

MORRISON | FOERSTER

2000 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.
20006-1888

TELEPHONE: 202.887.1500
FACSIMILE: 202.887.0763

WWW.MOFO.COM

MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
DENVER, NORTHERN VIRGINIA,
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TOKYO, LONDON, BEIJING,
SHANGHAI, HONG KONG,
SINGAPORE, BRUSSELS

Writer's Direct Contact
202/887-8743
FKrogh@mofocom

November 19, 2008

Electronic Ex Parte Filing

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petitioners' Alternative Rulemaking Proposal
CC Docket No. 96-128

Dear Chairman Martin:

Petitioners Martha Wright, *et al.* ("Petitioners"), respond to the cost study filed by several inmate calling service providers ("Cost Study"), as well as *ex parte* letters filed by Securus Technologies, Inc. ("Securus"), Pay Tel Communications, Inc. ("Pay Tel"), and Embarq, further elaborating on their prior filings.¹ The most striking aspect of these filings is that the Cost Study *largely supports the benchmark rates requested by*

¹ Don J. Wood, Inmate Calling Service Interstate Call Cost Study, CC Docket No. 96-128 (Aug. 15, 2008) ("Cost Study"); letter from Stephanie A. Joyce, Counsel for Securus Technologies, Inc., to Hon. Kevin J. Martin, Chairman, FCC, CC Docket No. 96-128 (July 7, 2008) ("Securus July 7 Letter"); Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Oct. 17, 2008) ("Pay Tel Oct. Letter"); letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 9, 2008) ("Pay Tel Arbitrage Letter"); letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (July 31, 2008) ("Pay Tel July Letter"). Petitioners will cite to the letter from Jeffrey S. Lanning, Director - Federal Regulatory Affairs, Embarq, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (July 15, 2008) (referring to meeting with Scott Bergmann), as representative of all five Embarq letters in the relevant time period ("Embarq July 2008 Filing").

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Petitioners. The Cost Study thus supersedes and rebuts, in large part, the other recent service provider filings, which, for the most part, raise issues previously addressed at length in *Petitioners'* previous filings in support of their Alternative Rulemaking Proposal (“Proposal”)² and recently summarized in *Petitioners'* June 2008 Letter.³

Although The Service Providers’ Cost Study Inflates Inmate Calling Costs, It Largely Supports Petitioners’ Requested Benchmark Rates.

According to the Cost Study, in providing interstate inmate debit calls in “marginal locations,” the service providers incur a fixed cost of \$1.56 per call and a transmission cost of \$0.06 per minute.⁴ For a 15-minute call, these costs are equivalent to slightly over \$0.16 per minute, well under *Petitioners'* requested benchmark of \$0.20 per minute for inmate interstate debit calls. *For a 12-minute call, the equivalent cost is \$0.19 per minute, still under the requested benchmark.* The Cost Study shows interstate inmate collect calling costs of \$2.49 per call and \$0.07 per minute.⁵ *For a 15-minute call, the equivalent cost is under \$0.24 per minute, less than the requested benchmark rate of \$0.25 per minute.* These results illustrate why the service providers have been so reluctant to reveal their costs and why the service providers had no coherent response to *Petitioners'* comparable rate analysis.

These results are even more startling when the service providers’ inappropriate sampling technique is examined. The Cost Study states that its analysis is based on interstate inmate toll calls from 25 “marginal” correctional locations, following the “marginal location analysis” used in the *Methodology Order*.⁶ In order to limit the

² *Petitioners'* Alternative Rulemaking Proposal, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (Mar. 1, 2007) (“Proposal”); FCC Public Notice, *Comment Sought on Alternative Rulemaking Proposal Regarding Issues Related to Inmate Calling Services*, 22 FCC Rcd 4229 (WCB 2007).

³ Letter from Frank W. Krogh, Counsel to *Petitioners*, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (June 27, 2008) (“*Petitioners'* June 2008 Letter”).

⁴ Cost Study at 4.

⁵ *Id.*

⁶ *Id.* at 4, 7-8 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, 2552 & n.20, 2571 (1999) (“*Methodology Order*”), *aff'd sub nom. American Public Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000)).

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sample of correctional facilities used in the Cost Study to “marginal locations,” the service providers attempted to use only locations ““where the payphone operator is able to just recoup its costs, including a normal rate of return on the asset, but is unable to make payments to the location owner.””⁷ Not surprisingly, the service providers had difficulty coming up with such “marginal” correctional facilities, given the tremendous profit available in almost all correctional settings. They accordingly settled for some locations where the service provider pays a “relatively small” commission to the correctional authority as well as some where there is no commission.⁸ Because most inmate calling service contracts involve the payment of a significant commission, the service providers’ “marginal location” sample thus is unrealistically skewed in favor of higher cost facilities.

