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

GLOBAL TEL*LINK, *et al*., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 15-1461 and consolidated cases Oral Argument on the Merits Not Yet Scheduled

SECURUS TECHNOLOGIES, INC. REPLY IN SUPPORT OF EMERGENCY MOTION FOR PARTIAL STAY OF FCC ORDER 15-136 PENDING REVIEW

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Petitioner Securus Technologies, Inc. ("Securus"), pursuant to Fed. R. App. P. 18 and 27(c), Circuit Rule 27(f), and the Court's Order dated February 3, 2016, files this reply memorandum in support of its Emergency Motion for Partial Stay ("Securus Mot.") of the order of the Federal Communications Commission ("FCC" or "Commission") titled *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 ("*Second Inmate Rate Order*" or "*Order*").

ARGUMENT

I. SECURUS IS LIKELY TO PREVAIL ON THE MERITS OF ITS APPEAL OF THE *SECOND INMATE RATE ORDER*

A. The FCC's Rules Restricting So-Called "Ancillary Service Charges" Are Unlawful

1. The FCC lacks jurisdiction over non-communications services.

Respondent FCC's Opposition ("FCC Opp.") contends that, because Section 276(d) defines "payphone service" to include "any ancillary services," 47 U.S.C. § 276(d), the FCC can regulate any "services that provide necessary support for the completion" of inmate calls. FCC Opp. 16 (quoting *Order* ¶ 196). Securus has conceded that the FCC can regulate any *communication* service related to inmate calling, Securus Mot. 4-5, but the FCC insists it can extend its jurisdiction to purely financial transactions, or for that matter to anything else that it deems "necessary" to support inmate calling.

It cites a handful of statutory provisions that it claims provide examples of other extensions of jurisdiction to non-communications services, but these are far from persuasive. First, the agency cites no authority for the proposition that the mention of "charges" and "practices … in connection with such communication services" in 47 U.S.C. § 201(b) gives it jurisdiction over entirely separate transactions that happen to involve payment for communications. FCC Opp. 17. By this argument, if a consumer used a credit card to pay their telephone bill, the FCC could regulate the credit card issuer's terms of service. There is no more basis for the FCC's sweeping interpretation of § 201(b) than there is for § 276(d). Second, it cites its authority over pole attachments under 47 U.S.C. § 224 and unbundled network elements under § 251, FCC Opp. 17, but in both of those cases the FCC's power is defined expressly rather than inferred from a general term such as "ancillary" or "in connection with[,]" so these provisions are of little relevance. Further, the FCC offers no response to the specific case law on statutory interpretation that Securus cited in its Motion.[1]

2. Even if it has jurisdiction, the FCC's rules capping ancillary service and premium billing service fees are arbitrary and capricious.

The FCC's Opposition fails to address meaningfully Securus's arguments

[1] The FCC's footnote addressing *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), FCC Opp. 17 n.5, raises an issue Securus already disposed of: directly imposing § 276 on non-communications services is no better than asserting ancillary jurisdiction over them. Securus Mot. 6.

concerning ancillary charges.

As to credit and debit card transaction fees, the FCC simply dismisses Securus as an "outlier[,]" FCC Opp. 28-29, without addressing the merits of its arguments that the agency failed to consider whether these rates would permit recovery of reasonable costs including return on investment. Even assuming *arguendo* that Securus's costs were above industry averages, that does not prove that the rates are sufficient to permit reasonably efficient providers to recover their costs. The FCC also fails even to acknowledge the glaring factual error in the Wireline Competition Bureau's Order denying a stay, in which it claimed that Securus complies with Alabama rate caps that actually never took effect. Securus Mot. 7-8 (citing *Bureau Order* ¶ 47 & n.195).

But, more importantly, the FCC's rejection of Securus's cost showing is itself arbitrary and capricious, because Securus was the ***only*** party to submit a detailed analysis of costs incurred specifically in processing credit and debit card transactions, including costs of bad debt and fraudulent transactions. An agency cannot rationally reject the only data point before it as an "outlier." The FCC has no meaningful explanation for its decision to ignore the cost evidence before it and instead adopt rate proposals devoid of any cost justification that were offered by other providers, possibly seeking to gain a competitive advantage by hobbling their rivals. (Except, of course, the obvious justification that the FCC disdained conduct-

ing the "balancing" of consumer and carrier interests required by this Court's and the Supreme Court's precedent on ratemaking, and instead preferred to tilt the scales entirely in one direction.) Certainly the FCC cannot plausibly argue that bad debts and fraudulent card transactions are not *bona fide* costs of service, so instead it prefers simply to pretend that these costs do not exist.

