¶ 154.

- "Additionally, we note that the Order adopts a historical cost methodology for the interim rules and we seek comment on what measure of cost – *e.g.*, historical, forward looking – should be adopted for the permanent rate structure." ¶ 163.

- "In the Order, we require charges for any services that are ancillary to the costs of providing ICS to be cost-based, and require ICS providers to submit cost data for these ancillary charges as part of the mandatory data request. Here we seek comment on how the Commission can ensure, going forward, that ancillary charges are just, reasonable, and cost-based." ¶ 168.

- "We seek comment on whether our conclusion resolves the issues surrounding billing-related blocking of interstate ICS calls. Additionally, we seek comment on whether we should extend our prohibition on blocking to intrastate ICS calls." ¶ 173.

These items depend absolutely upon the core of the Report and Order. They reveal, by their terms, that the policy underpinnings, as well as the factual findings and ratesetting methodologies, of the Report and Order form the very basis of the Further Notice of Proposed Rulemaking. These items will be reviewed by a court of appeals and may be vacated or reversed. As a result, the premise of the FNPRM will have been invalidated.

Taking comment now on the follow-on items in the FNPRM would be imprudent. While the appeal is pending, the Bureau will be constrained from undergoing any meaningful review of any comments or data. Thus, in order not to create an "unnecessary expenditure of time and resources"[5] on work that later could well be unhelpful, the Commission should hold the FNPRM in abeyance until the appeal from the Report and Order is resolved.

[5] *Elardo/Garavito*, 9 FCC Rcd. 7912.

## CONCLUSION

For all these reasons, the Commission should hold the further proceeding, including the call for comments in the Further Notice of Proposed Rulemaking, in abeyance while the appeals from the companion Report and Order are pending. Securus respectfully requests that the Commission resolve this petition by **November 8, 2013**.

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Dated: October 22, 2013

## CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of October, 2013, that the foregoing Petition to Hold Further Rulemaking in Abeyance was served via electronic mail on the following persons:

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**SECURUS TECHNOLOGIES, INC.**
**PETITION FOR STAY OF REPORT AND ORDER PENDING APPEAL**
**(FCC 13-113)**

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## SUMMARY

Securus respectfully seeks a stay of the *Inmate Rate Order* and demonstrates herein that its request meets all four criteria of the *Virginia Petroleum Jobbers* test.

First, Securus is likely to prevail on the merits of its appeal on any of several independent grounds:

- The *Inmate Rate Order* adopts ongoing, "historical", "cost-based" rate review without providing any notice that such regulation was under consideration.
- The *Inmate Rate Order* is fatally vague as to the rate regime to which inmate telecommunications now will be subject.
- Protestations to the contrary, the Commission is in fact abrogating existing service contracts by imposing a flash-cut rate decrease and preventing inmate service providers from paying site commissions.
- In adopting rates and a new policy that prevents service providers from paying site commissions, the Commission has overstepped its authority.
- The *Inmate Rate Order* sets rates that are demonstrably below cost, even omitting the cost of site commissions.
- The *Inmate Rate Order* establishes, if not requires, nationwide cross-subsidization across all facility sizes and types of call.

Secondly, Securus demonstrates, through the sworn affidavit of its Chief Executive Officer Richard A. Smith, that it will suffer irreparable harm of several types:

- The drastic rate decrease imposed by the *Inmate Rate Order* will prevent Securus from paying the site commissions that are required by contract and often state statute, causing it to lose customer goodwill and fear legal action.
- The *Inmate Rate Order* would require Securus to renegotiate, assuming that it has the right or opportunity to do so, more than 1,700 contracts within 90 days of Federal Register publication, a task that no company reasonably could be expected to complete.
- The below-cost rates imposed by the *Inmate Rate Order* will cause Securus significant financial losses that it could not recoup if the rates are overturned on appeal.

- The reporting requirements adopted in Rule 64.6060, with a due date of April 1, 2014, are so onerous that Securus would require 5 to 20 additional, full-time employees devoted only to compliance with that rule.

- The *Inmate Rate Order* exposes Securus to the strong possibility of litigating multiple rate cases even for rates that are below the rate caps adopted therein. Securus offers several different price structures on interstate calls among its 1,800 contracts, and under the Inmate Rate Order a complaint from just one consumer as to each structure would require a unique rate case.

Third, a stay of the *Inmate Rate Order* will not materially harm third parties and in fact would serve their interests. The Wright Petitioners, whose request for per-minute rate caps were the focal point of this proceeding, understood the tremendous work that will be required to renegotiate the thousands of service contracts in this market and advocated for a one-year "fresh look" period. The *Inmate Rate Order* provides just 90 days for that work; the Petitioners had no expectation of such rapid change. In addition, the *Inmate Rate Order* will create an inevitable and immediate loss of site commission funds that will jeopardize inmate welfare programs across the country. That result certainly will harm inmates, depriving them of irreplaceable programs intended expressly to encourage their rehabilitation and decrease recidivism.

Fourth, the public interest favors a stay, for several reasons:

- A stay will protect state, county, and local expectations of site commission funds on which existing budgets and programs rely.

- A stay will preserve the status quo of existing services and ensure that carriers can continue providing telephone service without incurring the crippling losses imposed by the new rates.

- In permitting carriers to continue providing service, the stay will preserve the competition in this market that the Commission consistently has recognized.

- A stay will prevent these regulated utilities from suffering unrecoverable losses, a result that the Commission has deemed a public benefit that weighs in favor of a stay.

- A stay of the rate regulation adopted in the Inmate Rate Order, which as explained herein is fatally vague and not readily applied, will prevent the public harm that flows from wasting agency resources on matters of uncertain basis and outcome.

Under Commission precedent, a petitioner need not make a strong showing as to every prong of *Virginia Petroleum Jobbers* in order to obtain a stay. Here, however, Securus has amply satisfied each prong and demonstrated that a stay is not only appropriate, but necessary.

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Securus Technologies, Inc. ("Securus"), through counsel and pursuant to 47 C.F.R. § 1.43, hereby files this Petition for Stay of the order titled *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, released September 26, 2013 ("*Inmate Rate Order*").[1] In support of this Petition, Securus files herewith the sworn Affidavit of Richard Smith, Chief Executive Officer (Oct. 17, 2013). Securus requests that the *Inmate Rate Order* be stayed pending review to prevent the irreparable harm that would flow from the order's immediate implementation. As described more fully below, maintaining the *status quo* is in the best interest of inmate telecommunications service providers, correctional facilities, and the public.

Due to the extremely brief implementation deadline in the *Inmate Rate Order*, Securus respectfully requests that the Commission resolve this Petition by **November 21, 2013**, which is 30 days from the date of this filing.

## STANDARD FOR ENTERING A STAY

The Commission applies the four-part test in *Virginia Petroleum Jobbers Association* when reviewing petitions for stay pending appeal.[2] That test is: (1) petitioner is likely to prevail on the merits of its appeal; (2) petitioner will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed by entry of a stay; and (4) the public interest

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[1] Contemporaneously with this Petition, Securus is filing a petition to hold in abeyance the follow-on rate proceeding initiated by the Further Notice of Proposed Rulemaking portion of this item.

