

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))
Verified Petition for Declaratory Ruling)
as to the Applicability of Section 13- 901 of the)
Public Utilities Act and 83 Ill. Admin. Code)
Part 770.)

Docket 12-0413

CONSOLIDATED COMMUNICATIONS ENTERPRISE SERVICES, INC.'S
RESPONSE IN OPPOSITION TO SECURUS' TECHNOLOGIES, INC.'S
SECOND PETITION FOR INTERLOCUTORY REVIEW

Owen E. MacBride
Schiff Hardin LLP
233 South Wacker Drive
Suite 6600
Chicago, IL 60606
(312) 258-5680
omacbride@schiffhardin.com

Attorney for
Consolidated Communications
Enterprise Services, Inc.

January 14, 2013

TABLE OF CONTENTS

I.	Introduction.....	1
II.	The Commission Has Already Denied the Relief Requested in Securus’ Second Petition for Interlocutory Review.....	2
III.	Securus’ Attempt to Introduce New Evidence for the First Time in its BOE Was Woefully Untimely and Was Properly Rejected by the ALJ Ruling Granting the Motion to Strike.....	3
IV.	Securus Has Failed to Demonstrate that the New Evidence in its BOE is Relevant, Or Even That It Would Be Admissible Evidence.....	8
V.	The ALJ Properly Rejected Securus’ “Administrative Notice” Argument.....	11
VI.	Securus Has Not Been Treated Unfairly; the Circumstances in Which it Finds Itself Are the Result of its Own Strategic Decisions and Delay.....	14
VII.	Other Assertions in Securus’ Second PIR Do Not Support its Argument.....	16
VIII.	Conclusion.....	18

Attachments:

Attachment 1: Staff Motion to Strike Portions of the Securus BOE

Attachment 2: Consolidated Communications Enterprise Services, Inc.’s Response to Staff Motion to Strike Portions of the Securus BOE

Attachment 3: Staff’s Reply to Securus’ Response to Its Motion to Strike Portions of the Securus BOE

Attachment 4: Notice of Administrative Law Judge’s Ruling dated December 18, 2012.

I. Introduction

Consolidated Communications Enterprise Services, Inc. (“Consolidated”), pursuant to §200.520 of the Commission’s Rules of Practice, 83 Ill. Adm. Code §200.520, submits this response in opposition to the Petition for Interlocutory Review (“Securus’ Second PIR”) filed on January 8, 2013 by Securus Technologies, Inc. (“Securus”). This is the second Petition for Interlocutory Review filed by Securus in this docket. Securus’ first Petition for Interlocutory Review (“Securus First PIR”) was denied by the Commission on December 19, 2012. Securus’ Second PIR asks the Commission to vacate the December 18, 2012 ruling (“ALJ Ruling”) of the Administrative Law Judge (“ALJ”) granting Commission Staff’s Motion to Strike Portions of Securus’ Brief on Exceptions (“BOE”).¹ The ALJ Ruling struck portions of Securus’ BOE that constituted new, purported factual information that Securus had not previously submitted for the record or taken any other action to enter into the record prior to including the purported evidence in its BOE to the ALJ’s Proposed Order (“ALJPO”) in this docket.

The Commission should deny Securus’ Second PIR. First, in denying Securus’ First PIR, the Commission has already denied essentially the same relief requested in Securus’ Second PIR. In Securus’ First PIR, Securus made an “offer of proof” of the new evidence that Securus presented for the first time in its BOE. The Commission denied Securus’ First PIR. The Commission should also deny Securus’ attempt at a second bite at the apple.

Putting the Commission’s prior ruling aside, however, Securus’ arguments in support of its Second PIR are meritless and should be rejected by the Commission. For purposes of argument in this Response, Consolidated uses Securus’ characterization that the new evidence introduced for the first time in its BOE was intended to respond to “erroneous factual assertions” in the Staff Response to Consolidated’s Petition for Declaratory Ruling. In fact,

¹ For completeness and the Commission’s ease of reference, this Response includes the following attachments: **Attachment 1** is the Staff Motion to Strike Portions of Securus’ BOE. **Attachment 2** is Consolidated’s Response in Support of the Staff Motion to Strike. **Attachment 3** is Staff’s Reply in Support of its Motion to Strike. **Attachment 4** is the ALJ Ruling granting the Motion to Strike.

however, the statements in the Staff Response that Securus refers to as “factual assertions” are policy arguments, not factual assertions. More importantly, *the ALJ’s conclusion in the ALJPO does not rely on any of these “factual assertions” in the Staff Response*, but rather relies on the facts cited in Consolidated’s Petition – which Securus has not disputed – and the text of §13-901 the Public Utilities Act (“PUA”) and the Commission’s regulation at 83 Ill. Adm. Code Part 770. ALJPO at 16-17. Thus, Securus’ entire argument in its Second PIR is based on a red herring.

The new “facts” that Securus included for the first time in its BOE are not part of the record compiled in this proceeding. Securus’ beyond-the-eleventh-hour attempt to introduce new evidence for the first time in its BOE (filed on November 16, 2012) was woefully late and was not supported by any showing of due diligence by Securus. Securus failed to demonstrate that any of the new evidence it attempted to include in its BOE – which, again, Securus asserts it submitted in response to “erroneous factual assertions” in the August 31, 2012 Staff Response to Consolidated’s Petition – could not have been proffered much earlier in this proceeding. Further, the new evidence included in Securus’ BOE is irrelevant and to a large extent would not have been admissible evidence even if proffered in a timely manner. None of the new evidence included in Securus’ BOE disputes the facts alleged in Consolidated’s Petition for Declaratory Ruling on which the recommended decision in the ALJPO are based. Finally, although Securus contends that the Commission can take administrative notice of the new evidence contained in Securus’ BOE, Securus did not follow the appropriate procedure for requesting that administrative notice be taken; and in any event, some if not all of the new evidence presented in Securus’ BOE is not information that is properly the subject of administrative notice.

In summary, the ALJ properly and correctly granted the Motion to Strike Portions of Securus’ BOE. Securus’ Second PIR should be denied by the Commission.

II. The Commission Has Already Denied the Relief Requested in Securus’ Second Petition for Interlocutory Review

Securus’ First PIR included an offer of proof of the new evidence that Securus included

for the first time in its BOE. Securus' First PIR at ¶9. In support of its offer of proof, Securus included its entire BOE as Exhibit 4 to its First PIR. On December 19, 2012, the Commission denied Securus' First PIR. Therefore, the Commission has already ruled that the new evidence proffered for the first time in Securus' BOE should not be admitted. On this basis alone, the Commission should deny Securus' Second PIR, which asks the Commission to vacate the ALJ Ruling that struck the new evidence from Securus' BOE – the same new evidence that Securus proffered in its offer of proof in its First PIR that the Commission denied.

III. Securus' Attempt to Introduce New Evidence for the First Time in its BOE Was Woefully Untimely and Was Properly Rejected by the ALJ Ruling Granting the Motion to Strike

The ALJ granted the Motion to Strike because (in part):

Securus' argument, that it is not barred from and is entitled to respond to Staff's response, ignores the procedural status of the docket. Securus failed to, in a timely manner, file a motion or seek other relief in regards to Staff's response, which Securus now claims contains unsubstantiated and erroneous factual conclusions. Rather than filing a timely motion or seeking other timely relief to address Staff's Response to the Petition, Securus waited until after the proposed order was issued and then attempted to improperly supplement the record and rely on material not in the record in its BOE. (ALJ Ruling at 1.)

Nothing Securus says in its Second PIR overcomes the ALJ's rationale.

Consolidated filed its Petition for Declaratory Ruling on July 3, 2012. A prehearing conference was held on July 31, 2012, at which Securus appeared by its General Counsel and outside counsel. Transcript of July 31, 2012 Prehearing Conference ("Tr.") at 4-5. At the prehearing conference, a schedule for filings was set by agreement that provided for Securus to file a response to Consolidated's Petition, then for Staff to file a response to the Petition, and finally for Consolidated to file a reply. Tr. at 9-10. The ALJ summarized the results of an off-the-record discussion as follows:

While we were off the record, we had a brief discussion regarding scheduling and how to proceed in this matter. It was discussed whether or not testimony would be necessary, and the parties have agreed that testimony would not be necessary. (Tr. at 9.)

The transcript does not show that Securus (or any other party) disputed or attempted to correct the ALJ's statement that "It was discussed whether or not testimony would be necessary, and the parties have agreed that testimony would not be necessary."

Securus now contends in its Second PIR that it "was not asked whether it anticipated wanting discovery, pre-filed testimony or a hearing and never agreed to anything in this regard" (Securus' Second PIR at ¶5); that "it was not asked about discovery, pre-filed testimony or a hearing" and "did not agree to waive discovery or . . . submitting evidence" or "its right to a hearing" (*id.* at ¶16); and that it "never stipulated to waive its right to a hearing" (*id.* at ¶27). (Although there was no evidentiary hearing with witnesses and testimony, Securus does concede, by its reference to 83 Ill. Adm. Code §200.525, that it received a paper hearing in this docket. *Id.* at ¶27-28.) Clearly, Securus did agree that no testimony would be necessary in this proceeding, and Securus failed to take issue with the ALJ's statement that "the parties have agreed that testimony would not be necessary." It may be that Securus was not expressly asked "do you want to have discovery?" and "do you want to have an evidentiary hearing?" but Securus was represented at the prehearing conference by counsel² and was free to disagree with the agreed procedural schedule summarized by the ALJ and to ask for the opportunity to take discovery, the opportunity to file testimony, and the opportunity to have an evidentiary hearing. Securus did none of these things.

A proceeding before the Commission – especially one like this docket involving sophisticated commercial entities – is not a kindergarten class. Parties and their counsel are expected to know the Commission's Rules of Practice. Parties and their counsel are expected to assert their own interests by asking for what they want in the procedural schedule. Parties and their counsel are expected to know that they do not have to wait to be **asked** if they would like to have the opportunity to submit testimony, take discovery and have an evidentiary hearing with

² At the time of the prehearing conference and continuing throughout the course of this docket to the present, Securus has been represented by outside counsel from two major Illinois law firms.

witnesses. Parties and their counsel are expected to state their disagreement with the ALJ's summary of an off-the-record discussion if they in fact disagree with the summary.

