STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE: SECURUS TECHNOLOGIES, INC.	DOCKET NO. TF-2017-0041

POST-HEARING BRIEF

The Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, submits this post-hearing brief in resistance to the request of Securus Technologies, Inc. (Securus) to withdraw its tariff for intrastate inmate calling services. References are to the testimony of Michael Lozich of Securus, Major Pete Wilson of the Iowa State Sheriffs' and Deputies' Association (Iowa Sheriffs' Association), William Pope of Network Communications International Corp. d/b/a NCIC Inmate Telephone Service (NCIC), and Blake Kruger of OCA.

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Introduction and Background

In *Equal Access Corp. v. Utilities Bd.*, 510 N.W.2d 147 (Iowa 1993) (*Equal Access*), the Supreme Court held that an inmate calling service (ICS) provider is an "alternative operator services" (AOS) company within the meaning of Iowa Code § 476.91 (2017). As the Board observed earlier this year, this statute provides that specified intrastate operations of such companies are subject to the Board's jurisdiction and to a tariffing obligation, notwithstanding any deregulation. *In re Deregulation of Local Exchange Services*, Docket No. INU-2016-0001, Order Deregulating Local Exchange Service, (Aug. 9, 2017), at 5-6, 38, 48, 49, 50, 51.

In the present proceeding, Securus, one of the largest providers of inmate calling services,[1] asks to withdraw its tariff in its entirety. Granting the request would relieve Securus of the tariffing obligation. It would also relieve Securus of the Board's jurisdiction, including adhering to future regulations by the Board implementing rate caps for intrastate inmate calls similar to the rate caps established by the FCC for interstate calls. *See In re Rule Making Regarding Inmate Calling Rate Caps*, Docket No. RMU-2017-0004.

The policy reasons in support of regulation of inmate calling services are compelling. These services are "a prime example of market failure." *Global Tel*Link v. FCC*, 866 F.3d 397,

[1]After a decade of industry consolidation, three firms, Securus among them, control 85% of the ICS market nationwide. *Global Tel*Link v. FCC*, 866 F.3d 397, 404 (D.C. Cir 2017), *Rates for Interstate Inmate Calling Services*, FCC 15-136, 30 F.C.C.R. 12763 (Nov. 5, 2015) (*FCC ICS Order 2015*) at n. 55.

404 (D.C. Cir. 2017) (*Global Tel*). The rates charged by ICS providers have been described by federal authorities as "prohibitive," "egregious," "excessive," "unaffordable," "extraordinarily high," and "absent regulatory intervention, . . . likely to rise."[2]

As explained by the *Global Tel* court, once a long-term, exclusive contract is awarded by a correctional facility to an ICS provider, competition ceases for the duration of the contract and subsequent contract renewals. 866 F.3d at 404. ICS providers "operate locational monopolies with a captive customer base of inmates." *Id*. If inmates and their families wish to speak by telephone, they have no choice of provider. *Id*.[3] Mr. Lozich, Senior Corporate Counsel and Director of Regulatory Affairs at Securus, acknowledged the inmates have no choice of provider. Tr. 12, line 20, to 13, line 7; Tr. 50, lines 5-8. Mr. Pope observed that the inmates generally have "no control . . . whatever." Pre-Filed Reply at 2, line 19, to 3, line 1; Tr. 75, lines 17-19.

Interim rate caps established by the FCC limit ICS charges for *interstate* calls to $.21 (debit or prepaid) or $.25 (collect) per minute, with no per-call or per-connection charges. 47 C.F.R. § 64.6030; 64.6080; *see* Lozich, Tr. 22, lines 15-23; Tr. 34, lines 12-16. These limits have dramatically reduced the charges for interstate calls. For example, in September 2013, Securus' charge for a 15-minute interstate call from the Polk County Jail was $17.85. OCA Reply Ex. STI-11. Today, the charge for the same interstate call cannot exceed $3.15 (debit or prepaid) or $3.75 (collect). *See* Lozich, Tr. 33, line 13, to 34, line 16.

In *Global Tel*, the court invalidated the FCC's efforts to secure just and reasonable rates for *intrastate* inmate calls. It did so because "the field of intrastate communication service . . .

[2]*FCC ICS Order* 2015, note 1 above, ¶ 1; *Global Tel*, 866 F.3d at 404.

