

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Consolidated Communications Enterprise Services, Inc. d/b/a Consolidated Communications Public Services and d/b/a Consolidated Communications Network Services	:	
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	:	Docket No. 12-0413
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Verified Petition for Declaratory Ruling as to Applicability of Section 13-901 of the Public Utilities Act and 83 Ill. Admin. Code Part 770.	:	

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**REPLY BRIEF ON EXCEPTIONS OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission” or “ICC”) Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief On Exceptions. Staff recommends that the Commission enter the Administrative Law Judge’s Proposed Order, as written. In support thereof, Staff states as follows:

**I. PROCEDURAL HISTORY**

On October 23, 2012, the ALJ issued a Proposed Order on the Petition and set a November 7, 2012 deadline for the submission of briefs on exceptions (“BOE”), and a November 15, 2012 deadline for the submission of reply brief on exceptions (“RBOE”).

On October 26, 2012, Securus filed a Motion to Set a Discovery Schedule and to Continue deadlines for Briefing on Exceptions. In response, on October 29, 2012, the ALJ issued an Order allowing responses to the motion to be filed by November 2,

2012, and replies by November 7, 2012. The ALJ also extended the dates for filing BOE and RBOE to November 16, 2012 and November 28, 2012 in light of the pending motions, and stated that these dates would be revisited based on the outcome of the pending motion. Thereafter, Staff, the Petitioner and Securus filed their responses and reply to Securus' pending motion on November 1<sup>st</sup>, 2<sup>nd</sup>, and 7<sup>th</sup> respectively.

On November 13, 2012, the ALJ ruled on and denied Securus' Motion to Set a Discovery Schedule and to Continue deadlines for Briefing on Exceptions. (*Consolidated Communications*, Order November 13, 2012). The ALJ also ruled that the deadline for BOE and RBOE remain the same.

Subsequently, on November 16, 2012, the Petitioner and Securus' filed their BOE's. In response to Securus' BOE, on November 20, 2012, Staff filed a Motion to Strike Portions of Securus' BOE on the basis that Securus, in open defiance of the Commission Rules of Practice and the express directive of the ALJ, included pages of new, unsupported, untested alleged facts and conclusions drawn from these extra-record alleged facts, and failed to cite to the record for support, because none of the alleged new facts were in the evidentiary record. (See, Staff's Motion to Strike Portions of the Securus BOE, November 16, 2012). On November 21, 2012, the ALJ entered a briefing schedule on Staff's motion allowing time for response and reply to be filed, with a December 12, 2012 date for conclusion of all briefing. On the same day, Petitioner filed a motion requesting a shorter briefing schedule.

Securus filed its response in opposition to Consolidated's motion to shorten the briefing schedule on November 26, 2012. It also filed its' Verified Petition for

Interlocutory Review and Offer of Proof. Subsequently on November 26, 2012, the ALJ issued an order denying Consolidated's request to shorten the briefing schedule.

On December 18, 2012, the ALJ issued an order granting Staff's Motion to Strike Portions of Securus' BOE on the basis that Securus improperly included and relied upon facts and conclusions that are not in the record. The ALJ ordered that the portions of Securus' BOE identified in Staff's Motion to Strike and in Consolidated's response be stricken. Securus was given until December 20, 2012 to file a revised BOE and Exceptions.

On December 19, 2012, Securus' Verified Petition for Interlocutory Review and Offer of Proof went before the Commission, and was denied.

## **II. REPLY TO SECURUS EXCEPTIONS**

Staff has already addressed most of the valid issues Securus raises in its BOE. Staff will attempt to avoid restating what it already has stated. Thus, any argument that Staff does not specifically address is because Staff believes it has already addressed the issue or the alleged issue is simply not worth responding to. Taking Securus' exceptions out of order, Staff will first address its rulemaking argument.

### **A. The Proposed Order Properly Declares That The Operator Service Rates At Issue Are Subject To Section 13-901 Of The Act, And Sections 770.20(a) and 770.40 of Part 770**

Securus argues that the Commission can only declare that the services at issue in this declaratory ruling are subject to Section 13-901, and Parts 770.20(a) and 770.40 through the Administrative Procedures Act ("APA") rulemaking provisions. Securus cites to a few immaterial cases to support this position. The cases are not relevant because neither of the administrative agencies at issue in those cases acted under the

PUA or an authorizing statute like the PUA. Securus, in fact, ignores the PUA. The PUA, however, specifically addresses this issue. The General Assembly specifically stated that:

Any proceeding intended to lead to the establishment of policies, practices, rules or programs applicable to more than one utility may, in the Commission's discretion, be conducted pursuant to either rulemaking or contested case provisions, provided such choice is clearly indicated at the beginning of such proceeding and subsequently adhered to. No violation of this Section or the Illinois Administrative Procedure Act and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner or hearing examiner of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission in the absence of prejudice.

220 ILCS § 5/10-101

This is a declaratory ruling proceeding and was declared such at the inception of the case and subsequently adhered to. Moreover, Secures cannot claim that it is prejudiced because it agreed to the schedule and the process followed.

However, it is also worth noting that Staff will soon be informing the Commission (in an internal Biennial Code Part Review) that a formal rulemaking be opened to address Part 770, not only on the rate cap issue but a through review of the entire Part 770, including quality of service issues.