Moreover, Securus' argument that it was not asked if it wanted to have an evidentiary hearing ignores the fact that the Commission's regulation providing for declaratory rulings, 83 Ill. Adm. Code §200.220, does not provide for an evidentiary hearing, but rather only for a paper hearing. Section 200.220 provides for the filing of a petition for declaratory ruling, the filing of responses to the petition, and the filing by the petitioner of a reply to the responses. 83 Ill. Adm. Code §200.220(a), (b), (e) and (f). If the petition, a response or a reply contains allegations of fact, it must be verified or supported by affidavit. 83 Ill. Adm. Code §200.220(g). Section 200.220(h) states that the Commission may in its sole discretion dispose of a request for a declaratory ruling solely on the basis of the written submissions filed before it. In the instant case, the ALJ (with the agreement, or at a minimum the acquiescence, of the parties) was setting a schedule in accordance with the procedure specified in §200.220. If Securus wanted to submit testimony, to take discovery, or to have an evidentiary hearing – none of which are provided for in §200.220 as a matter of course – it was incumbent on Securus to ask for them.

In any event, what Securus agreed to or didn't agree to, or asked for or didn't ask for, at the July 31 prehearing conference is really irrelevant to Securus' argument in its Second PIR, because Securus' claims that the new evidence in its BOE was submitted in response to assertions in Staff's August 31, 2012 Response to Consolidated's Petition, and that Securus did not have a need to submit evidence until it read Staff's Response (which, per the agreed schedule, was filed after Securus' Response to the Petition).³ Securus' Second PIR at ¶¶6, 8-9,

³ Securus does not contend that the new evidence included in its BOE was necessary to respond to the facts set forth in Consolidated's Petition. Securus has not contested the basic facts set forth in Consolidated's Petition, and upon which the decision in the ALJPO are based, about the operator services provided to the public in connection with the inmate calling services. Moreover, at the time of the prehearing conference (when it agreed that testimony would not be necessary), Securus was aware of the Petition and the facts asserted therein, and Securus did have the opportunity to file a response to the Petition, in which it could have disputed any of the facts set forth in the Petition.

11-13, 15, 17-18 (in each of these paragraphs, Securus argues that the additional evidence in its BOE was submitted in response to assertions in Staff's Response to Consolidated's Petition).

Rather, the fatal flaw in Securus' argument is that it **waited 52 days after the Staff Response to the Petition was filed before it took any action in this docket to indicate that it wanted to submit evidence in response to Staff's Response**. The Staff Response was filed on August 31, 2012. Securus took no further action in this case until October 22 – **52 days later** – when it served data requests on Staff, purportedly directed at various assertions in the Staff Response. One day later, on October 23, the ALJ issued the Proposed Order, and set dates for the parties to file briefs on exceptions (November 7) and replies to exceptions (November 15). On October 26 – **56 days after the Staff Response to Consolidated's Petition was filed** – Securus filed a Motion to Set Discovery Schedule and Continue Briefing on Exceptions.⁴ This was the first filing Securus made in this case indicating that it wanted the opportunity to submit evidence. Notably, this filing was made **after** the ALJPO had been issued.⁵

Securus attempts to justify the 60-day time gap between the date the Staff Response to Consolidated's Petition was filed and the date Securus requested a discovery schedule, by stating that after reviewing the Staff Response to the Petition, Securus submitted a Freedom of Information Act ("FOIA") request to the Commission to attempt to obtain information that it could use to respond to the assertions in Staff's Response, but that the FOIA request did not yield any information. Securus' Second PIR at ¶8 and Exhibits 1 and 2. It should be readily apparent to the Commission that this explanation is suspect. First, the FOIA request itself was not submitted until September 25, **25 days after the Staff Response to Consolidated's Petition**

⁴ After receiving briefs on Securus' Motion to Set Discovery Schedule, the ALJ denied it, and the Commission denied Securus' First PIR which sought reversal of the ALJ's denial of the Motion to Set Discovery Schedule.

⁵ Securus asserts that the ALJ "refused to defer briefing on" the ALJPO. Securus' Second PIR at ¶11. In fact, as the result of the filing of Securus' Motion to Set Discovery Schedule, Securus' First PIR, and the Staff Motion to Strike the improper additional evidence in Securus' BOE, the ALJ extended the completion of the briefing on the ALJPO by a total of 36 days, from November 15 to December 21.

was filed. Second, why did Securus attempt to obtain information from the Commission through a FOIA request, outside this docket, when it was already a party to an active docket and discovery by parties is permitted under the Commission’s Rules of Practice (83 Ill. Adm. Code §200.335 through 200.430)? Obviously, Securus made a strategic decision to attempt to obtain information through a process outside the scope of the docket so that the other parties would not know what information Securus was trying to obtain.⁶ Third, and most importantly, whether it proceeded via FOIA request to the Commission or data requests to Staff, **why didn’t Securus notify the ALJ and the parties promptly after the Staff Response to Consolidated’ Petition was filed on August 31?**

Moreover, both the FOIA request, and the data requests Securus served on Staff (which the ALJ ruled did not have to be answered), are also irrelevant to the issue presented by Securus’ Second PIR. The FOIA request and the data requests to Staff sought information completely different from the new evidence that Securus attempted to include in its BOE. This new evidence appeared for the first time in Securus’ BOE, filed on November 16 (**77 days** after the date that Staff’s Response to Consolidated’s Petition had been filed), and there was no prior request by Securus to the ALJ that it be allowed to submit this new evidence into the record.

In summary, the ALJ was correct in ruling that:

Securus failed to, in a timely manner, file a motion or seek other relief in regards to Staff’s response, which Securus now claims contains unsubstantiated and erroneous factual conclusions. Rather than filing a timely motion or seeking other timely relief to address Staff’s Response to the Petition, Securus waited until after the proposed order was issued and then attempted to improperly supplement the record and rely on material not in the record in its BOE.” (ALJ Ruling at 1.)

Nothing in Securus’ Second PIR shows that the ALJ’s conclusion was incorrect or inappropriate.

⁶ Securus states that “In a letter dated October 10, 2012, the ICC informed Securus that it would not provide Securus with any documents in response to its FOIA requests.” Securus’ Second PIR at ¶8. This characterization is disingenuous. The Chief Clerk’s response letter (Exhibit 2 to Securus’ Second PIR) stated that (i) one of the FOIA requests sought information the disclosure of which was restricted by §5-108 of the PUA and therefore fell within the exception in §7.5(s) of FOIA; and (ii) for the remaining requests, “after reasonable efforts to locate records responsive to your request, no such records have been found in the possession of the Commission.”

IV. Securus Has Failed to Demonstrate that the New Evidence in its BOE is Relevant, Or Even That It Would Be Admissible Evidence

Conspicuously absent from Securus' Second PIR is any attempt to go systematically through the various items of new evidence included in Securus' BOE and explain why each item is relevant, material and would otherwise be admissible. Instead, Securus simply attaches as Exhibit 3 its originally-filed BOE – not marked to show the portions containing the new evidence and related arguments that were stricken – and in its Second PIR discusses only a few of the items of new evidence. The Commission should deny Securus' Second PIR based on this deficiency alone.

Securus argues that in the ALJ Ruling, “the ALJ does not dispute that the stricken portions of Securus' BOE are relevant and material to this proceeding.” Securus' Second PIR at ¶18. However, the ALJ was not called upon to rule on the relevance and materiality of the new evidence in Securus' BOE, because the basis for the Staff Motion to Strike was that the challenged text constituted evidence that is not in the record and had not been offered in a timely manner. In any event, the burden is on Securus, as the proponent of the new evidence, to demonstrate its relevance, materiality and admissibility – the burden is not on the ALJ or the other parties to demonstrate that the evidence is not relevant and not admissible.

In fact, as Consolidated discussed in its Response in Support of the Staff Motion to Strike (**Attachment 2** hereto), the new evidence introduced in Securus' BOE is irrelevant, inadmissible, or both. As an initial matter, the new evidence in Securus' BOE does not dispute any of the facts about the operator services provided to the public in connection with the inmate calling services that are set forth in Consolidated's Petition, and on which the request for declaratory ruling and the conclusion in the ALJPO are based.⁷ Securus' admits this, since its sole rationale for the new evidence is that it responds to “erroneous factual assertions” in Staff's

⁷ As the ALJ stated in the ALJPO, “Neither Securus nor Staff contests Consolidated's description of inmate calling services.” ALJPO at 16. The ALJPO then states the uncontested facts on which the ALJ's proposed declaratory ruling is based.

Response to Consolidated's Petition. Further, the new "evidence" is simply assertions in a brief; it is not proffered testimony and exhibits sponsored by a witness who could be cross-examined.

Turning to specifics:⁸

- The new evidence includes footnote 8 on page 9 which asserts that a company named Technologies Management, Inc., described as a consulting firm to telecommunications carriers, has issued reports stating that Illinois has no applicable certification requirements or rate caps.⁹ This evidence is irrelevant and immaterial (it is in no way probative, or competent evidence on the legal question, of what §13-901 of the PUA and 83 Ill. Adm. Code Part 770 require) and is incompetent and inadmissible as well (it is at least double if not triple hearsay).
- Footnote 10 on page 15 purports to be a summary of rates and charges for inmate calling services in other states. This information is also double or triple hearsay and is not supported by documents or by citations to any readily available sources such as statutes, tariffs or regulatory commission regulations or orders. Further, the information and related argument concerning charges and requirements in other states are irrelevant, immaterial and incompetent since the instant case pertains to whether the provision of certain operator services to members of the public in Illinois is subject to the maximum rate provisions of the Illinois Commerce Commission's regulations at 83 Ill. Adm. Code Part 770 that were adopted pursuant to the requirements of §13-901 of the Illinois PUA.
- The new evidence includes information (at pages 15-18) from the Department of Corrections ("IDOC")/Department of Central Management Services Invitation for Bids ("IFB") on the types of telephone equipment that the provider of inmate calling services is required to install inside the corrections facilities. This information is irrelevant to the question presented by Consolidated's Petition for Declaratory Ruling and decided by the ALJPO, namely, whether 83 Ill. Adm. Code §770.10, 770.20(a) and 770.40 apply to the operator services provided to members of the public who engage in calls with inmates. This information is also irrelevant because §770.40 does not provide for cost of service-based ratemaking – if §770.40 applies to these services, then the only issue is whether the rates charged by an operator service provider are less than or equal to, or exceed the maximum rates established by the Commission pursuant to, §770.40(c) and (e).¹⁰ Further, the declaratory ruling requested in the Petition pertains only to the operator service rates and service provided to members of the public located outside the corrections facilities; it would not involve the Commission in any regulation of the equipment provided by the service provider inside the corrections facilities.