The service providers distorted the results even further by removing the locations where no commission is paid but the contract is sufficiently profitable for the service provider to pay a commission.⁹ The service providers thus cherry-picked unusually unprofitable, low volume/high-cost facilities for their study. It is surprising that they were able to find 25 facilities where no commission or a relatively small commission is paid. No doubt dismayed by the low average cost data derived from this relatively high-cost sample, the service providers warped the results again by adding three locations where the service providers do not recoup their costs and performed another analysis with the additional locations. This additional tweaking of the sample was supposedly based on the *Implementation Order*,¹⁰ which modified the *Methodology Order* by enlarging the definition of “marginal” to include payphones that do not pay commissions and that may not recoup all of their costs.¹¹ Even after loading the sample with three atypical money-losing operations, the Cost Study shows interstate inmate debit calling fixed cost of \$2.09 per call and a transmission cost of \$0.06 per minute,¹² *still under the requested benchmark of \$0.20 per minute for a 15-minute call.*

⁷ Cost Study at 7 (*quoting Methodology Order*, 14 FCC Rcd at 2552 n.20).

⁸ Cost Study at 8.

⁹ *Id.*

¹⁰ *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, 19 FCC Rcd 15636 (2004) (“*Implementation Order*”) (cited in the Cost Study at 8-9).

¹¹ *Implementation Order*, 19 FCC Rcd at 15652.

¹² Cost Study at 5.

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The inappropriateness of applying a “marginal location” approach to a high revenue niche such as inmate payphones is evident from the rationale of the *Methodology Order* and *Implementation Order*. As the Commission explained, basing payphone compensation on

the marginal payphone location satisfies Congress’s directive that we ensure the widespread deployment of payphones. As opposed to a calculation based on the average payphone location, use of a marginal payphone location should promote the continued existence of the vast majority of payphones.¹³

Five years later, in the *Implementation Order*, the Commission expanded the sample of “marginal” payphones “to take account of . . . the sharp and continuing decline in payphone call volumes,” a decline that “suggests that maintaining the current compensation rate will *not* preserve even the current deployment level.”¹⁴ The Commission found that modifying its compensation methodology to include within the definition of “marginal” payphones those payphones that currently do not pay commissions and may not currently recoup all of their costs would “increase[] the likelihood that the compensation rate will either preserve the current level of payphone deployment or at least slow the decline in the deployment level.”¹⁵

That rationale is entirely inapplicable to the correctional setting, in which inmate payphone use is as robust and call volumes as high as correctional officials will allow. Unlike the declining deployment of payphones available to the general public, inmate payphones are guaranteed heavy use by the ultimate captive market. As the Commission found in the *Inmate Payphone Order*, its payphone compensation methodology was established in the *Methodology Order* “to ensure that the current number of payphones is maintained.”¹⁶

That policy has little or no application in the prison context because, considering that [inmate service] providers offer commissions, prison

¹³ *Methodology Order*, 14 FCC Rcd at 2571.

¹⁴ *Implementation Order*, 19 FCC Rcd at 15652 (emphasis in original).

¹⁵ *Id.*

¹⁶ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3256 (2002) (“*Inmate Payphone Order*”).

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payphones are already profitable. Any increase in inmate calling services' revenue . . . will only encourage higher location commissions. Further, the correctional facility and its communications policy, not the market, often determine the number of prison phones.¹⁷

Thus, the service providers based their cost study on a sampling methodology that the Commission has found is entirely inapplicable to the prison payphone context. Accordingly, there is no reason to avoid "a calculation based on the average payphone location" in the prison context, as there was in the case of public payphones serving the general public.¹⁸ In order to determine actual inmate calling costs, it is therefore necessary to examine a representative sample of all prison payphones. By artificially limiting their study to the few prison payphone locations that could be considered "marginal," rather than a representative sample of all prison payphone locations, the service providers derived inmate calling costs that were atypically high.

Given the skewed sampling methodology used by the service providers, it is remarkable that their Cost Study did not derive much higher costs than it did. In searching out the few marginal correctional locations and going so far as to remove locations where the service providers could have paid commissions, but did not do so, it must be presumed that the service providers excluded all typical locations, where substantial commissions are paid. The unrepresentative sample of correctional locations used for the Cost Study thus precludes the use of its results for any purpose other than to provide further confirmation that the Petitioners' requested benchmark rates must be considered a high ceiling over reasonably cost-based interstate inmate service rates.

Not only is the Cost Study invalidated as a floor under reasonable rates by the skewed sampling methodology, but the estimated usage rates of \$0.06 per minute for debit calling and \$0.07 per minute for collect calling are also grossly inflated.¹⁹ The usage costs are limited to the "incremental costs associated with the termination of interstate toll calls."²⁰ Petitioners' expert, Douglas A. Dawson, has previously demonstrated that interstate toll call termination costs are approximately \$0.0125 per

¹⁷ *Id.*(emphasis added).

¹⁸ *Methodology Order*, 14 FCC Rcd at 2571.

¹⁹ *See* Cost Study at 4-5.

²⁰ *Id.* at 11.

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minute, one-fourth or less of the service providers' figures.²¹ The Commission can certainly verify current long distance call termination costs.

