

**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 A LIMITED
WAIVER OF SECTION 4901:1-6-22 OF THE OHIO ADMINISTRATIVE
CODE**

Securus Technologies, Inc. (“Securus”), pursuant to Ohio Administrative Code Section 4901:1-6-02(E), files this Motion respectfully requesting that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) enter an Order waiving 47 C.F.R. § 64.6030’s application to Rule 4901:1-6-22, and allow Securus to comply with Rule 4901:1-6-22 through adherence to a tiered rate cap structure for inmate operator services (“IOS”) identical to that contained in 47 C.F.R § 64.6010 as published in the Federal Register on September 13, 2016 (hereinafter “Tiered Rates”).¹

On August 22, 2018, the Commission clarified that compliance with 4901:1-6-22, and the reference to 47 C.F.R. part 64, subpart FF within the rule, was intended to reference 47 C.F.R. § 64.6030 (hereinafter “Interim \$.25/.21 Rates”).² Specifically, Securus seeks an Order and waiver permitting it to comply with 4901:1-6-22 through adherence to the Tiered Rates identified at 47 C.F.R. § 64.6010 for those facilities it services with an ADP of 349 or lower.

¹ The Tiered Rates are as follows: “No Provider shall charge, in the Jails it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of: (1) \$0.31 in Jails with an [Average Daily Population (“ADP”)] of 0-349; (2) \$0.21 in Jails with an ADP of 350-999; or (3) \$0.19 in Jails with an ADP of 1,000 or greater.”

² The Interim \$.15/.21 Rates are as follows: “No Provider shall charge a rate for Collect Calling in excess of \$0.25 per minute, or a rate for Debit Card, Prepaid Calling or Prepaid Collect Calling in excess of \$0.21 per minute.”

A waiver is appropriate for two main reasons. First, the Commission indicated that the Interim \$.25/.21 Rates are to be applied to 4901:1-6-22 because a federal court stayed the application of the Tiered Rates in 47 C.F.R. § 64.6010. However, the federal court stay orders are not binding on the Commission, and further, the federal court also stayed the application of the Interim \$.25/.21 Rates to intrastate calls, ruling that the Federal Communications Commission's ("FCC") effort to cap intrastate IOS rates was unauthorized. Second, the FCC has repeatedly concluded that tiered rate caps are necessary in order to account for the higher costs of providing services to smaller jail populations. (*See* FCC's Rates for Interstate Inmate Calling Services, Report and Order and FNPRM, released Sept. 26, 2013, summary published at 78 FR, 67956-67976; Rates for Interstate Inmate Calling Services, Second Report and Order and Third FNPRM, released Nov. 5, 2015, summary published at 80 FR 79136, 79140-79141; and Order on Reconsideration, released Aug. 9, 2016, summary published at 81 FR 62818, 62820-62823, collectively "FCC ICS Orders".) Here, Securus' higher costs of providing services to smaller populations in county jails and municipal police department facilities across Ohio justify the application of the Tiered Rates identified in 47 C.F.R. § 64.6010.

I. The Federal Court Stay Orders Should Not Preclude Waiver And The Commission Should Allow Adherence To 4901:1-6-22 Through The Tiered Rates in 47 C.F.R. § 64.6010.

47 CFR part 64, subpart FF, includes two sections on maximum per-minute usage rates, Section 64.6010 (the Tiered Rates) and Section 64.6030 (the Interim \$.15/.21 Rates). In September 2013, the FCC released its first order governing Inmate Calling Services ("ICS") rates. That order adopted "interim rate caps" of "\$0.21 per minute for debit and prepaid interstate calls and \$0.25 per minute for collect interstate calls." These "interim rate caps," codified at Section 64.6030, are to "sunset upon the effectiveness of the rates established in Section 64.6010." 47 CFR § 64.6030.

Section 64.6010 provides for tiered rate caps based upon the ADP³ of the jail.⁴ The “interim rate caps”, on the other hand, provide for a single maximum rate applicable to both large prisons and smaller jail populations. Again, as published in the Federal Register on September 13, 2016, the tiered rate caps were as follows:

- (a) No Provider shall charge, in the Jails it serves, a per-minute rate for Debit Calling, Prepaid Calling, or Prepaid Collect Calling in excess of:
 - (1) \$0.31 in Jails with an ADP of 0-349;
 - (2) \$0.21 in Jails with an ADP of 350-999; or
 - (3) \$0.19 in Jails with an ADP of 1,000 or greater.

81 FR 62818, 62825.⁵

Comparing the two C.F.R. sections, both would allow a maximum rate of \$0.21 per minute for debit and prepaid calls for jails with an ADP of 350-999. For jails with an ADP of 349 and lower, Section 60.6010 (the Tiered Rates) would allow a maximum rate of \$0.31 per minute, whereas Section 60.6030 (the Interim \$.25/.21 Rates) would limit the maximum rate to \$0.21 per minute. Thus, there is a significant difference between the two C.F.R. sections in the rate applicable to jail populations with an ADP of 349 or lower. The Commission’s intent to “mirror the existing interstate rate found in 47 C.F.R. 64.6030 . . . for all IOS service calls”⁶ is maintained, even if the Commission grants Securus’s request for a waiver, which would only apply to facilities with an ADP of 349 or lower.