⁸ Consolidated made each of the points set forth below in its Response in Support of the Staff Motion to Strike (at pages 2-3). Securus has failed to address these points in its Second PIR.

⁹ The page references in this discussion are to Securus' originally-filed BOE before portions were stricken, which is Exhibit 3 to Securus' Second PIR.

¹⁰ Notably, Consolidated submitted a response to the IFB, subject to the same equipment and other requirements that Securus listed in its BOE, but Consolidated proposed to charge operator service charges and call rates that complied with the maximum charges established by the Commission pursuant to §770.40. Consolidated Petition at ¶14.

- The new evidence also includes (at pages 19-21) comparisons between the current rates charged for operator services and calls under Consolidated's current IDOC contract and the rates bid in response to the IFB. These comparisons are hearsay because they are an analysis of information in documents purportedly obtained by Securus through a FOIA request and other, unidentified sources, and in fact are stated by Securus to be "on information and belief." These comparisons are irrelevant to the legal question presented in this case of whether 83 Ill. Adm. Code §770.10, 770.20(a) and 770.40 apply to the operator services provided the members of the public who engage in calls with inmates. Further, if §770.40 does apply, then the only question becomes whether the operator service and call rates charged (or proposed to be charged) by the operator service provider to the members of the public are less than or equal to, or exceed, the maximum charges established by the Commission pursuant to §770.40.¹¹

Securus argues that the listing in its BOE of IDOC's technical requirements for telecommunications equipment within the corrections facilities should not have been stricken because Consolidated placed its current IDOC contract "in the record" as Exhibit 4 to Consolidated's Response to Securus' Motion to Set Discovery Schedule. Securus' Second PIR at ¶22. However, Consolidated's Response to Securus' Motion to Set Discovery Schedule was filed on November 2, 2012, after the ALJPO was issued (October 23), and therefore the existing contract is not part of the record on which the ALJPO is based. Further, Consolidated attached its current contract to its Response to Securus' Motion to Set Discovery Schedule solely for the limited purpose of showing that Consolidated's current contract runs through March 31, 2013, as part of Consolidated's response to Securus' argument that Consolidated has no current interest in the resolution of the question presented in the Petition for Declaratory Ruling and the delay in this proceeding that would result from granting Securus' Motion to take discovery would not prejudice Consolidated.¹²

Securus also argues that the listing in its BOE of IDOC's technical requirements for telecommunications equipment within the corrections facilities should not have been stricken

¹¹ Additionally, the comparisons in Securus' BOE are misleadingly incomplete because they only show the rates bid by Securus and do not show the rates bid by Consolidated in response to the IFB.

¹² See Consolidated's Verified Response and Objections in Opposition to Securus' Motion to Set Discovery Schedule, filed in this docket on November 2, 2012, at 7-9.

because Consolidated's Petition "summarized the various provisions of the IFB." Securus' Second PIR at ¶22, *citing* Consolidated's Petition at ¶4 and ¶14 note 7. This assertion is bogus. The Petition did not "summarize the various provisions of the IFB," or even cite provisions of the IFB. Rather, the Petition described the operator services provided to members of the public (Petition ¶4) and noted that the service provider pays a commission to IDOC (*id.* at ¶14 note 7). The ALJ correctly stated that:

Securus' contention that the Invitation for Bids ("IFB") is in the record is incorrect. Securus argues that because Consolidated summarized portions of the IFB in the Petition, the IFB is in the record. Although some portions of the IFB are in the record, Securus did not base its argument upon the summaries contained within the Petition. Rather, Securus attached the entire IFB to its BOE and quoted from it at length. (ALJ Ruling at 2.)

Further, this assertion by Securus conflicts with its argument in support of its Second PIR that the new evidence included in its BOE was necessary to respond to "erroneous factual assertions" in Staff's Response to the Petition, which was filed after Securus' Response to the Petition. However, Securus' Response to Consolidated's Petition was (obviously) filed after the Petition was filed – 58 days after, to be precise. If Securus' wanted or needed to respond to any facts set forth in the Petition, Securus had the opportunity to do so in its Response to Consolidated's Petition. To hold off on responding to facts alleged in the Petition until its BOE was improper and this portion of Securus' BOE was correctly stricken by the ALJ as untimely.

V. The ALJ Properly Rejected Securus' "Administrative Notice" Argument

Securus claims that "The ALJ Erred by Striking Facts that are . . . Subject to Administrative Notice." Securus Second PIR at page 7 and ¶23-25. This argument fails on several levels. First, both §10-40 of the Administrative Procedure Act ("IAPA"), 5 ILCS 100/10-40, and §200.640(c) of the Commission's Rules of Practice (using the same text as in §10-40) specify that "Parties and Staff shall be notified either before or during the hearing or otherwise of the materials noticed and shall be provided a reasonable opportunity to contest the material so noticed." Securus never requested that administrative notice be taken of anything.

Indeed, not even in its BOE did Securus request that administrative notice be taken of the new evidence included in its BOE. Securus first claimed that the ALJ could take administrative notice of certain of the new evidence in its response to Staff's Motion to Strike. Citing new evidence not in the record for the first time in its BOE and then stating that the other parties could have responded to it in their replies to exceptions (Securus' Second PIR at ¶25) is not "a reasonable opportunity to contest the material so noticed." Under no stretch of the imagination did Securus satisfy the procedural requirements of §10-40 of the IAPA and §200.640(c) of the Rules of Practice.¹³ The ALJ correctly concluded:

[A]s mandated by the Administrative Procedure Act (5 ILCS 100-10-40), in contested cases parties and Staff must be notified of the materials for which administrative notice is sought and must be provided a reasonable opportunity to contest the materials. Securus did not request administrative notice of the information or documents that it now argues are subject to administrative notice. To the extent Securus' argument in response to the Motion to Strike could be construed as a request for administrative notice, the request is untimely. . . . By failing to take any action until after the proposed order was issued, Securus waived any opportunity to provide additional facts to the record. (ALJ Ruling at 2.)

Securus also argues that "the ALJ may take administrative notice of, among other things, rules, regulations and policies of governmental bodies; annual reports, tariffs, classifications and schedules filed with the ICC; technical facts within the specialized knowledge of the ICC; and all other matters which Illinois courts may take judicial notice, including matters of public record." Securus' Second PIR at ¶23. Securus has more or less accurately described various types of documents of which the ALJ "may" take administrative notice as listed in §200.640(a) of the Rules of Practice. The problem, however, is that, with the possible exception of the IFB (assuming it is a "public record"), Securus' submitted none of these types of documents. Securus' admits this when it states that "the facts contained in Securus' BOE are also **derived**

¹³ Securus' argument that Staff did not dispute that the facts in Securus' BOE are properly the subject of administrative notice (Securus' Second PIR at ¶25) is disingenuous. As noted above, the first time that Securus suggested that administrative notice could be taken of the new evidence introduced in its BOE was in Securus' response to Staff's Motion to Strike. Further, the basis of the Motion to Strike was Securus' untimely introduction of the new information.

from sources that are subject to administrative notice” and “other portions of the BOE struck by the ALJ **relied on** publicly available records.” Securus’ Second PIR at ¶24 (emphasis added). The stricken portions of Securus’ BOE are not documents of the type of which administrative notice may be taken under §200.640(a) of the Rules of Practice, but rather are Securus’ second-hand summaries and characterizations of such documents and Securus’ calculations based on information purportedly taken from such documents. As noted above, Securus even stated in its BOE that some of the information was based “on information and belief.” Securus’ assertion that “there can be no dispute that the facts contained in Securus’ BOE” are subject to administrative notice (Securus’ Second PIR at ¶24) is incorrect. Information summarized from reports published by Technologies Management, Inc., a private consulting firm, are not subject to administrative notice. Securus’ calculations of average rates, typical rates and ranges of rates in other states are not subject to administrative notice. Nor are Securus’ calculations of the average costs per call under the current IDOC contract subject to administrative notice.

Securus cites several cases in the “administrative notice” section of its Second PIR, but none of the cases cited support Securus’ argument. *Kirchner v. Greene*, 294 Ill.App.3d 672 (1st Dist. 1998), involved the garden-variety proposition that in a §2-615 motion to dismiss a complaint, the defendants can discuss the matters alleged in the complaint. There is nothing in *Kirchner* remotely similar to the sequence of procedural events in the instant docket. In fact, in *Kirchner*, the Appellate Court ruled that the circuit court had properly stricken material in plaintiffs’ reply to the motion to dismiss that went beyond the four corners of the complaint (294 Ill.App.3d at 677), so *Kirchner* actually supports the ALJ Ruling, not Securus’ argument. Similarly, *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill.App.3d 720, 724 (1st Dist. 1995), simply states the unexceptional proposition that the circuit court may take judicial notice of public records (in that case, a recorded deed). Finally, the court in *May Dept. Stores Co. v. Teamsters Union Local No. 743*, 64 Ill.2d 153, 159 (1976), ruled that it could take judicial notice

of two letters of determination from the National Labor Relations Board. In both *Riverwoods* and *May Dept. Stores*, the document of which judicial notice was permitted was the actual public document, not a party's summary or characterization of it or calculations derived from it.

In summary, the ALJ Ruling correctly concluded that "Securus' argument that the facts and documents it includes in its BOE should not be stricken because they are subject to administrative notice also fails." ALJ Ruling at 2.

