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

GLOBAL TEL*LINK, SECURUS TECHNOLOGIES, INC., *et al*., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	Nos. 15-1461, 15-1498, and consolidated cases Oral Argument on the Merits Not Yet Scheduled

SECURUS TECHNOLOGIES, INC. REPLY TO OPPOSITIONS TO EMERGENCY MOTION FOR MODIFICATION OF STAY OF FCC ORDER 15-136 PENDING REVIEW

Andrew D. Lipman
MORGAN, LEWIS & BOCKIUS LLP
2020 K Street, N.W.
Washington, D.C. 20006
202.373.6033 DD
202.373.6001 Fax
Andrew.Lipman@morganlewis.com

Stephanie A. Joyce
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20036
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

Counsel to Securus Technologies, Inc.

Dated: March 23, 2016

Petitioner Securus Technologies, Inc. ("Securus"), pursuant to the Court's briefing order of March 18, 2016, files this Reply to Oppositions to Emergency Motion for Modification of Stay.

ARGUMENT

As the FCC admits in its Opposition (FCC Opp. at 1), the principal aim of the pending motions is effectuating the intent of the Court's March 7 Order staying Rule 64.6010 ("Inmate Calling Services Rate Caps") and Rule 64.6020(b)(2) ("Ancillary Service Charge" – Single-Call Service Rate Caps). The FCC's interpretation of the March 7 Order is the result of hurried, *ex post facto* reasoning that appears to have been adopted from the recent advocacy of interested parties rather than a position firmly held since the *Second Inmate Rate Order* was adopted.[1] The FCC presents a fabricated argument based on definitional sleight-of-hand that has no basis in the *Order* itself. With regard to Securus's well-supported showing of irreparable harm, the FCC fails to understand, let alone grapple with, the effect that a new $0.21 intrastate rate will have on its contracts and billing system.

---

[1] Intervenors' Opposition offers the same interpretation of the rules and of the Court's March 7 Order as the FCC, so Securus will not address it separately. Attached, however, is a letter filed by Intervenors' FCC counsel on March 16 (the date the Public Notice was released) which sets forth exactly the kind of unthoughtful argument-by-way-of-redlining that appears in the Oppositions now before the Court. Letter from Lee G. Petro, Counsel for the Wright Petitioners, to Marlene H. Dortch, FCC (copied to all Commissioners and the Wireline Competition Bureau) (Mar. 16, 2016, posted Mar. 17, 2016).

1. The March 7 Order preserved the *status quo* for ICS rates that were in place as of March 16, 2016.

The accepted reason for a stay pending review is to preserve the *status quo*. *E.g.*, *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 712 F.2d 669, 671 (D.C. Cir. 1983) ("stays, of course, do not impede appeals from the stayed dispositive order; their sole purpose is to preserve the status quo while an appeal is in the offing or in progress"). Here, the *status quo* was the rates that were in effect as of March 16, the day before Rule 64.6010 was to become effective at prisons. The FCC asserts, however, that the Court intended to ***change*** the *status quo* by permitting the FCC to impose "interim rate caps" on intrastate calls starting March 17. Its lead argument is that the words "prohibit all new calling rates" do not appear in the March 7 Order, FCC Opp. at 10, which is emblematic of the agency's reliance on hyper-technical wordsmithing instead of reasoned decision-making.

The FCC's next argument is that the Court did not stay Rule 64.6030 which uses the term "interim rate caps", and that it allowed other ICS-related rules to become effective. FCC Opp. at 10.[2] But it cannot be the case that the Court intended to allow a sweeping change in ICS rates at the same time it clearly stayed the rules that set ICS rates. This conclusion is buttressed by the lack of ***any***

[2] These other rules only imposed regulatory controls for particular optional services and particular rate structures, but did not set maximum ICS calling rates. *Id*. (citing Rule 64.6080 (prohibiting "per-call" and "per-connection" charges); Rule 64.6090 (prohibiting up-front, flat-rate billing for calls)).

argument from ***any*** party, during the briefing of the previous motions for stay, that allowing Rule 64.6030 to take effect would result in a brand new intrastate rate cap. The FCC never suggested, discussed, or justified a $0.21 intrastate rate cap in the *Second Inmate Rate Order*. Mot. at 8-9.

Had the FCC told the Court in February that the *Order* creates "interim" rate caps on intrastate calls via Rule 64.6030, and the Court had then refused to stay Rule 64.6030, this would be a very different case. Of course, the FCC could not argue that position in February, because it had not yet thought of this interpretation. Only now does the FCC come to this Court asserting, with some definitional sleight-of-hand and a fabricated argument, that it meant to do this all along!