[3]Very often, correctional authorities award the monopoly franchise based principally on what portion of inmate calling revenues a provider will share with the facility, *i.e*., on the payment of "site commissions." *Id*. Accordingly, inmate calling providers compete to offer the highest site commission payments, which they recover through correspondingly higher end-user rates. *Id*.

remains the province of the states." *Id*. at 403. The principal effect of the decision is to clarify that the states bear sole responsibility for securing just and reasonable rates for intrastate inmate calls. Over 80 percent of inmate calls are intrastate.[4]

At the time of its response to OCA data requests, Securus provided inmate calling services at correctional facilities in 19 Iowa counties. OCA Reply Exs. STI-7, STI-18.[5] Its charges for 15-minute intrastate calls at these facilities are shown in a table provided by OCA.[6] In summary, for a 15-minute local call, Securus' charges range from $2.00 in Pottawattamie County to $9.75 in Cedar County. *Id*. For a 15-minute intrastate long distance call, Securus' charges range from $3.15 in Polk and Story Counties to $14.10 in Bremer County. *Id*.

Most of the charges far exceed the maximum charge for a 15-minute interstate call. *The cost of a 15-minute intrastate long distance call from the Bremer County Jail, for example, is* ***4.5 times*** *the cost of a 15-minute interstate call from the same facility*. Most of the charges also far exceed the maximum charges that Securus itself proposed to the FCC several years ago.[7] Meanwhile, the costs of providing inmate calling services have been going *down,* for a variety of

[4]*FCC ICS Order 2015*, note 1 above, ¶ 7.

[5]Securus no longer provides ICS in Allamakee and Cedar counties. OCA Reply Ex. STI-13.

[6]*See* Kruger Pre-Filed Reply at 8, citing OCA Reply Ex. STI-13.

[7]Securus and the other two largest ICS providers made a joint proposal urging the FCC to adopt rate caps of $.20 per minute for prepaid and debit calls and $.24 per minute for collect calls, both interstate and intrastate, with no per-call or connection charge. *FCC ICS Order 2015*, note 1 above, ¶¶ 76 and 158 and n. 313.

reasons, including the transition to Internet protocols.[8] Mr. Lozich agreed. Tr. 32, lines 16-25. The widely varying rates in the different facilities are unlikely to be based on costs.[9]

The problem of excessive ICS rates is exacerbated by "single pay" services, which cost as much as $14.99 per call, even for a one-minute call. *See* OCA Reply Ex. STI-15; Lozich, Tr. 26, lines 7-14. These single pay services are a growing part of the ICS market.[10] Securus has made a substantial investment in them and provides millions of such calls each year.[11] These services are used to inflate the rates paid by ICS customers.[12] They are harmful to consumers, particularly those who are newly incarcerated and vulnerable.[13] They cause substantial confusion.[14] Customers are often unaware that other payment options are available.[15] Securus describes the high-cost "single pay" option first and the low-cost or free option last.[16]

NCIC advises that the federally capped per-minute rates for interstate calls provide NCIC with sufficient revenues to cover its costs, pay a competitive commission to the correctional facility and still earn a fair profit. Pope Pre-Filed Reply at 4, lines 1-15. The Iowa Sheriffs'

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[8]*Rates for Interstate Inmate Calling Services*, FCC 13-113, 28 F.C.C.R. 14107 (Sept. 26, 2013) (*FCC ICS Order 2013*) ¶¶ 29-31 (citing increasing movement of inmate calling services to IP technology, centralized application of security measures, decreasing capital costs for on-site equipment, increased use of prepaid and debit calling as an alternative to collect calling, and inter-carrier compensation reforms that reduce the costs of transport and certain long distance charges); *see* also Pope Pre-Filed Reply at 8, lines 8-21.

[9]*FCC ICS Order 2013*, note 8 above, ¶ 36.

[10]*FCC ICS Order 2015*, note 1 above, ¶ 182. According to one study, single payment calls accounted for 14 percent of the calls and 42 percent of the revenues. *Id*., ¶ 185.

[11]*Rates for Interstate Inmate Calling Services*, FCC Docket No. 12-375, Securus Petition for Partial Stay Pending Appeal, filed Dec. 22, 2015, available at https://ecfsapi.fcc.gov/file/60001389974.pdf, p. 25 and attached affidavit of Danny DeHoyos, ¶ 6.

[12]*Rates for Interstate Inmate Calling Services*, Order Denying Stay Petitions, 31 F.C.C.R. 261 (Jan. 22, 2016), ¶ 53.