VI. Securus Has Not Been Treated Unfairly; the Circumstances in Which it Finds Itself Are the Result of its Own Strategic Decisions and Delay

Securus argues that the ALJ Ruling has denied Securus' "fundamental due process rights" and "is contrary to law, equity and fundamental fairness." Securus' Second PIR at ¶19. Securus also argues that the ALJ Ruling is contrary to the Commission's rules and policies and violates Securus' "right to a hearing." *Id.* at ¶26-29. Securus' arguments are baseless. The ALJ Ruling has not deprived Securus of a "right to a hearing" nor violated any Commission rules or policies. Rather, the circumstances in which Securus finds itself are the result of its own strategic decisions and delay. Only Securus is responsible for the following:

- At the prehearing conference, Securus agreed that no testimony was necessary in this case (*see* §III above).
- In its Response to Consolidated's Petition, Securus failed to contest any facts alleged in the Petition.
- After receiving and reviewing the Staff Response to Consolidated's Petition (which completed the scheduled filings in this case under the agreed schedule), Securus failed to notify the ALJ and the parties, in any time frame that could be considered timely, that it now wanted to submit evidence in this case.
- After receiving and reviewing the Staff Response to Consolidated's Petition, Securus, surreptitiously and outside the docket, sought to obtain information it thought relevant to Staff's position through a FOIA request, rather than promptly requesting the opportunity to take discovery from Staff. Securus did not issue data requests to Staff until **52 days** after the Staff Response to Consolidated's Petition was filed.
- Securus waited until its BOE – which, obviously, was after the ALJPO was issued – to proffer new evidence that it believed was responsive to the "erroneous factual assertions" in Staff's Response to the Consolidated's Petition, which Staff had filed **77 days** previously.

- Securus never filed a request asking the ALJ to take administrative notice of anything.

Securus has not been deprived of a right to a hearing. First, Securus has received a paper hearing. Second, the Commission’s rule pertaining to declaratory rulings (83 Ill. Adm. Code §200.220) does not require, or entitle the parties to, an evidentiary hearing, but rather provides for the determination to be made based on pleadings.¹⁴ (*See* §III above.) Third, the provisions of the Rules of Practice that Securus cites at ¶27-28 of its Second PIR do not give Securus a “right to a hearing”:

- 83 Ill. Adm. Code §200.525 states that parties and Staff “may stipulate to the waiver of **any rights they have** to a hearing and that the matter be tried or otherwise resolved on the basis of written pleadings and submissions” (emphasis added). Section 200.525 does not *create a right* to an evidentiary hearing.¹⁵
- 83 Ill. Adm. Code §200.500 authorizes the ALJ “to call upon any party or the Staff of the Commission to produce further evidence which is material and relevant to any issue.” This section does not create a “right to a hearing,” but rather authorizes the ALJ to request the submission of evidence the ALJ believes is needed to complete the record.
- 83 Ill. Adm. Code §200.870 authorizes the ALJ, on application of a party, to hold additional hearings after the record is closed. This section also does not create a “right to a hearing.” Further, this section specifies that “[s]uch application [for a hearing] shall state the reasons therefor, including material changes of fact or of law, and shall contain a brief statement of proposed additional evidence **and an explanation why such evidence was not previously adduced**” (emphasis added). Securus never made the application required by this section, and it has no credible explanation for why the new evidence introduced for the first time in its BOE “was not previously adduced.”
- Finally, 83 Ill. Adm. Code §200.875 specifies that after the close of the record, the ALJ, on his or her own motion or at the Commission’s direction, may “direct any or all of the parties to a case to provide, by a deadline to be set by the [ALJ], calculations and other numerical analyses of data that are related to evidence already

¹⁴ Consolidated is not stating that an evidentiary hearing cannot be held in a declaratory ruling proceeding, only that the Commission’s regulation providing for declaratory rulings does not require an evidentiary hearing.

¹⁵ Consolidated disputes Securus’ assertion that it never waived its right to a hearing. Securus agreed at the prehearing conference that no testimony was needed, which necessarily meant there would be no evidentiary hearing, and by either inaction or conscious strategic decision, Securus took no action to attempt to revoke that agreement (or otherwise to request a hearing) until after the ALJPO was issued. These facts constitute a waiver.

in the record or the rate levels or rate structures being considered by the Commission and where, in the judgment of either the [ALJ] or the Commission, such calculations and analyses are necessary for the Commission to determine final rate levels or rate structures in the case.” This section does not create a “right to a hearing,” and it has no applicability to this case.

- Moreover, contrary to Securus’ argument at ¶28, none of §200.500, 200.870 or 200.875 give a party a *right* to submit additional evidence after the record is closed.

Finally, Securus cites 83 Ill. Adm. Code §200.340 and 200.500 in support of its assertion that it is entitled to “full disclosure of all relevant and material facts.” Securus’ Second PIR at ¶29. These sections of the Rules of Practice also do not support Securus’ argument. Section 200.340 specifies that “It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding,” which the ALJ concluded would be the case here if Securus were allowed to begin discovery 52 days after the last scheduled pleading was filed, or to introduce new evidence for the first time in its BOE. Similarly, §200.500(g) authorizes the ALJ “to ensure . . . that order is maintained and that unnecessary delay is avoided in the disposition of the proceedings.” The ALJ Ruling is completely consistent with, and was an appropriate exercise of the ALJ’s authority under, §200.500(g) of the Rules of Practice.¹⁶

VII. Other Assertions in Securus’ Second PIR Do Not Support its Argument

At ¶10 of its Second PIR, Securus argues that “there are numerous legal issues” with the ALJPO, and lists several of these issues. Securus has raised these legal issues in its BOE; Consolidated has responded to these arguments in its Brief in Reply to Exceptions, and will not

¹⁶ In *Niles Twp. H.S. Dist. 219 v. Illinois Educ. Labor Relations Board*, 369 Ill.App.3d 128, 136-37 (1st Dist. 2006), cited in Securus’ Second PIR at ¶19, the court found that the IELRB erred because (1) the ALJ failed to set the case for a hearing even though the IELRB’s regulations specified that where a case presents unresolved questions of material fact, it “shall [be] set . . . for a hearing;” (2) the ALJ then dismissed the petition *sua sponte* without giving the petitioner notice of the issue on which the ALJ based the dismissal; and (3) the IELRB then failed to allow the petitioner to submit evidence addressed to the issue on which the ALJ had based the dismissal. The Commission does not have a procedural regulation like the IELRB’s regulation, and the facts in this case do not comport with the facts in *Niles*. As the ALJ found in the ALJPO, “there are no issues of fact before the Commission.” ALJPO at 16.

repeat its response to Securus' legal arguments here. However, for purposes of Securus' Second PIR, the important point is that Securus has not been deprived of any opportunity to raise and present argument on its legal issues. Further, as noted in §I above, the ALJPO **does not** "adopt Staff's factual conclusions regarding the cost of inmate telephone services and policies underlying added regulation" (Securus' Second PIR at ¶10.) Rather, the ALJ's conclusion in the ALJPO does not rely on any of these "factual conclusions" in the Staff Response, but rather relies solely on facts cited in Consolidated's Petition and on the text of the Public Utilities Act ("PUA") and the Commission's regulation at 83 Ill. Adm. Code Part 770. ALJPO at 16-17.

Securus also argues that the ALJPO would improperly change over 30 years of Commission decisions regarding regulation of inmate calling services. Securus Second PIR at ¶2 and 7. This argument is also meritless and has been fully responded to in Consolidated's Brief in Reply to Exceptions. Securus' argument is based on Commission orders that state that an entity providing telephone equipment in restricted areas of corrections facilities for use by inmates is not a "telecommunications carriers" under §13-202 of the PUA and is not required to be certificated as a "telecommunications carrier" under the PUA. However, §13-901(a)(1) of the PUA and 83 Ill. Adm. Code §770.10 define "operator service provider" as "every telecommunications carrier that provides operator services **or any other person or entity that the Commission determines is providing operator services.**" (Emphasis added.) Only one prior Commission order has addressed whether the service and maximum rate provisions of the Commission's operator service regulation, Part 770, apply to operator services provided to the public in connection with inmate calling services. Consolidated's Petition, and the ALJPO, do not challenge the Commission's previous rulings that an entity providing telephone equipment in restricted areas of corrections facilities for use by inmates is not a "telecommunications carriers" under §13-202 of the PUA and is not required to be certificated as a "telecommunications carrier;" but they do conclude that such an entity is an "operator service provider" in its

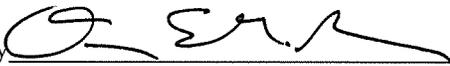
provision of operator services to members of the public and is subject to the service and maximum rate provisions of 83 Ill. Adm. Code §770.20(a), 770.40(c) and 770.40(e).

VIII. Conclusion

For the reasons stated in this Response, Securus' Second Petition for Interlocutory Review should be DENIED.

Respectfully submitted,

CONSOLIDATED COMMUNICATIONS ENTERPRISE
SERVICES, INC.

By  _____

Owen E. MacBride
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
(312) 258-5680
omacbride@schiffhardin.com
Its attorney

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he served copies of “Consolidated Communications Enterprise Services, Inc.’s Response in Opposition to Securus Technologies, Inc.’s Second Petition for Interlocutory Review” on the persons listed below by electronic mail on January 14, 2013.

/s/ Owen E. MacBride
Attorney for Consolidated Communications
Enterprise Services, Inc.

Service List – Docket 12-0413

Janis Von Qualen
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jvonqual@icc.illinois.gov

Abram I. Moore
K&L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602
abram.moore@klgates.com

Michael J. Lannon
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601
mlannon@icc.illinois.gov

John E. Stevens
Freeborn & Peters LLP
217 E. Monroe St., Ste. 202
Springfield, IL 62701
jstevens@freebornpeters.com

Angelique Palmer
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601
apalmer@icc.illinois.gov

James Zolnierek
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jzolnier@icc.illinois.gov

Michael J. Hayes
K&L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602
Michael.hayes@klgates.com

Dawn L. Johnson
K&L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602
Dawn.johnson@klgates.com

ATTACHMENT 1

STAFF MOTION TO STRIKE PORTIONS OF THE SECURUS BOE

**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 : Docket No. 12-0413
:
Verified Petition for Declaratory Ruling as to :
Applicability of Section 13-901 of the Public :
Utilities Act and 83 Ill. Admin. Code Part 770. :

STAFF MOTION TO STRIKE PORTIONS OF THE SECURUS BOE

NOW COME the Staff witnesses of the Illinois Commerce Commission (“Staff”), through its undersigned counsel, and pursuant to 83 Ill. Adm. Code 200.190 and 83 Ill. Adm. Code 200.830 files this Motion To Strike (“Staff Motion”) Portions of Securus Technologies’ (“Securus”) Brief on Exceptions (BOE).