The FCC insists that the March 7 statement of Chairman Wheeler and Commissioner Clyburn (Mot. App. B) – that this Court's stay does not "disrupt the interim rates set by the Commission in 2013" – is "entirely consistent" with counsel's litigation position that the Commission adopted *new* interim rates in 2015. FCC Opp. at 10 n.3. That conclusion is impossible under the plain language of the joint statement: "the interim rates set by the Commission in 2013." The Commission set only ***interstate*** interim rates in 2013, as Securus fully

demonstrated. Mot. at 7-8.[3] That fact is irrefutable.

Notably, the FCC's 18-page Opposition does not respond to the argument that Securus and the other movants are likely to prevail on review of Rule 64.6030 as it now is being enforced. To provide such a response, the agency would have to explain how the FCC, consistent with the Administrative Procedure Act, could have made a major substantive change in its "interim rate caps" without once mentioning this change in the *Order*, much less offering any reasoned explanation of its action. Mot. at 8-9. Counsel dares not make the attempt.

Instead, the FCC spends more than half of its Opposition reiterating the policy reasons that led it to adopt the *Second Report and Order*, even though the Court already considered those same issues earlier this month and did not find them compelling enough to allow any new rate caps to take effect. The FCC simply fails to mount a credible argument that preservation of the *status quo* meant the creation of a new $0.21 intrastate rate.

2. The FCC's explication of the new "interim rate caps" is inconsistent.

The FCC argues that the "plain language and effect" of the amended rules

---

[3] Perhaps in a narrow, legalistic sense, counsel's interpretation of the joint statement is true, in the same sense that saying "the sky is blue" is *consistent with* saying "the house is on fire." Still, no one who reads the joint statement would think the Commissioners believed the Court's March 7 Order allowed them to impose new rate caps on intrastate calls, just as it is unlikely that someone whose house is on fire would rather discuss the weather.

"compelled" its staff to conclude that the "interim rate caps" under Rule 64.6030 apply to intrastate calls. FCC Opp. at 9-10. But the FCC is blind to the inconsistencies in its position and in the staff's interpretation. As Securus and others showed, if one interprets the rules based ***solely*** on the rule provisions cited by the FCC, the necessary conclusion would be that the interim rate caps apply to ***all*** calls from prisons and jails, including international calls. The FCC shrugs this off, responding only that the *Second Inmate Rate Order* states that international calls are excluded from the rate caps. FCC Opp. at 12. Borrowing for a moment the agency's strict reliance on precise language, it must be noted that the exclusion of international calls is stated only in the text of the *Order* and not in the literal words in the definition of ICS (Rule 64.6000) on which both the FCC and the Intervenors hang their entire argument and analysis.

The FCC is trying to have it both ways. It wants to look outside the literal wording of the rules to demonstrate the agency's intent when that exercise yields a convenient result, but maintains that the Court and Petitioners must not look outside the literal wording when the outcome would be contrary to the FCC's new litigation position.

In a crucial concession, the FCC agrees with Securus that the *Second Report and Order* mentioned "interim rate caps" only in the context of "interstate" rates. FCC Opp. at 12 n.4. It attempts to explain this fact away by stating that those

sections of the *Order* "concern the previously existing interim rate caps, not the rate caps the Commission adopted when it modified Section 64.6030." *Id.* But the FCC never mentions "adopting" any "rate cap" of $0.21 anywhere in the *Order*. It remains a mystery why the FCC thinks it is helpful to emphasize that the *Order* never mentioned this $0.21 rate cap in the "modified Section 64.6030."

The FCC's justification for why "interim rate caps" apply to intrastate calls reads like something out of *Alice in Wonderland*: "the rules mean what they say, except when they don't; and the fact that we never mentioned intrastate interim rate caps proves that we intended to adopt them." The Court should reject these inconsistent and illogical positions, and conclude that Section 64.6030 was never intended to apply to intrastate rates.

However, even if the Court believes the unlikely story that the FCC intended all along to adopt interim rate caps for intrastate calls, it should still revisit the scope of the stay, because that would mean the FCC deliberately concealed its plans both from the public and from this Court when it briefed the previous round of motions for stay. It is a serious business when a federal agency creates new federal law by concealment.

3. The FCC fails to grasp Securus's showing of irreparable harm.

The FCC's argument that there is "no reason" to modify the stay to cover the newly invented intrastate rate cap, FCC Opp. at 12, is essentially a balance-of-

harms argument. It contends that capping intrastate rates will not harm ICS providers, because that interim cap is above costs. FCC Opp. at 13. Accuracy aside, this argument is essentially the same as the one made unsuccessfully to this Court in opposing a stay of Rule 64.6010. *See* Opp. of Resp. FCC to Motions for Partial Stay at 18-26, ECF Doc. 1598743 (filed Feb. 12, 2016). It is no more persuasive now than it was then. Moreover, it is irrelevant: Securus never addressed the $0.21 rate itself, but rather the tremendous and irreparable harm it will incur if now forced to implement this never-before-discussed $0.21 intrastate rate in its contracts and billing system.

