

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 15-1461, and consolidated cases

GLOBAL TEL*LINK, SECURUS TECHNOLOGIES, INC.,
CENTURYLINK PUBLIC COMMUNICATIONS, INC., TELMATE, LLC,
PAY TEL COMMUNICATIONS, INC.,
STATE OF OKLAHOMA, and
OKLAHOMA SHERIFFS' ASSOCIATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

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

SEPARATE BRIEF OF PETITIONER SECURUS TECHNOLOGIES, INC.

PUBLIC VERSION – CONFIDENTIAL MATERIAL REMOVED

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June 3, 2016

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Securus adopts and incorporates herein by reference the Certificate contained in the Joint ICS Provider Brief to which it is a signatory.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Securus states that it is wholly owned by Securus Technologies Holdings, Inc., whose principal investor is Securus Investment Holdings, LLC (“SIH”). SIH is indirectly controlled by ABRY Partners VII, LP (“ABRY”). Neither SIH nor ABRY has stock that is publicly traded. No entity having publicly traded stock owns 10 percent or more of either company. Securus, a Delaware corporation, is a telecommunications service and technology company that provides calling services and call management software to correctional facilities exclusively.

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STATUTES AND REGULATIONS

5 U.S.C. § 706(2)2

Authorities principally relied upon are designated by an asterisk (*).

GLOSSARY

Bureau	Wireline Competition Bureau
FCC or Commission	Federal Communications Commission
ICS	Inmate Calling Services
<i>Order</i>	WC Docket No. 12-375, Second Report and Order and Further Notice of Proposed Rulemaking, <i>Rates for Interstate Inmate Calling Services</i> , FCC 15-136, 30 FCC Rcd 12763 (2015)
<i>Stay Order</i>	WC Docket No. 12-375, Order Denying Stay Petitions, DA 16-83 (Wireline Competition Bureau rel. Jan. 22, 2016)

STATEMENT OF JURISDICTION

Securus adopts and incorporates herein the Statement of Jurisdiction in the Joint ICS Provider Brief to which it is a signatory.

STATEMENT OF THE ISSUES

1. Whether the Federal Communications Commission exceeded its authority, acted contrary to the record, or was arbitrary and capricious in adopting unprecedented caps on the fees for processing financial transactions such as credit card payments in the *Second Inmate Rate Order*.
2. Whether the Federal Communications Commission exceeded its authority, acted contrary to the record, or was arbitrary and capricious in adopting unprecedented caps on optional “Single-Call Services” such as Text2Connect and PayNow in the *Second Inmate Rate Order*.

STATUTES AND REGULATIONS

Pertinent statutes and regulations have been reproduced in the Addendum to the Joint ICS Provider Brief.

STATEMENT OF THE CASE

Securus adopts and incorporates herein the Statement of the Case in the Joint ICS Provider Brief to which it is a signatory.

STANDARD OF REVIEW

This Court will vacate an FCC order that is contrary to law, arbitrary and capricious, unsupported by evidence, or without observance of procedure required by law. 5 U.S.C. § 706(2).

In reviewing the caps, the Court will “inquire whether the Commission’s interpretations are ‘amply supported both factually and legally’ and accept them only if they are ‘the result of reasoned and principled decisionmaking that can be ascertained from the record.’” *OXY USA, Inc. v. FERC*, 64 F.3d 679, 697 (D.C. Cir. 1995) (quoting *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 442 (D.C. Cir. 1988)). “*Post hoc* rationalizations advanced to remedy inadequacies in the agency’s record or its explanation are bootless.” *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987).

SUMMARY OF ARGUMENT

1. The Commission imposed maximum rates for automated credit/debit card payments and live agent transactions that were considerably below Securus’s demonstrated costs. Its stated reason for disregarding Securus’s costs as an “outlier” is irrational, because Securus was the only party that provided any documentation at all of its itemized costs to provide these specific services.

2. The Commission prohibited providers from adding any markup to third-party financial transaction fees incurred in connection with so-called “single call”

services. Securus demonstrated that it incurred substantial start-up and operating costs specifically to provide single-call services; the Commission's rule arbitrarily and irrationally prohibits Securus from recovering those costs.

STATEMENT OF STANDING

Securus adopts and incorporates herein the Statement of Standing in the Joint ICS Provider Brief to which it is a signatory.

ARGUMENT

I. THE CAPS FOR AUTOMATED PAYMENT AND LIVE AGENT TRANSACTIONS ARE BELOW CARRIERS' COSTS.

The Commission imposed a maximum Automated Payment Fee of \$3.00 per use for processing a credit card or debit card payment. *Order* ¶167; Rules 64.6000(a)(1), 64.6020(b)(1). For processing by a live agent, it set a maximum fee of \$5.95 per transaction. *Order* ¶168; Rules 64.6000(a)(3), 64.6020(b)(3).