Consolidated petitioned the Commission for a declaratory ruling as to the applicability of Section 220 ILCS 5/13-901 of the Public Utilities Act (the “Act” or “PUA”) and the Commission’s regulations at 83 Ill. Adm. Code Part 770, Operator Service Providers, as it relates to operator services provided by Consolidated in connection with its provision of telephone calling services for inmates of corrections facilities in Illinois. This is a petition for a declaratory ruling, where the Petitioner does not dispute the facts, but simply seeks whether a rule is applicable to it. Contrary to what Securus would have you believe, prior to the filing of its’ BOE, no party raised any issues of fact for the ALJ’s consideration, and no issues of fact exist on the record.

On October 22, 2012, subsequent to the deadline for the conclusion of all briefing

on this matter, Securus issued data requests to Staff. The data requests sought, among other things, documents relating to arguments asserted in Staff's response to the Petition regarding regulation of inmate-only telephone services.

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. In the Proposed Order, the ALJ found, in pertinent part, as follows:

Consolidated's Petition provides sufficient information to determine that its request is within the parameters of the Commission's authority for issuance of a declaratory ruling and that there is an actual controversy.

* * *

There are *no issues of fact* before the Commission. Neither Securus nor Staff contests Consolidated's description of inmate calling services.

* * *

The issue before the Commission is whether the inmate calling services described herein include "operator services" as defined in Section 13-901(a)(3) of the Act and Section 770.10 of Part 770.

(*Consolidated Communications*, Proposed Order October 23, 2012, pp. 15-18)(emphasis added)("PO").

On October 26, 2012, Securus filed a Verified Motion to Set Discovery Schedule and Continue Deadlines for Briefing on Exceptions (Securus Motion). On November 1, 2012, Staff and Consolidated Communications Enterprise Services, Inc., d/b/a Consolidated Communications Public Services ("Consolidated") filed Responses to the Securus Motion objecting to the relief sought in the Securus Motion. On November 7, 2012, Securus filed a Reply to Staff's and Consolidated's Responses to the Securus Motion.

On November 13, 2012, the ALJ issued a Ruling on the Securus Motion

concluding that:

Securus' Motion ignores the procedural posture of this docket; the parties waived pre-filed testimony and an evidentiary hearing, and the PO has been issued. Securus has made no showing that it has exercised due diligence. Securus has not demonstrated that the discovery it wishes to pursue is relevant or necessary to the Commission's determination. The PO found that there were no issues of fact before the Commission. The matter is being briefed as a legal issue. Securus' data requests are not directed to the facts surrounding the inmate calling services in question, but rather inquire about the bases for Staff's Response to Petition filed on August 31, 2012 and about prior Commission orders. Although prior Commission orders are relevant, they are a matter of public record and can be obtained through Securus' own research.

November 13, Ruling, at 3.

The ALJ, moreover, in her November 13, Ruling also clearly warned Securus that: "Section 200.830(e) of Part 200 requires that statements of fact in briefs on exception should be supported by citation to the record." *Id.*

On November 16, 2012, Securus filed its Brief on Exceptions (BOE). In its BOE, Securus, in open defiance of the Commission Rules of Practice and the express directive of the ALJ, has included pages of new, unsupported, untested alleged facts and conclusions drawn from these extra-record alleged facts. Securus has failed to cite to the record for support because it cannot as none of these alleged new facts are in the evidentiary record. Moreover, neither Staff nor Consolidated has had an opportunity to test, either through discovery or cross-examination, into these alleged extra-record facts and the conclusions Securus based on the alleged facts. Accordingly, Staff specifically moves to strike the language starting on page 15, with the sentence stating "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" and proceeding straight through to page 21 ending with the sentence "On

this record, the PO's proffered policy rationale for regulation cannot and should not be sustained." Thus Staff also moves to strike the last two introductory sentences right before Section III, A, all of Section III, A and all of Section III, B of the Securus BOE, and all attached exhibits that Securus references in these sections. Staff will be irreversibly prejudiced unless these portions of Securus' BOE, which contain these unsupported alleged facts and associated conclusions, are stricken.

The Commission routinely enforces its Rules of Practice, including Part 200.830(e), in striking alleged facts that parties inappropriately try to insert into the evidentiary record, including in BOEs. See *e.g.*, *Notice Of Administrative Law Judges' Ruling*, Charmar Water Company, ICC Docket No. 11-0561- 0562, 0563, 0564, 0565, and 0566 Cons. (May 8, 2012).

Moreover, the ALJ's prior Ruling of November, 13, 2012, denying the Securus Motion, is the law of the case in this proceeding. Securus should not be allowed to simply ignore the ALJ's Ruling and particularly its express directive that "Section 200.830(e) of Part 200 requires that statements of fact in briefs on exception should be supported by citation to the record."

Finally, because this issue is so clear, Staff recommends that the ALJ not suspend the filing date scheduled for Reply Briefs on Exceptions, and set an expedited schedule to address this Motion to Strike.

WHEREFORE, Staff respectfully requests that the Administrative Law Judge
GRANT this Staff Motion to Strike.

Respectfully submitted,

MICHAEL LANNON
ANGELIQUE PALMER
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
E-mail: mlannon@icc.illinois.gov
apalmer@icc.illinois.gov

November 20, 2012

*Counsel for Staff of the
Illinois Commerce Commission*

ATTACHMENT 2

CONSOLIDATED COMMUNICATIONS ENTERPRISE SERVICES, INC.'S

RESPONSE TO

STAFF MOTION TO STRIKE PORTIONS OF THE SECURUS BOE

**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))	
Verified Petition for Declaratory Ruling as to the Applicability of Section 13- 901 of the Public Utilities Act and 83 Ill. Admin. Code Part 770.)	Docket 12-0413

**CONSOLIDATED COMMUNICATIONS ENTERPRISE SERVICES, INC.'S
RESPONSE TO
STAFF MOTION TO STRIKE PORTIONS OF THE SECURUS BOE**

Pursuant to the schedule set forth in the Notice of Administrative Law Judge's Ruling dated November 21, 2012 in this docket, Consolidated Communications Enterprise Services, Inc. ("Consolidated") submits this response to the Staff Motion to Strike Portions of the Securus Brief on Exceptions ("Staff Motion").¹

Consolidated agrees with and supports the Staff Motion. Consolidated also notes that there are additional portions of the Securus BOE, not identified in the Staff Motion, which are either purported factual assertions, or statements based on purported factual assertions, that are not in the record of this proceeding and that Securus is attempting to introduce for the first time in this case by statements in its BOE and/or documents appended to its BOE. These additional portions of the Securus BOE are subject to being stricken for the same reasons stated in the Staff Motion. These additional portions of the Securus BOE are:

- The third sentence in footnote 1 on page 2 ("Substantial factual evidence exists . . .") This statement refers to and is based on material in §III.B of the Securus BOE that Staff has moved to strike.
- Lines 2 through 7 on page 5, beginning with the sentence that starts "This fact is reflected in the State's Invitation for Bids . . ." and ends with "(*Id.* at 3 § 2.2.)" The

¹ Consolidated notes that there are two sections of Securus' Brief on Exceptions ("Securus BOE") that are labeled as section "III": the section at pages 11-14 and the section at pages 14-22. The Staff Motion is directed to portions of the section "III" at pages 14-22.

Invitation for Bids is referred to in greater detail at pages 16-18 of Securus BOE and is provided as Exhibit A to Appendix 1 to the Securus BOE, both of which are covered by the Staff Motion. In addition to being untimely, the contents of the Invitation for Bids is irrelevant because the issue in this case is simply whether 83 Ill. Adm. Code §770.10, 770.20(a) and 770.40 apply to the operator services provided to members of the public in connection with the inmate calling services. The purported objectives of the contract are not relevant to the determination of this legal issue. Further, the requested declaratory ruling would not result in any regulation by the Commission of telephone equipment or services provided within the walls of the corrections facilities, it would only result in clarifying that the service requirements of §770.20(a) and the maximum rates established by §770.40 are applicable to the operator services provided to members of the public located outside the corrections facilities who engage in calls with inmates.

- Footnote 8 on page 9. In addition to the statements in footnote 8 not being in the record, and being introduced for the first time in the Securus BOE, the assertions in footnote 8 are double or triple hearsay and there is no information presented to support the assertion that Technologies Management, Inc. is “a leading national telecommunications carriers’ consulting firm.” Further, the purported opinion of a third party consulting firm as to what this Commission’s policies are is irrelevant. Nor is the opinion of a consulting firm competent evidence on the legal question of whether 83 Ill. Adm. Code §770.10, 770.20(a) and 770.40 apply to the operator services provided to members of the public that are the subject of Consolidated’s Petition.
- Footnote 10 on page 15, except for the first sentence of the footnote (“Again, neither the PO or the Staff Response that it adopts offer any factual support for this assertion.”). In addition to the remainder of the information in footnote 10 not being in the record and being introduced for the first time in the Securus BOE, the information is hearsay and is unsupported by documents or by citation to any readily available sources such as statutes, tariffs, or regulatory commission regulations or orders. Further, the assertions concerning charges and requirements in other states are irrelevant, immaterial and incompetent since this case pertains to whether the provision of certain operator services to members of the public in Illinois are subject to the maximum rate provisions of the Illinois Commerce Commission’s regulations at 83 Ill. Adm. Code §770.40.
- The second full sentence on page 15, which starts with “First, this argument ignores the fact . . .” This sentence is based on the Invitation for Bids which is referred to in greater detail at pages 16-18 of Securus BOE and is provided as Exhibit A to Appendix 1 to the Securus BOE, both of which are covered by the Staff Motion. In addition to being untimely, this information on the types and costs of telephone equipment required to be installed and provided inside the corrections facilities is irrelevant to the question of whether 83 Ill. Adm. Code §770.10, 770.20(a) and 770.40 apply to the operator services provided to members of the public who engage in calls with inmates. This information is also irrelevant because §770.40 does not provide for cost of service-based ratemaking – if §770.40 applies, then the only issue is whether the rates charged by an operator service provider are less than or equal to, or exceed, the maximum rates established pursuant to §770.40(c) and (e).

