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Court of Appeal, Second Appellate District
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

Securus Technologies, LLC, a Delaware Limited Liability Company, Petitioner, v. Public Utilities Commission of the State of California, Respondent, The Utility Reform Network, Center for Accessible Technology, Prison Policy Initiative, Inc., and California Public Advocates Office, Real Parties in Interest.	Case No. B320207 Commission Decision 21-08-037

ANSWER OF REAL PARTY IN INTEREST PRISON POLICY INITIATIVE TO PETITION FOR WRIT OF REVIEW

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June 29, 2022

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that need to be disclosed pursuant to California Rules of Court, rule 8.208.

Dated: June 29, 2022

Respectfully submitted,

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS 3

TABLE OF AUTHORITIES 6

I. INTRODUCTION 10

II. NOTHING IN THE INTERIM ORDER CONTRADICTS FCC REGULATIONS 14

A. The FCC's Interstate Rate Caps Act as a Ceiling, Not a Floor 14

B. The CPUC Has Appropriately Cited and Interpreted the FCC's Factual Findings, and Is Under No Obligation to Follow the FCC in Lock-Step 15

III. THE CPUC'S ACTIONS REGARDING ANCILLARY FEES AND SITE COMMISSIONS ARE APPROPRIATE UNDER FEDERAL LAW 18

A. California is Free to Set Its Own Limits on Ancillary Fees 19

B. Nothing in Federal Law Requires the CPUC to Subjugate Its Ratemaking Authority to Sheriffs' Demands for Revenue 22

IV. THE CPUC'S FINDINGS REGARDING MARKET POWER ARE CORRECT AND CONSISTENT WITH THE FCC'S FINDINGS 24

V. THE INTERIM ORDER DOES NOT UNCONSTITUTIONALLY IMPAIR CONTRACTS 28

A. The CPUC May Impair Contracts When Exercising California's General Police Powers 31

B. Securus Cannot Prove Material Impairment of Contract Because the Record Contains No Evidence of the Relevant Contractual Terms 31

VI. CONCLUSION 32

CERTIFICATION OF COMPLIANCE 34

TABLE OF AUTHORITIES

Cases

Ames v. Pub. Util. Comm'n
(2011) 197 Cal.App.4th 1411 9

Campanelli v. Allstate Life Ins. Co.
(9th Cir. 2003) 322 F.3d 1086 29

City of El Paso v. Simmons
(1965) 379 U.S. 497 28

Home Bldg. & Loan Ass'n v. Blaisdell
(1934) 290 U.S. 398 27

Illinois Pub. Telecomm'cns Ass'n v. Fed. Comm'cns Comm'n
(D.C. Cir. 1997) 117 F.3d 555 (per curiam) 16

Louisiana Pub. Serv. Comm'n v. Fed. Comm'cns Comm'n
(1986) 476 U.S. 355 19

Midland Realty Co. v. Kansas City Power & Light Co.
(1937) 300 U.S. 109 29

People v. Galvan
(2008) 168 Cal.App.4th 846 12

Portland Ry., Light & Power Co. v. R.R Comm'n of Or.
(1913) 229 U.S. 397 28

Sveen v. Melin
(2018) ___ U.S. ___, [138 S.Ct. 1815] 30

Ting v. AT&T
(9th Cir. 2003) 319 F.3d 1126 20

Young v. City of Honolulu
(9th Cir. 2011) 639 F.3d 907 31

Statutes

47 U.S.C. § 152 20

47 U.S.C. § 201 20

47 U.S.C. § 276 .... 16, 17

Penal Code § 4025 22

Pub. Util. Code § 1757 .... 8, 14, 23

Pub. Util. Code § 451 20

Stats. 1951, ch. 764 12

Stats. 1987, ch. 1217 12

Other Authorities

Mitchell, *The History and Scope of Public Utilities Regulation in California* (1957) 30 So.Cal. L.Rev. 118................................ 30

Rules

Calif. Rules of Court, rule 8.724.. 9

Regulations

47 C.F.R. § 64.6000 18

47 C.F.R. § 64.6020 .... 18, 19

47 C.F.R. § 64.6030 13

Constitutional Provisions

U.S. Const., art. I, § 10, cl. 1 27

Real party in interest Prison Policy Initiative ("PPI") files this answer to the Verified Petition for Writ of Review and Memorandum of Points and Authorities (the "Petition") filed by petitioner Securus Technologies, LLC ("Securus") on May 11, 2022.