[2] *E.g.*, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 23 FCC Rcd. 1705, 1706 ¶ 4 (2008) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (granting petition for stay); *Charter Commc'ns Entm't I, LLC*, Memorandum Opinion and Order, 22 FCC Rcd. 13890, 13892 ¶ 4 (2007) (staying orders setting cable rates); *Comcast Cable Commc'ns, LLC*, File No. CSB-A-0741, Order, 20 FCC Rcd. 8217 ¶ 2 (2005) (citing same) (staying several orders that set local cable rates).

favors a stay.[3] The Commission does not always accord each prong of this test equal weight: "If there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors."[4] For example, "[i]f the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury."[5]

## BACKGROUND

On August 9, 2013, at its August Open Meeting, the Commission voted to adopt new interstate calling rates and ongoing rate-review regulation for inmate telecommunications services by a 2-1 vote. On September 26, 2013, the Commission released the *Inmate Rate Order* which requires inmate calling service ("ICS") providers to establish cost-based rates and sets forth an interim rate regime consisting of both safe harbor rates and rate caps. The new rates and other rules are codified in Rules 64.6000 – 64.6060. They include:

### 1. Inmate Calling Rates (Rules 64.6020 and 64.6030)

The *Inmate Rate Order* sets "safe harbors" and "interim rate caps" for interstate inmate calls, allowing for slightly higher rates on collect calls than on debit calls due to the increased costs of billing and uncollectible revenue inherent in a collect environment. The rates are:

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3 *TRS Services*, 23 FCC Rcd. at 1706 ¶ 2; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

4 *TRS Services*, 23 FCC Rcd. at 1707 ¶ 4.

5 *Charter Commc'ns*, 22 FCC Rcd. at 13892 ¶ 4.

| | Call Type | Per-Minute | 15-Minute Total |
|---|---|---|---|
| **Safe Harbor** | Debit | $0.12 | $1.80 |
| | Credit | $0.14 | $2.10 |
| **Interim Rate Cap** | Debit | $0.21 | $3.15 |
| | Credit | $0.25 | $3.75 |

In addition to setting these rates, the Commission has decided that inmate telecommunications service providers no longer may recover the cost of site commission payments in their calling rates.[6]

**2. Prohibition on Call-Blocking (Rule 64.6050)**

Inmate telecommunications service providers must complete collect calls to persons with whom no billing relationship exists. This prohibition will not apply from correctional facilities at which a prepaid calling option was offered prior to the inmate's placing the collect call.

**3. Reporting Requirements (Rule 64.6060)**

All inmate telecommunications service providers must provide reports to the Commission stating the number of both interstate and intrastate calling minutes provided in the previous year. That data must include per-call charges, per-minute charges, and the average duration of the calls. The providers must also state the number and the percentage of inmate telephone calls that were terminated for reasons other than a party hanging up the handset. The reports must be certified by an officer of the company.

6 *Inmate Rate Order* ¶¶ 54-58.

## ARGUMENT

### I. SECURUS IS LIKELY TO PREVAIL IN ITS APPEAL OF THE *INMATE RATE ORDER*

The first prong that the Commission considers in determining whether to stay the effectiveness of new regulations during the pendency of the appeal is the likelihood of success on the merits.[7] The *Inmate Rate Order* is likely to be overturned on any of the several independent grounds discussed below. Securus amply satisfies this prong.

A court of appeals reviewing the Commission's action in the *Inmate Rate Order* will evaluate Commission action under the strictures of 5 U.S.C. § 706 which states, in pertinent part:

> … The reviewing court shall –
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

As demonstrated herein, the *Inmate Rate Order* is likely to be found unlawful pursuant to subsections (A), (B), (C), (D), and (E).

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[7] *TRS Services*, 23 FCC Rcd. at 1706 ¶ 4; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

### A. The Inmate Rate Order Imposes New and Complex Rate Regulations Without Notice

The *Inmate Rate Order* adopts a novel "cost-based" ratemaking methodology that was neither raised in the NPRM nor discussed in the record and is therefore subject to being set aside pursuant to 5 U.S.C. § 706(2)(D). The NPRM simply sought further comment on the Martha Wright $0.20/$0.25 per-minute rate proposal that was raised via Alternative Petition for Rulemaking in 2007.[8] The NRPM refers repeatedly to "rate caps",[9] "per-minute rate caps",[10] and the "Alternative Wright Petition".[11] And though the *Inmate Rate Order* states that the "Commission sought comment on ways of regulating ICS rates based on the costs of providing ICS" as part of the NPRM in this docket, its own record citations prove otherwise.[12] Quite contrary to the Commission's assertion in the *Inmate Rate Order*, the citations prove that the Commission sought cost information in the context of evaluating various proposals for what level of rate caps would be "just and reasonable." There simply was no indication there that the Commission was considering the potential of requiring ICS providers to prove that their rates were cost-based, even if those rates fellow below whatever rate cap the Commission might adopt. The FCC thus failed to provide the requisite notice under the APA[13] and interpretive

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8 WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Notice of Proposed Rulemaking, FCC 12-167 ¶¶ 14-15 (rel. Dec. 28, 2012) ("*Inmate Rate NRPM*"). Petitioners requested a rate of $0.20 per minute for prepaid interstate calls and $0.25 per minute for collect interstate calls.

9 *E.g.*, *Inmate Rate Order* ¶¶ 13, 17, 23, 24, 28.

10 *E.g.*, *id*. ¶¶ 20, 21, 22.

11 *E.g.*, *id*. ¶¶ 17, 21, 22, 30.

12 *See id.* ¶ 50 & n.191.

13 "General notice of proposed rule making shall be published in the Federal Register," and such notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b).

precedent[14] that ongoing rate regulation, with periodic mandatory cost-based justification, could be adopted here.

Cost-based regulation with rate caps is not only a surprise, it is unnecessary and imposes heavy burdens on ICS providers and ultimately the Commission. This unexpected burden offends the basic notion of notice and comment rulemaking. Having not appeared in the NPRM, it was never the subject of active discussion during the comment period. Had it been afforded the opportunity, Securus would no doubt have explained the hazards of this hybrid rate-setting approach. But on this proceeding's record, it cannot be reasonably argued that the record provides the Commission with thoughtful presentations as to why cost-based regulation coupled with rate caps is or is not appropriate.[15] As such, the FCC lacks a record on this issue and will be unable to show sufficient evidence to support its decision.[16]

### B. The *Inmate Rate Order* Is Fatally Vague in Describing the Rate Regulation It Imposes

The FCC has imposed a form of rate making that is inexplicable and amorphous. At the least, it is a rate regime heretofore unseen. It is something akin to rate-of-return regulation, something that has not been used in the long distance market since 1989, but also has elements of a rate cap. The Commission describes it in the Further Notice of Proposed

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14 *Forester v. Cons. Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977) ("sufficient notice … affords interested parties a reasonable opportunity to participate in the rulemaking process.").

15 The *Inmate Rate NRPM* asks about the potential of applying the cost methodology that applies to **public pay phones**, *Inmate Rate NPRM* ¶ 26, but that methodology is never mentioned in the rules that the Commission adopted. Rather, as Securus explains in this section, the Commission combined ***two other methodologies*** to create a wholly new system of rate making. The Commission's failure to give proper notice is also indicated by the fact that the *Inmate Rate NRPM* never mentions the potential for a "safe harbor" for rates. A safe harbor is unnecessary in a "rate cap" environment, in which the only thing that matters is whether the provider's rates are below the required cap.

