STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: SECURUS TECHNOLOGIES, LLC	DOCKET NO. TF-2019-0033 **RESISTANCE TO MOTION TO COMPEL**

The Office of Consumer Advocate ("OCA") filed a motion to compel discovery, on an issue the Iowa Utilities Board (the "Board") has already – just weeks ago – resolved, which is not reasonably calculated to lead to admissible evidence, and which seeks to impose discovery efforts that are disproportionate to any reasonable use for the information sought. Securus Technologies, LLC ("Securus") resists and urges the Board to deny the motion for the following reasons.

BACKGROUND

This tariff docket is part of a series of cases that can be traced back to RMU-2017-0001, an effort by a single incarcerated calling service ("ICS") provider to propose rules to cap the rates and ancillary service charges for ICS calls. Since then, the Board and a large portion of the industry, including Securus, have been reviewing the terms and conditions of ICS services in Iowa for over four years now. For nearly all of that time, the OCA has supported language virtually identical to that now in Securus' tariff. Specifically, in the original petition in RMU-2017-0001, and again in a Notice of Intended Action issued in early 2018 in RMU-2017-0004 (the "ICS Rulemaking"), OCA supported a proposed a rule that would have provided, in relevant part:

> AOS companies that provide local or intrastate telephone services to inmates housed in prisons, jails, or other correctional facilities operated or contracted for operation by Iowa government officials shall charge rates and fees for inmate telephone services that ***do not exceed the following rates***: . .

> b. AOS companies may pass the following ancillary charges through to the end user of the collect inmate service directly with no markup:
>
> (1) ***Automated payment fees*** (includes payments by interactive voice response, web, or kiosk): ***$3***

See In re Rulemaking Regarding Inmate Calling Rate Caps, Docket No. RMU-2017-0004, Notice of Intended Action (ARC 3674C)(March 14, 2018). In short, the rule would have permitted an ICS provider to charge up to $3.00 as an Automated Payment Fee. The OCA supported this language without modification both when an ICS company proposed it and when the Board itself proposed it. *See In re Inmate Calling Rate Caps*, Docket No. RMU-2017-0001, OCA Statement of Position (May 4, 2017); *In re Inmate Calling Rate Caps*, Docket No. RMU-2017-0004 (May 25, 2018).

As the Board noted in its Order approving Securus' revised tariff sheets in this docket on April 26, 2021, the Board ultimately terminated the ICS Rulemaking on January 2, 2019, and instead required each ICS provider to file a complete updated tariff, and docketed each one for a thorough review. As the Board describes, "On January 29, 2021, Securus filed a revised tariff in compliance with the November 13, 2020 Board order." *April 26, 2021 Order*[1] at 1.

Securus' January 29, 2021 Tariff, in Section 4.3, first notes a jurisdictional question relating to ancillary fees[2], but then for intrastate jurisdictional fees provides the following:

> 4.3.3 Payment Fees.
>
> (a) The Automated Payment Fee (where available) is a credit card payment, debit card payment, and bill processing fee (including a fee for payments made by IVR, web, or kiosk (where available))
>
> **Automated Payment Fee**: $3.00 maximum charge per use

[1] Orders in the present docket will be referred to by date, without the full name and docket number.

[2] Section 4.3.1 of Securus' tariff reviews the effect of the FCC's assertion of jurisdiction over all ancillary service charges on the basis of them having mixed jurisdiction, except to the degree to which an ICS provider can segregate the calls as being intrastate based on the physical locations of the call parties being in the same state. Securus does not have access to that location data, and today treats all ancillary service charges as subject to the FCC ICS rules' caps on charges, which renders this dispute particularly irrelevant.

This language is consistent with Federal Communications Commission ("FCC") rules[3] and virtually identical to the previously proposed rule that OCA supported – that an Automated Payment Fee could be charged up to $3.00.

On February 8, 2021, Prison Policy Institute ("PPI") filed comments on the revised Securus tariff and attached portions of Securus's call script. Although the docket is for review of the tariff and not all operations of Securus, PPI raised concerns about how the script was structured and whether portions were clear. On February 26, 2021 – after a compliant tariff was filed – for the first time in any of the dockets since 2017 in which Securus was involved, OCA raised a question about whether the Automated Payment Fee, as applied to single calls, could be reduced. OCA speculated that the charge could perhaps be less than $3.00, but provided no evidence for any lower amount.