Securus challenges the California Public Utility Commission's ("CPUC") Decision Adopting Interim Rate Relief for IPCS (Decision 21-08-037, the "Interim Order," Exh. 69).[1] The CPUC's Interim Order is well-reasoned and provides desperately needed relief to California users of incarcerated persons calling services ("IPCS"). PPI supports the policy goals underlying the Interim Order.

This Court's review of the Interim Order, however, is limited to ensuring that the CPUC acted consistent with law, without fraud, and on the basis of substantial evidence. (Pub. Util. Code § 1757(a).) There "is a strong presumption of validity of the commission's decisions [citations], and the commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes

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[1] Unless otherwise noted, all citations to "Exhibits" or "Exh." Refer to the Appendix of Exhibits in Support of the Verified Petition for Writ of Review and Memorandum of Points and Authorities, filed by Securus on May 11, 2022. For the sake of consistency and ease-of-use, we use the same citation format as Securus, i.e., "[Exh. #], App-[Bates number]." (*See* Petition at 16, fn. 3.)

and language [citations].” (*Ames v. Pub. Util. Comm’n* (2011) 197 Cal.App.4th 1411, 1418, quoting *Greyhound Lines v. Pub. Util. Comm’n* (1968) 68 Cal.2d 406, 410-411.)

Securus raises many issues of fact and state law in its Petition, but none are persuasive; PPI largely relies on the CPUC to respond to these matters, and is confident the CPUC will do so effectively. PPI appears in this proceeding pursuant to California Rules of Court, rule 8.724(a)(2), to respond to Securus’s arguments that the Interim Order is in conflict with federal law.

As illustrated by the record, the market for IPCS is subject to both federal and state regulation. Since 2013, PPI has been an active party to an IPCS rulemaking conducted by the Federal Communications Commission (“FCC”). Securus refers to the FCC proceeding numerous times in the Petition, but does so selectively and without providing necessary context. PPI thus files this answer to provide the court with a more complete and balanced appraisal of relevant federal law.

I. INTRODUCTION

Securus begins by noting “[t]he provision of . . . IPCS to incarcerated persons is unique.” (Petition at 15.) This statement is true, but for different reasons than Securus highlights in its briefing. Perhaps the two most important aspects of the IPCS market are only obliquely referenced in Securus’s analysis, even though they deserve primary focus. First, unlike virtually all

consumer telecommunications service today, IPCS customers have no choice in providers. (Exh. 69, App-1610 [Finding 16]; Exh. 75, App-1747-1748.) The FCC, in its Third Report and Order and Fifth Further Notice of Proposed Rulemaking (which appears in the record here as Exhibit 7 to Securus's Request for Judicial Notice ("RJN")) concluded that "[i]ncarcerated people and the people they call have no choice in their telephone service provider. Instead, each correctional facility has a single provider of inmate calling services[2] that operates as a monopolist within that facility." (RJN, Exh. 7, ¶ 112 [citation omitted]; *see also id.* ¶ 7 ["Because correctional facilities generally grant exclusive rights to service providers, incarcerated people must purchase service from 'locational monopolies' and subsequently face rates far higher than those charged to other Americans."].)

The second factor that makes the IPCS market unique is that monopoly service providers receive their franchises from correctional facilities that often have a direct financial interest in maximizing revenue, which in turn puts upward pressure on rates. (*See* Petition at 17 ["many correctional authorities require additional revenue from telephone calls in order to fund [agency expenses unrelated to telecommunications]"]; *see also* RJN, Exh.

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[2] The FCC uses the term "inmate calling services" (or "ICS"), which is generally equivalent to California's defined term "incarcerated persons calling services" (or "IPCS").

7, ¶ 112 ["[V]ery often, correctional authorities award the monopoly franchise for inmate calling services based in part on what portion of inmate calling services revenues a provider has offered to share with the facility."] [citation omitted].)