As to the rule prohibiting any markup on third-party financial transaction fees, the FCC contends that such markups are bad for consumers and that it acted reasonably in prohibiting them. FCC Opp. 29. This essentially amounts to a claim that the FCC can prevent a carrier from recovering any cost whatsoever if it finds it to be in consumers' interest to do so. That argument flies in the face of the extensive Supreme Court precedent on rate regulation cited in the Securus Motion, which the FCC does not bother to discuss. The FCC also repeats the *Order*'s erroneous finding that providers had failed to provide cost justification for any markup, which ignored the extensive cost documentation in the FCC's possession. *Id.* It offered no response at all to Securus's argument that the *Order* failed to justify a departure from agency precedent permitting recovery of transaction costs.

The FCC now defends the rates in the *Order* by asserting that they more than allow recovery of both telecommunications costs and the payment of site commissions. FCC Opp. 19-20. It relies on rates at three large state prisons, which is far from a reasonable sample, and ignores Securus's reported, average

costs which were calculated without inclusion of site commissions in accordance with the FCC's instructions. To set rates that are essentially ***at*** Securus's average, non-commission costs, permitting no markup or additive rate, and then assert that those rates allow enough return to support site commissions is neither a reasonable agency action nor a reasonable defense in this appeal. It bears mention that Staff of the Louisiana PSC, in the rulemaking underway there, has told the PSC not to adopt rates based on costs that exclude site commissions and yet expect ICS carriers to continue paying commissions; Staff recommends rates of $0.25 per minute prepaid and $0.30 collect.

As to so-called single-call services, the FCC claims that Securus failed to show that a rule prohibiting ***any*** markup above the ordinary call rate prevents it from recovering sunk costs specific to these services. FCC Opp. 28. This essentially concedes that Securus cannot recover those costs directly from users of these services, and implies that the FCC thinks it reasonable to require customers who do ***not*** use optional services to bear costs incurred solely to enable those options.[2] This would itself be arbitrary and capricious, as the *Order* offered no rationale for such

[2] The FCC also attempts to justify its single-call rule as good public policy, FCC Opp. 27-28, which is irrelevant to the question of whether the rule is confiscatory. But in so doing, the FCC suggests that customers may not understand the optional nature of these services, which is why Securus provided the Court with the full text of the disclosures that precede such calls. Securus Mot., DeHoyos Aff. ¶¶ 4-5. The disclosures require double opt-in and make clear that the inmate can use other types of call options.

cost-shifting.

Finally, in response to Securus's argument that the rule prohibiting all new ancillary charges unreasonably deters innovation, the FCC contends it allowed flexibility for providers to innovate in offering the few specific categories of ancillary service that the rules permit. FCC Opp. 30. This is a red herring, since Securus's argument is that both the Act and FCC policy expressly require promotion of innovation by introduction of ***new*** services, not just improvement of old ones. Securus Mot. 9-10. The FCC also argues that providers seeking to introduce new services can seek a waiver or rule amendment, FCC Opp. 30, without even acknowledging, much less rebutting, Securus's argument that such a procedure in itself is an unreasonable obstacle to innovation. Securus Mot. 10.

B. The FCC Has No Remedy for Its Vague and Overly Broad Definition of "Site Commissions"

The FCC has two responses to the problem that "site commissions" is badly defined. FCC Opp. at 30-31. First, it states that the time to report "site commissions" has not begun, but that response says nothing to the substantive challenge Securus has raised. Second, the FCC parrots the definition of "site commission" from the *First Inmate Rate Order* (FCC Opp. 31) which is itself vague, under review in Case 13-1280, and was expressly "supersede[d]" and "replace[d]" by the new rules. *Order* ¶ 10. The FCC apparently has no defense for the new, replacement definition that Securus now appeals. The FCC thus has

no answer for the problem caused by a definition of "site commission" that could apply to any "service" or "good" or "product" involved in ICS, thus rendering compliance impossible and intruding on correctional authority. Securus Mot. 13.

