

EXHIBIT 3

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Consolidated Communications Enterprise Services, Inc. d/b/a Consolidated Communications Public Services)	
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Securus Technologies, Inc.'s Verified Brief on Exceptions to Proposed Order.)	Docket 12-0413
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**SECURUS TECHNOLOGIES, INC.'S VERIFIED
BRIEF ON EXCEPTIONS TO PROPOSED ORDER**

Intervenor, Securus Technologies, Inc. ("Securus"), by its attorneys, pursuant to the direction set forth by the Administrative Law Judge ("ALJ") in her October 23, 2012 and October 29, 2012 notices to all parties of interest, and pursuant to Section 200.830 of the Illinois Commerce Commission's ("ICC" or "Commission") Rules of Practice, 83 Ill. Admin. Code 200.830, submits the following Verified Brief on Exceptions to the ALJ's Proposed Order issued October 23, 2012 ("PO").

Preliminary Statement

For decades, the ICC has issued orders repeatedly confirming that inmate-only telephone services are not subject to ICC regulation. The PO in this proceeding advocates a wholesale departure from that position in response to the Verified Petition for Declaratory Ruling ("Petition") of a disappointed bidder whose contract with the Illinois Department of Corrections ("IDOC") is now about to end. The findings in the PO are wrong, and Securus takes exception to those findings, for each of the following reasons: (1) Petitioner, Consolidated Communications Enterprise Services, Inc. d/b/a Consolidated Communications Public Services ("Consolidated"), lacks standing because it is not an "affected person" entitled to seek such relief; (2) the legal positions adopted in the PO are contrary to all of the legal authority on this

issue, including the applicable statutes and regulations as well as the orders and guidance of the Commission; (3) the PO impermissibly adopts a change in Commission policy without complying with the rulemaking process enumerated in the Illinois Administrative Procedures Act; and (4) the PO advocates this change on policy grounds that are unsubstantiated and, more critically, factually incorrect.¹ Accordingly, Securus requests that the ALJ adopt the exceptions set forth in Securus Technologies, Inc.'s Exceptions to Proposed Order, appended hereto, in their entirety and amend the Proposed Order in accordance with the same for submission to the Commission.

I. The ALJ Should Recommend That The Commission Dismiss The Petition Or Decline To Issue A Ruling Because Consolidated Is Not An "Affected" Person.

Under Section 200.220(a) of the ICC's Rules of Practice, only an "affected person" is entitled to request a declaratory ruling. The PO concludes that Consolidated is an "affected person" because the "award of the [IDOC] [C]ontract is being litigated" and because Consolidated would like to know whether "in the future" charging rates for inmate calling services higher than the rates provided in Part 770 of Title 83 of the Illinois Administrative Code ("Code") would be a violation of Commission rules. (PO at 15.) The record demonstrates that neither conclusion has any merit.

As an initial matter, and as Consolidated concedes, its bid protest complaint filed in the Circuit Court of Sangamon County challenging the award of the IDOC Contract was dismissed

¹ The position that the current policy will result in exorbitant charges to consumers, first asserted in Staff's response to the Petition ("Staff's Response"), has no factual support in the record. It is, instead, mere supposition by Staff of the outcome of bidding processes for revenue generating contracts. Moreover, substantial factual evidence exists which demonstrates that Staff's position is factually incorrect, as addressed more fully below. When Securus sought to obtain discovery on what, if anything, Staff did in the way of investigating or analyzing the validity of these assumptions, the ALJ refused to set a discovery schedule and instead insisted that the parties proceed with briefing on exceptions.

with prejudice, based, in part, on the fact that Consolidated had no standing to sue. Securus has already entered into its contract with IDOC and the transition process has already begun. Thus, even if the Commission were to grant Consolidated's Petition at some point in the future, any such order would have no bearing on the litigation or IDOC's current contract with Securus. *See Pressed Steel Car Company v. Lyons*, 129 N.E.2d 765 (Ill. 1955) (refusing to apply new tax regulation to contractual relationship entered into on the basis of the prior, then-existing regulations); *Davies v. Arthur Murray*, 260 N.E.2d 240 (Ill. App. 1970) (plaintiff could not rely on an FTC order to avoid a contract as allegedly violative of FTC order that did not become effective until after the contract was formed).

Moreover, Consolidated's assertion that it wishes to know "in the future" whether the rate caps apply is completely inconsistent with the very premise of its Petition. The Petition argues that the Commission is not bound by its own orders and can (and according to Consolidated, should) change its mind on this issue at Consolidated's whim. Because the IDOC Contract runs for a period of three years (not including extensions) under Consolidated's view, any order issued in the near future would be of no force or effect the next time Consolidated can bid on the IDOC Contract in any event. Further, Consolidated has no standing to seek an advisory opinion about some future event. At this point, it is abundantly clear that the Petition is merely a litigation tactic.

Accordingly, based on the above reasons, the ALJ should recommend that the Commission either dismiss the Petition on the grounds that Consolidated is not an "affected person" within the meaning of Section 200.220(a) or that the Commission exercise its discretion under Section 200.220 in declining to issue a ruling.