It is against this backdrop that the CPUC has fashioned interim rate relief for intrastate IPCS. Telecommunications service in correctional facilities is an essential means of keeping incarcerated people connected with their families and loved ones. (RJN, Exh. 7, ¶ 7 ["Studies have long shown that incarcerated people who have regular contact with family members are more likely to succeed after release and have lower recidivism rates."].) It is not an exaggeration to say that these connections can be critical to incarcerated peoples' lives and wellbeing.

Prior to the Interim Order, as Securus itself notes, California sheriffs used these essential services as a vehicle for extracting money from incarcerated people's friends and families, and that money is often used to augment facilities' general operating budgets, not to cover the cost of facilitating telecommunications. (Petition at 17-18; *see also* Exh. 69, App-1612 [Finding 26: "Some California counties currently use funds from site commissions for rehabilitative and educational purposes for the incarcerated and for unrelated purposes."].) While the California Penal Code gives sheriffs the *ability* to extract revenue from IPCS customers, PPI is aware of no state law that makes

the CPUC's jurisdiction over telecommunications subordinate to sheriffs' discretionary ability to harvest revenue from ratepayers.[3]

Scattered throughout the Petition are references to various federal laws and FCC orders. In contrast to the narrative deployed by Securus, the CPUC is on solid ground with respect to federal law governing IPCS. We encourage the court to reject Securus's ill-crafted invocation of federal law and summarily dismiss the Petition.

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[3] Securus claims that "[t]he public interest mandate in Section 451 of the Public Utilities Code does not empower the Commission to limit the statutory discretion of county correctional authorities." (Petition at 51.) But this argument turns the appropriate legal analysis on its head. Section 451 (which contains no express or implied carve-out for IPCS) was enacted in 1951. (Stats. 1951, ch. 764, § 451, p. 2036.) The statute governing disposition of telecommunications-related site commission revenue was added to California Penal Code § 4025 several decades later, in 1987. (Stats. 1987, ch. 1217, § 1, p. 4348.) Securus invites this court to read the 1987 site-commission statute as impliedly curtailing the CPUC's power over IPCS, but this reading would run afoul of California's policy against implied amendments. (*People v. Galvan* (2008) 168 Cal.App.4th 846, 854 ["An implied amendment or repeal of a code section is generally disfavored. We presume that the Legislature, when enacting a statute, is aware of related code sections and intends to maintain a consistent body of rules."] [citations and internal quotation marks omitted].)

II. NOTHING IN THE INTERIM ORDER CONTRADICTS FCC REGULATIONS

After accusing the CPUC of conducting a "flawed" rate analysis (Petition at 46), Securus goes on to advance a profoundly flawed characterization of the FCC's ratemaking process. Specifically, Securus points to the FCC's current 14¢ rate cap for large jails (*see* 47 C.F.R. § 64.6030(b)) and then declares "[t]he FCC's methodology led it to conclude that $0.14 is a reasonable cost-based 'base' rate for large jails . . . which is nearly three times the Decision's $0.05 base rate." (Petition at 50.) As explained below, this statement both mischaracterizes the FCC's findings and inappropriately attempts to use federal law as a constraint on the CPUC's powers.

A. The FCC's Interstate Rate Caps Act as a Ceiling, Not a Floor

Securus mischaracterizes the FCC's findings by attempting to construct an absolute federal standard that does not exist. For example, Securus claims that "the FCC . . . has *repeatedly* found that rate caps *must* vary to reflect both facility type and size." (Petition at 48 [second emphasis added].) But Securus's citation in support of this statement is the FCC's 2015 report and order (RJN, Exh. 3), which has been superseded by a much different—and decidedly non-categorical—approach. The FCC's most recent pronouncement on this issue is its 2021 report and order (RJN,

Exh. 7). In the 2021 ruling, the FCC declined to promulgate a uniform rate cap for prisons and jails, doing so based on the limitations of the record before it. Even while issuing its revised rate caps, the FCC explicitly cautioned that its use of tiered rate caps is not a sacrosanct policy determination, but rather an interim step pending additional factfinding. (*Id.* ¶ 51.)

B. The CPUC Has Appropriately Cited and Interpreted the FCC's Factual Findings, and Is Under No Obligation to Follow the FCC in Lock-Step

Securus accuses the CPUC of making "selective and incorrect interpretations of the FCC's conclusions" (Petition at 49), but the Petition points to no provision of California or federal law that requires the CPUC to adopt FCC factual findings *and* legal conclusions without modification (and indeed, no such law exists).