16 *See* 5 U.S.C. § 706(2)(E).

Rulemaking ("FNPRM") only as "historical".[17] Thus, at a minimum, the new regulations are so vague as to warrant reversal on that ground alone.[18]

Even if a court of appeals was to reach past the threshold vagueness issue to review the rules substantively, reversal would be required due to their unreasonable, even nonsensical, structure. From what Securus can glean in the *Inmate Rate Order*, the Commission's new rate system for ICS service combines the ***worst*** of both worlds.

Under rate-of-return regulation, a carrier is ensured a rate of return that is aimed at ensuring continued business viability.[19] Rate-of-return local exchange carriers, for example, benefit from a 11.25% rate-of-return target.[20] Here, however, no such assured returns exist. Rather, the Commission purports to have used an 11.25% return as part of calculating the rate caps,[21] but makes no finding that this 11.25% rate-of-return is "appropriate in this context." The refusal to say that the return would be reasonable portends a future in which an ICS provider may well be subject to a rate proceeding only to be found to have over-earned even if its rates were under the rate caps and the provider used a cost-based methodology. In short, the Commission suggests that ICS providers are entitled to a "reasonable profit," but then leaves them without sufficient guidance as to what that means.

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17 *Inmate Rate Order* ¶ 163.

18 *See*, *e.g.*, *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (FCC directions that were too vague to provide regulated parties with sufficient notice of required conduct were vacated).

19 *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd. 7507, 7532 ¶ 213 (1990) ("It is well established that rate of return prescription under the 'just and reasonable' standard requires a balancing of ratepayer and shareholder interests. The regulated company must be allowed the opportunity to earn a return that is high enough to maintain the financial integrity of the company and to attract new capital to the business.") (citations omitted).

20 *Id.* ¶ 216.

21 *Inmate Rate Order* n.203.

But worse, the Commission then adds "interim" rate caps into the mix. Rate caps were, after all, what the Wright Petitioners requested and what the NPRM proposed. Thus, the Commission apparently decided it needed to purport to be applying a rate cap in theory, even if it was not applying it in practice. And, indeed, the rate caps will mean little in practice, because an ICS provider can only charge rates consistent with the rate cap if it shows that the rate is cost-justified. Thus, if the provider's costs decline, the Commission ***requires*** the carrier to reduce its rates ***again***, even though the rates are already below the cap. The result: ICS providers will no longer have an incentive to innovate or to improve efficiency.[22]

If the ICS provider must relinquish the benefit of its efficiency gains, and in the same time reduce its total revenue, then it is given little incentive to continue innovating.

A simple example will demonstrate. To begin, a rate cap is a form of rate regulation that simply assigns what an agency believes is a reasonable end user price for service and enables carriers to arrange their costs, and other sources of revenue, in a manner that maximizes profit.[23] Consider Provider A which has costs of $1 million. Assuming, *arguendo*,

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[22] The Commission previously appreciated this reality. *Cf.* CC Docket No. 92-77, *In re Billed Party Preference for Interlata 0+ Calls*, Second Report and Order and Order on Recon., 13 FCC Rcd. 6122, 6156 ¶ 59 (1998) ("If we set caps or benchmarks, carriers would have little incentive to contract to offer services at a lower rate.").

[23] *See*, *e.g.*, *Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 16 FCC Rcd. 9151, 9155-56 ¶ 7 (2001), *remanded by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2001) (setting rate caps for intercarrier compensation on ISP-bound traffic where the Commission wanted carriers to collect more revenue from end users than from other carriers and "emphasiz[ing] that ***the rate caps we impose are not intended to reflect the costs*** incurred by each carrier that delivers ISP traffic. Some carriers' costs may be higher; ***some are probably lower***. Rather, we conclude, based upon all of the evidence in this record, that these rates are appropriate limits on the amounts recovered from other carriers and provide a reasonable transition from rates that have (at least until recently) typically been much higher.") (emphasis added); *see also* CC Docket No. 87-313, *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, 6789-91 ¶¶ 22-37 (1990) (explaining the justification for establishing price cap regime for certain local exchange carriers and establishing rules that allowed LEC's profits to increase if the LEC improves efficiency and stating "[b]y

the Commission at some point formally declared an 11.25% rate of return reasonable, the provider would set rates that produced $112,500 in returns (assuming those rates comport with the rate cap).

Assume now that Provider A could implement efficiencies that would reduce its costs to $900,000. If Provider A pursued those efficiencies, with an 11.25% rate of return, it now would be required to set its rates for a return of $101,250. Thus, once a carrier has been able to constrain its costs sufficiently to get below the rate caps, the new rules eliminate any incentive to innovate and, in many cases, even to compete for contracts. Decreased competition among competent firms does not enhance consumer welfare.

It bears mention that the FCC has not regulated long distance services to this degree in almost 25 years. Until that time, AT&T was subject to rate-of-return review as the sole provider of retail long-distance service in the United States. The Commission realized in 1989, however, that rate-of-return was not only "difficult and complex" but also "has certain inherent flaws."[24] Moreover, the Commission found this type of regulation unnecessary "in an environment marked by competition and technological change."[25] Here, the FCC's record demonstrates that the inmate telephone service industry also boasts of significant competition and dramatic technological advancements. And unlike AT&T and the other rate-of-return

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establishing limits on prices carriers can charge for their services, and placing downward pressure on those limits or 'caps,' we create a regulatory environment that requires carriers to become more productive. ***Carriers that can substantially increase their productivity can earn and retain profits at reasonable levels above those we allow for rate of return carriers***, although earnings above a certain level are shared or returned. If carriers fail to become more productive, they risk seeing their earnings erode. Rate of return regulation lacks incentives for carriers to become more productive.") (emphasis added).

[24] *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd. 2873, 2890-91 ¶¶ 31, 33 (1989).

[25] *Id*., 4 FCC Rcd. at 2891 ¶ 34.

incumbents whose costs were analyzed across an entire region, Securus's costs must be reviewed on a contract-by-contract basis, resulting in regulation unprecedented in its granularity and burdensomeness.[26] Adoption of such intrusive regulation on an indefinite basis inexplicably reverses the Commission's desire to avoid hyper-regulation and is thus unreasonable, unwarranted, and unsupportable.

### C. The *Inmate Rate Order* Unlawfully Impairs Existing Contracts

The *Inmate Rate Order* is likely to be set aside on review, because it interferes with thousands of existing ICS contracts without meeting the necessary legal standards. While the Commission blithely asserts that it is not abrogating existing contracts,[27] this statement ignores the inescapable effect of the Commission's new ICS pricing rules and its long-understood and endorsed policy that ICS rates were to set by negotiated contract between correctional facilities and ICS providers.

