

**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 RESPONSE TO SECURUS’ SECOND PETITION FOR INTERLOCUTORY
REVIEW AND OFFER OF PROOF**

NOW COME the Staff 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 Response to Securus Technologies, Inc., (“Securus”) Second Petition for Interlocutory Review and Offer of Proof (“Petition”) of the December 18, 2012 Ruling.

Summary

This Interlocutory Petition, like Securus’ first Interlocutory Petition, is a transparent example of a party choosing a certain litigation strategy, which when it fails lashes out at Staff and the Administrative Law Judge for the poor choices it made. The Petition is, of necessity, full of gross misrepresentations. Securus foundational misrepresentation is that Staff adduced “unsubstantiated and erroneous factual conclusions.” (See Petition, generally.) Staff, as is clear from its filings and the record, offered one policy opinion and certain legal arguments based on the facts contained in the record. Securus, apparently, believes Staff and its counsel have a very limited role, one which does not provide them with an opportunity to voice an opinion or offer

argument. This role, of course, is absurd and entirely contrary to the Public Utilities Act and the Commission rules of procedure.

If one buys the Securus foundational misrepresentation, then it is easier to swallow what Securus conjures up next, which is that the ALJ “rushed this proceeding to resolution.” *Id.*, at 1-2. First, there was no *rush* at all. In fact, Part 200.220 (Declaratory Rulings) provides for an expedited process and does not require a hearing. Of course, Securus could have requested a hearing but failed to do so; instead, it agreed to a schedule that did not contemplate either discovery or a hearing. It is not Staff's fault or the ALJ's fault that Securus did not make a request for a hearing. The choice to remain mute was made only by Securus.

Clearly, however, it is not the rush but the *resolution* that Securus finds so unpalatable. Securus would not need to reach so deep into its trick-bag but for the PO's well-founded resolution of issues. It is the findings and conclusions of the PO that force Secures to undertake desperate tactics, such as its entirely unfounded attacks on the ALJ and Staff. These repeated and abusive tactics are bumping directly up against the Commission's Rules of Practice, Part 200.25. This code part consists of 5 subsections, all of which Securus is in clear danger of violating. These subsections consist of prohibitions against: (a) undermining the integrity of the fact-finding process; (b) unfairness; (c) slowing down proceedings in a manner that is inconsistent with the other goals of the Commission's processes; (d) inconveniencing others for no well-founded reasons; and (e) heedlessly driving up the costs of Staff, the Commission, and other parties. Securus is in clear and present danger of violating these basic tenets of due process and fairness because, among other reasons, it has not been deprived of any

process it had a right to and had a full and fair opportunity to file exceptions to the PO based upon the record evidence. The ALJ's Proposed Order's findings and conclusions may well be disagreed with by some but the PO is utterly rational, well reasoned and based entirely on the evidentiary record. There is no error. This is the essence of Securus' problem and the reason for its repeated unfounded and desperate tactics. The Commission should summarily dismiss this latest outburst from Securus.

Procedural History

Consolidated Communications Enterprise Services, Inc., d/b/a Consolidated Communications Public Services ("Consolidated"), filed on July 3, 2012, its Verified Petition for Declaratory Ruling ("Petition") in this docket. Pursuant to Section 5-150 of the Illinois Administrative Procedure Act ("IAPA"), 5 ILCS 100/5-150, 200.220(a)(1) of the Commission's Rules of Practice, and 83 Ill. Adm. Code Section 220.220(a)(1), Consolidated petitions 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.

On July 30, 2012, Securus emailed the Administrative Law Judge ("ALJ") a letter providing its position, which consisted entirely of legal argument. Securus did not raise any issues of fact in this letter. The letter was filed as an ex parte report by the ALJ on e-docket on July 31, 2012 ("Ex-parte letter").