The CPUC is empowered to make its own findings. (*See* Pub. Util. Code § 1757(b) [court hearing a petition for writ of review may not review evidence *de novo* or "exercise its independent judgment on the evidence"].) When making factual findings, the CPUC may rely in part on the FCC's record while ultimately promulgating policies that differ from the FCC's. Not only is this perfectly proper as a matter of California law, but the FCC itself has invited such an approach by encouraging state regulators to formulate different state-level IPCS regulations.

The FCC candidly admits that the data upon which it bases its (current) interim rate caps are imperfect. In a nod to the realities of rate-setting, the FCC notes that "a lack of perfect data is not fatal to agency action." (RJN, Exh. 7, ¶ 63.) And while acknowledging the imperfection of its data, the FCC also reiterates that its current rate caps are merely *interim* (*ibid.*) – a sentiment that echoes the CPUC's analysis in the Interim Order (*see* Exh. 69, App-1563-1565). Moreover, to remove any doubt about states' ability to act, the FCC clarifies that "[t]o the extent that state law . . . requires providers to impose rates or fees lower than those in our rules, that state law or requirement is specifically not preempted by our actions here." (RJN, Exh. 7, ¶ 217 [citation omitted].) Securus claims that the FCC's interstate caps are a measuring stick by which lower rates can be deemed confiscatory (Petition at 70), but if the FCC had intended for its rate caps to be used in such a manner, then it certainly would not have invited states to promulgate *lower* rate caps.

The FCC examined cost data and set interstate rate caps on a nationwide basis. While the federal rate caps apply uniformly to interstate IPCS, the FCC has never said that every state must treat the interstate caps as a floor for intrastate rate caps; yet, this is precisely the picture that Securus attempts to paint when it attacks the CPUC's departures from the FCC's rate-cap structure. The very fact that the FCC invited states to

set lower rate caps disproves Securus's interpretation of the record.

Finally, Securus makes one isolated reference to 47 U.S.C. § 276 (Petition at 20), but never explains how this statute is relevant to this case. That is because section 276 is irrelevant to this proceeding. Congress enacted section 276 as part of the Telecommunications Act of 1996 with the intent of addressing one very specific problem—in 1996, when payphones were still commonplace, many customers used payphones to dial a toll-free access number to then make a long-distance call through a provider of their choosing. Because these "dial around" schemes involved *toll free* calls, the company that operated the payphone received no revenue from these calls. (*Illinois Pub. Telecomm'cns Ass'n v. Fed. Comm'cns Comm'n* (D.C. Cir. 1997) 117 F.3d 555, 558-559 (per curiam).) Congress framed § 276 to require "fair compensation" to payphone providers in the face of this now-antiquated factual scenario.

To be clear, 47 U.S.C. § 276 remains law, and it covers IPCS calling; but, it is not relevant to the current dispute. Under section 276, "compensation is fair if the price for each *service or group of services* recovers at least its incremental costs, and no one service . . . recovers more than its stand-alone cost." (RJN, Exh. 7, ¶ 189 [citation omitted, emphasis added].) As a result, the FCC has held that:

> "fair compensation" under section 276(b)(1)(A) does not mean that each and every completed call must make the same contribution to a provider's indirect cost. Nor does it mean a provider is entitled to recover the total "cost" it claims it incurs in connection with each and every separate inmate calling services call.

(*Ibid.* [citation omitted].) Accordingly, the CPUC's determination that its current interim rate caps allow providers to recover their costs (Exh. 69, App-1557-1566) is adequate to insulate the Interim Order's rate caps from challenge under 47 U.S.C. § 276.

III. THE CPUC'S ACTIONS REGARDING ANCILLARY FEES AND SITE COMMISSIONS ARE APPROPRIATE UNDER FEDERAL LAW

The Interim Order establishes several important and necessary policies that bring just and reasonable rates to California's IPCS market. Securus criticizes two of these policies: (1) that the Interim Order eliminates most ancillary fees associated with IPCS calling, and (2) that the Interim Order calculates rate caps based in part on a 2¢ per minute allowance for facility cost recovery (commonly called "site commission" payments). Securus makes vague claims that these two policies are incompatible with federal law, but as explained below, there is no actual conflict.