The *Inmate Rate Order* interferes with existing contracts in exactly the two fundamental ways that Securus anticipated.[28] First, it ignores that ICS service contracts generally include the *rate* that will be charged for ICS services at correctional facilities – the very thing the Commission now purports to regulate under a wholly different standard. The record was abundantly clear and undisputed that rates for these services have been established by contracts resulting from competitive bidding processes and that nearly all of those contracts will

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26 Securus is aware that the Commission prefers to review the costs of inmate service on an aggregated basis "at the holding company level." *Inmate Rate Order* ¶ 83. That type of review is itself arbitrary, capricious, and unreasonable, because it ignores the reality of this market, as reflected in the record and the Order, that rates are derived on a contract-by-contract basis. Such aggregated review encourages, if not requires, national cross-subsidization across all facilities. *See* Section I.F., *infra*.

27 *Inmate Rate Order* ¶ 100.

28 Securus Initial Comments at 13.

remain in effect for months or years beyond when the new rate regulations take effect.[29]

Secondly, the FCC now is effectively prohibiting inmate telecommunications service providers from recovering the cost of site commission payments through their calling rates.[30]

*Sierra-Mobile* requires the Commission to make explicit findings of public interest to justify the intrusion into existing contracts and findings of unlawfulness to modify rates set forth in private contracts.[31] As the Commission observed in *IDB v. COMSAT*, "[t]he threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the *Sierra-Mobile* doctrine is much higher than the threshold for demonstrating unreasonable conduct under Sections 201(b) and 202(a) of the Act."[32] The Commission also has recognized that the doctrine would apply not just to contracts between two carriers, but also to the Commission's intrusion into contracts between a carrier and a non-carrier.[33] Specifically with regard to private contracts that contain rates for public utilities, "the Commission must make a finding that [the rates] are 'unlawful' according to the terms of the governing statute …" before it is authorized to modify those rates.[34]

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29 Securus Initial Comments at 13.

30 *Inmate Rate Order* ¶¶ 54-58.

31 *See Texaco, Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998) (an agency's "rulemaking authority requires only that it point to a generic public interest in favor of a proposed rule; the public interest necessary to override a private contract, however, is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect.")

32 *IDB v. COMSAT*, File No. E-97-48, 16 FCC Rcd. 11474, 11480 ¶ 15 (2001).

33 *Ryder Communications, Inc. v. AT&T Corp.*, File No. EB-02-MD-038, 18 FCC Rcd. 13603, 13614 ¶ 24 & n.78 (2003).

34 *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501, n.2 (D.C. Cir. 1987)

Although the Commission seems to recognize, at least in part, the standard that is required to interfere with existing contracts,[35] it completely fails to make the findings necessary to meet the standard established in the cases applying *Sierra-Mobile.* Indeed, it appears that the Commission expressly denied that the Order abrogates contracts precisely because it could not meet the *Sierra-Mobile* standard. Instead, the Commission makes broad pronouncements about what it could do or what "would be in the public interest," while explicitly *not* making the required findings. In short, the *Inmate Rate Order* swings an axe where the *Sierra-Mobile* doctrine requires a surgical scalpel. The Commission's intrusion into private contracts is therefore unlawful and likely to cause the *Inmate Rate Order* to be set aside upon review.

### D. The *Inmate Rate Order* Exceeds the Commission's Authority

It is axiomatic that when a regulatory agency adopts rules that exceed its statutory jurisdiction, a reviewing court must vacate the agency's action.[36] Here, the *Inmate Rate Order* exceeds the Commission's jurisdiction in two independent ways. First, the Commission improperly intrudes into the regulation of correctional facilities. Second, the Commission purports to regulate ancillary services over which it has no jurisdiction.

#### 1. The Commission improperly interferes with state and local corrections operations and policies.

The FCC has exceeded its authority in the *Inmate Rate Order*. It has adopted rates that will prevent Securus, and likely other inmate telephone service providers, from paying the site commissions on which state and local correctional authorities rely. In effect, the Commission abolished site commissions, prohibiting them from being passed through by rule and preventing them in practice via slashed calling rates. This action not only improperly

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35 *See Inmate Rate Order* n.365.

36 5 U.S.C. § 706(2)(C).

interferes with existing contracts, but it interferes with the operations and policies of state and local corrections authorities which rely on that revenue. Securus attempted to forewarn the Commission of this problem in its Comments.[37]

The decision to impose site commissions lies in the authority of state and local governments. The FCC never disputed the record evidence that site commissions are mandated by contract, if not state statute. The Commission is likewise aware of the uses to which site commission revenue is put, many of which inure directly to the benefit of inmates.[38] Now, in proscribing and preventing the payment of site commissions, the FCC has encroached on that authority. And in preventing carriers from paying site commissions, the FCC has changed the manner in which facilities operate and the services that they can provide. This action is, as Securus has explained in the docket, beyond the FCC's purview.[39]

In addition, the *Inmate Rate Order* prohibits ICS blocking calls to destinations in which the ICS provider has no billing relationship *unless* the facility agrees to permit an alternative to collect calling.[40] The decision of whether to have a collect calling alternative, however, has been *entirely* within the purview of the correctional facility and is not controlled by Securus. This new prohibition against call blocking therefore interferes with the decision-making authority of the correctional institution and requires Securus effectively to render free

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37 Securus Initial Comments at 8-10 (citing *Miranda v. Michigan*, 141 F. Supp. 2d 747 (E.D. Mich. 2001); *McGuire v. Ameritech Svcs., Inc.*, 253 F. Supp. 2d 988 (S.D. Ohio 2003); *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001)).

38 *See* Smith Affidavit ¶ 6.

39 *E.g.*, *Arsberry*, 244 F.3d at 566 ("[s]tates and other public agencies … have to get revenue somehow, and the 'somehow' is not the business of the federal courts unless a specific federal right is infringed."); *McGuire*, 253 F. Supp. 2d at 1007 ("when the ODRC establishes a collect calling telephone system in an Ohio correctional institution, that is the clear and articulated policy of Ohio.").

40 *Inmate Rate Order* ¶¶ 113-14.

services to inmates if the correctional facility does not agree to adopt an alternative to traditional collect calling. The Order is thus likely to be vacated, set aside, or reversed on this additional ground.

**2. The Commission has no authority over ancillary fees.**

The *Inmate Rate Order* imposes new "cost-based" rate regulation on ancillary fees that are charged in conjunction with ICS services. Though it does not set exact fees or caps, it states that it can and will subject a carrier to a rate investigation where they allegedly are not "cost-based".[41] As Securus articulated in its Reply Comments[42] and again in its Supplemental Reply Comments in response to the Commission's request for more data,[43] the Commission's statutory authority does not extend to financial transactions. Thus, the decision to impose regulation on ancillary fees is *ultra vires* and likely to be set aside on review.

**E. The *Inmate Rate Order* Imposes Below-Cost Rates**

The *Inmate Rate Order* sets a maximum rate of $0.21 per minute for calls that are prepaid by an account or calling card, and $0.25 per minute for collect calls. And though a per-call charge or call set-up charge is permitted, the total price of a 15-minute call must not exceed the product of these per-minute rates multiplied by 15. The immediate and unavoidable result is that the Order purports to adopt cost-based regulation but sets rate caps that are well below the costs Securus incurs to provide service nearly all of its locations.

Through the sworn Expert Report of Stephen E. Siwek, Securus provided cost information that included data which, the Commission acknowledged, was categorized

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41 *Inmate Rate Order* ¶¶ 92, 91.