[13]*Id*., ¶ 73.

[14]*Id*., ¶ 53.

[15]*Rates for Interstate Calling Services*, FCC 16-102, 31 F.C.C.R. 9300 (Aug. 9, 2016), ¶ 41.

[16]FCC Order Denying Stay Petitions, note 12 above, n. 304. *See* also Pope, Tr. at 78, lines 7-23.

Association concludes that the federally capped per-minute rates for interstate calls are reasonable and should be adopted for Iowa county correctional facilities. Wilson Pre-Filed Reply at 2, lines 13-18, and Sched. A.

The disparity between interstate and intrastate rates has prompted inmates and their families to seek ways to have intrastate calls treated as interstate calls. Lozich, Tr. 16, lines 7-10. Pope Pre-Filed Reply at 5, line 18, to 6, line 3. As Mr. Pope observed: "If a local call costs them . . . $3 for the first minute, an out-of-state call regulated by the FCC, the maximum would be 25 cents for a one-minute call. So they might obtain a Google Voice number out of state so that the inmate would be calling out of state to reach them and get that lower rate. So when they call and say, 'Good night, Honey," it's 25 cents and not $3." Tr. 75, line 23, to 76, line 5. Securus' charge for the first minute of a local call in Iowa is as high as $3.95. OCA Reply Ex. STI-13.

Excessive rates for inmate calling deter communication between inmates and their families, with substantial and damaging social consequences. Inmates' families may be forced to choose between putting food on the table or paying hundreds of dollars each month to keep in touch. When incarcerated parents lack regular contact with their children, those children—2.7 million of them nationwide—have higher rates of truancy, depression and poor school performance. Barriers to communication from high inmate calling rates interfere with inmates' ability to consult with their attorneys, impede family contact that can make prisons and jails safer spaces, and foster recidivism. *Global Tel*, 866 F.3d at 405 (quoting FCC). In the federal court proceedings, Securus did not seriously contest these facts. *Id*.

In short, there are compelling reasons why continuing state jurisdiction over intrastate inmate calling services is needed.

I. Prior to its conversion to Internet protocols, Securus was an alternative operator services company as defined in Iowa Code § 476.91(1)(a) (2017). It was therefore subject to the Board's jurisdiction and the tariffing obligation as provided in Iowa Code § 476.91(2) (2017).

Iowa Code § 476.91(1)(a) (2017) provides the following definition:

> "*Alternative operator services company"* means a nongovernmental company which receives more than half of its Iowa intrastate telecommunications services revenues from calls placed by end-user customers from telephones other than ordinary residence or business telephones. The definition is further limited to include only companies which provide operator assistance, either through live or automated intervention, on calls placed from other than ordinary residence or business telephones, and does not include services provided under contract to rate-regulated local exchange utilities.

There appears to be no dispute regarding the application of this definition to Securus' intrastate inmate calling services prior to Securus' conversion to Internet protocols. Securus' October 2016 registration with the Board placed an "X" before the blank "ALTERNATIVE OPERATOR SERVICES ONLY." OCA Ex. Kruger Reply, Sched. B. In its order dated May 3, 2017, the Board stated: "Securus is an alternative operator services company (AOS) subject to the Board's jurisdiction under Iowa Code § 476.91 (2017)." At hearing, Mr. Lozich acknowledged that Securus was an AOS provider in prior years. Tr. 42, lines 2-7; Tr. 43, lines 5-8.

Specifically, Securus met each of the statutory criteria:

- Mr. Lozich acknowledged that Securus is a nongovernmental company. Tr. 42, lines 8-12. Securus identifies itself as a private corporation. OCA Reply Ex. STI-1; Lozich Pre-Filed Direct at 6, lines 1-2. As explained in its application to the FCC earlier this year for transfer of ownership of the stock of its corporate parent, Securus is a Delaware corporation. By virtue of the transfer, it became a

thirteenth tier subsidiary of ultimate parent Gores Trust, the direct owner of Platinum Equity, a global investment firm. OCA Ex. Kruger Reply, Sched. A.[17]