On March 2, 2021, the Board issued an "Order Approving Tariff and Requiring Revised Tariff Sheets and Explanations." While the Board required two minor changes to the Securus tariff pages, the Board did ***not*** require any changes to the language regarding the Automated Payment Fee in Section 4.3.3. The Board also found that the script PPI had complained of was reasonable but asked for an explanation of why the tariff showed a $3.00 fee while the script had a variable "[Y]" for the fee. Nonetheless, the Board expressly rejected OCA's request that an ancillary fee lower than $3.00 be considered. *March 2, 2021 Order* at 9.

On April 1, 2021, Securus filed its revised pages, and its answers to the Board's questions. Securus noted that while the tariff is Iowa-specific, the form of the script is used across the country,

[3] *See* 47 CFR § 64.6020(b)(1) ("No provider shall charge a rate for a permitted Ancillary Service Charge *in excess of*: (1) For Automated Payment Fees - $3.00 per use")(Emphasis added).

and that some locations may have contracts with a different Automated Payment Fee rate. Securus clarified, however, that for Iowa that the Automated Payment Fee is, per the tariff, always $3.00.

On April 5, 2021, OCA served Data Request ("DR") 5 on Securus, asking for "each correctional agency that has negotiated or required a cap lower than $3.00 on the ancillary charge for a single call. For each such agency, specify the amount of the negotiated or required lower cap on the ancillary charge for a single call." Securus objected (as set forth in OCA's Motion) initially on the basis of the relevance of the out-of-state facilities with myriad factual differences, and subsequently based on the burden of manually searching 1,200 agency contracts for a potential small handful of exceptions, and on the fact that there is no ongoing proceeding in which the discovery would be relevant.

On April 6, 2021, OCA filed Comments that specifically raised the issue of Securus' response regarding the script and suggested the Board revisit OCA's rejected request to lower the $3.00 Automated Payment Fee.

On April 26, 2021, the Board approved the revised tariff pages. In addition to approving the tariff and requiring no further changes, the Board set forth the discussion among the parties regarding the Automated Payment Fee and held that "***the Board will not address ancillary fees at this time***, but may revisit the issue at a later date." *April 26, 2021 Order* at 6 (Emphasis added).

Undeterred by this clear statement of the Board's position, less than 10 days later, the OCA filed a motion to compel regarding the very issue of ancillary fees that the Board had just expressly said it would not address at this time.

ARGUMENT

There are ample reasons why the Board should deny OCA's motion to compel. While discovery may be broad in Iowa, the Iowa Rules of Civil Procedure also mandate that it be proportional. *See* IRCP 1.503(8)(c). Moreover, the oft-discussed breadth of discovery in Iowa is still tied to a standard: as the sole case cited for the discovery standard by OCA provides, "inadmissible information is discoverable as long as it leads to the discovery of admissible evidence." *OCA Motion to Compel* at 2 (*citing State ex rel. Miller v. Nat'l Dietary Rsch., Inc.*, 454 N.W.2d 820, 822-23 (Iowa 1990)). In the present case, that test is not, and cannot be, met. Here, the tests work together: the information sought is not reasonable because the burden is much greater than any current relevance of that information.

I. PRIOR BOARD RULINGS SHOW THAT DISCOVERY AT THE BOARD IS NOT LIMITLESS – RELEVANCE AND PROPORTIONALITY STILL MATTER.

While the Board allows liberal discovery, the leeway is not without limits. The Board has repeatedly denied motions to compel in rulings that respect both touchstones of appropriate discovery: relevance and proportionality. Those rulings denying motions to compel include cases where the arguments favoring the discovery were considerably stronger than they are here.

Several rulings in *In re Dakota Access* are instructive, for example. As an initial matter, objectors there had a stronger argument because *an actual contested case was pending with a hearing upcoming, and many of the objectors had a direct and personal role in the hearing, including the taking of their property through eminent domain.* In one instance, the Board denied as overly broad and unduly burdensome a request for all human-directed route modifications (i.e., not those automatically made by a GIS computer program) within five miles of two specific objector parcels; the Board limited the required answer to only those modifications that directly impacted the two objectors' parcels. *See In re Dakota Access LLC*, Order Granting in Part and

Denying in Part Motion to Compel Filed by Iowa Farmland Owners Association, et al. (November 6, 2015) at 10-11.

In another order in the same case, a landowner subject to condemnation requested Dakota Access provide information on whether each parcel owner had requested modifications, and what factors were considered in deciding whether or not to make a modification. When the motion to compel was made, the request was modified to cover just the eminent domain parcel owners. The Board denied, holding:

> Thus, the number of relevant parcels is reduced from over 1,200 to closer to 450. Still, that is a substantial number of parcels that Dakota Access would have to review; the focus on an individual, parcel-by-parcel response makes this request unduly burdensome.