II. The Proposed Order Is Inconsistent With All Applicable Authority On The Issue.

A. The Proposed Order Is Contrary To The Public Utilities Act And The ICC's Related Regulations.

In the Petition, Consolidated requested that the ICC make a finding that services that enable inmates in IDOC facilities to initiate telephone calls to members of the public are "operator services" provided to the general public as defined in Section 13-901(a)(3) of the PUA and are therefore subject to Part 770 of Title 83 of the Code. In the PO, the ALJ granted Consolidated's Petition and found that the provision of inmate calling services constitutes "operator services" provided to the general public. Securus takes exception to this finding.

Section 13-901(a)(3) of the PUA (adopted verbatim in Chapter 83, Section 770.10 of the Code) defines "operator services."

"Operator services" means any telecommunications service that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call between points within this State that are specified by the user through a method other than: (A) automatic completion with billing to the telephone from which the call originated; (B) completion through an access code or a proprietary account number used by the consumer, with billing to an account previously established with the carrier by the consumer; or (C) completion in association with directory assistance services.

(emphasis added).

The Code defines "consumer" as the "person initiating any intrastate telephone call using operator services." 83 Ill. Adm. Code § 770.10. The regulations under Section 770, including the definition of "operator services," are applicable only to these "consumers" who initiate calls. Neither the PUA nor the Code imposes any regulations based upon the recipient of a telephone call.

With respect to the inmate telephone calls at issue, it is undisputed that it is always the inmate who both initiates the call and specifies the points between which the call is made. Therefore, by definition, the inmates of the IDOC facilities are the "consumers" and "users" to

whom these telephonic services are provided. 83 Ill. Adm. Code § 770.10. The services are thus provided to the inmates, not to members of the general public. This fact is reflected in the State's Invitation for Bids ("Invitation") to which both Securus and Consolidated responded. That Invitation states that "the primary intent of the [Inmate Phone] System is to establish management of Inmate telephone privileges as an effective management tool for DOC and DJJ." (Ex. A at 3 § 2.2.1 (emphasis added).)² The system is aimed at providing "a means for managing the calling pattern of Inmates, tracing abuse and harassment calls to the originator, and restricting calls to specific locations and telephone numbers through [a PIN] system." (*Id.* at 3 § 2.2.) The system is not intended to provide a service to the general public and is therefore not subject to regulation under the Public Utilities Act.³ Moreover, the very restrictions on billings and charges that Consolidated hopes to impose under Section 770.40 relate only to bills and charges to "consumers" who initiate telephone calls.⁴ Inmates neither select their providers nor pay the charges associated with the calls they make, and therefore Section 770 was not intended to regulate the provision of telephone services to such inmates.

However, the ALJ found that "the operator services provided with these inmate calling services are provided to members of the general public" and not to inmates. (PO at 16.) The

² All Exhibits cited herein are included in Appendix 1, attached hereto. Appendix 2 is a red-lined version of the revisions made by Securus to the PO. Appendix 3 is a clean copy of the revised Proposed Order which Securus requests that the ALJ submit to the Commission.

³ The inmate calling services are, in essence, provided to the State of Illinois as sovereign. The State could, of course, elect to provide the phone services itself, but it elects to outsource this function. Still, the State is the ultimate provider of the services and controls the conditions under which those in its custody can access the phone systems.

⁴ That section requires that "Consumers shall be billed within one year after the date the service was provided" (§ 770.40(a)(1)), that the operator service provider "shall be identified on the consumer's bill" (§ 770.40(a)(2)), and that "consumers" are entitled to certain refunds (§ 770.40(a)(3)).

ALJ appears to have accepted Consolidated's argument that a member of the public who receives a call from an inmate, not the inmate who makes the call, is the "customer" who "initiates" the call because the member of the public must accept the call before a connection is finalized. However, this turns the meaning of the word "initiate" on its head. To "initiate" a call is "to set [the call] going by taking the first step." *American Heritage College Dictionary*, Third Edition (1997). The first step of the calls at issue involves the inmate selecting the member of the public to call and placing the call.⁵ The final step is when the member of the public accepts the call. In fact, the Invitation for Bids itself acknowledges that the inmates are the "originator[s]" of these calls. (Ex. A at 3 § 2.2.) The ALJ's finding that the inmate who initiates the call is not the "consumer" under Section 770.10 is clearly erroneous.

The ALJ also appears to have accepted Staff's argument that the exclusion of non-public areas of correctional institutions from the requirements for "aggregator locations" in Section 770.50(b) of the Code somehow suggests that the remainder of Section 770 applies to the provision of telephonic services to inmates. However, the express exclusion of non-public prison phones in one portion of Section 770 does not mean that such phones were intended to be regulated by the remainder of Section 770. To the contrary, where the Code referenced non-public telephones in correctional institutions, it consistently states that they are not subject to regulation. *See* 83 Ill. Adm. Code §§ 770.50(b), 771.100(b)(2).