- Mr. Lozich acknowledged that, in prior years, Securus received more than half of its Iowa revenues from calls placed by end-user customers from telephones other than ordinary residence or business telephones. Tr. 42, line 13, to 43, line 8. He acknowledged that Securus generates substantially all of its Iowa intrastate revenues by providing inmate calling services within correctional facilities. Lozich Pre-Filed Direct at 10, lines 8-9; *see* OCA Reply Exs. STI-3 and STI-6. He acknowledged that all of the revenues reported in Securus' annual filing, "but for the definitional difference," are revenues from intrastate telecommunications services. Tr. at 46, lines 4-13; *see* OCA Ex. Kruger Reply, Sched. C.
- Securus provides operator assistance through automated intervention. According to section 1.0 of Securus' tariff, "Inmate Operator Assisted Service," the company uses "[a]n automated system which prompts the [calling and called parties] on how to complete a call, without the use of a live operator." OCA Reply Ex. STI-19 at 11. The statutory definition of an AOS company "expressly includes operator assistance 'either through live or automated intervention.'" *Equal Access*, 510 N.W.2d at 149. "The fact that it is a computer-generated intervention, rather than a live person, is insignificant." *Id.* Mr. Lozich appeared to concede the point. Tr. 44, line 13, to 45, line 2.

[17]Following approval of the application by the FCC, the transaction was consummated on November 1, 2017. The notice of consummation is available at https://ecfsapi.fcc.gov/file/1113184000796/2017-11-13%20-%20Securus-Platinum%20FCC%20Consummation%20Notice.pdf.

- Securus' inmate calling services are not provided under contract to rate-regulated local exchange utilities. OCA Reply Ex. STI-4.

Prior to its conversion to Internet protocols, Securus was for these reasons an AOS company within the meaning of Iowa Code § 476.91(1) (2017).[18]

II. Following its conversion to Internet protocols, Securus remains an alternative operator services company as defined in Iowa Code § 476.91(1)(a) (2017). It therefore remains subject to the Board's jurisdiction and the tariffing obligation as provided in Iowa Code § 476.91(2) (2017).

Earlier this year, the Board amended 199 IAC 22.1(3) to remove "a provider of internet protocol-enabled service or voice over internet protocol service" at retail from the regulatory definition of "telephone utility." *In re Amendments to Telecommunications Regulations*, Docket No. RMU-2015-0002, Order Adopting Amendments (Jan. 24, 2017). Citing this amendment, Securus argues that it has transitioned its equipment to Internet protocols, is no longer a telephone utility, and may therefore withdraw its tariff.

The difficulty with Securus' argument is that no regulatory amendment can alter the meaning of the statute. Iowa Code § 476.91(2) (2017) provides:

> *Jurisdiction.* Notwithstanding any finding by the board that a service or facility is subject to competition and should be deregulated pursuant to section 476.1, all intrastate telecommunications services provided by alternative operator services companies to end-user customers, using other than ordinary residence or business telephones, are subject to the jurisdiction of the board and shall be rendered pursuant to tariffs approved by the board. Alternative operator services companies shall be subject to all requirements and sanctions provided in this chapter. Contracting entities shall be subject to the requirements of any board regulations concerning telecommunications services provided by alternative operator services companies.

[18]Mr. Lozich's suggestion that Iowa Code § 476.1(d) (2017) limits the reach of the statute to motels, hotels, hospital and college dormitory rooms lacks merit. *See* Lozich Pre-Filed Direct at 10, lines 21-24. In *Equal Access*, the statute was applied to an ICS provider.

For the reasons stated below, the inmate calling services provided by Securus remain a "telecommunications" service under this statute, and the statute continues to apply.

As in an earlier Securus brief, Mr. Lozich refers to the device used by the inmate to place a call as an "Internet access" device rather than a "telephone." Lozich Pre-Filed Direct at 5, lines 4-7, 7, lines 3-4, and 8, line 10. Securus' use of the term "Internet access" device could be misread to imply that the inmate can use the equipment like a computer to access the Internet. That is not the case. As Mr. Lozich states: "IP-enabled ICS . . . facilitate the ability of inmates to talk with family, friends and other . . . call recipients . . . . Calls placed by inmates . . . are connected via IP-enabled technology . . . . Securus' data and routing center . . . routes the call data to the called party's local telephone service or cellphone provider, which then terminates the call to that party." *Id*. at 4, line 14, to 5, line 11. Such use of Internet protocols for inmate calling services is not unusual. To Mr. Pope's knowledge, all ICS systems manufactured in the past ten years use Internet protocol technology. Pre-Filed Reply at 8, lines 4-7.

