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21-12013

Public Utilities Commission of Nevada  
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BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Rulemaking to Amend, Adopt, and/or Repeal  
Regulations in Accordance with Senate Bill  
387 (2021)

Docket No. 21-12013

REPLY COMMENTS OF PRISON POLICY INITIATIVE

Pursuant to the Notice of Rulemaking, Notice of Request for Comments, and Notice of Workshop filed in the above-referenced proceeding on December 29, 2021 (the “Notice”), Prison Policy Initiative (“PPI”) respectfully submits the following reply comments concerning implementation of Senate Bill 387.

In addition to our own comments, the Public Utilities Commission (“Commission”) staff and Securus Technologies, LLC (“Securus”) both filed opening comments in this proceeding. We respond to the substance of these comments as follows.

**I. The Regulatory Definition of “Correctional Facility” Should Mirror the Definition Used by the FCC**

Securus has proposed a new regulation that adopts Senate Bill 387’s definition of “correctional facility” verbatim.<sup>1</sup> At the same time, Securus separately proposes that the Commission adopt *all* defined terms contained in the Federal Communications Commission’s (“FCC”) rules regarding inmate calling services (“ICS”).<sup>2</sup> Securus’s two proposals are in conflict because Senate Bill 387’s definition of correctional facility is different from the FCC’s. PPI encourages the Commission to adopt all FCC defined terms, including the FCC’s definition of “correctional facility.”

As a threshold matter, it is entirely appropriate for the Commission to adopt a defined term that is more detailed than the statutory definition, provided that the regulatory definition

<sup>1</sup> Comments of Securus at 9 (Feb. 23, 2022) (proposed Nev. Admin. Code § 704.X10(1)).

<sup>2</sup> *Id.* at 12 (proposed Nev. Admin. Code § 704.X60(1)(b)). The FCC’s defined terms are found at 47 C.F.R. § 64.6000.

does not conflict with the legislature’s intent.<sup>3</sup> In the case of Senate Bill 387, the statute defines “correctional facility” as including certain enumerated types of institutions as well as “other correctional facility[ies].”<sup>4</sup> By adopting a rule that provides greater detail regarding what types of “other” correctional facilities are covered by the new ICS regulations, the Commission is solidly within the bounds of its delegated authority.

There are three reasons why adoption of the federal definition from 47 C.F.R. § 64.6000(f) is desirable. First, the FCC’s definition unambiguously applies to federal facilities.<sup>5</sup> For the sake of comprehensiveness, the Commission should regulate ICS rates and practices in all correctional facilities in Nevada including federal detention centers. Such an approach does not implicate federalism or Supremacy-Clause issues because ICS regulations would not interfere with the decisions of federal agencies (something that Nevada generally lacks the legal authority to do), but instead would regulate the conduct of private businesses operating in Nevada (a power that the legislature has clearly delegated to the Commission under Nevada Revised Statute § 703.150). Indeed, this dynamic is affirmed by the federal government itself—in a recent solicitation document for telephone service in federal immigration detention facilities, the Department of Homeland Security has specified that bidders must “meet[] all inmate telephone industry standards for Services quality as defined by the respective State regulatory agency (i.e. State Public Utility Commission) where the Primary Detention Facility is located.”<sup>6</sup> The Federal Bureau of Prisons has used comparable language in its telecommunications contracts, specifying that “matters involving the interpretation of retail rates, rate schedules, tariffs, riders, and tariff related terms provided under this Contract, and conditions or service, are

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<sup>3</sup> *State Division of Insurance v. State Farm Mutual Auto. Ins. Co.*, 995 P.2d 482, 485, 116 Nev. 290 (2000) (per curiam) (“When determining the validity of an administrative regulation, courts generally give ‘great deference’ to an agency’s interpretation of a statute that the agency is charged with enforcing.”)

<sup>4</sup> SB 387 § 2.

<sup>5</sup> 47 C.F.R. § 64.6000(j) and (r) (the definitions of “jail” and “prison” both include facilities operated by “local, state, or federal” agencies).

<sup>6</sup> U.S. Dept. of Homeland Security, Immigration & Customs Enforcement, “Draft Statement of Objectives: Noncitizen Communication Services,” Notice RFI\_001, § II.18 (Jan. 14, 2022).

subject to the jurisdiction and regulation of the utility rate commission having jurisdiction.”<sup>7</sup>

Thus, as long as its rules are limited to intrastate calling services, the Commission can and should apply those rules to ICS carriers operating in federal facilities.