See In re Dakota Access LLC, Order Granting in Part and Denying in Part Motion to Compel Filed on October 5, 2015 (Gannon) (October 23, 2015) at 5-6. The review of 450 known parcels where the information sought was recent is still a substantially lesser burden than what is OCA asks of Securus at this late date: to review 1,200 agreements on an individual, contract-by-contract basis. Nonetheless, the Board denied the motion to compel.

Yet a third order in *Dakota Access* is applicable here. Based on a single passage in testimony, Sierra Club sought information on the ETCO pipeline, which can be reached by way of Dakota Access. The Board correctly realized that the single passage was unlikely to carry much weight in the entirety of the case, and further realized that the relevance of information about a *different* pipeline in a different jurisdiction was simply too remote to compel:

> With respect to Data Request No. 9, it appears the testimony that underlies the data request is a single sentence at page 3, lines 18 through 21, of Mr. Rahbar-Daniels's prefiled direct testimony. In that testimony, which is a part of a general description of the purpose of the proposed pipeline, Mr. Rahbar-Daniels says that in addition to connecting to existing pipelines at the Patoka Hub, the proposed ETCO pipeline will provide a direct link from the Patoka Hub to the Gulf Coast, specifically Nederland, Texas. That bare statement regarding the potential ETCO pipeline,

> without more, is not going to be any significant part of the Board's deliberations in this docket. The point of the testimony appears to be that the Dakota Access pipeline, if approved and constructed, will connect the Bakken production area to the Patoka Hub, where there are other crude oil pipelines, one of which might be the ETCO line. The relevance of this specific ETCO information appears to be remote, at best; Sierra Club has not established that further information about the ETCO pipeline will be relevant to this proceeding. The motion to compel a further response to Data Request No. 9 will be denied.

See In re Dakota Access LLC, Order Granting in Part and Denying in Part the Sierra Club's Motion to Compel Discovery (October 20, 2015) at 6-7. Here, OCA seeks to use a single passage from the call script, which was not even part of the tariff under review, as a hook for its discovery. As with the ETCO information, it is clear that the information sought by OCA will not be significant in the Board's deliberations – when the Board issued its April 26, 2021 Order approving Securus' revised tariff pages, it already was well aware that in some other states there were facilities with Automated Payment Fee rate caps under $3.00. Securus had told the Board so. Whereas in *Dakota Access* the decision was yet to be made, but the Board could tell the requested information was *unlikely to be material*, here the Board *actually knows for certain* that the presence of some fees below $3.00 outside of Iowa was in fact *not determinative* in the Board's decision. It is hard to see how knowing the details at this point would now affect the Board's analysis. As with the ETCO information sought by Sierra Club, the "relevance of this specific. . . information appears to be remote, at best."

The Board's limits on discovery do not come solely from *Dakota Access*, however. In a telecommunications case, *McLeodUSA Telecomms. Servs., Inc. v. Qwest Corp.*, FCU-06-20, the issue involved the conditions and charges for central office DC power provided by Qwest to McLeod. Qwest sought discovery on where, other than the central office where the dispute arose (and including other states beyond Iowa), McLeod ordered "measured power," a different product

that could substitute for what McLeod ordered in the relevant case. The Board denied Qwest's motion to compel, holding:

> With respect to Request No. 65, the Board finds that a list of the states in which McLeodUSA has requested measured power is irrelevant to whether Qwest incurs a different level of costs to provide McLeodUSA access to Qwest's central office power plants. This kind of out-of-state data appears to be beyond the established scope of this remand.

Id., Order Denying Motion to Compel (January 22, 2010) at 3-4. As in the current case, what McLeod did in other states – even though the relationship was with Qwest, the other party to the litigation, which are stronger facts than the OCA can present here – was irrelevant to the specific costs Qwest and McLeod faced in the Iowa central office involved in the dispute.

The larger point of these rulings collectively is that, contrary to OCA's apparent view, discovery at the Board is not unlimited. The Iowa Rules of Civil Procedure require relevance, and they require proportionality. As is demonstrated below, both are absent here.