Securus' tariff describes the "terminal equipment" as "telecommunications services, apparatus and associated wiring on the Premises of the Confinement Facility." OCA Reply Ex. STI-8, p. 9. The drawing submitted by Securus with its April 2017 letter shows communication between an "Inmate Caller" with equipment visually represented by the handset of a traditional telephone and a "Dialed Party" with equipment visually represented by a wireline telephone, cellphone or computer. On questioning, Mr. Lozich acknowledged the device used by the inmate meets the FCC's definition of "inmate telephone." Tr. 31, lines 14-25. *See* 47 C.F.R. § 64.6000(k) ("Inmate Telephone means a telephone instrument, or other device capable of initiating calls, set aside by authorities of a Correctional Facility for use by Inmates").

When asked whether the device provides inmates with access to the public telephone network, Mr. Lozich responded it does. Tr. 32, lines 1-3. When asked whether the inmate dials the called party's phone number, Mr. Lozich responded "yes." Tr. 32, lines 4-6. When asked how, once an inmate is connected to, say, a spouse or child, their experience differs from the experience they would have had prior to the conversion to Internet protocols, Mr. Lozich responded: "I can't think of any way in which it would." Tr. 32, lines 7-11; Tr. 39, lines 17-25.

Securus has made repeated admissions that its inmate calling service is a telecommunications service. In May 2017, approximately a month *after* its initial letter in these proceedings, Securus submitted a filing to the FCC stating: Securus "*ha[s] been providing telecommunications services since the 1990s. Securus currently provides intrastate, interstate and international telecommunications services in connection with the inmate calling services and public payphones that it provides to or at confinement facilities throughout the U.S.*" OCA Ex. Kruger Reply Sched. A, p. 3. This statement echoes like statements on numerous other occasions in Securus' Iowa tariff[19] and other filings.[20]

The meaning of Iowa law is not dependent on the company's vacillating characterization of the services it provides. In *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216

[19]Section 0.0 of the Securus "Telephone Tariff" states that the tariff "contains the regulations and rates applicable to intrastate telecommunications services provided by Securus . . . ." OCA Reply Ex. STI-19 at 9. Section 2.1.1 states that the services "consist of furnishing . . . intrastate telecommunications services to Inmate Users . . . of Confinement Facilities and who use a Company Pay Telephone on the premises thereof." *Id*. at 13. Section 3.1 states that Securus "offers intrastate . . . telecommunications services to Confinement Facilities in Iowa." *Id*. at 20. In its cover letter to revisions submitted October 9, 2017, Securus identified the tariff as a "Telephone Tariff." OCA Reply Ex. STI-8 at 2.

[20]In its "Telephone Utility Annual Report" filed March 16, 2017, Securus reported Iowa intrastate revenues, defined as "revenues from intrastate telephone services . . . ," in the amount of $1,599,831.27. OCA Ex. Kruger Reply Sched. C. In reply comments filed July 1, 2013, in Docket No. NOI-2013-0001, Securus stated: "Securus is a leading provider of telecommunications services in the . . . Inmate Telephone Service market." In Docket No. SPU-2010-0013, advising the Board of a name change from Evercom to Securus, the company stated: "Evercom . . . is registered with the Iowa Utilities Board to provide telecommunications services and provides inmate telecommunications services within the State of Iowa."

(Iowa 2014), the Supreme Court decided an issue that is virtually identical to the one presented here. The case considered a company providing Voice-over-Internet-Protocol (VoIP) service on cable wires. Holding that the company was a "telephone company" for purposes of a property tax assessment statute, the Court explained that a statute "can encompass technologies not in existence at the time of its promulgation." *Id*. at 223. Similarly, "legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope and coming into existence subsequent to their passage." *Id.* The Court "appl[ies] the language of the statute in a common-sense manner rather than assuming the legislature intended to capture only technologies that existed when the law was enacted." *Id*. at 225.