42 Securus Reply Comments at 16.

43 Securus Supplemental Reply Comments at 1-3 (July 24, 2013) (responding to WC Docket No. 12-375, DA 13-2445, Public Notice, *More Data Sought on Extra Fees Levied on Inmate Calling Services* (June 26, 2013)).

"according to type and size of facility."[44] The Report demonstrated that smaller facilities are orders of magnitude more expensive to serve than larger facilities, especially state-run penitentiaries. The *Inmate Rate Order* dismisses these differences in cost structure by observing that smaller facilities "hold only a very small share of inmates nationally."[45]

That statement is problematic for a few reasons. First, the fact that small facilities hold few inmates was precisely Securus's point. Smaller facilities are disproportionately more expensive to serve, because they require many of the same infrastructure investments as larger facilities, but have lower call volumes over which to spread those costs. Thus, the Commission's decision to set rate caps based entirely on the costs of serving larger prison facilities under statewide contracts[46] erroneously ignores the record evidence that demonstrates that smaller sites, such as jails in rural areas, produce significantly higher costs.[47] The Commission's failure to address Securus's evidence, which was one of two cost data reports from the industry,[48] is a failure of "reasoned decisionmaking" and thus constitutes reversible error.[49]

Further, the failure to fully consider and analyze the record evidence regarding site commissions that are imposed by contract or state law has also caused the Commission to set

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44 *Inmate Rate Order* ¶ 26.

45 *Id.*

46 *See id.* ¶ 62 (setting rates based on data from bid submissions for "seven states that have excluded site commission payments from their rates").

47 The second unavoidable error flowing from the Commission's "small share of inmates" statement is that the Commission, in order to shoe-horn the entire country into one rate, has effectively mandated cross-subsidization between large prisons and small facilities which is itself an unreasonable decision. *See* Section I.F., *infra*.

48 CenturyLink also provided cost data for its calling rates. *Inmate Rate Order* ¶ 68.

49 *E.g.*, *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1232 (D.C. Cir. 1980) (partially vacating FCC order as to private line rates); *see also id*. at 1231 ("the FCC failed to take a sufficiently careful look at the problem presented") .

rate caps that are confiscatory in violation of the Takings Clause of the Fifth Amendment.[50] The *Inmate Rate Order* states that inmate telephone service providers may not include mandatory site commission payments as a cost of providing interstate calling service, and then sets rates that, as the record amply shows, will prevent providers from recouping those payments. In the parlance of utility regulation, it will now be unlawful for carriers to "pass through" the cost of site commissions. Simply put, the FCC deliberately set rates that are below Securus' costs to a staggering degree.

Stephen Siwek analyzed what would be the effect on Securus if the FCC were to adopt a prohibition on site commission pass-through. His sworn report, filed contemporaneously with Securus's comments, showed that eliminating site commission pass-through would render rates below cost by as much as 438%. The Commission's disregard of this evidence is likely to result in *vacatur* of the *Inmate Rate Order*.

### F. The *Inmate Rate Order* Effectively Mandates Cross-Subsidization Nationwide and Among All Facilities

Finally, the Commission's failure to take into appropriate consideration the disparate costs of providing service to smaller facilities, especially those located in more rural locations, creates an unreasonable cross-subsidization that the Commission's Order fails to acknowledge or justify. Although the Commission sought information about how rates, call volumes, and costs vary at facilities across the country,[51] it simply ignored the data that was provided when it came to establishing the rate caps. That data, there can be no dispute, showed that costs to provide service to smaller facilities, which have lower call volume, were higher for

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50 "The Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *see also Verizon Commc'ns v. FCC*, 535 U.S. 467, 481 (2002) (rates must be "sufficiently reasonable to avoid unconstitutional confiscation").

51 *E.g.*, *Inmate Rate NRPM* ¶ 26.

Securus and other providers of ICS services at smaller facilities.[52] The record also demonstrates the fundamentally different calling patterns and cost structure at jails, which typically house individuals for short periods of time, as opposed to state prisons.

The Commission ignored the record evidence and adopted a "one size fits all" approach that is arbitrary and capricious. Moreover, it unreasonably has coupled this "one size fits all" approach with a waiver standard that carriers are unlikely to meet.[53] The result is a policy that not only ***permits*** but ***requires*** nationwide cross-subsidization of ICS services.[54] This cross-subsidization contravenes the mandate of section 276, which expressly requires fair compensation for "each and every" call,[55] and the Commission's own oft-repeated policy against cross-subsidization.[56] Here, the Commission not only fails to justify the cross-subsidization, it never even acknowledges that it is the necessary outcome of its new rules. Inmates at prisons will now be required to subsidize the calls of those in jail, and larger prisons will be required to

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52 *See Inmate Rate Order* ¶ 26 (describing and citing to the data provided by Securus).

53 The Commission's indicates that it will only entertain waiver requests of the rate cap on a holding company basis. *Inmate Rate Order* ¶ 83. Thus, there is no way to obtain a waiver of the rate cap for a particular high-cost facility. The result is a requirement that Securus subsidize that service to high-cost facilities in the short term. *See id*. ¶ 123 (requiring cost averaging "on the basis of either the whole of its ICS business or by groupings that reflect reasonably related cost characteristics"). In the long term, Securus will choose between continuing to subsidize the service or cease providing service to the facility all together.

54 This, of course, assumes incorrectly that all of the higher cost correctional facilities will continue to be able to contract with ICS provider to provide services at their facility.

55 47 U.S.C. § 276.

56 *See*, *e.g.*, *Local Competition Order*, 16 FCC Rcd. at 9192 ¶ 87 (finding no public policy reason for basic telephone users to subsidize dial-up Internet access users); *Billed Party Preference Order*, 13 FCC Rcd. 6122, 6154 ¶ 55 (finding cross-subsidization with regard to operator services "would inhibit competition" and is "contrary to [the Commission's] policies."); *id.* ¶ 61 (finding cross-subsidization with regard to prison phone service would be contrary to Commission policy).

subsidize the costs of ICS for smaller prisons. In addition, revenue generated from local and intrastate inmate calling services will now subsidize interstate services.

The Commission's lack of reasoned analysis in all of these matters renders the *Inmate Rate Order* an arbitrary and capricious decision that is likely to be vacated, reversed, or set aside.

## II. SECURUS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

As the foregoing discussions make clear, Securus is likely to prevail on the merits of its appeal, a factor that strongly weighs in favor of granting the requested stay.[57] Securus also amply satisfies the second prong of *Virginia Petroleum Jobbers*, because it will suffer irreparable harm if the *Inmate Rate Order* becomes effective.

The harm that Securus will suffer if the *Inmate Rate Order* becomes effective prior to appellate review is of several types: (1) being forced to continue paying mandatory site commissions during the duration of its existing contracts without the ability to recover those costs; (2) the Herculean task of re-negotiating more than 1,700 contracts; (3) being forced to provide interstate calling service at below-cost rates; (4) compliance with the extremely onerous reporting requirements; and (5) the almost unavoidable, highly burdensome rate investigations that the *Inmate Rate Order* invites.