II. THE OCA'S CURRENT DISCOVERY REQUEST IS NEITHER RELEVANT, NOR PROPORTIONAL, AND THE MOTION TO COMPEL MUST BE DENIED.

As Securus explained in response to OCA, and now supports by sworn affidavit[4], Securus has contracts with approximately 1,200 agencies nationwide. There is no existing list of those contracts with an Automated Payment Fee rate cap lower than $3.00. As a result, someone would have to manually review all 1,200 agreements – of which all but perhaps two dozen or less will have an Automated Payment Fee of $3.00, just like Securus charges in Iowa. This is virtually the definition of looking for a needle in a large haystack. The Securus legal department has five attorneys, an IP manager, a paralegal, one administrative staff, and four regulatory specialists. But that small team has to cover all 47 states and the District of Columbia in which Securus operates, as well as the federal jurisdiction. There are currently large proceedings under way at the FCC,

[4] *See* Affidavit of Michael Lozich, filed with this Resistance.

the California Public Utilities Commission, and the New Mexico Public Regulation Commission, so Securus' staff is already fully occupied.

On the other hand, the Board should consider how little relevance the information would have as compared to the substantial burden on Securus. As Securus pointed out in its objections to the OCA, there are numerous reasons the information on the likely handful of facilities with fees under $3.00 is not relevant here.

First, those facilities are all out of state. Every Iowa facility served by Securus has a $3.00 fee. The handful of exceptions almost surely have differences from the Iowa facilities – different terms that comprise the various trade-offs in the agreements, different legal requirements, different sizes and facility population composition, different costs to serve, different funding or bidding or management practices. Without evaluating the full context, the raw data would not be indicative of anything about the appropriateness of the Board-approved Iowa fee.[5] Yet, OCA itself has admitted that the kind of deep comparisons needed – the kind of cost analysis Securus had said would be needed to fairly set rate caps – are undesirable because such a cost proceeding is a "daunting challenge" and noted the long time it would require. *See In re Inquiry into Regulatory Requirements for Alternative Operator Services Companies*, Docket No. NOI-2019-0001, OCA's Request for Leave to File Additional Comments (January 3, 2020) at 1-2.

Second, there is no actual pending dispute here, and not even a prima facie case that there is anything to be gained, or for the Board to consider. There is no active proceeding – the Board was fully aware of OCA's argument on this issue and approved Securus' tariff anyway. The Board has now issued two orders approving Securus' Automated Payment Fee. A $3.00 Automated

[5] This is not unlike the FCC's effort to use national averages to set rate caps applicable to individual states, which the D.C. Circuit struck down, finding it "not the product of reasoned decisionmaking." *Global Tel*Link v. Fed. Comms. Comm'n*, 866 F.3d 397, 415 (D.C. Cir. 2017).

Payment Fee is fully compliant with the law and is consistent with what has been approved for Securus' competitors. There is no basis to single out Securus just because it was more transparent than its competitors about its call scripts, which were tangential to the tariff proceeding to begin with. OCA itself long supported the very language it now seeks to investigate. And even if some two dozen or less out of 1,200 agreements might have fees of $2.99, or $2.75 etc., Securus respectfully submits that there is not enough to be gained to make it worth manual review of all 1,200.[6]

OCA will surely argue that the Board made the tariff approval subject to further complaint and investigation, or that the Board said it may revisit ancillary services at a later time. But it cannot be the case that just 10 days after approval of a tariff that concluded a four-year process is an appropriate time to start a new investigation (there is no complaint). That makes a mockery of the Board's order, especially when the Board was aware of and explicitly considered – and then

[6] In an apparent effort to make a more compelling argument, OCA intentionally or through misunderstanding of the facts conflates two entirely different issues at paragraph 8 of its Motion. The sections of the FCC orders cited by OCA do not address the type of single-call product offered by Securus and at contention in this data request. As is clear in Section 3.3.5 of Securus' tariff, AdvanceConnect Single Call is a Securus product offered directly by Securus. As a result, any funding transaction fee must comply with the applicable Automated Payment Fee (i.e., not to exceed $3.00). On the other hand, OCA directs the Board's attention to products *offered by third-parties* through the ICS provider. OCA cites to Para. 182 in the FCC 2015 Order (*Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015).) noting that "the record is 'replete with evidence that some of these [single call and related] services are being used in a manner to inflate charges' and that the record 'also highlights substantial end-user confusion regarding single-call services.'" But Para. 182 makes it clear that "These options, such as single-call services, are billing arrangements whereby an ICS provider's collect calls *are billed through third-party billing entities* on a call-by-call basis to parties whose carriers do not bill collect calls." (Emphasis added.) That sentence precedes and provides context for the OCA's quotation, and it is clear that this discussion does not address single-call services directly from ICS providers, such as AdvanceConnect Single Call. OCA also fails to note that the FCC addresses these third-party single-call transactions through a rule *separate* from the standard Automated Payment Fee at issue in this data request, which is called the "Fees for Single-Call and Related Services" and requires the ICS provider to pass through "the exact transaction fee charged by *the third-party provider*, with no markup, plus the adopted, per-minute rate." 47 CFR Sec. 64.6020(b)(2). (Emphasis added).