Consolidated will not repeat the arguments in the Staff Motion. In addition to the arguments in the Staff Motion, Consolidated notes the following points:

1. Securus, represented by counsel, appeared at the initial prehearing conference in this docket on July 31, 2012 and waived the opportunity to submit testimony or other evidence in this case. Transcript of July 31, 2012 prehearing conference at 9. This strategic decision by Securus was cited by the ALJ in her ruling denying Securus' Motion to Set Discovery Schedule. Administrative Law Judge's Ruling, November 13, 2012, at 3. Further, if Securus believed there were grounds for presenting evidence in this case, Securus should have sought to do so in connection with its response to Consolidated's Petition for Declaratory Ruling, which Securus filed on August 30, or at the very latest promptly after the filing of Staff's Response to the Petition for Declaratory Ruling, which was filed on August 31 (almost three months ago). In short, Securus has not exercised due diligence. Further, allowing Securus to introduce evidence for the first time in its BOE would be contrary to the objective of §5-150 of the Illinois Administrative Procedure Act (5 ILCS 100/5-150), that agencies "provide . . . for the filing **and prompt disposition** of petitions or requests for declaratory rulings" (emphasis added).

2. Comparisons between the current rates charged for operator services and calls under the current IDOC contract and the rates bid in connection with the new IDOC contract (Securus BOE at 19-21) are irrelevant to the legal question presented in this case of whether 83 Ill. Adm. Code §770.10, 770.20(a) and 770.40 apply to the operator services provided to members of the public who engage in calls with inmates. Further, if §770.40 does apply, then the only question becomes whether the operator service and call rates charged (or proposed to be charged) by the operator service provider to the members of the public are less than or equal to, or exceed, the maximum charges established by the Commission pursuant to §770.40(c) and (e).

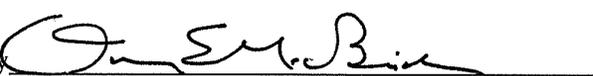
3. To the extent that Staff and Consolidated have moved to strike purported factual assertions in the Securus BOE that are unsupported by any source documents or citations to readily available sources, the ALJ should not allow Securus to use the briefing process on the Staff Motion (*i.e.*, Securus' response that is due on December 6) to submit or cite source documents or otherwise bolster the basis for these unsupported assertions. Securus should have provided the sources or bases for the new information in its BOE.

4. To the extent that the ALJ does not strike any of the portions of the Securus BOE that Staff and Consolidated have objected to, Staff and Consolidated should be allowed to respond, in their briefs in reply to exceptions, to Securus' factual assertions, based on supporting verifications.

WHEREFORE, Consolidated respectfully submits that the Staff Motion to Strike, as supplemented by the additional portions of the Securus BOE identified in this Response, should be granted.

Respectfully submitted,

CONSOLIDATED COMMUNICATIONS ENTERPRISE
SERVICES, INC.

By 

Owen E. MacBride
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
(312) 258-5680
omacbride@schiffhardin.com
Its attorney

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he served copies of Consolidated Communications Enterprise Services, Inc.'s Response to Staff Motion to Strike Portions of the Securus BOE on the persons listed below by electronic mail on November 30, 2012.

/s/ Owen E. MacBride
Attorney for Consolidated Communications
Enterprise Services, Inc.

Service List – Docket 12-0413

Janis Von Qualen
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jvonqual@icc.illinois.gov

Abram I. Moore
K&L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602
abram.moore@klgates.com

Michael J. Lannon
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601
mlannon@icc.illinois.gov

John E. Stevens
Freeborn & Peters LLP
217 E. Monroe St., Ste. 202
Springfield, IL 62701
jstevens@freebornpeters.com

Angelique Palmer
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601
apalmer@icc.illinois.gov

James Zolnieriek
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jzolnier@icc.illinois.gov

Michael J. Hayes
K&L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602
Michael.hayes@klgates.com

Dawn L. Johnson
K&L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602
Dawn.johnson@klgates.com

ATTACHMENT 3

STAFF'S REPLY TO SECURUS' RESPONSE

TO ITS MOTIONS TO STRIKE PORTIONS OF THE SECURUS BOE

**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 : Docket No. 12-0413
:
Verified Petition for Declaratory Ruling as to :
Applicability of Section 13-901 of the Public :
Utilities Act and 83 Ill. Admin. Code Part 770. :

**STAFF’S REPLY TO SECURUS’ RESPONSE TO IT’S MOTION TO STRIKE
PORTIONS OF THE SECURUS BOE**

NOW COME the Staff witnesses of the Illinois Commerce Commission (“Staff”), through its undersigned counsel, and pursuant to 83 Ill. Adm. Code 200.190 and 83 Ill. Adm. Code 200.830 files this Reply to Securus’ Response to the Staff Motion To Strike (“Staff Motion”) Portions of Securus Technologies’ (“Securus Response”) Brief on Exceptions (BOE), and Staff’s Reply to Consolidated Communications Services (“Consolidated”) Response to the Staff Motion to Strike.

I. OVERVIEW

Consolidated petitioned the Commission for a declaratory ruling as to the applicability of Section 220 ILCS 5/13-901 of the Public Utilities Act (the “Act” or “PUA”) and the Commission’s regulations at 83 Ill. Adm. Code Part 770, Operator Service Providers, as it relates to operator services provided by Consolidated in connection with its provision of telephone calling services for inmates of corrections facilities in Illinois. This is a petition for a declaratory ruling, where the Petitioner does not dispute the facts, but simply seeks whether a rule is applicable to it.

Some of the issues raised in Staff's Motion To Strike Portions of Securus' BOE were fully addressed, and in the interest of avoiding unnecessary duplication, Staff has not repeated every argument previously made in Staff's Motion. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in its initial motion.

II. ARGUMENT

Staff's Response to Consolidated

Staff agrees with and supports Consolidated's position on every issue it addressed in its Response to the Staff Motion to Strike. In particular, Staff agrees with and supports striking the additional portions of the Securus BOE that Consolidated identified for the reasons Consolidated articulated. (See Consolidated Response to Staff Motion to Strike, pp. 1-2)

Staff's Response to Securus

As an initial matter, one need only a cursory reading of the Securus Preliminary Statement in its Response to understand the absurdly desperate tactics that Securus has been reduced to. (See Securus Response to Staff's Motion to Strike, pp. 1-2) For instance, Securus claims that Staff is pursuing an "unrelenting effort to rush this proceeding to resolution . . . with as little analysis and inquiry as possible." Yet, Attachment A (the transcript of the pre-hearing held on July 31, 2012) to the Securus Reply clearly reflects that Securus itself agreed to the schedule. Moreover, Securus claims that it needs to respond to new facts that Staff injected into this proceeding by . . . discussing the publicly available [bid] that Consolidated has already described in its filing." *Id.* at 1. Huh? What? Staff "injected" new facts by "discussing" something

Consolidated had "already described"? Now that is an example of pure double-speak. It also seems to assume that Staff's role in Commission proceedings is supposed to be that of a potted plant; that is, a party that merely sits and does not say or offer anything.

Securus also, to put it charitably, willfully mis-characterizes the pre-hearing conference. If Securus was not a "party" on July 31, it is also technically true when Securus filed its Response to the Petition, filed on August 23, 2012, it was not a party because Securus filed a Petition to Intervene on August 30, 2012. Nonetheless, the ALJ treated Securus as a party on both July 31 at the pre-hearing conference and August 23 when Securus was allowed to file its Response to the Petition. Securus should not be allowed to complain now that it was not a party on July 31. Additionally, Securus claims that it was not asked whether it "wanted discovery, pre-filed testimony or a hearing." Of course, this is an absurd claim as Securus agreed to the schedule that was put in place. Ironically, in this instance, it is Securus that is claiming for itself the role of a potted plant.

A. Securus' knowingly agreed that the facts in this record are uncontested, that no issues of fact exist, and waived its' right to present a witness, to engage in discovery and to have an evidentiary hearing.

Securus would have you believe that it never agreed that the filing of discovery, pre-filed testimony, or a hearing was unnecessary. Well thankfully, we have the transcript of the July 31, 2012, pre-hearing conference, and an email from Securus to the ALJ prior to the pre-hearing conference, to jog our memories.

Prior to the pre-conference hearing, counsel for Securus contacted Administrative Law Judge ("ALJ") Von Qualen on July 30, 2012, and submitted a detailed letter requesting dismissal of the Petition. (See Staff Exhibit 1, July 30, 2012).

Attached to this letter, were documents in support of Securus' letter requesting dismissal such as, legal pleadings from other unrelated cases, a prior commission order, and case law. In this letter, Securus provided a detailed 3 page outline of past events leading up to the Petition, Securus' opinion on the legal viability of the Petition, the reasons why Securus believed that the Petitioner should not be allowed to bring this petition, and ultimately why the Petition should be dismissed. *Id.* The ALJ filed this letter on e-docket as an ex parte filing. (See Ethics Report, July 31, 2012)

At the July 31, 2012 pre-hearing conference, Securus entered an appearance. The relevant portions of the transcript clearly show the subject matter dealt with, the representations, and understanding of the parties and the ALJ, are as follows:

Judge Von Qualen: I think that the purpose of the prehearing is to set a schedule for this matter.

Judge Von Qualen: Shall we go off the record and we can discuss the timing for filing of the responses?

We will go back on the record.

While we were off the record, we had a brief discussion regarding scheduling and how to proceed in this matter. It was discussed whether or not testimony would be necessary, and *the parties have agreed that testimony would not be necessary.* My understanding is that Securus is going to file a Petition to Intervene and would like an opportunity to file a response, and that response will be due to be filed and served on the parties on or before August 22. And Staff would also like the opportunity to file a response. Staff's response will be due to be filed on or before August 29 and served on the parties. And then the petitioner will have an opportunity to reply to both responses on or before September 12.