### A. Securus Will Be Unable To Recover the Cost of Mandatory Site Commissions Under Its Approximately 1,800 Contracts

The *Inmate Rate Order* sets rate caps that preclude Securus from recovering the cost of mandatory site commissions. Despite acknowledging that site commissions are an express term of service contracts, the *Inmate Rate Order* boldly asserts that it does not "explicitly

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[57] *Charter Commc'ns*, 22 FCC Rcd. at 13892 ¶ 4.

abrogate any agreements between ICS providers and correctional facilities."[58] "Explicitly" or not, the Commission's new policy leaves Securus and other ICS providers in the untenable position of having contractual, and sometimes statutorily imposed, obligations to pay millions of dollars in site commissions without any possibility of recoupment.

Further, although the Commission encourages "voluntarily renegotiation,"[59] there is no recourse for Securus if a correctional facility declines the Commission's invitation to voluntarily relinquish its contractual rights to funds that are allocated for anti-recidivism programs and other penological purposes. The result could be that nonpayment would be deemed a breach and expose Securus to hundreds of claims. At the least, failing to pay site commissions will endanger Securus's goodwill in a very competitive market, a harm that courts have deemed sufficient to support entry of a stay.[60]

This need, or contractual obligation, to continue paying site commissions without possibility of recoupment is another form of irreparable harm that warrants a stay of the Report and Order.

### B. Securus Will Be Unable To Renegotiate The More Than 1,700 Contracts Affected By The *Inmate Rate Order* In The Allotted 90-day Period

Having wholly modified the method by which ICS rates are set, abandoning a market-based approach in favor of a heavily-regulated process, and in many instances requiring Securus to assess below-cost rates for interstate calls, the *Inmate Rate Order* provides carriers with a scant 90-day period in which to implement the new rate caps. Existing rates are, however,

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58 *Inmate Rate Order* ¶ 101.

59 *Id.* ¶ 102.

60 *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Svcs*., LLC, 425 F.3d 964, 970 (11th Cir. 2005) ("'the loss of customers and goodwill is an irreparable injury'") (staying FCC *Triennial Review Remand Order*) (internal citation omitted).

generally included as express terms of service contracts.[61] The Commission recognizes that only some "contracts may include change-of-law provisions" but then nevertheless appears to proceed under the assumption that ICS providers can insist on modifying their existing contracts to meet the Commission's new rules or, perhaps more accurately, arbitrary ignores that many ICS providers have no ability to demand immediate renegotiation of contract terms. In most cases, Securus has no such right and will therefore be at the mercy of the correctional facilities in seeking to implement negotiated changes to the existing rate structure.[62]

Even if Securus had the right to demand renegotiation of all or even most contracts, it is a practical impossibility. Securus asserted in its comments that it would be impossible for it to renegotiate its contracts in the one year period proposed by Petitioners.[63] The *Inmate Rate Order* never denies this assertion or the supporting evidence provided by Securus. Of its approximately 1,800 contracts, **95%** would require amendment.[64] And even prior to seeking renegotiation, where permitted, Securus must calculate its costs on a contract-by contract basis to understand whether its cost would support charging the safe harbor, the interim rate cap, or perhaps some other rate.

No company could reasonably be expected to change 1,000+ contracts in 90 days. Indeed, Securus estimates that it will take approximately **20 person hours per contract** to complete analysis, negotiation and contract amendment, so approximately **19 person years of**

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61 Smith Affidavit ¶ 7.

62 *Id*. ¶ 10.

63 *Securus Initial Comments* at 11 (citing Hopfinger Decl. ¶ 3); *see also Inmate Rate NRPM* ¶ 45.

64 Smith Affidavit ¶ 11.

**work** for all 1800 contracts.[65] The *Inmate Rate Order* thus purports to mandate an impossibility. It "essentially is setting Securus up to fail."[66]

Moreover, as a practical matter, if Securus were to seek a waiver of the interim rate cap so as to avoid providing below-cost service, it would need to complete that process before it could practicably complete contract renegotiations to modify the rates established in its existing contracts. It is virtually impossible to believe that a waiver request could be filed, briefed, and decided by the Wireline Competition Bureau in the 90-day period provided in the Order, much less also engage in thousand of contract renegotiations. All of this uncertainty and delay will bring the ICS industry to a standstill. For this additional reason, Securus will be severely harmed if a stay is not entered.

### C. Securus Will Be Forced To Provide Below-Cost Service Under The New Rates

The filings made by Securus clearly establish that its cost of providing service to many correctional facilities are well above the rate caps established by the *Inmate Rate Order*, even removing site commissions from the cost base. Although the Order purports to establish a waiver process for situations in which the carrier can demonstrate that the rate caps are insufficient to meet its costs on a holding company basis, as Securus noted above it is not practicable to prepare, file, and conclude a necessary request for waiver in the 90-day period provided in the *Inmate Rate Order.*[67]

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65 Smith Affidavit ¶ 10.

66 *Id*.

67 The Commission may believe that the inclusion of a waiver option in the Order would prevent Securus from showing irreparable harm. However, the waivers as described in the *Inmate Rate Order* are ineffective in preventing irreparable harm, for two interrelated reasons. First, the rules provide no time limit in which waivers will be evaluated. Secondly, during this unknown time period in which a waiver request would be pending, Securus would be required to

Thus, although Securus already has demonstrated to the Commission that hundreds of its sites have costs that exceed the adopted rate cap, if not stayed the Commission's order would require Securus to accept those below-cost rates for an extended period of time while it goes through a proceeding with the Wireline Competition Bureau, which, of course, is under no requirement to act within any given time period. The harm that would flow from Securus's inability to complete a waiver request, and thus be forced to provide below-cost service, before the effective date of the *Inmate Rate Order* is another form of irreparable harm that warrants a stay.

### D. The *Inmate Rate Order* Subjects Securus To New Regulatory Reporting Requirements In Less Than Six Months

The *Inmate Rate Order* imposes new requirements to report annually on several aspects of their rates and costs, minutes of use, as well as average call duration.[68] In addition, ICS providers must submit information regarding call terminations, the reason or cause for the termination, and data regarding ancillary charges. The first filing deadline is April 1, 2014.

The Commission opines that these additional reporting requirements will be "minimally burdensome."[69] According to Mr. Smith, they actually are extremely burdensome.

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assess rates below the interim rate cap, even if those rates are insufficient to meet Securus's costs.

Moreover, the potential for a waiver from the rate caps is illusory as a practical matter and itself presents additional burdens. For example, the Commission fails to consider as a practical matter how an ICS provider will be able to determine obtain a waiver in the time period typically permitted to respond to requests for competitive bids. Thus, Securus will be faced with the dilemma of either competing for a contract without knowing how much it will be permitted to charge or foregoing the opportunity to bid. With regard to pre-existing contracts, Securus must accept below-cost payments until it can obtain a waiver and re-negotiate its contracts. Then, because it is required to publish and/or its calling rates at each institution, a later-approved waiver would require Securus to duplicate its notification efforts.

68 *Inmate Rate Order* ¶¶ 116-17, 124-26; Rule 64.6060.

69 *Inmate Rate Order* ¶ 117.

Securus estimates that providing the detailed reports that the FCC now demands would require the hiring of **an additional 5-10 full-time employees** devoted to making these reports.[70]

The first report will be due during the pendency of the forthcoming appeal, and yet the requirement very well may be vacated on appeal. Thus, compliance with Rule 64.6060 would result in unrecoverable losses. This problem presents an additional example of the irreparable harm that will result absent a stay.