Substituting a generous \$0.02 per minute estimate for usage costs in the Cost Study yields a blended *per-minute cost under \$0.18 per minute for a 20-minute collect call*, using the fixed cost estimate of \$3.19 for the higher cost 28-location sample in the Cost Study.²² That is lower than Petitioners' requested benchmark rate of \$0.20 per minute for debit calls, which, as the Cost Study asserts, are cheaper than collect calls. Substituting a \$0.02 usage cost also yields a blended *per-minute cost under \$0.195 per minute for a 12-minute debit call* using the debit fixed cost estimate of \$2.09 for the 28-location sample.²³ Thus, even assuming the most artificially inflated fixed cost estimate, using the most atypically small correctional facilities the service providers could find, substituting a realistic usage element brings the service providers' cost estimate below the requested benchmark rates for a 12 or 20 minute call. One can only surmise that the use of a representative sample of facilities and a realistic usage estimate would have resulted in cost estimates far below Petitioners' requested benchmarks for any length of call, confirming the generosity of the benchmarks.

The Cost Study Rebutts The Service Providers' Cost Arguments.

The service providers' Cost Study rebuts or moots most of the service providers' arguments in their recent ex parte filings. For example, Securus attempts to demonstrate that the supposedly unique circumstances of its inmate calling service contract with the Florida Department of Corrections cannot be replicated in most inmate calling service contracts and that the favorable rates established in that contract thus cannot serve as a basis for a comparable rates analysis for interstate inmate calling services generally.²⁴ As the Cost Study demonstrates, however, even if no large state prison systems are considered, an unrepresentative sample of small, relatively high-cost correctional facilities yields estimated costs similar to Petitioners' requested benchmarks. Even if

²¹ Declaration of Douglas A. Dawson in Support of Petitioners' Alternative Proposal ¶ 26 (Feb. 16, 2007) ("Dawson Alternative Declaration"), attached as Appendix B to the Proposal.

²² Thus, assuming a usage cost of $\$0.02 \times 20 = \0.40 for a 20-minute call, adding the collect fixed cost of \$3.19 on page 5 of the Cost Study yields a total cost of \$3.59, or slightly under \$0.18 per minute.

²³ A usage cost of $\$0.02 \times 12 = \0.24 for a 12-minute call. Adding the debit fixed cost of \$2.09 on page 5 yields a total cost of \$2.33, or slightly under \$0.195 per minute.

²⁴ Securus July 7 Letter at 1-2.

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Securus were correct about not being able to replicate the efficiencies of its Florida contract, it still would not be able to successfully challenge the requested benchmarks.²⁵

Moreover, Securus and other inmate calling service providers clearly do experience similar efficiencies in other states as well. Aside from the Florida contract, Petitioners have pointed to several other state inmate calling service contracts, including Securus contracts, with similarly reasonable interstate collect and debit rates.²⁶ Securus has not tried to explain why all of those contracts, like the Florida contract, are also uniquely unrepresentative of all other state prison system inmate calling contracts.

Three correctional associations insist that the requested benchmark rates will not cover the service providers' costs of providing security functions.²⁷ That Securus and other service providers are able to offer interstate inmate services, including state-of-the-art security functions, at so many prison systems at such reasonable rates, however, disproves the correctional associations' arguments. The service providers' Cost Study also includes all security costs, and it still yielded results roughly similar to the requested benchmarks.

Securus argues that the high call volumes experienced in Florida correctional facilities are not representative of the entire nation, especially in the case of county jails,

²⁵ Securus does not describe the "innovative network architecture" deployed for Florida correctional facilities in sufficient detail to accept its glib assertion that the same architecture cannot be used efficiently elsewhere. *Id.* at 2. It is more likely that the efficiencies reside in Securus facilities and functions that are common to all of its services. See discussion of centralized functions performed by inmate calling service providers in Reply Declaration of Douglas A. Dawson in Support of Petitioners' Alternative Rulemaking Proposal ¶¶ 21-23 (June 20, 2007) ("Dawson Reply Declaration"), appended as Attachment A to Petitioners' Reply Comments, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (June 20, 2007) ("Petitioners' Reply Comments").

²⁶ See Petitioners' June 2008 Letter at 4-7 (summarizing comparable interstate inmate calling rates).

²⁷ Letter from Chuck Lange, Executive Director, Arkansas Sheriffs' Ass'n, to Marlene H. Dortch, Secretary, FCC, at 1, CC Docket No. 96-128 (Aug. 18, 2008) ("ASA Letter"); letter from James A. Gondles, Jr., Executive Director, American Correctional Ass'n, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (July 31, 2008) ("ACA Letter"); letter from Hal Turner, Executive Director, Louisiana Sheriffs' Ass'n, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (July 7, 2008) ("LSA Letter").