Also on July 31, 2012, the ALJ held a preliminary hearing and established a schedule for the submission of pre-filed verified comments in lieu of briefs. (*Tr.*, July 31,

2012, pp. 9-11). Securus appeared at this hearing and was granted leave to file its Verified Petition for Leave to Intervene. Also at this hearing, Staff informed everyone of its intention to support the Petition in an off-the record discussion. Additionally, a case management schedule was set for the filing of Verified Comments on the issues raised by the Petition. All the parties agreed that no evidentiary hearing was required. The ALJ entered an Order allowing time for the Verified Comments and Replies of Consolidated, with a September 12, 2012 end date for the conclusion of all briefing. (*Id.*, at pp. 4-12). This Order was entered with the understanding that, thereafter, the ALJ would issue a Proposed Order, with time for Brief on Exceptions and Reply Brief on Exceptions to follow. (*Id.*, at p. 11). The need for discovery in this matter was never mentioned, anticipated or requested by the parties.

On August 30, 2012, Securus filed a Petition to Intervene, which also included a Response to the Petition, entitled Attachment B. Like its Ex-parte letter, Securus' Response to the Petition consisted entirely of legal argument. Securus did not raise any issues of fact.

On August 31, 2012, Staff filed its response to the Petition. In the response, Staff Witness Kathy Stewart merely introduced Part 770 and offered an opinion on its application. All arguments made by Staff were based upon the unchallenged facts contained in the Petition.

On September 14, 2012, the Administrative Law Judge ("ALJ") granted Securus' motion to intervene.

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 were generally

objectionable as they are overly broad, unduly burdensome, irrelevant, oppressive and not likely to lead to the discovery of admissible evidence in this matter. (See Securus Interlocutory Petition, Ex.1(a)). Responding to Securus' data requests was rendered moot one day later as a result of the ALJ's issuance of a Proposed Order.

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

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

On October 26, 2012, Securus filed a Motion to Set a Discovery Schedule and to Continue deadlines for Briefing on Exceptions. In response, on October 29, 2012, the ALJ issued an Order allowing responses to the motion to be filed by November 2, 2012, and replies by November 7, 2012. The ALJ also extended the dates for filing BOE and RBOE to November 16, 2012 and November 28, 2012 in light of the pending motions, and stated that these dates would be revisited based on the outcome of the pending

motion. Thereafter, Staff, the Petitioner and Securus filed their responses and reply to Securus' pending motion on November 1st, 2nd, and 7th respectively.

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

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

Securus filed its response in opposition to Consolidated's motion to shorten the briefing schedule on November 26, 2012. It also filed its' Verified Petition for Interlocutory Review and Offer of Proof. Subsequently on November 26, 2012, the ALJ issued an order denying Consolidated's request to shorten the briefing schedule.

Consolidated and Staff filed a response to Securus' Verified Petition for Interlocutory Review of the November 13, 2012 Ruling on December 3, 2012.

On November 30th and December 6th, 2012, Petitioner and Securus, respectively, filed their responses to Staff's Motion to Strike Portions of Securus' BOE, and Staff filed its reply on December 12, 2012. On December 18, 2012, the ALJ issued an Order granting Staff's Motion to Strike, and instructing Securus to file a revised BOE consistent with the ruling.

On December 19, 2012, the Commission entered an Order denying Securus' Petition for Interlocutory Review of the November 13, 2012 Ruling.

Subsequently, on December 20, 2012, Securus filed its revised BOE consistent with the ALJ's December 18, 2012 ruling. Petitioner and Staff filed their Reply BOE's on December 2, 2012.

On January 8th, 2013, Securus filed its second Verified Petition for Interlocutory Review. The second petition seeks review and reversal of the ALJ's December 18, 2012 Ruling granting Staff's Motion to Strike Portions of Securus' BOE.

Argument

I. Securus Fails to Identify Any Error by the ALJ, or that the Proposed Order is Contrary to ICC Rules and Policy

Securus contends that despite taking numerous steps to obtain full information and provide a full record on Staff's allegedly unsupported allegations, that it was denied the right to do so. Thus, Securus states it was forced to file its' BOE and respond to Staff's erroneous factual allegations and policy arguments without the benefit of Staff's responses to data requests or any discovery whatsoever. Not only is this representation false, but it demonstrates Securus' intentional mischaracterization of the record.

The record in this case clearly shows that three days after the PO was issued, Securus *for the first time* made a motion to set a discovery schedule, and *at that time* asked Staff to produce responses to DR's. If these responses were so essential and such a benefit to Securus' ability to provide a full record, why did Securus wait until *after* the PO was issued to request a response? Nevertheless, this Commission in its consideration of Securus' first Petition for Interlocutory review, which dealt with Securus' untimely request for this discovery, upheld the ALJ's ruling denying the request. (November 13, 2012 Ruling).