### E. The *Inmate Rate Order* Subjects Securus To Multiple, Potentially Endless Rate Proceedings

The *Inmate Rate Order* states that the new rules are effective 90 days after Federal Register publication. On the 91st day, any consumer can lodge a complaint with the FCC and initiate a full rate investigation proceeding against Securus. If the rates charged by Securus exceed the safe harbor at even a single location, Securus will not be entitled to the protection of the safe harbor ***even for locations where its rates are within the safe harbor***.[71] And because each Securus contract carries its own calling rates, each consumer complaint could trigger a different proceeding with Securus having the burden of production and persuasion in each case.

The burden that a rate-of-return investigation imposes cannot be overstated. They require submission of reams of cost and operational data, as well as expert analysis. The FCC

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70 Smith Affidavit ¶ 13.

71 *Inmate Rate Order* n.226 & 429. This decision suggests that the Commission will entertain complaints on a location-by-location basis. That type of location-based review, however, is inconsistent with the manner in which the Commission discusses costs in other parts of the Order. For example, the Order states that requests for waiver will be reviewed "at the holding company level," *id.* ¶ 83, and indicates that an ICS provider is entitled to "fair compensation" only on an ***aggregated basis***, *id.* ¶ 123.

itself has called rate-of-return review "an administrative quagmire for the industry and for this agency."[72]

Securus never has participated in a rate-of-return proceeding.[73] It does not have the human resources that may be required to address these inquiries and estimates that it would be required to hire **5-20 new full time highly-skilled employees** for these tasks alone.[74] In a word, the *Inmate Rate Order* creates a regulatory morass, the likes of which have not been seen in the retail market for decades, and which will immediately impose enormous, unrecoverable costs if permitted to go into effect. For this additional reason, Securus will suffer irreparable harm absent a stay.

## III. THIRD PARTIES WILL NOT BE HARMED BY A STAY

With regard to the third prong of *Virginia Petroleum Jobbers*, the Wright Petitioners and other consumers of ICS will not be materially harmed by a stay of the *Inmate Rate Order*. As an initial matter, the Wright Petitioners did not envision or advocate the ongoing, cost-based rate review that the Commission has established here. Suspension of that regulatory regime thus would not deprive them of any expected relief in that regard.

Further, the Wright Petitioners did not advocate for new rate caps to become effective within 90 days. Rather, their proposal suggested a "fresh look" period of one year, four times the period the Commission ultimately provided in the *Inmate Rate Order*, for ICS providers to review and adjust their contracts.[75] Others agreed that 6 months was a minimally reasonable time period for implementation of the new rates, unless contracts were earlier

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72 *Authorized Rate of Return for the Interstate Services of AT&T Commc'ns and Exchange Telephone Carriers*, 49 Fed. Reg. 32871, 32872 ¶ 4 (1984).

73 Smith Affidavit ¶ 12.

74 *Id*.

75 *Inmate Rate NRPM* ¶ 45.

negotiated.[76] The record therefore demonstrates that more than 90 days would be required to implement the changes that were then under consideration.

In addition, the drastic, almost immediate rate cuts that the *Inmate Rate Order* imposes, coupled with the danger of decreased competition and unpaid site commission revenue, pose a much greater harm to the public than would a stay pending review. A 78% decrease in rates may seem attractive at first blush, but the competitive and operational repercussions would quickly overshadow it.

## IV. THE PUBLIC INTEREST FAVORS A STAY

Finally, a stay will satisfy the fourth prong of *Virginia Petroleum Jobbers*, because the public interest will be gravely impaired if the *Inmate Rate Order* becomes effective. Most obviously, public will be harmed because the FCC has taken two actions that will prevent correctional agencies from obtaining the site commission revenue that was an express part of their RFPs and a material term of their service contracts: first, it has held that site commissions are not a real cost of service for providers and thus cannot be recovered via their rates; secondly, it has set interstate calling rates so low as to preclude site commission recovery even if the FCC would permit it. This loss of revenue will have a significant impact on the operation of correctional facilities. As discussed more below, there are several other public harms that will also flow from the immediate implementation of the *Inmate Rate Order* that support Securus's petition for a stay pending appeal.

### A. Enforcement Of The *Inmate Rate Order* Will Deprive State And County Governments Of Funds Used For Salutary Purposes Such As Victims' Rights Funds And Inmate Welfare

The *Inmate Rate Order* imposes grave harm to third parties, most notably to the

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[76] *See Inmate Rate Order* n.360.

inmates whom the Commission would like to serve and protect. It forbids, as a matter of law, and precludes, as a matter of fact, carriers from remitting site commission revenue on which agencies rely for prison operations, anti-recidivist programs like job training, and financial assistance for indigent inmates. Depriving state, county and local budgets of expected revenue, immediately resulting in either an increased the burden on the public tax base and or diminished inmate welfare, is a serious and irreparable harm to the public interest.

Moreover, contrary to the Order's hopeful prognosis, the deprivation of site commissions also makes it inevitable that the continued advancement of security features and functionalities necessary to maintain public safety inside and outside of the correctional facility will be curtailed in the long run. Service providers will be without the resources to continue to innovate and correctional facilities will be unable to pay for them. Public safety is perhaps the most crucial responsibility for the government to protect and uphold yet it will be undermined without the appropriate resources. Thus, the public interest weighs in favor of a stay.

### B. The Commission Failed To Consider The Possibility That Its Rate Caps Could Lead Correctional Facilities To Deny Inmates Access To Telecommunications Services

In addition to denying inmates access to services that are funded through site commissions, the *Inmate Rate Order* failed to acknowledge the potential that the Commission's decision to impose a rate cap that is below the cost of providing service to smaller facilities, and the elimination of an ISP providers' ability to pass through site commission charges, could result in certain inmates being denied access to the very services that the Commission seeks to make more accessible. With limited budgets and the inability to make up site commissions through other sources, the Commission should take seriously the possibility that correction facilities will revisit its policies on providing regular access to phone services to inmates.

As Securus previously noted, courts have found that there is "no constitutionally

guaranteed right of inmates to use a telephone."[77] Thus, it is not at all clear that smaller facilities that rely on site commissions to provide important services to inmates will continue to make phone services available if the Commission eradicates site commissions. For this reason, the public interest favors maintaining the *status quo* during the review process.

### C. The Harsh, Flash-Cut New Rate Regime In The *Inmate Rate Order* Is Likely To Have A Materially Adverse Effect On Competition

As demonstrated herein, the *Inmate Rate Order* sets rates below cost, abrogates thousands of publicly awarded service contracts, and puts service providers in the impossible position of providing safe and secure service while overhauling their rates and operations in 90 days. Carriers now face an immediate loss of revenue as well as the threat of litigation to remedy the breaches of contract that the *Inmate Rate Order* will create. These harms will be substantial and will gravely imperil the ongoing operations of inmate telephone service providers.

The record at the FCC demonstrates that this industry is fiercely competitive. Rates are decreasing, many costs are decreasing, and margins are not fat. The tremendous financial and operational body-blows that the *Inmate Rate Order* imposes could well drive carriers to choose between acquisition and cessation of service. With a stated goal of fostering competition in the inmate service market, the Commission's new order could well lead to increased consolidation and market exits in situations where ICS service cannot be provided without a loss. As stated in Section I.B. above, a decrease in competition among competent firms does not serve the public interest.