A. California is Free to Set Its Own Limits on Ancillary Fees

Federal regulations define ancillary service charges (commonly called "ancillary fees")[4] as "any charge Consumers may be assessed for, or in connection with, the . . . use of Inmate Calling Services that are not included in the per-minute charges assessed for such individual calls." (47 C.F.R. § 64.6000(a).) The FCC has prohibited all ancillary service charges except for five enumerated fees which may not exceed maximum amounts specified in regulation. (*Id.* §§ 64.6000(a)(1)-(5) [defining the five allowed fees] and 64.6020 [prohibiting unenumerated ancillary fees and capping the allowed fees].)

The CPUC's Interim Order prohibits all ancillary fees with one exception: IPCS providers are still allowed to "directly pass through third-party financial transaction fees to consumers with no markup," subject to "a limit of $6.95 per transaction." (Exh. 69, App-1568.) The Interim Order's allowance of third-party "pass through" fees and the associated $6.95 cap precisely mirror the ancillary fees authorized under 47 C.F.R. § 64.6020(b)(5).

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[4] Many in the IPCS industry use the terms "ancillary service charge" and "ancillary fees" interchangeably. Indeed, even the FCC treats the two terms as equivalent. (*See* RJN, Exh. 7, ¶ 209.) The Interim Order generally speaks of "ancillary fees." (*See* Exh. 69, App-1567-1568.)

Securus claims that the Interim Order's ancillary-fee rules "conflict[] with the FCC's requirements" and are "ambiguous and unworkable." (Petition at 53-54.) Neither contention has merit. State and federal laws "conflict" where "compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving not room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." (*Louisiana Pub. Serv. Comm'n v. Fed. Comm'cns Comm'n* (1986) 476 U.S. 355, 368-369.)

Here, there is no conflict under any of the recognized standards. The FCC's rules simply restrict IPCS carriers from charging *more than* a certain amount for any type of ancillary fee; nothing in federal law requires a carrier to charge any ancillary fee. When, for example, an IPCS carrier does not charge a fee for issuing a paper bill, that company is compliant with both California law (*see* Exh. 69, App-1622 [Interim Order provision eliminating paper bill fees]) and federal law (*see* 47 C.F.R. § 64.6020(b)(4) ["No Provider shall charge a rate . . . *in excess of* . . . $2 per use" for paper bills] [emphasis added]). Accordingly, compliance with both laws is physically possible.

Nor does federal law contain any implicit barriers to state regulation—on the contrary, the FCC has explicitly provided that states may impose lower caps on ancillary fees, in which case "that state law or requirement is specifically not preempted by our actions here." (RJN, Exh. 7, ¶ 217.)

Nor has Congress occupied the field. Again, Congress has deliberately preserved the jurisdiction of states over intrastate telecommunications. (47 U.S.C. § 152(b).)

Finally, the Interim Order does not stand as an obstacle to any federal policy. Federal and California law are in harmony—both require "just and reasonable" telecommunications rates. (47 U.S.C. § 201(b); Pub. Util. Code § 451.) Congress and the FCC have invited the states to participate in telecommunications regulation, and that is precisely what the CPUC has done in the Interim Order. (*See Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1137-1138 [47 U.S.C. § 201(b) evinces a congressional intent that customers receive reasonable rates, but does not require strict uniformity throughout the country].)

Securus's companion argument that the CPUC's ancillary-fee rules are "ambiguous and unworkable" is also unpersuasive. The sole basis for this assertion is the supposed failure of the Commission to specify "which 'jurisdictionally mixed' calls are subject" to the ancillary-fee rules in the Interim Order. (Petition at 55-56.) Once again, the FCC has anticipated this argument

and set forth a legal framework that is fatal to Securus's argument. Federal law defines "jurisdictionally mixed" ancillary services as those services that are capable of supporting both interstate and intrastate communications. (RJN Exh. 7, ¶ 238.) Most ancillary fees relate to customer prepayments, and are thus jurisdictionally mixed because prepaid funds can eventually be used to pay for either inter- or intrastate calls. (*Id.* ¶ 236.) The FCC has allowed states to set their own limits on jurisdictionally mixed ancillary fees, so long as the state fee caps are not higher than the FCC's. (*Id.* ¶ 217.)