OCA's second citation addresses third-party financial transaction fees with third-party financial services companies (e.g., Western Union and MoneyGram), which the Board already addressed in the tariffs. Para. 91 of the FCC's 2020 Order (*Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485 (2020).), which OCA cites for the proposition that the FCC "has an inquiry currently outstanding regarding ancillary charges," does not mention single-call products and does not address other ancillary service charges such as the Automated Payment Fee.

rejected – OCA's concerns.[7] There is nothing to investigate because the Board had quite literally just finished investigating this very issue, requiring Securus to file an additional explanation regarding the call script for Automated Payment Fees. The process must come to an end at some point. The OCA cannot simply relitigate every issue over and over. Allowing OCA limitless ability to engage in discovery, even when there is no pending proceeding (and therefore nowhere for the fruits of such discovery to be "admissible", as the standard for relevant discovery requires) is unsupported by law, and simply unfair to other parties. It is also counter-productive: it merely raises the costs of doing business that have to be recovered, ultimately in rates.

Finally, Securus reiterates a concern it has raised at various stages of the tariff proceedings. It is not clear whether OCA has asked every ICS provider in Iowa whether they have any contracts, anywhere in the nation, with an Automated Payment Fee less than $3.00. If this is to be an issue, then this should not be solely a Securus issue. If OCA now genuinely believes that $3.00 is an improper fee – despite there being no law to the contrary, and despite the Board approving it just weeks ago after a four-year investigation – that is a global issue appropriate for a rulemaking. It is not a matter properly resolved through a discovery dispute with a single carrier in a tariff docket.

CONCLUSION

Securus has cooperatively made all of the tariff revisions the Board has required in this lengthy process. As a result, the Board has approved Securus' tariff. The Board did so even after being apprised of OCA's concern that some facilities in other states may have contracts setting maximum Automated Payment Fees below $3.00. The Board was correct in that decision: the

[7] It seems clear that what OCA is truly attempting is to have the Board reconsider its *April 26, 2021 Order*, but to avail itself of what it sees as a lower standard for discovery disputes. OCA's real complaint is that the Board, aware of Securus' explanation that the variable in the call script was because some facilities in other states have fees lower than $3.00, nonetheless rejected OCA's argument for dragging this proceeding out to further investigate. That decision by the Board should be treated as law of the case. OCA should not be permitted to gin up a discovery dispute to get around the Board's very recent decision.

mere fact of a handful of lower fees, without all of the relevant context (other terms and conditions, costs of service, nature of the facility, other state laws, etc.) is meaningless. The rate charged uniformly in Iowa is legal and reasonable. In this circumstance, it makes no sense to allow OCA to continue to require burdensome nationwide discovery on a tariff that was just approved – and approved as to the specific issue on which discovery is sought. The Board has previously denied discovery that was tied much more tightly to a relevant geography (denying discovery regarding parcels just five miles away in *Dakota Access*; denying discovery on purchase of similar central office power services in other states in *McLeod v. Qwest*.) And the Board has previously denied discovery that was even less burdensome (the individual modification factors in *Dakota Access*, which had been reduced from the same number of individual files Securus would have to review – 1,200 – down to 450).

As the accompanying affidavit avers, the task required by OCA's discovery would be onerous for Securus' small legal department. And in exchange, the discovery would provide little or no value: there is no ongoing proceeding, the issues raised by the discovery have been decided so recently it is hard to imagine the outcome being unsettled so soon, and the facts to be discovered are simply too remote and context-sensitive to have any weight. Because the discovery sought is both irrelevant and disproportionate to any reasonable use (particularly with no active contested case), the Board should deny the Motion to Compel.

Respectfully submitted this 19th day of May, 2021.

By: */s/ Bret A. Dublinske*

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ATTORNEYS FOR SECURUS TECHNOLOGIES, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of May, 2021, he had the foregoing document electronically filed with the Iowa Utilities Board using the EFS system which will send notification of such filing (electronically) to the appropriate persons.

/s/ Bret A. Dublinske
Bret A. Dublinske