As the Court detailed in *Kay-Decker*, four earlier Supreme Court cases "underscore the importance of functionality" and "support[] the view that the [statutory] definition . . . adapts with changing technology . . . ." *Id*. at 225-26. In *Bruce Transfer Co. v. Johnston*, 227 Iowa 50, 287 N.W. 278 (1939), an 1872 statute authorizing lawsuits against railway corporations was held to apply to a trucking operation, even though automobiles did not exist in 1872. In *Kruck v. Needles*, 259 Iowa 470, 144 N.W.2d 296 (1966), a statute banning tire protuberances was held to apply to safety spike winter tires, even though tires of that type were not produced when the statute was enacted and even though the legislature "may not have had in mind prohibition of their use." In *Iowa Union Tel. Co. v. Bd. of Equalization*, 67 Iowa 250, 25 N.W. 155 (1885), a law initially pertaining only to "every telegraph company" was held to apply to telephone companies. The Court reasoned: "Both the telephone and telegraph are used for distant communication by means of wires stretched over different jurisdictions. The fundamental principle in each by which communication is secured is the same." In *Franklin v. Nw. Tel. Co.*,

69 Iowa 97, 28 N.W. 461 (1886), focusing on the fact that both telegraph and telephone companies achieved distant communication through wires, not the methods of signal transmissions, the Court held that a statute authorizing lawsuits against telegraph companies also applied to telephone companies.

The reasoning of the *Kay-Decker* Court, in particular its focus on functionality, is applicable and controlling here as to the meaning and interpretation of Iowa Code § 476.91 (2017). The earlier cases cited by the *Kay-Decker* Court "support the view that the [statutory] definition . . . adapts with changing technology, so long as there is a line and a comparable service is being provided." *Id*. at 226. As was the case with the statute at issue in *Kay-Decker*, there is no requirement in Iowa Code section 476.91 (2017) that the service be provided using any particular technology or that the wire be made of a given material or assembled in a given way. *Id*. at 224.

The proper analysis is a functional one: a traditional cable company also providing phone service on its broadband network is treated the same as a traditional phone company that also provides Internet service on its broadband network. Both "are supplying telephone services, plus other services," and both "are therefore telephone companies." *Id*. Like the cable VoIP provider in *Kay-Decker*, Securus provides end users with access to the public telephone network. *Id* at 227. To assert otherwise "misstates the reality of the situation." *Id*.

As in *Kay-Decker*, the conclusion that the company is providing a telecommunications service is bolstered by the company's own marketing materials. 857 N.W.2d at 226-27. A screenshot from its website begins: "At Securus, we understand the importance of variety and convenience when it comes to funding inmate *telephone calls*." OCA Ex. Kruger Reply Sched. F (emphasis added). The websites of the correctional facilities also consistently refer to

"telephone" or to the "telephone" or "phone" system or both. Kruger Pre-Filed Reply at 7, lines 1-16; OCA Ex. Kruger Reply Sched. G.[21]

The fact that Securus characterizes its services as "unique" or offers a "suite" of services including security and other features is irrelevant. There is no exclusionary language in the definition of AOS company at Iowa Code § 476.91(1) (2017) for companies that claim to have unique services or that offer a suite of services. A company would be unusual if it did not offer a suite of services. The statutory definition presupposes something "other than ordinary residence or business telephones." Iowa Code § 476.91(1) (2017).

The fact that Securus' services are one way, in the sense that the inmate must call out and the other party cannot call in, is similarly irrelevant. The inmate calling service at issue in *Equal Access* permitted only collect outgoing calls. 510 N.W.2d at 148. The statute was held to apply. In addition, the calls are two-way in the more important sense that both the inmate and the called party can speak to and hear one another. *See Kay-Decker*, 857 N.W.2d at 218 ("VoIP is a service that enables two-way voice communications").

Finally, the reasoning of the *Kay-Decker* Court is in no way limited to taxation statutes, as previously suggested by Securus. Only one of the four above-cited earlier Iowa precedents on which the *Kay-Decker* Court relied involved a question of the law of taxation.

In summary, the inmate calling service provided by Securus is a telecommunications service within the meaning Iowa Code § 476.91 (2017). Securus is an alternative operator services company within the meaning of the statute. Its Iowa intrastate inmate calling service is

[21]Several examples are provided here. Bremer County: "The Inmate Phone System used in the Bremer County Jail is SECURUS TECHNOLOGIES." Mahaska County: "We use Securus Technology for our inmate phone system." Marion County, under heading "Inmate Telephone Service": "an inmate . . . can contact family and friends by calling . . . from phones in the jail." Pottawattamie County: "Inmate telephone services are provided through a contract with Securus." OCA Ex. Kruger Reply, Sched. G at 2, 3, 4, 6.

subject to the Board's jurisdiction and to the tariffing requirement in the statute. Securus' proposed withdrawal of the tariff should therefore be denied.

III. The amendment to the definition of "telephone utility" at 199 IAC 22.1(3) did not have the effect of allowing Securus and other ICS providers to offer intrastate services without a tariff resulting in unregulated monopolies and consequent harm to inmates and their families.