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which account for 80 percent of its client base.²⁸ Securus also asserts that many local and county jails experience significant interstate inmate calling traffic and argues that the state prison systems on which Petitioners' comparable rates analysis is based therefore are not representative of the facilities from which most interstate inmate calls are placed.²⁹

Jail jurisdictions with an average daily jail population of 1,000 or more inmates, however, accounted for over 50 percent of the U.S. jail population at midyear 2007.³⁰ Securus does not reveal whether the county facilities generating significant interstate calling traffic are among these larger -- and presumably lower cost -- systems. Similarly, Pay Tel does not reveal the range of jail facility sizes that it serves in arguing that the Proposal would be detrimental to providers primarily serving jail facilities.³¹ Securus' data thus is perfectly consistent with Petitioners' conclusion, based on consistent *service provider* data from different time periods, that the overwhelming bulk of interstate inmate calls are made from state prisons and other large confinement systems.³² In any event, the service providers' own Cost Study shows that even atypically low volume, high-cost correctional facilities exhibit cost characteristics consistent with Petitioners' requested benchmarks.³³

²⁸ Securus July 7 Letter at 2.

²⁹ *Id.* at 8. Securus' anecdotal assertions do not undermine Petitioners' characterization of the overall balance of inmate calling in different types of facilities. There may well be many local and county facilities originating a higher proportion of inmate calls that are interstate than is typical for such facilities, but, given the thousands of local and county facilities in the United States, that says nothing about the proportion of inmate calls from *all* local and county facilities that is interstate or how that proportion compares with the proportion of inmate calls from state prisons that is interstate. See Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics 2003* at 91, Table 1.98, available at <http://www.albany.edu/sourcebook/pdf/t198.pdf> (last visited July 28, 2008) (3376 jails in the U.S. in 1999).

³⁰ Bureau of Justice Statistics, U.S. Dept. of Justice, *Jail Inmates at Midyear 2007* (June 2008), available at <http://www.ojp.usdoj.gov/bjs/abstract/jim07.htm> (last visited July 28, 2008).

³¹ See Pay Tel July Letter.

³² Petitioners' Reply Comments at 15-16 & n.48 (Pay Tel Communications, Inc. 2005 data); Petitioners' June 2008 Letter at 10 (service provider trade association 2000 data).

³³ Based on its unproven assumptions that a significant proportion of inmate calling from small local facilities is interstate and that interstate service from those facilities will be provided at a loss under the requested benchmark rates, Securus argues that intrastate calls from those

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Securus also complains that Petitioners advocate inappropriate cross-subsidies from larger correctional facilities to smaller ones, citing an *Access Charge Reform Order*, a *Universal Service Order* and a *Payphone Order*.³⁴ In all of these cases, however, the Commission addressed subsidies of one type of service by another, not by larger to smaller customers of the same service.³⁵ Securus claims that it is not requesting ad hoc individualized pricing depending on the size of the served facility, but that is the end result of its cross-subsidy arguments.³⁶ Securus thus has not rebutted Petitioners' point that rates are developed to cover the average cost of serving large and small customers.³⁷ Again, the Cost Study moots Securus' arguments because it shows that even small, high-cost facilities exhibit cost characteristics consistent with the requested benchmark rates.

facilities will be required to recoup the cost of interstate calls. Securus July 7 Letter at 8. In fact, the subsidies appear to be flowing in the opposite direction, according to statements and data provided by the service providers, including one of Securus' predecessor firms, Evercom Systems. See Petitioners' June 2008 Letter at 10. Moreover, Securus' backwards subsidy flow theory implicitly assumes a service provider serving only small facilities and that the size of the facility is the sole determinant of cost. In reality, a typical service provider serves many facilities of different sizes and types, and service providers enjoy economies of scale that reduce costs for all facilities, independently of the sizes of the served facilities. Petitioners' Reply Comments at 16-17; Dawson Reply Declaration ¶¶ 21-23.

³⁴ Securus July 7 Letter at 9 (citing *Access Charge Reform*, 12 FCC Rcd 15982 (1997), *aff'd* *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ("*Access Charge Reform Order*"); *Federal-State Board on Universal Service*, 12 FCC Rcd 8776 (1997), *aff'd* *Alenco Communs., Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000) ("*Universal Service Order*"); and *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545 (1999), *aff'd* *American Pub. Communs. Council v. FCC*, 215 F.3d 51 (2000) ("*Payphone Order*").

³⁵ See *Access Charge Reform Order*, 12 FCC Rcd at 15985-90, 15994-96 (carriers using interstate access services to subsidize local retail services); *Universal Service Order*, 12 FCC Rcd at 8786 (removing implicit support for universal service from interstate access charges); *Payphone Order*, 14 FCC Rcd at 2570 (customers making coin calls should not have to subsidize dial-around calls).

³⁶ Securus July 7 Letter at 4.

³⁷ Petitioners' June 2008 Letter at 3.

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Arguments About Arbitrage Misstate The Facts.