The federal court stay orders do not preclude the Commission’s ability to grant Securus a limited waiver. In 2016, United States Court of Appeals for the District of Columbia Circuit (“DC Circuit”) stayed 47 C.F.R. § 64.6030 (the Interim \$.25/.21 Rates) to the FCC’s application of those

³ ADP is defined as the “sum of all inmates in a facility for each day of the preceding calendar year, divided by the number of days in the year.” 47 C.F.R. § 64.6000(c).

⁴ The FCC defined “Jail” in 47 C.F.R. § 64.6000(m). At this point Securus only serves jails in Ohio.

⁵ The tiered rates for collect calling pursuant to 47 C.F.R. § 64.6010(c), and effective after July 1, 2018, are the same for prepaid calling under subsection (a).

⁶ August 22, 2018 Entry, ¶ 18.

caps to *intrastate* calling services. *See Global Tel*Link v. FCC*, 2016 U.S. App. LEXIS 15421 (D.C. Cir., March 23, 2016) (“insofar as the FCC intends to apply [47 C.F.R. § 64.6030] to intrastate calling services . . . petitioners have satisfied the stringent requirements for a stay pending court review”). In addition, in 2016, the DC Circuit stayed the FCC’s application of 47 C.F.R. § 64.6010 (the Tiered Rates), subject to a challenge that the rates were “just and reasonable.”

None of the DC Circuit stay orders restrict the authority of this Commission with respect to intrastate rates. The orders were particular to specific FCC notices of rulemaking, none of which themselves are binding on this Commission. Indeed, ultimately the DC Circuit ruled that the FCC did not have the authority to cap the amount states, counties, and cities can charge inmates to make in-state phone calls. *See Global Tel*Link v. FCC*, 859 F.3d 39, 51-55 (D.C. Cir., 2017). So the PUCO is not inhibited in any way from allowing the application of the Tiered Rates by the actions of the DC Circuit.

Rule 4901:1-6-22(B) provides that the “maximum rate of any usage sensitive charge that may be applied by an IOS provider to any intrastate IOS call **shall be consistent with** 47 C.F.R. part 64, subpart FF.” (Emphasis added.) Granting Securus a limited waiver and permitting compliance with 4901:1-6-22 through adherence with 47 C.F.R. § 64.6010 (the Tiered Rates) for facilities with an ADP of 349 or lower, is consistent with what was intended by federal regulations within 47 C.F.R. part 64, subpart FF.

II. Economies of Scale Support a Waiver

ICS rates are set to (a) recover the cost of technology, equipment, and services in connection with establishing the ICS at the inmate facilities at no cost to the public agencies, (b) cover ongoing services and technology updates during the term of the ICS contract, and (c) offset

legitimate costs for expenses generated for inmate facilities that allow inmates to communicate with individuals outside of those facilities. In particular, ICS providers offer various technological and security features to individual facilities customers (e.g., recording, monitoring, investigative tools, automated reporting tools, voice biometric verification, etc.), and those customers select from a menu of available services those they wish to receive. Facility-specific factors (e.g., facility population size, age, and condition) foreseeably affect the per-minute cost of providing ICS services at different facilities. Because the Interim \$.25/.21 Rates fail to reasonably account for these variables, their exclusive application to all facilities regardless of size would harm the interests of facility customers.

The FCC concluded in August 2013, in November 2015, and again in August 2016 that tiered rate caps were necessary in order to account for the higher costs of providing services to smaller jail populations. (*See* ICS Orders, *supra*) 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.

The Commission should recognize the economies of scale and higher costs to serve smaller jail populations by granting Securus a waiver and permitting it to comply with Rule 4901:1-6-22(B) with adherence to 47 CFR § 64.6010 (the Tiered Rates) for facilities with an ADP of 349 or lower.

As of August 31, 2018, Securus provides intrastate IOS calls in 68 jail facilities in Ohio, all but 6 of which have an ADP of 349 or less. Indeed, the remaining 62 facilities that Securus

provides IOS services in Ohio have an average ADP of 77. Further, many of the facilities have very small average populations. For instance, the Ashtabula Police Department's facility has an ADP of 16, the Bedford Police Department's facility has an ADP of 7, and the Lorain Police Department's facility has an ADP of 8. As for counties, the Holmes County jail has an ADP of 38 and the Noble County jail has an ADP of 12. Securus provides IOS services to all of these facilities. The infrastructure costs of establishing and maintaining services at these facilities, as well as deploying technological updates, are a significantly higher percentage of the revenue generated from these smaller facilities, as repeatedly recognized by the FCC. Securus is entitled to a reasonable return on its investment, and setting a maximum rate regardless of the size of jails fails to rationally account for the realities of providing IOS services at the smaller facilities.