For the reasons stated in brief point II, the amendment to the regulatory definition of "utility" at 199 IAC 22.1(3) *did not* have the effect of allowing Securus and other ICS companies[22] to offer intrastate services without a tariff. If a contrary conclusion is reached, the result would be unregulated monopolies and consequent harm to inmates and their families.

The Board requested briefing on the effect of subsections (2) and (4) of Iowa Code § 476.91 (2017). Tr. 81, lines 22-23. Both of these subsections begin with the words "Notwithstanding any finding by the board that a service or facility is subject to competition and should be deregulated . . . ." The evident purpose of this language is to ensure than any deregulation order by the Board does not have the effect of deregulating AOS services. The Board effected that purpose when it excepted AOS services from its order deregulating local exchange service. *See* above at 2.

[22]Mr. Pope estimated there are about 10 ICS providers in Iowa. Tr. 70, line 24, to 71, line 16. In addition to Securus and NCIC, the Board's website shows tariff filings for Correct Solutions, LLC, Encartele, Inc., Lattice Incorporated, Protocall Inc. and Reliance Telephone of Grand Forks, Inc. If other companies are providing intrastate inmate calling services in Iowa without a tariff, an inquiry or if necessary an enforcement proceeding may be appropriate.

IV. There is no basis in law or justification in policy for the Board to forbear from enforcing Iowa Code § 476.91 (2017).

In earlier briefing, Securus suggested the Board should "forbear" from enforcing Iowa Code § 476.91 (2017). Securus brief filed July 10, 2017 at 3-5. There is, however, no forbearance provision in this statute. "Forbearance" is a feature of federal law. The relevant statute, 47 U.S.C. § 160, titled "competition in provision of telecommunications service," authorizes forbearance if (1) enforcement of a provision is not necessary to ensure that charges and practices are just and reasonable, (2) enforcement is not necessary for the protection of consumers, and (3) forbearance is consistent with the public interest. None of these requirements, if they applied, could be said to be met here. Unregulated monopolies do not yield just and reasonable prices, do not protect consumers and are not in the public interest.

Securus argues that a number of other states have chosen not to regulate inmate calling services. Securus brief filed July 10, 2017 at 4, n. 5; Lozich, Tr. 54, line 20, to 55, line 4. Earlier this year, responding to objections based on allegedly excessive pricing to the transfer of control of Securus' corporate parent, Securus represented to the FCC that "**States Continue To Play a Role in ICS Rates**," stating that fourteen states where Securus operates impose rate caps and six other states have tariffing requirements. Hearing Ex. 1. Moreover, deregulatory actions in other states likely preceded the court's very recent decision in *Global Tel* and may have been based on an incorrect anticipation that the FCC's efforts to regulate intrastate rates would be upheld rather than struck down. Such actions in other states may need to be rethought in light of the resulting heightened need for state oversight of intrastate ICS rates.

V. Iowa Code § 476.91 (2017) is not pre-empted by federal law.

In earlier briefing, citing *Charter Advanced Services v. Lange*, 259 F.Supp.3d 980 (D. Minn. 2017), *appeal pending*, No. 17-2290 (8th Cir.), Securus argued that state regulation of "non-nomadic" or fixed VoIP services is preempted by federal law. Securus brief, filed July 20, 2017, at 3, n. 3. For the reasons stated below, the district court decision in *Charter* is not persuasive, and the Board has consistently rejected the argument.

The district court in *Charter* relied on *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), which reasoned: "the provision of IP-TDM . . . protocol conversion is sufficient to render an interconnected VoIP service an information service." 259 F.Supp.3d at 989. This reasoning, which was never persuasive,[23] was not the basis for decision on appeal to the Eighth Circuit in *Vonage*. While the appeal in *Vonage* was pending, the FCC issued an order preempting Minnesota's proposed regulation of Vonage. The FCC's order did not rest on the "protocol conversion" reasoning of the district court. It rested on a conclusion that interstate and intrastate components of "nomadic" service were inseverable, making it impossible for Minnesota to regulate the intrastate component without impermissibly regulating the interstate component. In a short order, the Eighth Circuit affirmed on the basis of the FCC order, observing that Minnesota's only avenue for review of the FCC order was a petition for review of that order. *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 394 F.3d 568 (8th Cir. 2004).