The CPUC has properly interpreted and applied the relevant federal law when crafting the ancillary fee rules in the Interim Order. (Exh. 69, App-1618 [Conclusion 20].) Accordingly, there is nothing "unworkable" about the CPUC's ancillary fee rules. To the extent that Securus is unhappy with hypothetical uncertainties in the rules, these worries are properly addressed to the CPUC, not a court hearing a petition for writ of review.

B. Nothing in Federal Law Requires the CPUC to Subjugate Its Ratemaking Authority to Sheriffs' Demands for Revenue

In its most recent ruling concerning site-commission payments, the FCC explicitly addressed California's site-commission statute and correctly noted that the law does not *require* payment of any site commissions to county jails. (RJN

Exh. 7, ¶ 103, fn. 314 [citing Cal. Penal Code § 4025(d) for the proposition that site commissions are "discretionary" when "state law specifically permits certain correctional facilities to recover site commissions from providers but does not mandate such payments."].) Securus even accedes to the FCC's reading of § 4025(d), as it must, given the statute's plain text. (Petition at 51, fn. 10.) But then Securus curiously goes on to claim that the CPUC's "comparison to the FCC-adopted allowance for site commissions is flawed." (*Id.* at 52.) The legal relevance of the CPUC's allegedly "flawed" comparison to the FCC's ruling is unclear. When the FCC added a 2¢ per minute allowance to its rate caps to account for site-commission payments that are directly related to providing IPCS, the agency did not purport to create a rule that is binding on the states.

For its part, when the CPUC borrowed the FCC's 2¢ adjustment as a *factual* matter, the California commission made clear that it was employing a different *legal* standard from the FCC. (Exh. 69, App-1561 ["Although the FCC strictly limited eligible site commission payments to those reasonably related to the facility's cost of enabling IPCS and where these result from contractual obligations or negotiations, we do not so limit eligible site commission costs today."] [citation omitted].) In light of this language, it is unclear what relief Securus seeks when it argues that "California sheriffs are not required to limit site

commissions to just a facility's costs related to providing IPCS." (Petition at 52.) This policy argument is wholly irrelevant to this proceeding because the CPUC has not ordered sheriffs to do or not do anything with respect to site commissions.

This court's review is limited to determining whether the CPUC "acted without, or in excess of, its powers or jurisdiction." (Pub. Util. Code § 1757(a)(1).) Here, although Securus challenges the factual basis for the CPUC's action, the company does not appear to dispute that the CPUC acted within its jurisdiction to set just and reasonable utility rates. (Exh. 69, App-1615 [Conclusion 2]; *see also* Petition at 14 [admitting the CPUC's jurisdiction over public utilities including Securus].) Accordingly, while this court may determine whether the CPUC acted on the basis of an adequate record (*see* Pub. Util. Code § 1757(a)(3) and (4)), the mere fact that the CPUC used a different legal framework from the FCC is legally irrelevant.

IV. THE CPUC'S FINDINGS REGARDING MARKET POWER ARE CORRECT AND CONSISTENT WITH THE FCC'S FINDINGS

Securus claims that "[t]he Commission's conclusion that IPCS providers 'operate as locational monopolies' and exercise 'market power' within facilities to charge unjust and unreasonable rates is not based on substantial record evidence or rational reasoning." (Petition at 56.) This contention is both perplexing and unsupported. It is perplexing because it is not

clear what relief Securus seeks as a result of this alleged insufficiency—none of the rules contained in the Interim Order appear to be contingent on the CPUC's market-power findings. The argument is unsupported because the CPUC made well-supported findings that are in perfect harmony with numerous detailed findings made by the FCC.

In its 2015 order, the FCC admitted that while it "prefers to rely on competition and market forces to discipline prices, there is little dispute that the ICS market is a prime example of market failure." (RJN, Exh. 3, ¶ 2 [citation omitted].) While market competition leads to "more competition, lower prices, and better services," the FCC noted that the IPCS market "by contrast, is characterized by increasing rates, with no competitive pressures to reduce rates." (*Ibid.* [citation omitted].)