The FCC's simply fails to understand the showing of harm that Securus actually made. Securus explained that it renegotiated approximately 1,500 contracts – requiring months of work by dozens of regulatory, sales, and IT personnel – to create a new rate structure under Rule 64.6010. Mot. at 11-12; Aff. of Richard A. Smith ¶¶ 5-7, 9, 10 (Mar. 17, 2016). The FCC responds that Securus could comply with the $0.21 rate cap on intrastate calls without having to "renegotiate contracts that currently comply with the Commission's lower permanent rate caps." FCC Opp. at 16. But those permanent rate caps are completely different from this purported $0.21 intrastate rate, and compliance with them would not create compliance with this supposed "interim" rate.

The permanent rate caps that the FCC adopted, and this Court stayed, would

have set maximum rates of $0.11, $0.14, $0.16, and $0.22 for various categories of correctional facilities. *See* FCC Opp. at 5. None of these permanent caps were set at $0.21, and they are a complex set of tiered rates rather than a uniform rate, so Securus had no reason to negotiate contracts that contemplated or could implement this $0.21 intrastate rate. In addition, although Securus renegotiated the contracts prior to March 7 to ensure compliance with the permanent caps, those contracts also took account of the fact that motions for stay were pending in this Court. The rate provisions of those renegotiated agreements thus never took effect. Therefore, allowing the FCC to extend the interim rate caps to intrastate calls would still require reopening and renegotiation of all of those contracts.

Finally, the FCC does not even mention the harm that Securus would incur due to FCC enforcement actions and private claims and lawsuits that will very likely arise due to the impossibility of complying with a newly invented interim rate cap on nine hours' notice. Mot. at 12-13.

CONCLUSION

The FCC'S Public Notice and its position here are complete fabrications, using definitional sleight-of-hand and *ex post facto* justifications that have no basis in the *Order*. For all these reasons, the Court should modify its March 7 Order to stay Rule 64.6030 to the extent the FCC seeks to expand it to intrastate calls.

Dated: March 23, 2016

Respectfully submitted,

By: s/Andrew D. Lipman
Andrew D. Lipman
MORGAN, LEWIS & BOCKIUS LLP
2020 K Street, N.W.
Washington, D.C. 20006
202.373.6033 DD
202.373.6001 Fax
Andrew.Lipman@morganlewis.com

By: s/Stephanie A. Joyce
Stephanie A. Joyce
ARENT FOX LLP
1717 K Street, N.W.
Washington, D.C. 20006
202.857.6081 DD
202.857.6395 Fax
Stephanie.Joyce@arentfox.com

Counsel to Securus Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify on this 23rd day of March, 2016, that the foregoing Reply to Oppositions to Emergency Motion for Modification of Partial Stay of FCC Order 15-136 Pending Review was served on all parties to these consolidated appeals via ECF.

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

ATTACHMENT

DrinkerBiddle&Reath LLP

Lee G. Petro
202-230-5857 Direct
202-842-8465 Fax
Lee.Petro@dbr.com

Law Offices
1500 K Street N. W.
Suite 1100
Washington, D.C.
20005-1209

(202) 842-8800
(202) 842-8465 fax
www.drinkerbiddle.com

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
NEW YORK
PENNSYLVANIA
WASHINGTON D.C.
WISCONSIN

March 16, 2016

By ECFS
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *Ex Parte* Submission
Rates for Interstate Inmate Calling Services
WC Docket No. 12-375

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's rules, the Wright Petitioners hereby submit the following response to the recent submissions of Telmate[1] and Pay Tel Communications[2] in response to the effective date of the rules contained in the *Second Report and Order* in the above-referenced proceeding.[3]

In particular, Telmate and Pay Tel Communications seek "clarification" that certain rule changes set forth in the *Second R&O* do not become effective on March 17, 2016. Instead, they argue that certain rule changes contained in Section 64.6000 and 64.6030, affecting the adoption of the interim rate cap for ICS should not be read to affect current intrastate ICS intrastate rates. Both make the argument at the rules relating to the interim rate cap set forth in Section 64.6030 were not changed in the Second R&O, and therefore, the Commission's cap of 21 cents/minute for debit, prepaid, and prepaid collect calling and 25 cents/minute for collect calling do not apply to intrastate ICS rates. In making this argument, though, they ignore the significant changes to both rules in the Second R&O, and can point to no FCC or appellate order staying the effect of the changes to the rules.

