

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Motion Of)	
Securus Technologies, Inc. For A Limited)	
Waiver Of Rule 4901:1-6-22 Of The Ohio)	Case No. 18-0890-TP-WVR
Administrative Code)	
)	

**REQUEST OF SECURUS TECHNOLOGIES, INC. FOR
CLARIFICATION OF SECTION 4901:1-6-22 OF THE OHIO
ADMINISTRATIVE CODE**

Securus Technologies, Inc. (“Securus”), a licensed inmate operator service (“IOS”) provider in Ohio since 1997, respectfully requests that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) clarify what maximum rates should be applied to IOS pursuant to the recently enacted changes to Rule 4901:1-6-22. Specifically, Rule 4901:1-6-22(B), as amended and effective on May 24, 2018, provides that maximum rate of usage “shall be consistent with 47 C.F.R. part 64, subpart FF.” The reference to the Code of Federal Regulations (“CFR”) section within Ohio’s IOS Rule requires clarification for two independent reasons.

First, Rule 4901:1-6-02(H) provides that references to the CFR are intended to incorporate the version of the cited matter that was effective on September 13, 2010.¹ 47 CFR part 64, Subpart FF, the cited section in Rule 4901:1-6-22, was not effective until February 11, 2014. Thus, the reference to the CFR in new Rule 4901:1-6-22(B) has had the effect of capping, pursuant to the filed-rate doctrine, each ISO’s rates at those included in its Commission-approved tariff.²

¹ A proposed amendment to Rule 4901:1-6-02(H) identifies October 1, 2016 as the intended effective date of references to the CFR. However, that proposed amendment was not codified in the Ohio Administrative Code as of May 24, 2018, and has not been codified at the time of filing this Motion for Clarification.

² *Pilkington N. Am., Inc. v. Toledo Edison Co.*, 145 Ohio St. 3d 125, 2015-Ohio-4797, P30 (Under the filed-rate “doctrine, a utility may charge only the rates fixed by its current, commission-approved tariff.”).

Second, even if the reference to the CFR in Rule 4901:1-6-22(B) is intended to reference the CFR published as of October 1, 2016 (which again, is not the current state of Rule 4901:1-6-02(H)), clarification would still be needed as the text of 47 C.F.R. part 64, Subpart FF as of that date includes two sections on maximum per-minute usage rates. Section 64.6010 sets caps on Inmate Calling Services (“ICS”) that vary based on the size and the type of facility being served, or tiered rates. Conversely, Section 64.6030 sets “interim caps” on ICS based on a single rate applicable to all types of facilities. Thus, these sections provide for different maximum rates of usage, and it is not clear whether IOS providers in Ohio should align their rates with the tiered rates in Section 64.6010 or the interim cap rates in Section 64.6030, or whether compliance with *either* section is permitted under Rule 4901:1-6-22. In addition, the content and effective date of both of these CFR sections has changed over time due to various court rulings, as well as amendments to the sections.

I. Clarification is Needed as to the Effective Date of the Referenced CFR Section

In Case No. 2014-1554, the Commission approved changes to Rule 4901:1-6-02(H) that modified the date of September 13, 2010 to October 1, 2016 for the intended effective date of any references to the United States Code or the CFR within chapter 4901:1-6. On April 16, 2018, the Commission filed the proposed changes to 4901:1-6-02, including the change to subsection (H), with JCARR. As of the date of the filing of this Motion, the Commission has not filed a final version of 4901:1-06-02 with JCARR, and thus the Commission’s approved change to subsection (H) has not yet been enacted into the Rule (i.e., the September 13, 2010 date stands).

The Inmate Calling Services section of the CFR, 47 CFR part 64 Subpart FF, was first effective February 11, 2014. Thus, the references in Rule 4901:1-6-22 to 47 CFR part 64, Subpart FF, have created confusion as that CFR section did not exist on September 13, 2010.