If the Commission determines that providers of inmate-only calling services are "operator service providers" under Section 770 of the Code and Section 13-901 of the Act it will not simply subject these providers to the rate caps of Section 770.40, it will impose a host of new duties upon these providers under the Code and will require a fundamental restructuring of the

⁵ There is no dispute that a member of the general public cannot make a call to an inmate.

nature of these services. For example, while inmates presently "do not have the option to use alternative providers" (PO at 17), this must change if the providers are considered "operator services providers." Under Section 770.30, an "operator service provider shall ensure that any of its equipment allows the consumer to use equal access codes to obtain access . . . to the consumer's desired provider of operator services."⁶ In other words, if the PO findings are adopted, inmates must be granted access to unsecure providers that do not have the unique security systems required by correctional facilities.⁷ If the PO findings are adopted, providers of inmate services will be required to make certain disclosures to the inmates regarding rates and provide a dispute resolution mechanism for disputed charges. (Code Section 770.20(a)(3).) Further, under Section 13-901(b)(6), operator services providers may be subject to certain tariffs. In other words, the implications of designating providers of inmate calling services as "operator services providers" would be far more substantial and intrusive than simply imposing new rate caps upon the providers.

B. Prior Orders Of The ICC Have Long Established That Inmate Calling Services Not Accessible To The Public Are Exempt.

In decisions spanning nearly three decades, the ICC has consistently viewed inmate-only telephone services to be exempt from regulation. In 1986, in *Illinois Bell Telephone Company*,

⁶ Because Section 770.30 applies to aggregators and operator service providers, inmate-only telephone service would be covered not as an aggregator but as an operator service provider under the findings in the PO.

⁷ These requirements that the PO, at Consolidated's request, seeks to impose upon the State Correctional System directly interfere with the Sovereign's obligations to provide a secure correctional facility to fulfill its statutory mission. Such an intrusion into the nature and administration of prison telephone systems is unwarranted, and even federal courts have recognized that the "exact nature of telephone services to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions." *Carter v. O'Sullivan*, 924 F.Supp.903, 909 (C.D. Ill. 1996) ("The courts generally do not interfere with such prison administrative matters in the absence of constitutional concerns.")

ICC Docket No. 84-0442, the ICC held that “to read into the definition of telecommunications carrier a legislative intent to include those entities providing telecommunications service other than for public use is not supportable or convincing.” (Ex. B at 4.) In *Tele-Matic Corporation Application for Authorization to provide Services on an Interexchange Basis*, ICC Docket No. 94-0093, the Commission relied on its order in *Illinois Bell* in concluding that providers of telecommunication services for correctional facilities “that do not locate pay telephones in public areas are not public utilities and *are not subject to Commission regulation with respect to the service.*” (Ex. C at 1.)

The ICC’s June 5, 1996 Order in *Inmate Communications Corporation*, ICC Docket No. 96-0131, reiterated this view:

Prisoners of detention and correctional facilities are not members of the public and the telephones located in non-public areas are not accessible to or used by a large number of the general public. For these reasons, an Applicant providing these telephone services would not be a public utility or telecommunications carrier under Section 13-202 of the Public Utilities Act with respect to these phones, even though it may be considered to be reselling telecommunications services.

Similarly, the Commission considers operator services associated with the provision of non-public telephones in correctional institutions to be exempt from the operator service requirements of 83 Ill. Adm. Code 770.

(Ex. D at 1.) Accordingly, the ICC found that no Commission action was required with respect to the inmate-only telecommunications services.

In *Infinity Networks, Inc.*, ICC Docket No. 05-0429, the ICC again confirmed that pay telephones for use by inmates of correctional and other confinement facilities are for “private use,” concluding that providers of such services were not subject to certification requirements in the Public Utilities Act. (Ex. E at 4.) In doing so, the Commission acknowledged that in certain cases in the past, it had granted certificates of authority to providers of inmate-only services without appropriately determining whether the provider’s services would be for public use. (*Id.*)

The Commission went on to explain that, as a result, it may have issued certificates of authority to providers that only offered service available to inmates and that in doing so it had *exceeded its authority*. (*Id.*) The Commission went on to reaffirm its decision in *Inmate Communications Corporation* and to specify that “[t]hese principles will guide all subsequent proceedings before this Commission.” (*Id.*)⁸ The Commission’s decision to specify that its order was to guide “all subsequent proceedings before this Commission” was likely a product in part of Staff’s invitation in those proceedings to ensure consistent treatment of inmate-only telephone services. As Staff recognized in *Infinity Networks*, “participants in the inmate payphone services industry have a right to expect a consistent regulatory policy in this area.” (Ex. F, ¶ 3 (emphasis added).)

The Commission Analysis and Conclusion set forth in the PO does not identify a single order from the Commission supporting its new view on regulation of inmate-only telephone services and makes only a weak attempt to address the litany of contrary authority. The PO disregards all but the ICC’s Order in *Inmate Communications Corporation*, and it does so only by conclusorily asserting that that Order does not contain any analysis of the PUA, Commission rules or the “nature of the operator services provided in connection with the inmate payphone services.” (PO at 16.) The PO suggests that this case is somehow different because the Commission was, apparently, previously unaware of the “nature of the operator services included in inmate calling services.” (*Id.*) There is no basis for the current Staff’s arrogant suggestion that the ICC was previously unaware of how telephone calls initiated by inmates in correctional facilities were connected or billed. In fact, this assertion is blatantly incorrect, because the

⁸ Technologies Management, Inc. (“TMI”), a leading national telecommunications carriers’ consulting firm specializing in state and Federal regulatory matters, appears to have taken the Commission at its word. In each of the three publications Securus received from TMI effective in January, May and October 2012, addressing, state-by-state, the rates and charges applicable to inmate telephone services, Illinois is identified as having no applicable certification requirements or rate caps—as reaffirmed in *Infinity Networks*.