Securus showed that its cost of processing credit card payments is considerably higher than *either* of these amounts:

- Up to **** CONFIDENTIAL \$** ****** charged by the vendors that perform credit card processing, plus
- Bad debt chargebacks averaging **** CONFIDENTIAL \$** ****** per transaction, plus
- An average of **** CONFIDENTIAL \$** ****** per transaction for internal labor, specialized software, IT operations expense, testing/QA

expense, Product Manager expense, network operations expense, accounting expense, reconciliation expense, accounts payable expense, auditor expense, reporting expense, SG&A, and overhead attributable to transaction processing.¹

The Commission dismissed Securus's cost evidence as an "outlier" and asserted that other providers considered the proposed rate caps to be reasonable. *Order* ¶167 (JA-____.) Even assuming *arguendo* that Securus' costs were above industry averages, that would not prove the rates are sufficient to permit reasonably efficient providers to recover their costs. But, more importantly, Securus was the *only* party to submit a detailed analysis of costs incurred to process credit card transactions, including costs of bad debt and fraudulent transactions. It is arbitrary and capricious for an agency to reject the only data point before it as an "outlier."

In addition to ignoring Securus's costs, the Bureau later justified its arbitrary caps by asserting that Securus enables credit card payments in Alabama where "similar rate caps" are in effect. *Stay Order* ¶43 (JA-____). But Alabama's ICS regulations are *not* in effect—they were stayed pending appeal, as Securus explained to the Commission. WC Docket No. 12-375, Securus Reply Comments at 4-5 (filed Jan. 27, 2015) (JA-____.)

¹ Declaration of Dennis Rose ¶3 (Jan. 9, 2015) (JA-____).

It is a fundamental principle that regulated rates must permit a return on investment “sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944). Rate caps that are below the direct cost of service, by definition, cannot provide *any* return on investment and therefore cannot be just and reasonable.

The Commission has no meaningful explanation for its decision to ignore Securus’s cost evidence and instead adopt rate proposals having no cost justification. The FCC never attempts to show Securus’s itemized costs are not *bona fide* costs of service, so it pretends these costs do not exist. This Court should vacate the automated payment and live agent fee caps as arbitrary and capricious.

II. THE MAXIMUM CHARGES FOR “SINGLE-CALL” SERVICES DO NOT PERMIT PROVIDERS TO RECOVER THEIR COSTS.

Rule 64.6020(b) requires carriers to charge no more than the per-minute cap for premium billing options, which the *Order* and rules refer to as “single-call and related services,” plus a pass-through *without markup* of third-party transaction fees. *Order* ¶¶182-189; Rule 64.6000(a)(2), 64.6020(b)(2). These services are described in the Joint ICS Provider Brief, section IV.B.

Securus offers two optional services that fall under “single-call services”. Text2Connect enables an inmate to place a collect call to a wireless phone; it is a

crucial innovation in ICS which was not possible a few years ago. PayNow enables an inmate to place a call to a person with whom Securus does not have an established billing relationship, and allows the recipient to charge the call to a credit or debit card in real time. Both optional services rely on a third-party billing vendor. Both services require double consent by the paying party. Securus invested approximately **** CONFIDENTIAL \$** ****** to develop the software and billing arrangements necessary to offer Text2Connect and PayNow.² Rule 64.6020(b) prevents Securus from recovering these external costs as well as the internal operating costs that it incurs on an incremental basis. It is therefore arbitrary and capricious for the same reasons discussed in the preceding section.

CONCLUSION

The caps for credit card transactions, 47 C.F.R. §64.6020(b)(1) and (b)(3), and the caps for Single-Call services, *id.* §64.6020(b)(2), should be vacated.

Dated: June 3, 2016

Respectfully submitted,

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² Rose Declaration ¶¶4-6 (JA ___ - ___).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), and the Court's April 18, 2016, briefing order, the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), this brief contains 1,119 words; together with the Joint Brief for the ICS Carrier Petitioners the total number of words does not exceed 15,500 in compliance with the Court's April 18 Order (Doc. 1609084). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2013) used to prepare this brief.

/s/ Stephanie A. Joyce
Stephanie A. Joyce

June 3, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on June 3, 2016, I filed the Non-Public Version of the Separate Brief of Petitioner Securus Technologies, Inc. with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit and served it by hand on the following persons:

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I also certify that on this day I filed the Public Version of this document via ECF and all parties were served via ECF and via First Class Mail.

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