Securus also contends that both Staff and the ALJ did not dispute that the facts that Staff struck from the Securus BOE are relevant and material to this proceeding. This is misleading. Staff's argument in its Motion to Strike were procedural in nature, regarding the timing of the introduction of these alleged facts. Staff saw no reason to comment on whether these alleged new facts were relevant and material. Staff prevailed in its Motion, justifying its litigation strategy. Staff, however, does not agree with Securus that the material the ALJ struck on Staff's Motion were relevant and material. They are not. The ALJ's ruling on Staff's Motion was entirely proper and well reasoned. The ALJ reviewed the evidence in the record, the arguments of the parties, weighed the merits, and held as follows:

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.

(December 18, 2012, Ruling, p. 1). No amount of flamboyant language or argument on the part of Securus can negate the facts in the record of this case. If Securus failed to provide the Commission with relevant facts, it is only because Securus *chose* not to provide facts it now considers relevant. As such, Securus cannot now ask the Commission to allow it to manufacture “error” so that it can avoid the consequences of its’ own litigation strategy.

Lastly, with respect to Securus’ argument that it has wrongfully been prevented from creating a record containing evidence showing that Consolidated and Staff requested a change in ICC policy that is factually unsubstantiated and false, Staff would like to point out that this is the same re-hashed argument previously brought before, ruled on, and denied by this Commission in Securus’ first Petition for Interlocutory Review to Reverse the ALJ ruling denying Securus’ Motion to Set Discovery Schedule. (December 19, 2012, Commission Order; Securus Verified Petition for Interlocutory Review, November 26, 2012, pp. 4-5). In fact, this argument and the Petition in its entirety were denied.

II. The ALJ Properly Granted Staff’s Motion to Strike Facts Regarding IDOC Technical Requirements and IFB contracts, as that Information Was Never Part of the Record.

Here is yet another example of Securus trying to take a second bite of the apple before the Commission. Securus’ argument that the ALJ erred in striking facts regarding certain Illinois Department of Correction (“IDOC”) technical requirements and unrelated State Invitation for Bid (“IFB”) information/contracts is entirely meritless.

Securus failed in its Response to the Motion to Strike Portions of the BOE, and fails again now, to point to any error in the ALJ’s application of the law to the facts in this

case. The ALJ considered this issue in ruling on Staff's Motion to Strike Portions of Securus' BOE on December 18, 2012. The ALJ ruled as follows:

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.

(December 18, 2012, Ruling, p.2).

And yet again, in the filing of this petition, Securus still provides no evidence to negate the fact that the IDOC and IFB information that it seeks to claim is part of the record and/or subject to administrative notice, was never part of the record; despite its attempt to attach it to the BOE, well after the window for discovery and briefing had closed. Securus has not made even a remotely reasonable argument. These new alleged facts were not part of the evidentiary record. They were properly stricken by the ALJ from Securus' BOE.

Lastly, if attempting to manufacture facts were not enough, Securus takes it one step further and blatantly accuses the ALJ of making a ruling that she never made. In particular, Securus states that the ALJ *sua sponte* refused to take administrative notice when she ruled that: "Securus did not request administrative notice of the information that it now argues are subject to administrative notice". (December 18, 2012 Ruling, p.2; Securus Verified Petition for Interlocutory Review of the December 18, 2012 Ruling, p. 9). This statement is not a *sua sponte* ruling. It is simply a reiteration of fact in the record. Black's Law Dictionary defines '*sua sponte*' as acting "of his or its own will or

motion; voluntarily; without prompting or suggestion". (Black's Law Dictionary, 5th Ed., West Publishing, 1979). This statement in the December 18, 2012 Order certainly does not reflect that the ALJ's ruled on anything not raised by the parties on her own volition. To make such a bold misrepresentation is not only desperate, but it calls into question the veracity of Securus' arguments, allegations, and this petition in its entirety.

Conclusion

WHEREFORE, Staff respectfully requests that the Commission deny Securus' Verified Petition for Interlocutory Review and Offer of Proof of the December 18, 2012 Ruling, in its entirety.

Respectfully submitted,

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