Commission's Order specifically recounts that Inmate Communications' services were—as here—set up so that recipients of inmate calls that agreed to accept the charges were billed for the call. (Ex. D at 1.)

Furthermore, in *Infinity Networks*, where the Commission subsequently *reaffirmed* its Order in *Inmate Communication Corporation*, the petitioner provided a detailed description of its inmate services leaving no doubt as to the “nature” of services provided. (*See* Ex. E at 7.) Despite the express direction of the Commission that the principles enumerated in its decision are to guide “all subsequent proceedings before the Commission,” the PO makes no attempt to address this glaring inconsistency. Neither does Staff. Consolidated simplistically asserts that *Infinity Networks* is not on point because it does not specifically address Consolidated's particular request that providers of inmate-only telephone services now be deemed “operator service providers” subject to the surcharge maximums contained in Section 770.40 of the Code. However, the Commission has repeatedly pronounced that inmate-only telephone services are not subject to any regulation (not, as Staff suggests, that the services are merely exempt from certification requirements).⁹

Ultimately, it appears that the PO simply disavows the consistent interpretation reflected in Commission Orders spanning nearly three decades by insisting that the Commission is not bound by *res judicata*. This position ignores the Commission's consistent reference to its prior orders in addressing the subject generally, not to mention the Commission's explicit directive that its order in *Infinity Networks* is to guide “all subsequent proceedings” before the Commission. Furthermore, the fact that the legislature has not promulgated an amendment to address the issue over the nearly thirty years in which the Commission has consistently and

⁹ The Commission may have recognized that a contrary reading would interfere with the State's sovereign responsibility to provide a secure and effective correctional institution.

continuously employed this interpretation indicates that the legislature fully acquiesces in this construction. *See, e.g., People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 53 (2002) (lack of legislative intervention over course of 17 years constituted “a clear indication that the General Assembly fully acquiesce[d] in that construction”). In fact, as the United States Supreme Court recently reiterated, this type of sudden change in interpretation is viewed with skepticism by the courts. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2166 (2012) (agency’s interpretation of its regulations is not entitled to deference when it conflicts with prior interpretations or does not reflect the agency’s fair and considered judgment on the matter).

III. The ICC Must Promulgate A Rule To Change Its Policy Toward Inmate Calling Services.

The Illinois Administrative Procedure Act, 5 ILCS 100, *et. seq.* (the “IAPA”), defines a “rule” as “each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy. 5 ILCS 100/1-70. The IAPA “requires all agency rules be promulgated, *i.e.*, made available for public inspection and filed with the Secretary of State.” *Walk v. Illinois Dept. of Children and Family Services*, 399 Ill. App. 3d 1174, 1184 (4th Dist. 2010); 5 ILCS 100/5-10. The IAPA sets forth the requisite steps of the rulemaking process. First, the agency must provide at least 45 days’ notice (*i.e.*, the “first notice period”) of its intended action/proposed rulemaking to the public. *See* 5 ILCS 100/5-40(b). During the first notice period, the agency must accept and consider comments about its intended action/proposed rulemaking from the public. *Id.* Under certain circumstances, the agency must hold a public hearing on the intended action/proposed rulemaking. *Id.* Second, the agency must provide notice of the intended action/proposed rulemaking to the Joint Committee on Administrative Rules (*i.e.*, the “second notice period”). *See* 5 ILCS 100/5-40(c). During the second notice

period, the Joint Committee on Administrative Rules may offer suggestions or objections regarding the intended action/proposed rulemaking. *Id.* Finally, after the Joint Committee on Administrative Rules examines the intended action/proposed rulemaking (or after the second notice period expires), the agency must file a certified copy of the rule with the Secretary of State in order to effectuate the rule. *See* 5 ILCS 100/5-40(d). "Rules not properly promulgated are invalid, not effective against any person or entity, and 'may not be invoked by an administrative agency for any purpose.'" *Walk*, 399 Ill. App. 3d at 1184.

The PO declares, on behalf of the ICC Staff, that "an entity providing telephone calling services accessible to inmates of corrections facilities that include operator services as described [in the PO] is subject to Section 13-901 of PUA Sections 770.20(a) and 770.40 of Part 770." (PO at 18 (emphasis added).) This finding is a statement that would be generally applicable to all providers of inmate-only calling services. These providers are non-governmental entities which contract with the State to provide the technology and services needed for inmates in Illinois prisons to initiate calls to persons outside of the prison. It is also a prescription that all such providers of inmate calling services are subject to certain regulations. Consequently, the finding is a "rule" under the IAPA. *See* 5 ILCS 100/1-70 (a "rule" is "each agency statement of general applicability that . . . prescribes policy"). If the finding (i.e., "rule") is not promulgated as a rule, it will be invalid and not effective against any person or entity. *Walk*, 399 Ill.App.3d at 1184, 926 N.E.2d at 782.