The correctional associations argue that the imposition of the requested interstate benchmarks will induce inmates' families and other people receiving intrastate calls from prisoners to obtain prepaid wireless telephones or Voice over Internet Protocol ("VoIP") services with out-of-state numbers in order to have such calls rated as interstate.³⁸ Pay Tel echoes these arguments, focusing on inmate collect calling rates.³⁹ As Petitioners have explained previously, however, the opposite arbitrage is occurring now. Relatively low local inmate rates have driven out-of-state customers to use cell phones and VoIP phones with numbers that are local to the prison facilities from which they receive calls.⁴⁰ Moreover, Pay Tel previously argued that, even if the requested relief is granted, its average local inmate rates will still be 33 percent *below* the reduced interstate inmate rates, leaving the direction of current arbitrage incentives unchanged.⁴¹

State Policies Cannot Override the Command of the Communications Act.

Citing the Florida contract, Securus repeats the service providers' refrain that the market is working and that state policies should govern interstate inmate telecommunications rates.⁴² Embarq also repeats its argument that Petitioners are asking the Commission to "resolve a state political question, namely, at what rate should state correctional facilities permit inmates to make telephone calls."⁴³ As Petitioners have explained repeatedly, however, the "question" of "what rate should" apply to interstate inmate telephone calls is governed entirely by the "just and reasonable" rate mandate of Section 201(b) of the Communications Act and cannot be overridden by state policies or even statutes, such as the Texas law cited by Embarq.⁴⁴ The

³⁸ ACA Letter; LSA Letter; letter from Gwyn Smith-Ingley, Executive Director, American Jail Ass'n, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 2 (Aug. 15, 2008) ("AJA Letter").

³⁹ See Pay Tel Arbitrage Letter.

⁴⁰ Letter from Deborah M. Golden, Counsel to Petitioners, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 3 (Oct. 10, 2007) ("Golden Letter").

⁴¹ *Id.*

⁴² Securus July 7 Letter at 1-2.

⁴³ Embarq July 2008 Filing at 1.

⁴⁴ *Id.* at 2. See Petitioners' Reply Comments at 33-36 (states may not nullify federal statutes).

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Commission correctly found in the *Inmate Payphone Order* that the inmate calling service market has not worked to bring about lower rates,⁴⁵ and Section 201(b) has no exception for prison inmates. As the Maine Public Utilities Commission pointed out in a similar context, inmate service providers offer service “not simply to those incarcerated in [correctional] facilities but [also] to any member of the public who wants to communicate with them by telephone.”⁴⁶ State correctional authorities do not regulate the public’s use of interstate collect calling services.

Commission Payments Constitute Profit, Not A Cost Of Service.

Embarq also repeats the service providers’ argument that Petitioners are challenging the commission payments demanded by correctional authorities, rather than interstate inmate rates themselves.⁴⁷ Petitioners have repeatedly explained, however, that service providers would be free to agree to any level of commission payments, as long as their interstate inmate rates did not exceed the benchmarks. The benchmark rates might not allow for the payment of large commissions, but that result does not constitute the regulation of state correctional authorities, any more than “the Environmental Protection Agency regulates the automobile industry when it requires states and localities to comply with national ambient air quality standards.”⁴⁸

Securus continues to misread this Commission’s position on the commissions paid by inmate service providers to prison administrators and correctional authorities, insisting that they do not constitute a profit.⁴⁹ Securus argues that the Commission did not actually decide in the *Inmate Payphone Order* that these site commissions should be treated as profit, stating that this issue was put out for comment in the Notice of Proposed Rulemaking included in that order. Securus further argues that it would be

⁴⁵ *Inmate Payphone Order*, 17 FCC Rcd at 3253.

⁴⁶ *Barbara Pierce, et al. Request for Commission Investigation into Unjust, Unreasonable, Discriminatory Rates for Telephone Services Provided by the Maine Department of Corrections and Verizon*, Order at 26, Docket No. 2007-467 (Me. PUC, Aug. 1, 2008).

⁴⁷ Embarq July 2008 Filing at 1.

⁴⁸ *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (“no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects”) (quoted in Petitioners’ June 2008 Letter at 12). *See also* Petitioners’ Reply Comments at 36-39.

⁴⁹ Securus July 7 Letter at 2-4.

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improper for the Commission to conclude that inmate facility site commissions, which are “unavoidable and fixed,” should be treated as “location rents.”⁵⁰ In fact, the *Inmate Payphone Order* rejected the cost data submitted by the Inmate Calling Service Providers Coalition (“ICSPC”) underlying one of their requests that was partly based on the assumption that “commissions are properly treated as profit.”⁵¹ Securus studiously overlooks the Commission’s holding on this point, which states:

[W]e find the cost data deficient because ICSPC treats the commissions paid to the inmate facilities as costs rather than profits. As noted earlier, these commissions are location rents that are negotiable by contract with the facility owners and represent an apportionment of profits between the facility owners and the providers of the inmate payphone service. When the commissions are properly treated as profit, rather than as fixed costs, the result is that ICSPC claims a \$0.73 profit for each call that costs roughly \$1.00 to provide. . . .⁵²

Contrary to Securus’ characterization, the Notice of Proposed Rulemaking portion of the *Inmate Payphone Order* did not seek further comment on this holding or on its conclusion that inmate facility site commissions are anything other than “location rents,” *i.e.*, profit.⁵³

The quoted holding also rebuts Embarq’s argument that commissions should be treated as a cost, rather than a division of profit. Embarq insists that commissions constitute a cost because they cover correctional facility costs incurred in making it possible for inmates to have telephone service.⁵⁴ The correctional associations similarly suggest that imposition of the requested benchmark rates would deprive prison administrators of compensation for costs they incur in making payphones available to inmates or somehow force them to reduce inmates’ access to telephone services.⁵⁵ The

⁵⁰ *Id.* at 4.