**B. The Proposed Order Is Entirely Consistent With The PUA And The Related Commission Rules**

Securus has identified a slight inconsistency between the Part 770 definition of “consumer” and certain substantive provisions of Part 770; such as Part 770.40(a)(1) and (a)(2). Securus, however, is putting form over substance.

It is clear that the "consumer" of inmate calling services is *not* the inmate. It is the member of the general public that pays for the service. The PO (at 16) accurately explains why a member of the general public must be the consumer:

Inmate calling services are provided through telephone equipment placed in restricted areas of the corrections facility, accessible to inmates. The inmates are allowed to use the telephone equipment only for pre-paid collect or post-paid collect calls with members of the public outside of the corrections facility. The calls are operator assisted; operator assistance is provided via an automated operating platform. The equipment used does not make a connection between the telephone used by the inmate and the telephone used by the other party until the other party has entered appropriate codes signifying acceptance of the call and responsibility for the charges. In order for the collect call between an inmate and a member of the public to occur, the responsibility to pay for the collect call, including the charges for operator assistance provided in connection with the call, must be accepted by a member of the general public at the outside telephone number.

To find that the inmate is the consumer would be akin to a child, at less than legal age, at a summer camp (before cell phones) instructed by a parent to call home collect once a week being the consumer instead of the parent, despite the fact that the child has no relationship with the service provider. The parent is the one with the relationship with the service provider; the parent is the one whom specifically "oks" or accepts the call; and it is the parent that pays the accumulated charges that are also billed to the parent.

In the situation of inmate calling services, the person, like the parent above, accepting the collect charges for the call is the person who is billed for the service and is also the person that specifically "oks" the call by entering the appropriate codes signifying acceptance of the call and responsibility for the charges. Thus, it is the member of the public that is the consumer not the inmate, which like the child, does nothing except initiate the call.

Moreover, where there is a slight discrepancy in a rule, the clear language of the authorizing statutory provision will control. As the PO implicitly recognizes, Section 13-901 does not use the word "initiate" to define the consumer but rather refers to the "user" to refer to the "consumer." 220 ILCS § 13-901(a). Consequently, to entirely hinge this case on the inadvertent misuse of one word would be to throw the baby out with the bath water, particularly when the controlling statutory provision does not employ the offending word.<sup>1</sup>

Finally, the Securus BOE implies that Staff has taken the position that the phones in the institution are "public." This is not true. Staff, however, has argued that the operator service rates applied to these calls, which are assessed to members of the general public, are subject to the rate caps. That is all the PO also declares. Securus' argument (at 6 & 7) that determining the operator service providers fall under Code Part 770 would require the use of alternative providers is not valid. Staff clearly stated in our filing that phones in correctional institutions are not "aggregator locations." The fact that they are not aggregator locations means that they do not have to allow equal access to alternative service providers. Specifically, in its Response to the Petition for Declaratory Ruling (at 7), Staff stated, after quoting extensively from Part 770.50(b), that

The purpose of this language is to specifically exempt mental health facilities and correctional institutions or facilities from those provisions imposed on aggregator locations. These locations are not required to allow equal access to alternate operator service providers, nor are they required to post information on the telephone device regarding the operator service provider.

Securus' argument that the PO is inconsistent with the PUA and existing rules, should, for the reasons noted above, be summarily dismissed.

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<sup>1</sup> Also, as noted above, Staff can address the use of the word "initiate" in the upcoming biennial review of Part 770.

**C. The Proposed Order Properly Addressed The Argument That Past Commission Precedent Precluded The PO's Conclusions**

Securus contends that past Commission precedent requires the conclusion that the services at issue in this proceeding are not regulated. In support of its position, Securus hurls unfounded and factually distorted accusations at Staff. For instance, Securus claims that: "There is no basis for the current Staff's arrogant suggestion that the ICC was unaware of how telephone calls initiated by inmates in correctional facilities were connect or billed." This statement appears to purposefully false as Staff never suggested any such thing as Commission ignorance. Staff, however, did argue that:

[T]hat the issue presented to the Commission by the Petition is whether these operator services *should be* regulated. This issue has not been addressed by the Commission.

Staff Response to the Petition, at 11.

Moreover, Securus simply will not accept the fact that Commission orders are not *res judicata*. The Illinois Supreme Court explained exactly why it is that the Commission orders are not *res judicata* back in 1953:

The commission, however, is not a judicial body, and its orders are not *res judicata* in later proceedings before it. The concept of public regulation includes of necessity the philosophy that the commission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding.

*Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill.2d 509, 513 (1953)(internal citations omitted).

The Commission must of necessity be free to deal with each situation as it comes before it, regardless of how it may have addressed previous situations. That is all that Staff has requested. The ALJ properly concluded that the situation presented her by

the Petition could, and should, address the issue of whether this type operator services *should be* regulated.

For all the reasons articulated above, Staff recommends that the Commission summarily ignore the Securus unfounded arguments and enter the Administrative Law Judge's Proposed Order, as written.

### III. CONCLUSION

For the reasons set forth *supra*, Staff respectfully requests that the Commission's Final Order in the instant proceeding reflect Staff's recommendations consistent with this Reply Brief On Exceptions and adopt the Administrative Law Judge's Proposed Order, as written.

Respectfully submitted,

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