The second benefit of adopting the FCC definition is clear and unambiguous coverage of incarcerated people who have not been convicted of a crime. While Senate Bill 387 refers to “a facility where *a prisoner* is housed [pursuant to a Department of Corrections contract],”<sup>8</sup> the term “prisoner” is undefined. The FCC’s definition unambiguously applies to facilities that hold people who are awaiting adjudication of criminal charges.<sup>9</sup>

Finally, the FCC is currently in the process of amending its definition to include juvenile detention facilities and secure mental health facilities to the definition of “jail.”<sup>10</sup> If, as Securus proposes, the Commission automatically adopts FCC defined terms, including future revisions,<sup>11</sup> then Nevada’s ICS rules will automatically cover residents of juvenile and mental-health facilities when the FCC finalizes its amendment.

For these reasons, the Commission should adopt a slightly modified version<sup>12</sup> of Securus’s proposed Nev. Admin. Code § 704.X60(1)(b) and reject proposed § 704.X10(1).

## **II. ICS Tariff Proceedings Should Comply with Generally Applicable Tariff Rules in Chapter 703 of the Nevada Administrative Code**

Senate Bill 387 directs ICS carriers to file schedules or tariffs for review and approval by the Commission.<sup>13</sup> Any rule that implements this provision should clarify the applicability of the Commission’s existing rules for tariff proceedings. PPI respectfully makes two suggestions in

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<sup>7</sup> See e.g., U.S. Dept. of Justice, Fed. Bureau of Prisons, Solicitation No. RFP X00-0578: Public Utility – Telecommunications Service, ¶ A.2.7.0(d) (Jul. 17, 2009).

<sup>8</sup> SB 387 § 2 (emphasis added).

<sup>9</sup> 47 C.F.R. § 64.6000(m)(1).

<sup>10</sup> See 86 Fed. Reg. 40443 (Jul. 28, 2021) (proposed modification of 47 C.F.R. § 64.6000(m)(3)).

<sup>11</sup> Cmts. of Securus at 12 (proposed Nev. Admin. Code § 704.X60(1)(c)).

<sup>12</sup> Securus’s proposed § 704.X60 must be modified because it does not comply with Nev. Rev. Stat. § 704.215(2). A complete copy of any incorporated FCC rules *must* be included in any rule adopted by the Commission. Incorporation by reference to an ephemeral website, as Securus attempts in its proposed § 704.X60(2) appears to conflict with the requirements of § 704.215(2).

<sup>13</sup> SB 387 § 4.

this respect. First, any ICS tariff proceeding should be governed by sections 703.375 through 703.410 of the Nevada Administrative Code. Second, the Commission should amend Nevada Administrative Code § 703.160(10) to include ICS tariff proceedings as a type of filing covered by that rule.

### **III. The Commission Should Issue a Rule Specifying the Information Required to Grant a Variance Request**

Senate Bill 387 anticipates a procedure for ICS carriers to seek a variance allowing rates in excess of the Commission's rate caps.<sup>14</sup> Securus's proposed rule regarding such variance proceedings is inadequate because it does not require applicants to provide information about the cost of providing services.<sup>15</sup> In brief, Securus proposes that applicants provide call volume projections and "a statement" regarding the carrier's alleged need to exceed rate caps. This information falls far short of what the Commission needs to make an informed decision—the Commission cannot discharge its duty to ensure that rates are just and reasonable<sup>16</sup> without obtaining information concerning the applicant's cost of providing service.<sup>17</sup> At a minimum, applicants should be required to submit the following:

- Basic facility and contract information (as described in Securus's proposed § 704.X40(1)(a) and (b)).
- Complete copies of the correctional facility's solicitation document for the relevant contract, the carrier's responsive proposal, and the resulting contract.
- Any publicly available evaluation of responsive bids compiled by the contracting agency (including but not limited to a summary of scores made pursuant to Nevada Revised Statute § 333.335(6)) along with a narrative explanation of what steps the carrier took to obtain such information from the contracting agency.
- Duly authenticated evidence concerning the carrier's actual or reasonably anticipated costs to provide calling service to the correctional facility (or facilities) in question.
- Any evidence of actual historic call volumes at the relevant correctional facility (or facilities) that the carrier has in its possession, but not including any such information for periods more than 36 months prior to the date of the application for variance.