II. Clarification Is Needed As to Which Section of the CFR Governs Maximum Rates for ISO in Ohio

The published version of 47 CFR part 64, Subpart FF dated October 1, 2016, includes two sections on maximum per-minute usage rates, Section 64.6030 and Section 64.6010. Section 64.6030 reflects “interim rate caps”, originally adopted in 2013, which sets single maximum rates applicable to both large prisons and smaller jail populations. However, the Federal Communications Commission (“FCC”) concluded in December 2015 that tiered rates were necessary in order to account for the admittedly higher costs of providing services to smaller jail populations. *See* 80 FR 79136, 79140-79141. Therefore, Section 64.6010 provides for tiered rates based upon the average daily population (“ADP”) of the particular facility. The FCC specifically found that:

- “adopting tiered interstate and intrastate rates accounts for the differences in costs to ICS providers serving smaller, higher-cost facilities, such as the vast majority of jails”;
- “the costs to serve prisons are lower than to serve jails”; and
- “economies of scale, such as the recovering of fixed ICS costs over a larger number of inmates, supports the tiered approach.”

Id.

Securus currently provides intrastate IOS calls in 71 facilities in Ohio, the vast majority of which are smaller jail populations and would be subject to a maximum rate of \$.31 per minute under 64.6010(a). Section 64.6010 also provides for a maximum rate of \$.13 per minute (originally to be effective after July 1, 2018) for phone services in prisons (defined as primarily used to confine individuals convicted of felonies and sentenced in excess of one year).

In June 2017, the United States Court of Appeals for the District of Columbia (“DC Circuit”) ultimately held that the rates initially codified at 64.6030 were legally infirm. *See Global Tel*Link*

v. FCC, 859 F.3d 39, 55-58 (D.C. Cir., 2017).³ The court reasoned that the FCC acted arbitrarily in determining an appropriate maximum rate when it categorically excluded certain costs (site commissions) and dismissed record evidence that many ICS providers in many inmate institutions have costs higher than the rate caps the FCC established. *Id.* Thus, the current effective maximum rates for interstate ICS are the “interim” rates, codified at 47 CFR 64.6030 (i.e., \$0.21 per minute for debit and prepaid calls interstate calls and \$0.25 per minute for collect interstate calls), but those “interim” rates will sunset upon effectiveness of tiered rates in Section 64. 6010.

The Commission could recognize the economies of scale and higher costs to smaller jail populations by permitting Ohio IOS providers to comply with Rule 4901:1-6-22(B) with adherence to *either* 47 CFR 64.6010 *or* 47 CFR 64.6030 (both within 47 CFR part 64, Subpart FF), and as reflected in the text of the CFR dated as of October 1, 2016.⁴ In addition, allowing Ohio IOS providers to adhere to *either* 47 CFR 64.6010 *or* 47 CFR 64.6030 as reflected therein would partially alleviate concerns over FCC-established illegally infirm rates, as ruled by the DC Circuit.

In addition, confusion exists over the application of Rule 4901:1-6-22 as another IOS provider in Ohio has asserted its belief that the recent changes to Rule 4901:1-06-22 were to be applied prospectively only, and do not apply to existing contracts. *See Response of Global Tel*Link Corporation to Waiver Requests*, filed May 24, 2018, Case No. 18-0890 and 18-0917.

WHEREFORE, Securus respectfully requests that the Commission clarify what maximum rates should be applied to Ohio IOS providers pursuant to the recently enacted changes to Rule 4901:1-6-22. Further, Securus specifically requests that the Commission indicate that Ohio IOS

³ The DC Circuit applied its decision and the rationale to the tiered rates currently reflected in Subpart FF in a summary order in December 2017.

⁴ This assumes that Rule 4901:1-6-02(H) is amended to include the effective date of October 1, 2016.

providers can comply with Rule 4901:1-6-22(B) with adherence to *either* 47 CFR 64.6010 *or* 47 CFR 64.6030 as reflected in the text of the CFR dated as of October 1, 2016. Finally, Securus specifically requests that the Commission address the question of prospective application.

Dated: August 1, 2018

Respectfully submitted,

/s/ Michele L. Noble

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Certificate of Service

I hereby certify that a copy of the foregoing *Request of Securus Technologies, Inc. for Clarification of Section 4901:1-6-22 of the Ohio Administrative Code* was served upon the following individuals on August 1, 2018, via e-mail correspondence.

/s/ Michele L. Noble
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Summary: Motion for Clarification of Section 4901:1-6-22 of the Ohio Administrative Code electronically filed by Michele L Noble on behalf of Securus Technologies, Inc.