Judge Von Qualen: To the extent there are any facts in the response or reply that are new to the record, I would expect them to be supported by an affidavit or verification pursuant to the Rules of Civil Procedure.

(Tr., July 31, 2012, pp. 7, 9-11; Securus Response to Staff's Motion to Strike, Ex. A)

(Emphasis added).

It is clear from the email and the record that Securus had notice and knowledge prior to the pre-hearing conference of all claims asserted by the Petitioner and any potential areas of contested fact. It is also clear that Securus knew that it would need to notify the parties and the ALJ of any contested issues of fact, whether discovery would be needed, and if a hearing on the matter was required before briefing. However, the transcript clearly reflects the fact that Securus raised no issues of fact; did not contest any facts in the Petition; and was not deprived of the right to discovery as Securus said *nothing* to the ALJ or the parties and waived that right. *Id.* Instead, Securus agreed to go straight to briefing of the legal issue. *Id.*

Asking for a "re-do" because of Securus' failure to advocate the way they would now like to, based on a change in strategy since the Proposed Order was issued, does not create a legal or factual basis to manufacture alleged evidence to support its position.

Accordingly, Securus has not shown that it did not knowingly agree that the facts in this record are uncontested. Securus has shown that it intentionally waived its right to discovery, to present a witness that could present facts, and to hold an evidentiary hearing in this matter. Until the Proposed Order was issued, Securus was content to brief the issue. Hindsight is 20/20, but it does not entitle Securus to a second, third, or even fourth bite of the apple where there are no issues of fact or legal error.

B. Staff Made No New Factual Arguments or Conclusions Regarding Costs of Inmate Telephone Services, and therefore, Securus is not entitled to set forth new unsubstantiated and unsworn facts into the record.

Securus contends that it is entitled to respond to the alleged “unsubstantiated and erroneous factual conclusions regarding the cost of inmate telephone services that Staff injected into this proceeding and which have been adopted in the Proposed Order”. (Securus Response to Motion to Strike, p. 2) As is clear from the record, Staff did not inject facts but, instead, relied upon the facts in the Petition. Staff’s Response to the Petition argued that the Commission should be mindful of already distressed consumers that actually order and pay for these services, and make a declaratory ruling that the rates they pay should be regulated. This is a legal and policy issue, not a factual issue as Securus would have you believe.

Contrary to Securus’ representations, no new facts were injected by Staff apart from those stated in the Petition. Neither were any new facts, arguments, or conclusions made with respect to: the expense of providing this calling service or the technical requirements imposed on vendors to provide this service – these are new unsubstantiated and unsworn alleged facts and conclusions *inserted by Securus in its BOE!* None of these purported new facts were ever part of the record, or tested by the parties. Securus attempts to improperly insert new facts and conclusions based on those facts in its’ BOE, in violation of Part 200.830(e) of the Rules of Practice and this Court’s clear instruction. (November 13, Ruling, at 3)

Also, Securus’ representation that Staff does not dispute that portions of its’ BOE are material and relevant is also not accurate. Nowhere does Staff concede that

Securus' new unsubstantiated and unsworn facts are material or relevant. Interestingly enough, Securus makes this broad allegation without a single cite the record to substantiate this claim.

Additionally, with respect to Securus' contention that the arguments in Staff's response were only done after Securus responded to the Petition, as previously mentioned, Securus agreed to the schedule specifically required Staff to file its response after Securus filed its Petition to Intervene and its Response to the Petition. Thus, the record clearly shows that Staff's legal arguments were not made in reaction to Securus' response, it was made pursuant to a timeline agreed upon by the parties' and ordered by the Court. There is no merit to this argument.

As such, Securus has not demonstrated that it is entitled to set forth new unsubstantiated facts in the record.

C. The New Unsubstantiated Facts in Securus' BOE are not in the Record and are not Subject to Administrative Notice.

The record is the uncontested facts in the Petition. Securus concedes this in its' Response to Staff's Motion to Strike Portions of Securus' BOE. (Securus Response to Staff's Motion to Strike, p. 6) Yet, in its Response, Securus references provisions of Illinois Department of Corrections ("IDOC") technical requirements as to how to make the inmate phone system work, in an unrelated contract and business arrangement not before the Court. Securus contends that because the Petitioner attached an existing yet unrelated contract to its Response to Securus' Motion to Set Discovery Schedule, which was denied by the Court, it has free reign to argue that this reference created an issue of fact. Securus argues that this unrelated contract permits it to talk about other

IDOC contracts and the technical requirements thereunder. However, a simple look at the Petitioner's reference to the unrelated existing contract with IDOC in its' Response to Securus' Motion to Set Discovery Schedule, shows that Consolidated simply referenced that contract in an attempt to explain to this Court that Securus' delay tactics in this docket would have a prejudicial effect on other existing contracts. (See, Consolidated Resp. to Securus' Mot. To Set Discovery Schedule, p. 9, referencing Ex. 4) This 'other' unrelated IDOC contract was not mentioned for its factual application, relevance, or materiality to the instant docket. No facts or provisions from this other IDOC contract were even raised or argued by the Petitioner or Staff, as the technical requirements of the inmate phone system are not at issue here.

Securus had not provided any evidence or even made a remotely reasonable argument to support its contention that the Petitioner's specific and limited reference to an unrelated contract, would allow Securus to introduce new facts in its BOE regarding technical provisions that a vendor must follow to provide inmate phone service. These facts are not at issue, nor were they ever part of the record. They are not be subject to Administrative Notice, and should be stricken from Securus' BOE.

II. CONCLUSION

WHEREFORE, Staff respectfully requests that the Administrative Law Judge GRANT Staff's Motion to Strike Portions of Securus' BOE in its entirety.

Respectfully submitted,

MICHAEL LANNON
ANGELIQUE PALMER
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
E-mail: mlannon@icc.illinois.gov
apalmer@icc.illinois.gov

December 12, 2012

*Counsel for Staff of the
Illinois Commerce Commission*

STAFF EXHIBIT #1

From: Sipek, Gayle D. [gayle.sipek@klgates.com]
Sent: Monday, August 27, 2012 11:19 AM
To: VonQualen, Janis
Cc: Steven L. Childers (stevechilders@consolidated.com); Lannon, Michael; Palmer, Angelique; @ MacBride, Owen; Zolnierek, Jim; Hayes, Michael J.; Johnson, Dawn L.; Moore, Abram
Subject: FW: Consolidated Communications Enterprise Services, Inc. Response to Verified Petition for Declaratory Ruling, Docket 12-0413
Attachments: SECURUS TECHNOLOGIES RESPONSE.PDF

I received notice this morning that the original e-mail was undeliverable to Janis Von Qualen. I am resending to Janis Von Qualen.

From: Sipek, Gayle D.
Sent: Thursday, August 23, 2012 2:26 PM
To: Janis Von Qualen (jvonqual@icc.illinois.gov); Steven L. Childers (stevechilders@consolidated.com); Michael J. Lannon (mlannon@icc.illinois.gov); Angelique Palmer (apalmer@icc.illinois.gov); Owen E. MacBride (omacbride@schiffhardin.com); James Zolnierek (jzolnier@icc.illinois.gov)
Cc: Johnson, Dawn L.; Hayes, Michael J.; Moore, Abram
Subject: Consolidated Communications Enterprise Services, Inc. Response to Verified Petition for Declaratory Ruling, Docket 12-0413

The attached is being sent on behalf of Dawn L. Johnson.



Gayle D. Sipek
Legal Secretary to Dawn L. Johnson
K&L Gates LLP
70 West Madison Street, Suite 3100
Chicago, Illinois 60602
Phone: +1.312.558.8277
gayle.sipek@klgates.com
www.klgates.com

This electronic message contains information from the law firm of K&L Gates LLP. The contents may be privileged and confidential and are intended for the use of the intended addressee(s) only. If you are not an intended addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this e-mail in error, please contact me at gayle.sipek@klgates.com.

July 30, 2012

Michael J. Hayes
D 312.807.4201
Michael.hayes@klgates.com**VIA E-MAIL AND FEDERAL EXPRESS**Janis Von Qualen
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701
jvonqual@icc.illinois.gov**Re: Consolidated Communications Enterprise Services, Inc.
Verified Petition for Declaratory Ruling, Docket 12-0413**

Dear Ms. Von Qualen:

This firm represents Securus Technologies, Inc. ("Securus"). We write regarding the Verified Petition for Declaratory Ruling (the "Petition") filed by Consolidated Communications Enterprise Services, Inc. ("Consolidated") with the Illinois Commerce Commission ("ICC") on July 3, 2012, Docket No. 12-0413.

Introduction

Consolidated is a disappointed bidder for the IDOC inmate telephone contract which the State recently awarded to Securus. The Petition is nothing more than an attempt of a disappointed bidder to manufacture some type of after-the-fact support for its meritless bid protest lawsuit. As set forth in more detail below, we would request that the ICC use its broad discretion and summarily dismiss the Petition pursuant to Section 200.220(h) of the ICC's Rules of Practice because: 1) Consolidated has filed a lawsuit before the Circuit Court of Sangamon County seeking the same relief; 2) the ICC has already ruled on and resolved the rate issue Consolidated requests a declaratory ruling on; and 3) Consolidated is not an "affected person" with standing to request this declaratory ruling.

A. Consolidated Has Brought the Rate Issue Before a Court.

As an initial matter, the ICC should use its discretion to summarily dismiss the Petition because Consolidated has brought this matter before a Court.

The State has recently awarded Securus the State's new inmate telephone contract. Consolidated, the State's incumbent inmate telephone provider, filed a bid protest claiming that Securus' bid included surcharges that exceeded the cap on surcharges for provision of telecommunications services authorized by 83 Ill. Adm. Code §770.40(c) and (e). The Chief

Janis Von Qualen
July 30, 2012
Page 2

Procurement Office (“CPO”) denied Consolidated’s bid protest because prior ICC precedent made clear that “inmate-only payphone providers [such as Securus] are not regulated ‘telecommunications carriers’ within the meaning of Section 13-202 of the Act.” See Petition, Attachment 1, CPO’s Decision. Based on this ICC precedent, the CPO denied Consolidated’s bid protest.