The IAPA lists certain statements that are not considered "rules." These statements include: "(i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription

of standardized forms, (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act, or (vi) guidance documents prepared by the Illinois Environmental Protection Agency under Section 39.5 or subsection (s) of Section 39 of the Environmental Protection Act. 5 ILCS 100/1-70. None of these exceptions apply to the finding in the PO. Moreover, the finding is purportedly made pursuant to ICC Rule of Practice 200.220, which does not create an independent exception to the definition of "rule" for findings made in declaratory rulings. *See* 83 Ill. Admin. Code 200.220 ("the [ICC] may . . . issue a declaratory ruling with respect to the applicability of any statutory provision enforced by the [ICC] or of any [ICC] rule *to the person(s) requesting the declaratory ruling.*") (emphasis added).

As set forth above, the ICC has a clear policy regarding the applicability of the operator services requirements of Part 770 to providers of inmate calling services. (*See supra* § II.B.) The ICC cannot effectively change this policy through a declaratory ruling because such an action circumvents the requisite rulemaking process. As addressed in Section IV, *infra*, a change in this policy involves significant economic considerations that clearly have not been considered, let alone analyzed, by Staff or the ALJ. This is exactly the type of issue that the rulemaking process (and not a declaratory proceeding) was intended to address. Consequently, the finding in the PO will not be effective against any person or entity. *Walk*, 399 Ill.App.3d at 1184, 926 N.E.2d at 782; *see also Senn Park Nursing Center v. Miller*, 104 Ill.2d 169, 179, 470 N.E.2d 1029, 1034 (1984) (when no exceptions are contained within the definitional section of "rule," an agency must follow established rulemaking procedures).

The PO also expressly acknowledges that the petitioner requested the declaratory ruling "so that it may know whether, in the future, charging rates higher than allowed in Part 770 for

inmate calling services would be a violation of Part 770 of the [ICC] rules.” (PO at 15.) The PO’s purported applicability to future action also inappropriately expands the scope of the ICC’s declaratory ruling powers. *See Resource Tech. Corp. v. Commonwealth Edison Co.*, 343 Ill.App.3d 36, 43-44, 795 N.E.2d 936, 941 (1st Dist. 2003) (rejecting the ICC’s argument that 83 Ill. Admin. Code § 200.220 grants it power to issue declaratory rulings each time a petitioner requests the ICC’s “view of statutory application” because providing the ICC with such power “goes too far”); *see also Harrisonville Telephone Co. v. Illinois Commerce Com’n*, 176 Ill.App.3d 389, 393, 531 N.E.2d 43, 45 (5th Dist. 1988) (vacating a portion of a declaratory ruling that purported to direct certain compliance from a company in future projects because the portion of the order was not “required to determine the correlative rights and duties of the parties before the [ICC]”). As in *Resource Technology* and *Harrisonville*, the finding in the PO is intended to provide the ICC’s view of statutory application and give future guidance to providers of inmate calling services. (See PO at 18.) That policy change and future guidance are not properly made through a declaratory ruling.

III. The PO’s Assertion That Inmate-Only Telephone Services *Should Be Regulated Is Factually Unfounded.*

Despite consistent Commission authority finding that inmate-only telephone services must not be regulated, Staff, at Consolidated’s request, now seeks to substitute its and Consolidated’s judgment for that of the Commission. The PO essentially acknowledges its departure from prior Commission authority by asserting that, as a policy matter, the provision of inmate-only telephone services should now be subject to ICC regulation, including the rate surcharge maximums set forth in Section 770.40. (PO at 16-17.) In doing so, the PO adopts the assertion of Staff that the industry “cries out for regulation.” (PO at 13, 16.) The purported “facts” offered by Staff in support of its conclusion, and as adopted in the PO, are nothing more

than a 1985 quote from Charles F. Phillips, Jr., and a conclusory assertion that the bidding process for the IDOC Contract will inherently yield "exorbitant rates" and "irrationally inflated prices" to the detriment of the "general public." (PO at 13-15.) Staff's conclusion is based solely on the assertion that such must be the result when a bidding process on a revenue generating contract involves the payment of commissions.¹⁰ First, this argument ignores the fact that equipment used for inmates in correctional facilities must meet far more technologically sophisticated requirements—at far greater expense—than comparable public access payphones. As such, higher rates for these services, as opposed to public payphone services, are not "irrational." Second, and perhaps more significantly, the bidding process for the IDOC Contract that the PO derides will actually *reduce* the average cost per call paid by IDOC inmates based on current data. Thus, contrary to the PO's assumption, competition during the bidding process has *not* yielded "exorbitant rates."