Five years later, when tasked with rewriting the 2015 rules following a ruling by the United States Court of Appeals for the D.C. Circuit, the FCC cited that same judicial ruling for the proposition that incarcerated people's "only [calling] option is typically an inmate calling services provider chosen by the correctional facility that, once chosen, operates as a monopolist." (RJN, Exh. 6, ¶ 5 [citation omitted].)

In its most recent order, the FCC refined its previous determinations "that providers of telephone services to incarcerated people have monopoly power in the facilities they

serve" and proceeded to "reaffirm this long-established finding, one that applies equally not only to the rates and charges for calling services provided to incarcerated people, including ancillary services, but also to providers' practices associated with their provision of calling services." (RJN, Exh. 7, ¶ 31 [citations omitted].)

Securus attempts to elide the FCC's clear history of findings by claiming that the "relevant market" for IPCS "is the bidding market where providers compete for contracts in response to governing entities' Requests for Proposal." (Petition at 56.) But this argument too has been specifically rejected by the FCC numerous times. In 2013, in the first major order in its current IPCS rulemaking, the FCC noted that even though providers do compete for contracts,

> competition does not effectively constrain rates for interstate ICS to ensure that such rates are just, reasonable, and fair. While the [FCC] found that there is competition among ICS providers to provide service to correctional facilities, it concluded that there is not sufficient competition within facilities to ensure that rates are just and reasonable to end users because of exclusive contract arrangements.

(RJN, Exh. 2, ¶ 176 [citations omitted].) In 2015, having examined data collected as part of its first mandatory data collection, the FCC found "evidence that competition to supply ICS may not always be robust, which in turn suggests providers

are able to earn more than economic costs, and if faced with lower revenues, may remain profitable." (RJN, Exh. 3, ¶ 62.)

Finally, in its most recent order, the FCC again refuted the industry's perennial competition argument in a concise and comprehensive analysis:

> Some commenters argue the market for inmate calling services is competitive because providers of those services bid against each other to win contracts with correctional facilities. . . . Because correctional officials typically allow only one provider to serve any given facility, however, there are no competitive constraints on a provider's rates once it has entered into a contract to serve a particular facility. The Commission has observed that "because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates." Thus, even if there is "competition" in the bidding market as some providers assert, it is not the type of competition the Commission recognizes as having an ability to "exert downward pressure on rates for consumers."

(RJN, Exh. 7, ¶ 33 [citations omitted].)

The CPUC's findings regarding market power are well-reasoned and supported by a robust independent record. (Exh. 69, App-1537-1545.) The fact that the CPUC's findings are nearly identical to the FCC's findings simply lends more credibility to an already strong analysis.

V. THE INTERIM ORDER DOES NOT UNCONSTITUTIONALLY IMPAIR CONTRACTS

As a last-ditch argument, Securus summarily contends that the Interim Order unconstitutionally "impairs obligations under existing contracts."[5] (Petition at 66.) This avenue of attack falters both because Securus advances an overly broad application of the Contracts Clause and because the company has failed to lay an adequate evidentiary foundation.

A. The CPUC May Impair Contracts When Exercising California's General Police Powers

The Contracts Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." (U.S. Const., art. I, § 10, cl. 1.) But the U.S. Supreme Court has long been clear that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." (*Home Bldg. & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 428, citing *Ogden v. Saunders* (1827) 25 U.S. 213, 328.) A state inherently "continues to possess authority to safeguard the vital interests of its people" and that authority can be properly used to "modify[] or abrogate[e] contracts already in effect." (*Id.* at 434-435 [citation

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[5] Securus cites article VI, § 10, clause 1 of the U.S. Constitution in support of its argument. (Petition at 66.) Because there is no such section of the Constitution, our analysis here is based on the presumption that Securus intended to cite the Contracts Clause found in article I, § 10, clause 1.

and internal quotation marks omitted].) As a result, "[n]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." (*Id.* at 435.)