After the CPO denied Consolidated’s bid protest, Consolidated commenced a lawsuit against Securus, the Department of Central Management Services, the Illinois Chief Procurement Office, and others (*Consolidated v. Dept. of Central Management Services, et al.*, Case No. 2012 MR 556, Circuit Court of Sangamon County, Illinois) (the “Springfield Litigation”) regarding the IDOC inmate telephone contract.¹ See Consolidated’s Complaint filed in the Springfield Litigation (attached hereto as Exhibit 1). Consolidated alleged in the Springfield Litigation that the CPO was incorrect in denying its bid protest because Securus should be not be able to exceed the ICC’s cap on surcharges.

Rule 200.220(b)(1) of ICC’s Rules of Practice require Consolidated to include “a full disclosure of the requester’s interest” in its Petition. Consolidate failed to do this. Specifically, Consolidated failed to mention that the same issue it requests a declaratory ruling on is the subject of the Springfield Litigation. The Petition is simply an attempt to end-run the court in the Springfield Litigation and attempt to manufacture some type of an after-the-fact favorable ruling. As such, the Commission should dismiss the Petition.

B. The ICC Has Already Ruled On and Resolved the Rate Issue Raised by Consolidated.

The ICC should also summarily dismiss the Petition because the ICC has already issued precedent providing that payphones for prison inmates are “private-use” phones that are not subject to the ICC’s certification or other requirements.

Consolidated requests a ruling on whether the inmate telephone services at issue are “operator services” as that term is defined by Section 770.10 of Title 83 of the Illinois Administrative Code. However, the ICC’s prior ruling makes clear that the inmate telephone services at issue **are not** “operator services” subject to the requirements of Section 770. Indeed, in Commission Docket No. 96-0131, *Inmate Communication Corporation* (June 5, 1996) (attached hereto as Exhibit 2), the ICC reiterated its prior precedent that “telecommunication providers that do not locate telephones in public areas are not public utilities and are not subject to Commission regulation with respect to that service.” The ICC explained that prisoners are not members of the public, and a provider of pay telephones which are for inmate-only use is therefore “not [] a public utility or telecommunications carrier under Section 13-202 of the Public Utilities Act with

¹ The same day Consolidated filed its Complaint in the Springfield Litigation and its Petition with the ICC, it filed a second bid protest with the CPO (raising other meritless issues). Consolidated is using this desperate flurry of meritless actions in an effort to prolong its status as the provider of payphone services to IDOC inmates, even if only for the short time during which the frivolous complaints are pending.

Janis Von Qualen
July 30, 2012
Page 3

respect to these phones even though it may be considered to be reselling telecommunications services.” In fact, the ICC made clear that it “considered operator services associated with the provision of non-public telephones in corrections institutions to be exempt from the operator service requirements of 83 Ill. Adm. Code 770.” This case has never been rescinded or overturned. Moreover, this case was recently cited in Commission Docket No. 05-0429, *Infinity Networks* (Oct. 19, 2005) (attached hereto as Exhibit 3), where the ICC affirmed its position that “inmate-only payphone providers are not regulated ‘telecommunications carriers’ within the meaning of Section 13-202 of the [Public Utilities] Act” and that “[t]hese principles will guide all subsequent proceedings before this Commission.” As such, the ICC has already resolved the issues in the Petition by concluding that payphones for prison inmates are “private-use” phones that are not subject to the ICC’s certification or other requirements.

C. The Commission should Dismiss the Petition Because Consolidated is not an “Affected Person” with Standing to Request a Declaratory Ruling.

Section 200.220(a) of the ICC’s Rules of Practice only entitles an “affected person” to request a declaratory ruling. Consolidated cannot be an “affected person” because the bidding for the IDOC inmate telephone contract is finished and the State has issued a notice of intent to award the contract to Securus. The Petition does not mention any future bidding or even attempt to explain how Consolidated is an “affected person.”

Apparently, Consolidated hopes to reverse the Commission’s longstanding position on this issue and then attempt to convince the court in the Springfield Litigation to somehow retroactively apply the revised position to disqualify Securus. A court cannot retroactively apply an ICC ruling that did not exist at the time of bidding to disqualify a bidder. The Petition is merely Consolidated’s misguided litigation tactic, which does not make Consolidated an “affected person” with standing to request a declaratory ruling.

Conclusion

For the above-described reasons, the ICC should summarily dismiss the Petition. Alternatively, Securus requests that it be served with the Petition pursuant to Section 200.220(c) of the ICC’s Rules of Practice and that Securus have the opportunity to file a response to the Petition.

Sincerely,



Michael J. Hayes

cc: Owen MacBride

ATTACHMENT 4

NOTICE OF ADMINISTRATIVE LAW JUDGE'S RULING

DATED DECEMBER 18, 2012



ILLINOIS COMMERCE COMMISSION

December 18, 2012

Consolidated Communications Enterprise Services, Inc.	:	
d/b/a Consolidated Communications Public Services	:	
	:	12-0413
Verified Petition for Declaratory Ruling as to the Applicability of Section 13- 901 of the Public Utilities Act and 83 Ill. Admin. Code Part 770.	:	SERVED ELECTRONICALLY

NOTICE OF ADMINISTRATIVE LAW JUDGE'S RULING

TO ALL PARTIES OF INTEREST:

Notice is hereby given by the Administrative Law Judge that on November 20, 2012, the Staff of the Illinois Commerce Commission ("Staff") filed a Motion to Strike Portions of the Securus Technologies, Inc. ("Securus") Brief on Exceptions ("BOE") filed on November 16, 2012. Staff's Motion to Strike alleges that Securus' BOE included pages of new, unsupported, untested facts and conclusions. A ruling was issued, setting a schedule for responses and replies and directing Securus to address all facts not supported by citations to the record. Consolidated Communications Enterprise Services, Inc. d/b/a Consolidated Communications Public Services ("Consolidated") filed a response supporting Staff's Motion to Strike and identifying additional portions of Securus' BOE which it states should be stricken for the same reasons stated in Staff's motion. Securus filed a response to Staff and Consolidated.

Securus' Response to the Motion to Strike argues that Securus is not barred from and that it is entitled to respond to what it describes as unsubstantiated and erroneous factual conclusions included in Staff's August 30, 2012, Response to the Petition. Additionally, Securus argues that the facts included in its BOE that are at issue are encompassed in the record and/or are subject to administrative notice.

Securus' argument, that it is not barred from and is entitled to respond to Staff's response, ignores the procedural status of the docket. Securus failed to, in a timely manner, file a motion or seek other relief in regards to Staff's response, which Securus now claims contains unsubstantiated and erroneous factual conclusions. Rather than filing a timely motion or seeking other timely relief to address Staff's Response to the Petition, Securus waited until after the proposed order was issued and then attempted to improperly supplement the record and rely on material not in the record in its BOE.

Securus' contention that the Invitation for Bids ("IFB") is in the record is incorrect. Securus argues that because Consolidated summarized portions of the IFB in the Petition, the IFB is in the record. Although some portions of the IFB are in the record, Securus did not base its argument upon the summaries contained within the Petition. Rather, Securus attached the entire IFB to its BOE and quoted from it at length. Attaching material not in the record to its BOE and attempting to rely on material not in the record is improper.

Securus' argument that the facts and documents it includes in its BOE should not be stricken because they are subject to administrative notice also fails. Section 200.640(a)(7) of the Rules of Practice (83 Ill. Adm. Code 200.10 *et seq.*) provides for administrative notice of a variety of matters. However, as mandated by the Administrative Procedure Act (5 ILCS 100-10-40), in contested cases parties and Staff must be notified of the materials for which administrative notice is sought and must be provided a reasonable opportunity to contest the materials. Securus did not request administrative notice of the information or documents that it now argues are subject to administrative notice. To the extent Securus' argument in response to the Motion to Strike could be construed as a request for administrative notice, the request is untimely. Facts included in briefs on exceptions must be supported by citations to the record. By failing to take any action until after the proposed order was issued, Securus waived any opportunity to provide additional facts to the record.

In summary, Securus' BOE improperly included and relied upon facts and conclusions that are not in the record. For the foregoing reasons, the portions of Securus' BOE identified in Staff's Motion to Strike and in Consolidated's response are stricken. On or before December 20, 2012, Securus shall file a revised BOE and Exceptions removing the following language and all reliance upon it:

- The third sentence in footnote 1 on page 2, "Substantial factual... below.";
- Lines 2 through 7 on page 5, beginning with the sentence that starts "This fact is reflected" and ends with "... system." (Id. at 3 § 2.2.);
- Footnote 8 on page 9;
- Footnote 10 on page 15, except for the first sentence of the footnote, "In Securus' experience ..." through "... in this respect.";
- The second full sentence on page 15 and first clause of next sentence, "First, this argument ..." through "... As such,";
- From page 15 through page 21, beginning with "Second, and perhaps ..." through "... should not be sustained."

Sincerely,

Elizabeth A. Rolando
Chief Clerk

Service List – 12-0413

Owen E. MacBride
Atty. for Applicant
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606 *
mailto:omacbride@schiffhardin.com

Steven L. Childers, Chief Financial Officer
Consolidated Communications Enterprise
Services, Inc.
d/b/a Consolidated Communications Public
Services
d/b/a Consolidated Communications Network
Services
121 S. 17th St.
Mattoon, IL 61938 *
mailto:steve.childers@consolidated.com

Michael J. Hayes, Dawn L. Johnson
& Abram I. Moore
Attys. for Securus Technologies, Inc.
K & L Gates LLP
70 W. Madison St., Ste. 3100
Chicago, IL 60602, *
mailto:michael.hayes@klgates.com
mailto:dawn.johnson@klgates.com
mailto:abram.moore@klgates.com

John E. Stevens
Atty. for Securus Technologies, Inc.
Freeborn & Peters LLP
217 E. Monroe St., Ste. 202
Springfield, IL 62701 *
mailto:jstevens@freebornpeters.com

James Zolnierek, Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701 *
mailto:jzolnier@icc.illinois.gov

Michael J. Lannon & Angelique Palmer
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601 *
mailto:mlannon@icc.illinois.gov,
mailto:apalmer@icc.illinois.gov

Janis Von Qualen
Administrative Law Judge
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701 *
mailto:jvonqual@icc.illinois.gov