A. The Technical Requirements Imposed By IDOC For Inmate Telephones Increase The Expense Of Providing Such Service.

The PO makes much of the fact that the parties do not dispute the general facts contained in the Petition laying out the basic mechanics of how Consolidated's equipment allows an inmate to place a call to someone outside a correctional facility and how Consolidated bills calls placed

¹⁰ Again, neither the PO or the Staff Response that it adopts offer any factual support for this assertion. In Securus' experience, this is, in fact, not the case. On a national scale, Securus has found a wide variance in call rates that has no relationship to the payment of fees or commissions. For example, Maryland legislatively mandates commission payments for inmate-only telephone services and Maryland's Public Service Commission does not impose a regulatory rate cap. Nevertheless, the local call rate in facilities operated by the Maryland Department of Corrections is a flat \$0.85 and many county facilities have a local call rate of \$0.90. In-state long distance calls for Maryland DOC inmates typically range between \$3.00 and \$4.00 for a 15 minute call. Virginia is another good example, where commission payments are not prohibited and inmate-only telephone services are not rate capped, yet the standard local call cost is approximately \$1.50 and the standard in-state long distance call cost is approximately \$3.00 for a 15 minute call. These only a few of the available examples outside of Illinois that further demonstrate the factual inaccuracy of the PO's assumption in this respect.

by inmates on its equipment. (PO at 16.) This process is nothing new—the basic description set forth in the Petition is similar to that described in Infinity Networks, Inc.’s Application to the Commission and to the process described by the Commission in its Order in *Inmate Communications Corporation* (and undoubtedly, countless other ICC filings and order). Neither decision supports the position adopted in the PO. Nevertheless, the PO concludes as a policy matter that regulation of inmate-only telephone services is necessary to avoid exorbitant rates, and a general overview of the logistics by which an inmate places a call are irrelevant to analyzing whether the rates charged for inmate-only telephone services are exorbitant, uneconomical or irrationally inflated.¹¹ Thus, the “undisputed facts” in the Petition do not address the conclusory and highly disputed facts first raised in Staff’s Response.

Inmate telephone services require far more technologically advanced equipment than that required for public access payphones. IDOC has an extensive list of technical requirements with which telephones for the use of inmates must comply:

- The equipment must require the use of unique authorization codes for each inmate (“PIN”) to which up to twenty telephone numbers will be associated that will be allowed calls the particular inmate can place.
- The equipment must have an alert function in place that can provide an alert, by email, dial out to a number, audio or visual alert on a personal computer or otherwise, to provide notification when a call is made by a specified PIN or to a specified telephone number.
- The equipment must allow for unlimited secure, remote DOC access to the administration and management system put in place to provide the foregoing,

¹¹ In light of the fact that the PO takes the position that such sweeping policy change can be effected through a single declaratory ruling (rather than through the proper procedures for rule making, as set forth above), the ALJ should, at a minimum, have allowed discovery on these issues to develop a complete record for consideration. Despite the absence of *any* facts suggesting that a quick decision is needed or that the addition of several weeks for discovery will have any impact (indeed, Securus argued that it will not), the ALJ refused to allow discovery into such matters—matters that Staff did not claim to be irrelevant or immaterial.

allowing DOC to assign or change security codes, view call records, generate reports, monitor live conversations, and search, retrieve and play recorded calls.

- The equipment must be capable of simultaneously recording all lines and allowing access to the data and recordings from selected locations as specified by the DOC; the equipment must be capable of generating reports regarding call processing; and the call detail must be searchable and sorted by all collected data, including but not limited to inmate name and/or ID number, called number, start and end times, site, station name and ID number, call duration and alerts.
- The equipment must allow authorized staff to monitor ongoing-calls via an internet browser; and the equipment must also be capable of allowing unmonitored or unrecorded calls and hiding recordings and call data from selected users or from anyone other than selected users.
- The equipment must be able to detect a third party transfer by the called party, immediately disconnect upon detection, and provide a recording or other notification to the called party identifying the reason for the disconnection.
- The equipment must provide a means for preventing fraudulent call transfers other than by hook switch detention as set forth above.
- The equipment must allow the called party the capability of blocking unwanted calls at their instrument's keypad.
- The equipment must provide automated service that is available seven days per week, twenty-four hours per day and that is available in English and Spanish.
- The equipment must provide an announcement to the called party specifying that the call is from a correctional facility and identifying the specific name of the inmate and the correctional facility, and acceptance of the call must be through positive acceptance with the exception of specified numbers through which passive acceptance is allowed by administrators.
- The equipment must provide a message to the calling inmate for any incomplete collect call identifying the specific reason the call was not completed.
- The equipment must limit calls to one call per connection and disable or otherwise restrict the hook switch and dial pad upon completion of dialing.
- The equipment must allow DOC to specify alternate parameters on specified numbers for investigative purposes.
- The equipment must restrict service to outgoing calls only.
- The equipment must have the capability to restrict the length of calls, to allow such length to be set individually by facility, to provide a warning tone or

announcement prior to the conclusion of the designated length of time, and to automatically terminate at the conclusion of the designated length of time.

- The equipment must allow for each institution to impose restrictions on the hours of the day within which inmates are permitted to place calls.
- The equipment must have the capability to restrict the number of connected calls a particular inmate can make during a variable interval of time (*i.e.*, one completed call per month, three completed calls per month, etc.).