Specifically, the 2013 First Report and Order adopted the following definition for Inmate Calling Services:

> Inmate calling services means the offering of interstate calling capabilities from an Inmate Telephone.[4]

---

1 *See Ex Parte Submission of Telmate, LLC*, filed March 11, 2016 (http://apps.fcc.gov/ecfs/document/view?id=60001531334).

2 *Ex Parte Submission of Pay Tel Communications, Inc.*, filed March 15, 2016 (http://apps.fcc.gov/ecfs/document/view?id=60001534818).

3 *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (Nov. 5, 2015) (the "Second R&O").

4 47 C.F.R. §64.6000 (2016).

The *Second R&O* fundamentally changed the definition of Inmate Calling Services, with the following becoming effective tomorrow:

> Inmate Calling Service means a service that allows Inmates to make calls to individuals outside the Correctional Facility where the Inmate is being held, regardless of the technology used to deliver the service;

The differences between the two definitions are reflected:

> (j) Inmate ~~calling services~~Calling Service means a service that allows Inmates to make calls to individuals outside the ~~offering of interstate calling capabilities from an~~Correctional Facility where the Inmate ~~Telephone;~~is being held, regardless of the technology used to deliver the service;

Further, significant changes were made to the definition of Section 64.6030 – Interim Rate Caps. The First Report and Order's version of 64.6030 was:

> No provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. A Provider's rates shall be considered consistent with this section if the total charge for a 15-minute call, including any per-call or per-connection charges, does not exceed $3.75 for a 15-minute call using Collect Calling, or $3.15 for a 15-minute call using Debit Calling, Prepaid Calling, or Prepaid Collect Calling.[5]

Whereas, the *Second R&O* version of 64.6030 that becomes effective tomorrow is:

> No Provider shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. These interim rate caps shall sunset upon the effectiveness of the rates established in section 64.6010.

The differences between the two sections are reflected:

> No P~~rovider~~ shall charge a rate for Collect Calling in excess of $0.25 per minute, or a rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of $0.21 per minute. ~~A Provider's rates shall be considered consistent with this section if the total charge for a 15-~~ ~~minute call, including any per-call or per-connection charges, does not exceed $3.75 for a 15-~~ ~~minute call using Collect Calling, or $3.15 for a 15-minute call using Debit Calling, Prepaid~~ ~~Calling, or Prepaid Collect Calling.~~ These interim rate caps shall sunset upon the effectiveness of the rates established in section 64.6010.

---

5 47 C.F.R. 64.6030 (2016).

Thus, it is clear that the Commission intended to overhaul the definition of "Inmate Calling Services" and the definition of "Interim Rate Caps" in the *Second R&O*. Those changes to each rule will become effective on March 17, 2016.[6] To the extent that certain ICS providers missed those changes when they decided to seek a stay of the Second R&O, the Wright Petitioners do not believe that the public interest would be served by a "clarification" that ignores the Commission's clear intent and action.

Further, while it is correct that the interim rate cap for intrastate ICS rates will be lower than the rate caps set forth in Section 64.6010, there is no reason for the Commission to delay the implementation of the rates. Instead, the Commission's expressed a willingness to review requests for waiver of the rate caps. Should there be an ICS provider that seeks a waiver of the Interim Rate Caps, it can seek a waiver. Holding up the effective date for all intrastate calls for a small subsection of all ICS calls would not serve the public interest, and has not been directed by the Court of Appeals.

Finally, to the extent that the ICS providers missed this issue when they launched their assault on the *Second R&O*, the Commission has no responsibility to bail them out on the eve of the implementation of the new rules. Stated another way, just because the ICS providers failed to include it their parade of horribles filed at the Court of Appeals doesn't mean millions of inmates and their families should continue to experience unjust, unreasonable and unfair intrastate ICS rates.

Should you have any questions regarding these matters, please contact undersigned counsel.

Respectfully submitted,

Lee G. Petro

Counsel for the Wright Petitioners

6 80 FR 79135 (Dec. 18, 2015).

cc (by/email):

Chairman Thomas Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Jonathan Sallet, General Counsel
Matt DelNero, Chief, Wireline Competition Bureau
Gigi Sohn, Counselor to Chairman Wheeler
Rebekah Goodheart, Legal Advisor to Commissioner Clyburn
Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel
Nicholas Degani, Legal Advisor to Commissioner Pai
Amy Bender, Legal Advisor to Commissioner O'Rielly
Madeleine Findley, Deputy Bureau Chief, Wireline Competition Bureau
Pamela Arluk, Chief, Pricing Policy Division, Wireline Competition Bureau
Lynne Engledow, Assistant Division Chief, Pricing Policy Devision, WCB