⁵¹ *Inmate Payphone Order*, 17 FCC Rcd at 3262.

⁵² *Id.* at 3262-63.

⁵³ *Id.* at 3276; *see also id.* at 3275-79.

⁵⁴ Embarq July 2008 Filing at 2.

⁵⁵ ACA Letter; ASA Letter at 1; LSA Letter; AJA Letter at 2. The Louisiana Sheriffs’ Association (“LSA”) also asserts that requiring a debit or prepaid calling option would not be feasible for jails and other small facilities. LSA Letter. Given all of the examples in the record

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record in this proceeding, however, demonstrates that commissions are primarily used for purposes other than to defray prison administrators' costs incurred in making telephone services available to inmates.⁵⁶ Moreover, the bid-driven escalation in commission rates reflects a classic location monopoly rent extraction mechanism, rather than a true cost. Indeed, one of the reasons that the Commission denied the service providers' requested relief in the *Inmate Payphone Order* was that

[N]either a surcharge nor preemption of rate ceilings would necessarily increase an ICS provider's net revenue. The additional revenue stream likely would drive up the commissions offered by competing ICS providers to the confinement facilities, thereby keeping the ICS providers' net revenue flat.⁵⁷

This illustrates the perennial problem of monopolistic rents. . . . Monopolistic rents can occur whenever an owner has exclusive control of a resource, like inmate calling facilities.⁵⁸

If commissions represented a real cost, they would not rise in this manner to absorb whatever portion of total inmate calling revenue prison administrators demanded. The correctional associations also argue that a reduction in, or elimination of, commission payments will result in a reduction in programs that benefit inmates or increased funding needs.⁵⁹ Although funding correctional services "through proper appropriations channels may result in a greater drain on the government's finances, the

of inmate debit and prepaid calling offerings that require no time or resources of correctional staff, however, the source of LSA's concern is not clear. See Petitioners' Reply Comments at 27-29.

⁵⁶ See, e.g., Opposition of Embarq at 3-4, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (May 2, 2007) (listing inmate support programs funded by commissions with no mention of prison administrative costs) (cited in Petitioners' Reply Comments at 38-39 n.157).

⁵⁷ *Inmate Payphone Order*, 17 FCC Rcd at 3260.

⁵⁸ *Id.* at 3260 n.74.

⁵⁹ ACA Letter; ASA Letter at 2; letter from Jack Trotter, Inmate Welfare Services Unit, Glen Helen Rehabilitation Center, San Bernardino County Sheriff's Department, to Dana [Schaffer], CC Docket No. 96-128 (Oct. 7, 2008).

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responsibility for such [functions] does in fact rest with the government.”⁶⁰ There is no exception to the “just and reasonable” rate requirement in Section 201(b) of the Act for interstate telecommunications services used to subsidize beneficial programs.

The service providers also have not addressed Petitioners’ argument that, independently of the *Inmate Payphone Order*, any service rates that generate commissions of 30 to 65 percent are unreasonably excessive.⁶¹ The tremendous commissions paid by the service providers rebut Embarq’s claim that service providers are not receiving “unjust or unreasonable profits from inmate calling.”⁶²

Commercial Payphone Operator Service Rates Available To The General Public Are Irrelevant To A Comparable Rates Analysis Of Inmate Calling Rates.

Securus also takes exception to Petitioners’ reliance on the Commission’s finding that “inmates have none of the alternatives available to non-incarcerated payphone customers.”⁶³ Securus argues that, as a practical matter, many users of commercial payphone service do not have alternatives either and that commercial operator service rates may therefore be used as a point of comparison for inmate rates.⁶⁴ Particular end users’ economic circumstances, however, cannot be the basis for an economic analysis of competition. The Commission has acknowledged the theoretical existence of payphone “locational monopolies,” but “no party has [ever] accepted [the Commission’s] invitation” “to identify and request this Commission to regulate or otherwise remedy such locational monopolies.”⁶⁵ Unless and until the Commission takes such action, there is no basis to assume that operator service rates charged to the

⁶⁰ *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (enjoining the use of commissary funds to finance monitoring of inmate telephone calls).

⁶¹ Proposal at 22-23 (citing *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 12312, 12332 (2001) (defendant failed to explain how revenues from a “truly reasonable” charge “could profitably permit” commissions of up to 24 percent of gross revenues), *recon. denied*, 16 FCC Rcd 21750 (2001)).

⁶² Embarq July 2008 Filing at 1.

⁶³ *Inmate Payphone Order*, 17 FCC Rcd at 3253 (quoted in Petitioners’ June 2008 Letter at 8).