These and other requirements imposed by IDOC are designed to address issues unique to correctional institutions and are neither necessary nor, in many cases, appropriate for use on public payphones. For example, calling services provided to inmates must allow call blocking of specified numbers to ensure that judges, prosecutors, victims and other witnesses are kept safe. For similar reasons, inmate telephone systems must be able to prevent call forwarding or third-party conferencing that would allow an inmate to circumvent blocks on specified numbers or would otherwise prevent corrections authorities from knowing the identity of a third party on the call. These and numerous other technical requirements are designed to ensure a safe calling environment and prevent inmate telephone usage from serving as a means for committing criminal acts or endangering inmate security or the public safety.

B. The IDOC Bidding Process Targeted In The PO Has *Lowered* Rates For Inmate Calling Services.

While the expense associated with the technological requirements for inmate-only telephone services is greater than that associated with standard, public access payphones, advances in technology in this area and greater competition among providers have led to lower calling prices for inmates and their friends and family. The PO, and the Staff's Response position it adopts, asserts that regulation of inmate-only telephone services is needed to provide "all telecommunications services . . . to all Illinois citizens at just, reasonable, and affordable rates . . ." (PO at 16.) This conclusion appears to be based on the assumption that a market

utilizing a bidding process for revenue generating contracts involving the payment of a commission to the State "is not a competitive market" and that the winning bidder "will then charge exorbitant rates to ensure that its winning bid is financially beneficial," purportedly forcing "distressed consumers . . . to pay the uneconomical and irrationally inflated prices this peculiar bidding process invites." (PO at 15, 16.) However, IDOC's most recent round of bidding provides ample evidence of the *cost savings* achieved for friends and family of inmates at IDOC facilities. Data obtained by Securus to date demonstrates that the IDOC bidding process complained of in the PO and in Staff's Response has yielded a winning bid that is going to *decrease* the average rates currently paid per inmate call and will ensure average rates *below* the total charges permitted under Section 770.40 as well as those publicized by carriers for standard public access payphones.

In response to a request under the Freedom of Information Act, Securus has obtained IDOC records reflecting monthly computations of number of calls, length of calls and revenue generated (*i.e.*, amounts charged by Consolidated) for inmate calls for the months of May, June and July 2012. (*See Ex. E.*) This data reflects that in May 2012, the average revenue generated per call was \$5.72 and that the calls lasted an average of 16.41 minutes per call; in June 2012, the average revenue generated per call was \$5.70 and that the calls lasted an average of 16.38 minutes per call; and in July 2012, the average revenue generated per call was \$5.71 and that the calls lasted an average of 16.35 minutes per call. On information and belief, during this three month time period, Consolidated charged a surcharge (essentially a connection fee) of approximately \$2.50 per call along with a per minute charge of roughly \$0.19 or \$0.20 per minute for calls in which the called party agreed to accept and was billed for the charges for the call. On information and belief, this combination of a surcharge and per minute rate yields the

average revenue per call ranging from \$5.70 to \$5.72. On information and belief, Consolidated also charged additional fees not reflected in the average revenue per call in certain circumstances which also had to be paid by the called party accepting the charges, the most notable being a convenience fee of approximately \$3.00 per transaction for credit card payments.

As a result of IDOC's competitive bidding process, these average rates will *decrease* under Securus' contract with IDOC.¹² While Securus bid a "surcharge" of \$4.10 per call in its bid proposal, Securus *is not charging per minute rates*.¹³ As a result, IDOC inmates will be able to make in-State calls for up to the 30 minute institutional time limit for a flat rate of \$4.10. (The chart below illustrates the cost savings on inmate calls following the most recent bid process.) Based on the foregoing average revenue per call data, this represents a *cost savings* to friends and family of more than 25%. In addition, Securus' rates do not include *any* convenience fees for credit card payments, representing additional cost savings to friends and family members in aggregate of an estimated \$75,000 per month.

¹² While the PO asserts that recipients of inmate telephone calls are "captive" in that they do not have the option to choose among providers, it does not address the fact that the market for inmate telephone services itself is extremely competitive in the bidding process prior to the selection of the single provider to whom call recipients are purportedly "captive."

¹³ Contrary to the PO's assumption that the bidding process will result in a race to the top, Securus' bid proposal was not the highest proposed surcharge in the IDOC bidding process, yet it was selected as the winning bidder. Moreover, the PO wholly disregards the effect of total cost of the call upon inmate telephone utilization. In its bid proposal, Securus pointed out that it anticipated its low cost, flat rate fee would increase call volume, thereby increasing revenue while still lowering the average cost per call.