It is important to note that other states have considered applying the FCC's various rate caps, and most have either modified the FCC rates, adopted the tiered rates, or both. While the Alabama Public Service Commission adopted the 2013 interim rates for intrastate ICS rates for prisons, it modified those rates to \$0.30 per minute (to be reduced to \$0.25 two years after the effective date) for pre-paid calls from jails.⁷ The Louisiana Public Service Commission also considered the FCC's 2013 interim rates, and modified those rates to \$0.30 per minute for collect calls, and \$0.25 per minute for prepaid, debit, or credit calls.⁸ The Georgia Public Service Commission initially based its rate caps on the FCC's 2015 tiered rate structure, and then increased to allow additional cost recovery to ICS providers, including a rate of \$0.31 per minute for jails

⁷ See *In re Generic Proceeding Considering the Promulgation of Tel. Rules Governing Inmate Phone Service*, Dkt. No. 15957, *Further Order Adopting Revised Inmate Phone Serv. Rules*, Appendix B at 1 (Ala. Pub. Serv. Comm'n Dec. 9, 2014)(as updated Jan. 16, 2015, and June 12, 2015).

⁸ See *In re: Rulemaking to Establish Rules & Regulations Specific to Regulation of Prison Telephone Commc'n Sys.*, Dkt. No. R-32777, *General Order Appendix A* at Attachment A (La. Pub. Serv. Comm'n Apr. 20, 2016).

with an ADP below 350.⁹ All these modified rate caps reflect the reality that the FCC's rates caps were too low for the costs related to providing ICS to smaller facilities.

Indeed, the Tiered Rates as published on September 13, 2016 are conservative due to the DC Circuit's ruling that the rates codified at Section 64.6030 were legally infirm. *See Global Tel*Link v. FCC*, 859 F.3d at 55-58. The court reasoned that the FCC acted arbitrarily when it categorically excluded certain costs (site commissions) and by dismissing record evidence that many ICS providers in many inmate institutions have costs higher than the rate caps the FCC established, in determining an appropriate maximum rate. *Id.*

The FCC's 2013 interim rate caps, like the permanent tiered rate caps the FCC subsequently adopted, were derived through a fundamentally flawed methodology, which led the D.C. Circuit to vacate the latter and remand the rule making to the FCC in 2017. *See Global Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 413 (D.C. Cir. 2017).

The fundamental flaws the D.C. Circuit identified with the FCC's proposed rate caps apply equally to the proposed rate caps adopted by the Commission.

- The proposed intrastate rate caps categorically fail to account for site commissions as costs of providing ICS services. Such “categorical exclusion of site commissions from the calculus used to set ICS rate caps defies reasoned decisionmaking because site commissions obviously are costs of doing business incurred by ICS providers.” *Id.* at 413. The adoption of rate caps derived from a ratemaking calculus that excludes site commissions is therefore arbitrary and capricious. *Id.* at 414, 416.
- The proposed intrastate caps are not based on local ICS cost data. Lacking justification in the record, use of industry-wide average cost data to set ICS rate caps is “not supported by

⁹ See *In re: Institutional Telecomm. Servs.*, Dkt. No. 18870-U, *Order Adopting Rates and a Procedural & Scheduling Order* at 1-2, 3-4 (Ga. Pub. Serv. Comm'n Oct. 2, 2017).

reasoned decisionmaking” and is therefore arbitrary and capricious. *Id.* at 416. The FCC based its national rate caps on national industry-wide average cost data, which the D.C. Circuit found was arbitrary and capricious. Adopting rates in the intrastate context derived in this manner without an option for waiver recognizing local costs would be even *more* arbitrary, particularly in a state that features urban and rural inmate populations housed in a range of historic to state-of-the-art facilities.

In short, the D.C. Circuit opinion regarding the FCC rule making illustrates what rational, reasoned decisionmaking in the ICS ratemaking context at a minimum requires: (1) consideration of all costs incurred in providing ICS, including site commissions, and (2) consideration of the costs of providing ICS within the region where the rates adopted will apply. *Id.* at 416–17.

The Commission should recognize the economies of scale and higher costs to smaller jail populations by granting Securus a limited waiver and permitting compliance with Rule 4901:1-6-22(B) through adherence to 47 CFR 64.6010 (the Tiered Rates) an ADP of 349 or lower. In addition, allowing Securus to adhere to the Tiered Rates would partially alleviate concerns over FCC-established illegally infirm rates for the smaller population facilities, as ruled by the Court of Appeals for the District of Columbia.

WHEREFORE, Securus respectfully requests that the Commission enter an Order waiving 47 C.F.R. § 64.6030’s application to Rule 4901:1-6-22, and allowing Securus to comply with Rule 4901:1-6-22 through adherence to 47 C.F.R § 64.6010 (the Tiered Rates) facilities with an ADP of 349 or lower.

Dated: September 28, 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 Waiver of Section 4901:1-6-22 of the Ohio Administrative Code* was served upon the following individuals on September 28, 2018, via U.S. first class mail.

/s/ Michele L. Noble
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Summary: Motion for Limited Waiver of Section 4901:1-6-22 electronically filed by Michele L Noble on behalf of Securus Technologies, Inc.