⁶⁴ Securus July 7 Letter at 5.

⁶⁵ *Implementation Order*, 19 FCC Rcd at 15647.

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general public for payphone calls provide an appropriate basis for a comparable rates analysis for interstate inmate calling rates.

Moreover, Securus has not attempted to rebut Petitioners' economic analysis concluding that there is no demonstrable relationship between the cost of commercial operator services and their rates, precluding their usefulness in a comparable rates analysis.⁶⁶ In any event, the service providers' Cost Study shows that inmate service costs are far below current payphone operator service rates.

**Any Relief In This Proceeding Should Address The Problem Of
Disconnected Inmate Calls.**

Securus expresses indignation over Petitioners' report of disconnected inmate calls and insists that such occurrences are "truly rare." Securus presents no data on the frequency of such problems, however, and its assurances thus cannot be taken seriously. The Commission has acknowledged the possibility that premature disconnections "have the unintended, and perhaps unnecessary, effect of increasing the costs incurred by inmates and their families."⁶⁷ Moreover, Pay Tel concedes that Petitioners raise a "legitimate issue."⁶⁸ A recent ex parte filing in this docket reports that a subsidiary of Global Tel*Link improperly disconnected inmate calls from Dade county jails for *seven years*.⁶⁹ Thus, these problems are ongoing and significant.

Based on its unproven conclusion that premature disconnections of inmate calls are rare, Securus argues that Petitioners have not made the case for usage-only charges for interstate calls.⁷⁰ Securus incorrectly asserts that, except in the case of prepaid calls from Indiana correctional facilities, "per-call charges are the norm for interstate inmate calling rates."⁷¹ In fact, Petitioners pointed out four other contracts in which there is

⁶⁶ See Petitioners' June 2008 Letter at 8.

⁶⁷ *Inmate Payphone Order*, 17 FCC Rcd at 3278.

⁶⁸ Pay Tel Oct. Letter at 2.

⁶⁹ Letter from Alex Friedman, Associate Editor, Prison Legal News, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 2 (Sept. 21, 2008).

⁷⁰ Securus July 7 Letter at 7-8.

⁷¹ *Id.* at 6. Securus claims to have been mystified by the rate information for one of its own contracts. It complains that the "rate change" in the case of prepaid calls from Indiana correctional facilities "was not evident from Petitioners' Exhibit 13." *Id.* at 6-7 n.4. In fact,
(Footnote Continued)

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also no per-call charge for inmate debit calling.⁷² The more typical reliance on usage-only rates for debit and prepaid inmate calling services undercuts Securus' argument that payphone fixed costs require inmate per-call charges.

There is also a disturbing pattern in the frequency of premature disconnections. They are much more common in the case of inmate collect calls, for which there is typically a per-call charge that can be repeatedly assessed each time a call is reinitiated, than in the case of inmate debit calls, which are more likely to have no per-call charge.⁷³ In light of this pattern, there should be no per-call charges for any interstate inmate calls, and, given the less typical use of per-call charges for inmate debit calling today, there is certainly no justification for per-call charges in the case of interstate inmate debit calling.

To address the problem of disconnected calls, Petitioners have recommended that, if the Commission ultimately decides to include a per-call charge option in an interstate inmate calling benchmark, it should also require that such a per-call charge be waived automatically -- *i.e.*, without requiring any application for refund or other action by the consumer -- for any collect call reinitiated by the same prisoner to the same number within two minutes of the end of the previous call.⁷⁴ Pay Tel raises an issue as

there was no "rate change." The absence of a per-call charge was quite "evident" from the last two pages of the referenced exhibit, which were appended to Petitioners' June 2008 Letter as Attachment A. The first page clearly addresses only "Inmate Collect Call[s]," and the second page, a letter from T-NETIX -- now part of Securus -- clearly states that the "rate for inmate prepaid is \$.25 a minute for all types of inmate prepaid calls," with no mention of the "call connect" charge assessed for collect calls. Petitioners' June 2008 Letter, Att. A.

Securus also seems to believe that the Indiana contract was amended to accommodate the prepaid rate. Securus July 7 Letter at 9. Contrary to Securus' confusion as to the chronology of its Indiana contract, the T-NETIX letter is dated April 9, 2001, four months before the original contract was executed. *Compare* Dawson Alternative Declaration, Exh. 13, at 15 (signature page of original Indiana contract), *with id.* at Exh. 13, App. 6 and letter from Arthur E. Heckel, Vice President - Sales, T-NETIX, Inc., to Shelley Harris, Indiana Department of Administration (April 9, 2001).

⁷² Petitioners' June 2008 Letter at 7 n. 35 (Federal Bureau of Prisons, Maryland and Missouri); Petitioners' Reply Comments at 9 (GEO Group contract to operate facility for Department of Homeland Security).

⁷³ Petitioners' Reply Comments at 23.

⁷⁴ *Id.*

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to possible abuse of such a requirement and suggests that it be qualified by a condition that the total duration of any such reinitiated call, including both portions of the call, not extend beyond the permitted length of the original call.⁷⁵ Petitioners believe that would be a reasonable limitation on any call reinitiated without a per-call charge.