LOWER INMATE CALL COSTS RESULTING FROM BIDDING

	Surcharge	Per Minute Charge	Average Cost Per Call (16.35 min.)	Additional Credit Card Convenience Fee
Pre-Bid Rates (Consolidated)	\$2.50	\$0.19	\$5.70	\$3.00
Securus Rates	\$4.10	None	\$4.10	None

The effectiveness of this bidding process is further highlighted by the fact that the Commission's approved surcharge and per minute rates as well as published rates available from certain public payphone service providers would also result in *higher* average charges per call than those charged by Securus. For example, ICC rates applicable to a 19 minute local call (within 1 to 10 miles) yield a total charge of approximately \$8.51 and rates applicable to a comparable in-State long distance call yield a total charge of approximately \$10.15. Under Securus' IDOC Contract, both calls are a flat rate of \$4.10. Similarly, Verizon Select Services, Inc. has tariff available through its website reflecting surcharges of \$2.90 for local and in-State long distance calls with per minute charges of \$0.2465/\$0.2176 and \$0.3047/\$0.2901, respectively, yielding total charges of approximately \$7.06 for a 19 minute local call and \$8.43 for a 19 minute in-State long distance call. These are only a couple of examples demonstrating that the PO's assertion that regulation is needed to ensure just, reasonable, and affordable rates for inmate-only telephone services is not borne out by the facts. On this record, the PO's proffered policy rationale for regulation cannot and should not be sustained.

REQUEST FOR HEARING

Pursuant to Section 200.500 and/or 200.870, Securus requests that the ALJ set this matter for hearing. Although the PO states that the facts set forth therein are "undisputed", the undisputed facts are the general logistics of inmate telephone call alleged in the Petition. *After*

the Petition was filed, and *after* the Prehearing Conference was held, and *after* Securus submitted its response to the Petition, Staff first raised its economic policy argument. When Securus attempted to conduct discovery into these issues, the ALJ refused, pointing to the fact that Securus did not raise this issue in Prehearing Conference. The truth is that this Brief on Exceptions is Securus' first opportunity to dispute those facts – which were first introduced in the Response filed by Staff on August 31, 2012 and then echoed in the Reply filed by Consolidated on September 7, 2012. Securus requests that the ALJ set this matter for hearing in order to determine whether the factual findings in the PO are true, including whether the current bidding process for the provision of inmate telephone services is a competitive market, whether the process incentivizes the winning bidder to charge exorbitant rates, and whether the winning bid forces consumers to pay uneconomical or irrationally inflated prices.

REQUEST FOR ORAL ARGUMENT

In the event the ALJ denies Securus' request for a hearing, above, Securus requests oral argument pursuant to Section 200.850(a)(3) for the same reasons set forth above. To the extent the ALJ concludes a hearing is not warranted, Securus desires the opportunity to further address factual issues first raised in Staff's Response as well as the opportunity to make a proffer on these and any other factual issues before the ALJ.

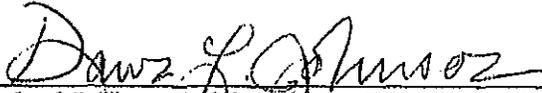
WHEREFORE, Securus Technologies, Inc. respectfully requests that the Administrative Law Judge adopt the exceptions set forth in Securus Technologies, Inc.'s Proposed Order, a red-lined version of which is attached hereto as Appendix 2 and a clean copy of which is attached as Appendix 3, in their entirety and amend the Proposed Order in accordance with the same for submission to the Commission.

Dated: November 16, 2012

Respectfully submitted,

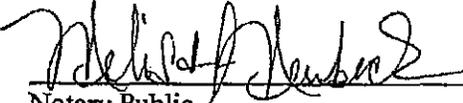
SECURUS TECHNOLOGIES, INC., Intervenor

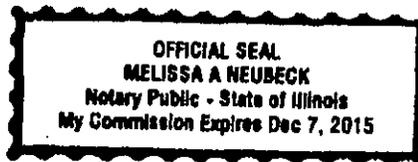
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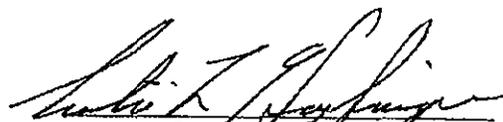
SUBSCRIBED and SWORN to me this 16 th day of November, 2012


Notary Public

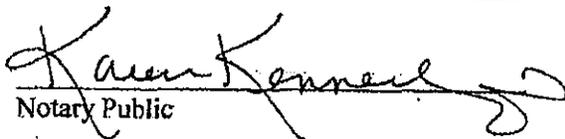


VERIFICATION

Curtis L. Hopfinger, being first duly sworn on oath, states that he is the Director - Regulatory and Government Affairs for Securus Technologies, Inc. and is duly authorized to execute and submit this Verification on behalf of Securus Technologies, Inc.; that he has read the above and foregoing Brief on Exceptions and has personal knowledge of the facts set forth therein; and that to the best of his knowledge, information and belief, said facts are true and correct except as to those matters stated on information and belief, and as to such matters, he verily believes them to be true.


Curtis L. Hopfinger

SUBSCRIBED and SWORN to me this 16th day of November, 2012


Notary Public



CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Securus Technologies, Inc.'s Verified Brief on Exceptions to be served upon:

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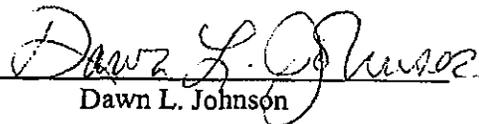
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by e-mail and first-class mail, this 16th day of November, 2012.


Dawn L. Johnson