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<sup>14</sup> SB 387 § 5(1)(d).

<sup>15</sup> Cmts. of Securus at 10-11 (proposed Nev. Admin. Code § 704.X40).

<sup>16</sup> Nev. Rev. Stat. § 704.040(1).

<sup>17</sup> See e.g., Nev. Rev. Stat. § 704.110(3) (requiring submission of "recorded results of revenues, expenses, investments and costs of capital" in support of a general rate application).

- A statement from the chief executive or governing body of the contracting agency supporting the carrier's request for a variance.

Additionally, as with standard tariff filings, variance requests should be listed as a type of proceeding covered by Nevada Administrative Code § 703.160(10).

#### **IV. The Consumer Disclosure Rules Proposed by Securus Are Inadequate**

Securus's proposed consumer disclosure rule is entirely inadequate.<sup>18</sup> In brief, Securus suggests that rates, terms, and conditions are adequately disclosed if they are posted on a website, maintained at a carrier's Nevada office, and delivered with a customer invoice. None of these options do any good for incarcerated customers, who do not have internet access, cannot visit the carrier's office, and typically cannot afford the \$2 cost of receiving bills and account statements.<sup>19</sup>

The deficiencies in Securus's proposed rule can be remedied by adopting the following regulatory language, which is based on New Mexico Administrative Code § 17.11-28.11:<sup>20</sup>

1. All inmate calling service suppliers must disclose their rates, fees, and charges as follows:

(a) For intrastate calls the supplier shall comply with all rate disclosure requirements contained in 47 C.F.R. §§ 64.710 and 64.6110, including any amendments thereto.

(b) Rates, fees, and charges applied pursuant to this rule shall be made available to the party paying for a transaction prior to the commencement of the transaction and without the consumer having to dial a separate telephone number or access a separate website. Such information shall include an equally prominent disclosure of alternative funding or refunding mechanisms that are free of ancillary service charges.

2. The information required by this section must be delivered to the correctional institution by the inmate calling service supplier for posting on or near the institutional phone, in plain view of incarcerated persons, provided that such signage is allowed by the correctional institution. The posted signage must clearly and simply disclose all applicable rates, fees and charges for inmate calling services set forth in this rule and provide the relevant contact information for the supplier for purposes of submitting consumer complaints, as well as the mailing address of the Public Utility Commission's Division of Consumer Complaint Resolution for unresolved consumer complaints.

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<sup>18</sup> Cmts. of Securus at 12 (proposed Nev. Admin. Code § 704.X50).

<sup>19</sup> See 47 C.F.R. § 64.6020(b)(4) (authorizing paper-statement fees up to \$2 per bill).

<sup>20</sup> Securus has spoken approvingly of the New Mexico rule in proceedings before that state's utilities commission.

## V. The Commission Should Not Outsource its Rate-setting Obligations to the FCC

Both Securus and Commission staff recommend that the Commission automatically apply the FCC's interstate ICS rate caps to Nevada intrastate ICS calls. PPI respectfully encourages the Commission to exercise its independent judgment and collect evidence upon which to base independent intrastate rate caps. There are several different options that the Commission could use to collect relevant data. It could seek relevant information directly through a customized fact-finding exercise;<sup>21</sup> or, the Commission could require (under Nevada Revised Statute § 703.195) each Nevada ICS carrier to provide the Commission with the same data the carrier submits to the FCC as part of that agency's third mandatory data collection.<sup>22</sup> Regardless of the method used and the timing (i.e., promulgation of custom intrastate rate caps may not be feasible during calendar year 2022), the Commission should act independently from the FCC and conduct its own examination of ICS carriers' Nevada-specific rates and costs.

## VI. Conclusion

PPI hopes that the above comments provide the Commission with useful information for purposes of promulgating new rules. We look forward to participating in the March 17 workshop in this proceeding.

Respectfully submitted this 9th day of March 2022.

### PRISON POLICY INITIATIVE

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<sup>21</sup> See Nev. Rev. Stat. §§ 703.195 (inspection of books and records), 704.183 (examination).

<sup>22</sup> See "[Wireline Competition Bureau announces the due date for responses to the Commission's inmate calling services third mandatory data collection](#)," DA 22-214 (Mar. 2, 2022) (announcing a June 30 deadline for submission of data).

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by electronic service to:

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Dated at Portland, Oregon, this 9th day of March, 2022

/s Stephen Raher  
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