If the Commission decides to include a per-call charge, the per-call and usage charges in that case also should be calibrated to generate the same total revenue as the requested benchmark per-minute rates for an interstate inmate call of average length, based on reliable call-length data.⁷⁶ Where the rules in a particular correctional facility establish a shorter permitted call length, the charges should be readjusted to generate the same total revenue as the requested benchmark rates for a call of the maximum permitted duration in that facility.

If The Commission Decides To Require Prepaid Calling As An Option In Place Of Debit Calling, Safeguards Are Necessary.

In response to service provider arguments that prepaid calling would be more appropriate in a correctional setting than debit calling, Petitioners described the abuses that often accompany the provision of prepaid inmate calling services and proposed safeguards in the event that the Commission required a prepaid calling option instead of debit calling.⁷⁷ Pay Tel argues that the requested safeguards are too stringent and insists that the costs of prepaid calling are significantly higher than debit calling costs.⁷⁸ Pay Tel's recitation of prepaid calling costs, however, appears to exaggerate those costs, relative to collect calling costs.

As Petitioners have pointed out, inmate prepaid rates typically are significantly lower than inmate collect rates and are some of the lowest inmate rates in the record. Moreover, usage-only prepaid rates are becoming more common.⁷⁹ That would not be possible if Pay Tel's exaggerated prepaid billing cost claims were accurate. Pay Tel does not have to set up a new billing system for every new prepaid account, anymore

⁷⁵ Pay Tel Oct. Letter at 3.

⁷⁶ Securus and Embarq assert that average inmate call length is about 12 minutes. Securus July 7 Letter at 6 (interstate calls); Embarq July 2008 Filing at 3.

⁷⁷ Petitioners' Reply Comments at 29-30.

⁷⁸ Pay Tel Oct. Letter at 3-4.

⁷⁹ Petitioners' June 2008 Letter at 4-7 & nn.20, 21, 26, 35.

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than it sets up a new billing system for every debit account. The fraud, uncollectibles and bad debt costs of prepaid calls are far less than those cost categories in the case of collect calls, simply because, as in the case of debit calls, the revenue is received before the call is made. Those cost savings far outweigh any increased prepaid billing costs, as shown by the low prepaid calling rates in the record.

In fact, as Consolidated Communications Public Services, Inc. (“CCPS”) noted, no per-call charge is necessary with a prepaid option, implicitly conceding that billing and collection costs are not a significant problem with prepaid accounts.⁸⁰ The only additional fees associated with prepaid accounts that could be considered legitimate are third-party fees assessed in connection with payment processing options chosen by the customer, such as Western Union fees or other electronic payment services. A minimum payment amount of \$25 or less to set up a prepaid account is also a reasonable requirement. Otherwise, however, inmate prepaid long distance rates should be no different from inmate debit long distance rates and should be governed by the same benchmark ultimately imposed by the Commission.

A One-Year Transition Would Be Sufficient.

Finally, Securus complains again about the one-year transition proposed by Petitioners to allow for the contract renegotiations necessary to accommodate the benchmark rates. Securus takes exception to what it characterizes as Petitioners’ “sweeping generalization that inmate telephone service contracts are ‘being renegotiated’ with lower rates soon after their initial execution.”⁸¹ Petitioners did not say “soon,” but, otherwise, Securus has the statement about right, except that Petitioners were quoting Public Communications Services, Inc. (“PCS”).⁸² PCS’s original statement was:

⁸⁰ Comments of Consolidated Communications Public Services Regarding the Alternative Rulemaking Proposal of Martha Wright, *et al.* at 13-16, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (May 2, 2007) (“CCPS Comments”) (billing and collection costs vary with number of calls).

⁸¹ Securus Letter at 9.

⁸² Petitioners’ June 2008 Letter at 12.

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With increasing frequency, DOCs are renegotiating terms after contracts have been awarded and requesting rate reductions in exchange for lower commissions.⁸³

Securus' quarrel is with fellow service provider, PCS. As Petitioners noted, waiver relief is available to any service provider demonstrating unusually burdensome circumstances.⁸⁴

Petitioners accordingly request that their Proposal be granted expeditiously. In accordance with Section 1.1206(b)(1) of the Commission's rules, a copy of this presentation is submitted for inclusion in the record of the above-captioned docket. Please do not hesitate to contact the undersigned with any questions or concerns about this letter or the issues discussed.

Very truly yours,

/s/ Frank W. Krogh
Frank W. Krogh

Counsel to Petitioners

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate
Amy E. Bender
Scott M. Deutchman
Scott K. Bergmann
Nick Alexander
Greg Orlando
Penny Y. Nance
Dana R. Schaffer
Albert Lewis
John Hunter

⁸³ Comments of Public Communications Services, Inc. at 3, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128 (May 1, 2007).

⁸⁴ Petitioners' June 2008 Letter at 12.

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Pamela Arluk
Lynne Engledow
Darryl Cooper
Douglas Galbi