[23] *In the Matter of AT&T Petition to Launch a Proceeding concerning the TDM-to-IP Transition*, WC Docket No. No. 12-353, Comments of the National Association of Regulatory Utility Commissioners, filed Jan. 28, 2013, at 16: "[T]he shift to IP technology merely changes the technology for managing the existing network. It no more creates a new category of regulation than did the conversion from electro-mechanical to electronic switches, the introduction of multiplexers (which use packetized data), or the introduction of ISDN and frame relay services, which are also packet technologies. Indeed, significant network upgrades and transitions have occurred ever since phone service was invented."

Later, the Eighth Circuit upheld the FCC's order on direct review. *Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). The court observed, however, that the FCC had "recognized the potentially limited temporal scope of its preemption of state regulation in this area in the event technology is developed to identify the geographic location of nomadic VoIP communications." *Id*. at 579-80. The court also noted the FCC's indication in subsequent proceedings that its preemption of state authority *applied only to nomadic VoIP service* because "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation." *Id*. at 580, citing *Universal Serv. Contribution Methodology*, 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006).

The court expressly recognized that "a distinction can be drawn" between nomadic and fixed VoIP service. 483 F.3d at 575. With respect to the latter, the court said: "the geographic originating point of the communications can be determined." *Id*. Further, "when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished." *Id*.

The Eighth Circuit decision in *Vonage* thus does not approve or affirm the district court reasoning in *Vonage* on which the district court decision in *Charter* relied. Nor does the decision support the proposition that federal law preempts state law insofar as non-nomadic or fixed VoIP services are concerned.

The FCC, meanwhile, "has not classified interconnected VoIP services as 'telecommunications services' or 'information services'" and has expressly declined to subject all VoIP-PSTN traffic exclusively to federal jurisdiction. *In the Matter of Connect America Fund (CAF Order)*, FCC-11-161, 26 F.C.C.R. 17663 ¶¶ 718, 934 (2011). The FCC has also

"specifically disagreed with" two pre-*CAF Order* decisions relied on by the *Charter* court. *See Centurytel of Chatham, LLC, v. Sprint Communications Co. L.P*. (CenturyTel), 185 F.Supp.3d 932, 944-45 (W.D.La. 2016),[24] *affirmed,* 861 F.3d 566 (5th Cir. 2017).

Mr. Lozich testified that a call recipient out of state might have a local number, or that a call recipient with an in-state cell number might be out of state when called, implying that Securus is generally incapable of distinguishing interstate and intrastate calls—and hence that the FCC's rationale for preempting state regulation of nomadic VoIP should also be applied to fixed VoIP. Tr. 46, line 14, to 47, line 3. The Eighth Circuit in *Vonage*, however, was well aware of the fact that "customers can choose . . . numbers with area codes different from those associated with their billing addresses" and thus cause an intrastate call to "appear to be an interstate call," but the court nevertheless expressly recognized the distinction between nomadic and fixed VoIP as discussed above. 483 F.3d at 575. Acceptance of the implication suggested by Mr. Lozich would result in complete preemption of all state authority over inmate calling services, an absurd result in light of the *Global Tel* court's decision that intrastate inmate calls are within the jurisdiction of the states and without the jurisdiction of the FCC.

Finally, the Board has itself considered and rejected the argument that fixed VoIP services are preempted by federal law. *Sprint Communications Co., L.P. v. Iowa Telecommunications Serv., Inc.*, Docket No. FCU-2010-0001, Order dated Feb. 4, 2011;[25] *MCC Telephony of Iowa, LLC, v. Capitol Infrastructure LLC*, Docket No. FCU-2010-0015, Order dated Mar. 30, 2011. The Board's recent decision to remove retail VoIP services from the regulatory

[24]Citing CAF Order ¶ 956 n. 1953.

[25]The Board's decision was affirmed on review in federal court, but the court did not reach the issue. *Sprint Communications Co., L.P. v. Lozier*, 860 F.3d 1052 (8th Cir. 2017).

definition of telephone utility did not disturb these prior Board decisions. The Board could not have retained authority over wholesale VoIP services if federal law preempted state law.

Conclusion

For the reasons stated above, Securus is an alternative operator service company within the meaning of Iowa Code § 476.91 (2017). Its Iowa intrastate inmate calling services are subject to the Board's jurisdiction and to the tariffing requirement of the statute. The proposed tariff withdrawal should accordingly be denied.

Respectfully submitted,

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