It is telling that the FCC has abandoned its position that OMB will re-write the definition, as if it could, to resolve the FCC's own fatal errors and deficiencies. *Id*. 13-14 (citing *Bureau Order* ¶ 31).

C. The Commission Still Provides No Jurisdictional Basis for Its New Regulation on Video Services

The FCC makes the stunning statement that it did not "need to decide whether it had authority to regulate video visitation" (FCC Opp. 31) prior to adopting what it agrees (*Bureau Order* ¶ 57) is a video visitation regulation. That statement is an admission that the FCC lacks jurisdiction for this part of Rule 64.6060.

The FCC responds to Securus's notice argument (FCC Opp. 31) by citing to the *Bureau Order* which was released ***after*** the *Second FNPRM* and the *Second R&O* and thus cannot demonstrate that the industry had any prior notice that video regulation was under consideration. The *Second FNPRM* did not, as Securus showed (Securus Mot. 15), state that video regulations were contemplated, and the FCC has no answer to that showing.

II. THE FCC IGNORES SECURUS'S SHOWING OF SEVERE, IRREPARABLE HARM

The FCC responds to Securus's showing of irreparable harm with just one

footnote (FCC Opp. 33 n.6). It ignores both the evidence that Securus gave to the Commission in January 2015, and the Affidavit of Richard A. Smith filed with the Motion which show, in dollars and cents, how much Securus will lose on every credit card transaction under the new caps. This showing is not speculative, it is certain and irreparable, and the FCC has no answer for it.

The FCC also ignores the fact that Securus will be forced to cease allowing automated credit card transactions, Text2Connect calls, and PayNow calls. Securus Mot. 16-17. *Amicus curiae* NCIC simply repeats (at 4-5) the FCC's error, squarely addressed by Securus, in relying on the Alabama PSC order to show that ICS companies can operate at those rates – that order has been fully stayed and never has been effective as to Securus or Global Tel*Link. Securus Mot. 7 & App. D.

The FCC does not even acknowledge the fact that its reporting requirement for badly defined "site commissions" carries a significant risk of sanction for innocent noncompliance, and, as shown in Section I.B. above, the FCC can provide no clarity for this definition even now.

As to all these points, Securus's showing of irreparable harm stands unrefuted.

III. THE FCC IGNORES THE FACT THAT THIRD PARTIES AND THE PUBLIC INTEREST WILL BE HARMED UNLESS A STAY IS GRANTED

The FCC, because it ignored Securus's evidence of irreparable harm, fails to acknowledge that "consumers will benefit from a stay, because Securus would not be forced to discontinue innovative, convenient services on which consumers have relied." Securus Mot. 18-19. The FCC never addresses this issue, nor do the Wright Intervenors or *amicus curiae* NCIC.

The FCC also never addresses the fact that staying a reporting requirement, which does carry risk of sanction for Securus, will have no effect on consumers themselves. *Id*. 19.

For the rules that Securus has moved to stay, the balance of interests weighs strongly in Securus's favor. Text2Connect, PayNow, and credit card transactions are optional services that consumers choose to use. Other types of calling and other, free means of payment will exist for anyone who wants them. But Securus cannot sustain the optional services at the drastically, unreasonably reduced rates that the FCC has adopted. To deny the stay will therefore remove services from the market which is a cognizable harm to both third parties and the public.

CONCLUSION

For all these reasons, the Court should stay these portions of the *Order*:

- Definition of "Site Commission" in Rule 64.6000;
- Fee caps on credit card processing and "Single-Call Service" in Rule 64.6020;
- Reporting requirements in Rule 64.6060 as they relate to Site Commissions and video-based services.
- Per-Call and Per-Connection Charges in Rule 64.6080;
- Flat-Rate Calling in Rule 64.6090; and
- Minimum and Maximum Account Balances in Rule 64.6100.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 19th day of February, 2016, that the foregoing Reply in Support of Emergency Motion for Partial Stay of FCC Order 15-136 Pending Review was served via First Class Mail on the following person:

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All other parties have appeared through counsel and will receive this document via the Court's ECF system.

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