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[77] *Walton v. New York State Dep't of Correctional Svcs.*, 921 N.E. 2d 145, 155 (N.Y. 2009) (citing *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000)).

### D. Requiring Securus To Charge Below-Contract Rates, Without A Mechanism To Reclaim The Lost Revenue If The *Inmate Rate Order* Is Reversed, Is Also Contrary To The Public Interest

The Commission has provided no mechanism that would allow ICS providers to recover the difference in rates charged under the *Inmate Rate Order* and its existing contract rates if a court subsequently determines that the *Inmate Rate Order* is invalid. The Commission's precedent provides that a carrier's inability to recover uncollected revenue associated with improper rate reduction orders is not only a harm to the carrier, but also against the public interest.[78] As the Commission has recognized, the effort to recoup the losses caused by enforcing a rate reduction that is later vacated leads to a "waste of time and energy" that is ultimately borne by subscribers to the service.[79] Consistent with this prior precedent, staying the effectiveness of the rate caps and allowing the *status quo* to remain is in the public interest.

### E. Additional Public Interest Considerations Support A Stay

As in the *Comcast Cable* decision, the *Inmate Rate Order* lacks specifics regarding the appropriate calculation of the cost-based rates that the Commission purports to mandate.[80] This lack of specificity, together with the number of potential appeals involved, and "the efficacy of having a uniform resolution imposed" are additional public interest factors that the Commission has previously found to weigh in favor of a stay pending appeal.[81]

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78 *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 3 (granting stay in part on ground that public interest would not be served if Comcast issued refunds to consumers without a mechanism for recouping those funds if order was later reversed).

79 *Charter Commc'ns*, 22 FCC Rcd. at 13893 ¶ 9.

80 *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 3.

81 *Id.*

## CONCLUSION

For all these reasons, the Commission should stay the effectiveness of the Report and Order until the forthcoming appeals from that order are resolved. Securus respectfully requests that this Petition be resolved by **November 21, 2013**.

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*Counsel to Securus Technologies, Inc.*

Dated: October 22, 2013

## CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of October, 2013, that the foregoing Petition for Stay of Report and Order Pending Appeal (FCC 13-113) was served via electronic mail on the following persons:

Marlene H. Dortch
Secretary
Federal Communications Commission
Marlene.Dortch@fcc.gov

Acting Chairwoman Mignon Clyburn
Federal Communications Commission
Mignon.Clyburn@fcc.gov

Commissioner Jessica Rosenworcel
Federal Communications Commission
Jessica.Rosenworcel@fcc.gov

Commissioner Ajit Pai
Federal Communications Commission
Ajit.Pai@fcc.gov

Sean Lev
General Counsel
Federal Communications Commission
Sean.Lev@fcc.gov

Julie Veach
Chief
Wireline Competition Bureau
Federal Communications Commission
Julie.Veach@fcc.gov

By: s/Stephanie A. Joyce
Stephanie A. Joyce

# ATTACHMENT

## Affidavit of Richard Smith
## Chief Executive Officer
## Securus Technologies, Inc.
## (October 17, 2013)

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

| | |
|---|---|
| Rates for Interstate Inmate Calling Services | WC Docket No. 12-375 |

## AFFIDAVIT OF RICHARD SMITH

I, Richard Smith, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am the Chief Executive Officer of Securus Technologies, Inc. ("Securus") with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254.

2. I am providing this Affidavit in support of the Motion for Stay seeking immediate relief from the *Inmate Rate Order* of the FCC. I have personal knowledge of the facts stated herein and could testify to the same.

3. I have been CEO of Securus since June 2008. I have been an executive officer in the telecommunications industry since 1985, most recently as CEO of Eschelon Telecom which was acquired by Integra Telecom in August 2007.

4. Securus provides services exclusively to correctional facilities. As Securus has told the FCC, it presently serves approximately 2,200 correctional facilities in 43 states and the District of Columbia. It holds approximately 1,800 service contracts with state, county, and city governments.

5. Securus is required by the vast majority of its contracts to pay site commissions to its correctional facility clients. Correctional agencies decide the level of site commissions they require. In some instances, such as at state facilities in Maryland and Texas, site commissions are mandated by state statute.

6. Site commission revenue is used for different purposes, all at the discretion of the supervising governmental agency. In my experience, this money goes to inmate job placement programs, inmate job training, inmate health care programs, inmate substance abuse treatment programs, welfare funds for indigent inmates, and victims' rights funds. In some instances, site commission revenue goes straight to paying the cost of jail operations. Securus has no input in where site commission revenue is spent.

7. Calling rates are key terms of Securus's contracts. Each bid is customized to the stated needs of the correctional facility, and each rate proposal is structured to recover the costs of that customized package. In this way, the correctional facilities have actually set the calling rates by choosing them.

8. The new FCC rates make it impossible to pay site commissions. At rates that equate to $0.21 per minute for debit calls, and $0.25 for collect calls, the FCC has cut Securus's interstate rates by as much as 78%. These rates will prevent Securus from paying site commissions, and, in most cases, will not even cover the cost of facilities, software, and service.

9. In addition, the FCC rates do not account for the fact that Securus already provides approximately 20-30 million free calls per year because of State statutes and contractual requirements. For example, some correctional agencies require the first 2 calls made by an inmate to be free of charge; in addition, some correctional agencies require calls to criminal attorneys, bail bondsmen, embassies, and certain state agencies to be free of charge.

10. The FCC has given carriers 90 days to implement the new rules. In other words, Securus has 90 days to change material contract terms in nearly all of its 1,800 contracts. But in most instances, Securus does not even have the right to demand renegotiation at this time. Even if we have the right, it is not possible to change so many contracts so quickly. The FCC has set a completely unworkable deadline, and essentially is setting Securus up to fail. My estimate is that it will take approximately **20 person hours per contract** to complete analysis, negotiation and contract amendment, so approximately **19 person years of work** for all 1800 contracts. Accordingly, it is clearly impossible for us to complete this task in 90 days.

11. In order to amend its rate structures nationwide to comport with the new interstate rates, Securus must amend more than **95% of its contracts**.

12. I am also deeply concerned about the huge regulatory burden that will fall on Securus under this new order. Securus has never been subject to ongoing rate review. Securus has never participated in a rate-of-return proceeding. We do not have the human resources to comply with the enormous data production and analysis required for this kind of ratemaking. Securus would need to hire at least **5-20 new full-time employees** devoted solely to the task of complying with the FCC's new rate-review rule.

13. Finally, the data reporting requirement contained in the *Inmate Rate Order* is extremely burdensome. Securus processes hundreds of millions of calls each year. Providing the detailed reports that the FCC now demands, the first of which is due in less than six months, would require the hiring of **an additional 5-10 full-time employees** devoted to making these reports.

I affirm that the foregoing is true and correct to the best of my knowledge.

Richard A. Smith

SUBSCRIBED TO AND SWORN BEFORE ME this 17th day of October, 2013.

NOTARY PUBLIC

KAREN KENNEDY
Notary Public, State of Texas
My Commission Expires
September 03, 2014

My Commission expires: 9.3.14