Of course, states' powers are not unlimited—to modify obligations of contract by law, a state must be acting "to protect the . . . general welfare of the people." (*City of El Paso v. Simmons* (1965) 379 U.S. 497, 508, quoting *East N.Y. Sav. Bank v. Hahn* (1945) 326 U.S. 230, 232 [internal quotation marks omitted].) Here, the Interim Order contains a clear and accurate explanation of why IPCS rate regulation is necessary as a matter of protecting the public. (Exh. 69, App-1610-1614 [Findings 12, 31, 32, and 46].) Moreover, the CPUC's actions are consistent with a long line of U.S. Supreme Court cases that have specifically upheld states' powers to modify contracts in regulated industries.

The Supreme Court has held that a state utility commission may invalidate a discriminatory railroad fare even though the railroad was contractually obligated to charge the invalidated fare. (*Portland Ry., Light & Power Co. v. R.R. Comm'n of Or.* (1913) 229 U.S. 397, 412-413 [the railroad's contractual agreement to abide by the 5¢ fare "must be taken to have been made in view of the continuing power of the state to

control the transportation rates of common carriers subject to its jurisdiction."].) Even a utility's contractual obligations created *before the existence* of a state regulatory body must yield to a subsequently constituted regulator's lawful exercise of its ratemaking authority. (*Midland Realty Co. v. Kansas City Power & Light Co.* (1937) 300 U.S. 109, 113 [contract executed prior to the formation of the Missouri utilities commission was properly abrogated by an order of the commission because "the State has power to annul and supersede rates previously established by contract between utilities and their customers."].) Federal Contracts Clause jurisprudence is as vibrant and forceful today as it was during the formative years of the early twentieth century, with twenty-first century courts recognizing states' abilities to modify contractual obligations, particularly in regulated industries. (*E.g.*, *Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, 1098-1099 [California statute that retroactively revived time-barred claims against insurer did not violate Contracts Clause "[g]iven the highly-regulated nature of the California insurance industry" and the public purpose of the statute].)

Modern Contracts Clause jurisprudence clearly disposes of Securus's contractual impairment theory. The CPUC was created over 110 years ago, in 1911, and is vested with "[b]road powers for regulation and control over public utilities." (Mitchell,

The History and Scope of Public Utilities Regulation in California (1957) 30 So.Cal. L.Rev. 118, 120.) Securus has existed for only thirty years. (Exh. 7, App-88.) Accordingly, any contracts to which Securus is a party, by definition, have been entered into at a time when the contracting parties knew or should have known that the CPUC has the power to regulate IPCS rates.

B. Securus Cannot Prove Material Impairment of Contract Because the Record Contains No Evidence of the Relevant Contractual Terms

In synthesizing its twentieth century Contracts Clause jurisprudence, the U.S. Supreme Court has characterized the necessary judicial analysis as a two-step inquiry. First, "[t]he threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship." (*Sveen v. Melin* (2018) ___ U.S. ___, [138 S.Ct. 1815, 1821-1822] [citation and internal quotation marks omitted].) This analysis is fact-sensitive, looking to multiple factors including "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating [its] rights." (*Id.* at 1822.) If the law in question does operate as a substantial impairment, the second step asks "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." (*Id.* [citation and internal quotation marks omitted].)

Securus's Contracts Clause argument necessarily fails because Securus has not provided any evidence of its contractual obligations in California. To constitute substantial impairment for purposes of a Contract-Clause analysis, the challenged law "must have caused [the party] to breach its contractual obligations and have create[d] a defense to the breach that prevents the recovery of damages." (*Young v. City of Honolulu* (9th Cir. 2011) 639 F.3d 907, 914 [citation and internal quotation marks omitted, second alteration by the court].) Here, neither the CPUC nor this Court can make such a finding, because the record does not contain any of Securus's California contracts or any other reliable evidence concerning the nature of Securus's contractual obligations. Without knowing Securus's obligations, the court cannot make a reasoned determination that such obligations are substantially impaired. This lack of evidence is fatal to Securus's Contracts Clause claim.

VI. CONCLUSION

Securus's Petition launches myriad attacks against the Interim Order. Many of Securus's complaints raise contestable issues of public policy but none point to a valid reason for this court to invalidate any component of the Interim Order. For the reasons stated herein, we respectfully ask the court to summarily dismiss the Petition.

Dated: June 29, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Cal. Rules of Court, rule 8.204(c)(1), I hereby certify that the foregoing Answer consists of 5,739 words, according to the word-count generated by the software used to produce this document.

Dated: June 29, 2022

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