BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
02/28/22
04:59 PM
R2010002

Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People.	Rulemaking 20-10-002

JOINT REPLY BRIEF OF PUBLIC ADVOCATES OFFICE, THE UTILITY REFORM NETWORK, PRISON POLICY INITIATIVE, AND CENTER FOR ACCESSIBLE TECHNOLOGY

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February 28, 2022

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Summary of Recommendations

Pursuant to Rule 13.12 of the Rules of Practice and Procedure of the California Public Utilities Commission, The Public Advocates Office at the California Public Utilities Commission, The Utility Reform Network, the Prison Policy Initiative, and Consumers Center for Accessible Technology (collectively, Joint Intervenors) provide the following summary of recommendations.

- The California Public Utilities Commission has the state authority to protect individuals who are incarcerated from excessive video calling service rates.
- Despite the continued false claims by IPCS Providers in incarceration facilities, the Federal Communications Commission has not classified video calling services as a Title I information service.
- Even assuming that video calling services were classified as a Title I information service, the law is clear that this classification has no preemptive effect on state oversight.
- Section 706 of the Federal Telecommunications Act of 1996 empowers the California Public Utilities Commission to encourage the deployment of advanced telecommunication capabilities, like video calling services.
- The California Public Utilities Commission should exercise its jurisdiction over video calling services offered to people who are incarcerated to place price cap and other regulations on Communications Service Providers.
- Finally, the California Public Utilities Commission should gather more information about the remaining services identified in Question 1 of the Scoping Memo in Phase II of this proceeding.

I. INTRODUCTION

The Public Advocates Office at the California Public Utilities Commission (Cal Advocates), The Utility Reform Network (TURN), the Prison Policy Initiative (PPI), and Center for Accessible Technology (CforAT) (collectively, Joint Intervenors) file this joint reply legal brief[1] in response to the November 29, 2021 Assigned Commissioner's Phase II Scoping Memo and Ruling Extending Statutory Deadline (Phase II Scoping Memo). The Phase II Scoping Memo asks parties to answer two questions regarding the California Public Utilities Commission's (CPUC or Commission) jurisdiction to regulate certain telecommunication services used by people who are incarcerated:

1) Does the Commission have authority to regulate rates, fees and/or service quality of video and related services provided to incarcerated persons in California, including remote video calling services, in-person video calling services, text (SMS) services, private messaging services, tablet services, photo sharing/music, video entertainment and/or internet access services?
2) If yes, should the Commission adopt interim or permanent rate caps and/or ancillary fee regulations for video and related services?

The answer to Question 1 is an emphatic *yes*. The analysis demonstrates that this is the case regardless of the technologies used to provide Incarcerated Persons Communications Service (IPCS) and despite Securus Technologies (Securus), Global Tel*Link (GTL), and NCIC Inmate Communications (NCIC) (collectively, IPCS Providers') mischaracterizations of law in the opening briefs. The answer to Question 2 is also *yes*. Ample evidence shows the benefits of video calling services (VCS) to people who are incarcerated and to society as a whole.[2] Yet, VCS prices in California are extremely high and unaffordable for many people who are incarcerated and for their families. Each IPCS Provider has a monopoly over communications services in the

[1] As permitted by Rule 1.8(d) of the Commission's Rules of Practice and Procedure, counsel for Cal Advocates has been authorized to sign this brief on behalf of each of the Joint Intervenors.

[2] Leah Wang, "Research roundup: The positive impacts of family contact for incarcerated people and their families" (Dec. 21, 2021), *available at* https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ (collecting research findings regarding the potential benefits of VCS as a supplement to in-person visitation).

incarceration facilities that they serve; people who are incarcerated and their families have no choice of their IPCS VCS service providers or the prices they pay for these services. To address these issues, Joint Intervenors urge the Commission to use its authority to adopt rate caps and ancillary fee limitations for VCS.

II. THE COMMISSION'S NEXT STEPS SHOULD FOCUS ON VIDEO CALLING SERVICES.

The Assigned Commissioner's Phase II Scoping Memo poses two focused questions about VCS and other IPCS services. Some commentors have seized on isolated phrases or references in the Scoping Memo in order to introduce tangentially related complexities into this round of legal briefing. As set forth in our opening brief, Joint Intervenors encourage the Commission to focus on VCS in the present phase because video calling is a common and critically important service for incarcerated people and their families. The Commission should avoid the unnecessary distractions that other parties have attempted to emphasize as further discussed below.

The Commission should not address wireless service in Phase II. Indeed, the Scoping Memo does not mention wireless service at all, but CTIA-The Wireless Association (CTIA) raises numerous irrelevant issues by fixating on one reference to "text (SMS) services." For example, CTIA invokes 47 U.S.C. § 332, a statute dealing with "private mobile service," even though nothing in the record suggests that any type of IPCS falls within the definition of private mobile service. Although it does appear that some IPCS providers may offer services that deliver messages using SMS technology, the record on these products is too sparse to support any action at this time. Joint Intervenors recommend that the Commission continue to gather facts about SMS options in the IPCS market in order to consider SMS technology in the context of IPCS in the future.[3]

[3] Even if the Commission were to regulate IPCS SMS products, it is unlikely to implicate the issues that CTIA seems concerned about. CTIA represents the interests of mobile carriers—i.e., the companies that provide cellphone service. If the Commission were to regulate SMS products in this proceeding, any final rule would presumably be limited to regulating the prices charged *by IPCS providers*. To the extent that a non-incarcerated IPCS customer receives a communication from an incarcerated correspondent delivered in the form of an SMS message, Joint Intervenors do not expect that any rule promulgated in this

Thirteen small local exchange carriers (the "Small LECs") filed opening comments that similarly focus on an isolated refence to internet service in the Scoping Memo.[4] GTL also raises similar concerns.[5] As the Joint Intervenors note in our opening brief, some IPCS offerings may rely on broadband service to transmit and receive signals, but this is information that still needs to be gathered. Joint Intervenors reiterate our recommendation that the Commission defer its consideration of tablet or other broadband-enabled services until the factual record about these services is better developed in this proceeding.

As for GTL's broadband access argument, the authorities cited by the company do not apply in the IPCS context.[6] GTL cites the federal definition of broadband internet access service: "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data *from all or substantially all internet endpoints.*"[7] People who are incarcerated simply do not have this type of broadband access. The California Department of Corrections (CDCR) generally prohibits people who are incarcerated from accessing networked computers,[8] which means that these individuals would be prohibited from using computers that are connected to the Internet. Thus, even to the extent that tablet-based IPCS offerings utilize broadband connectivity (a question that should be the focus of the Commission's fact-finding), also refered to as "broadband-

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proceeding would touch on the relationship between the non-incarcerated recipient and their mobile carrier.

[4] Opening Brief of Small LECs, January 28, 2022 (Opening Brief of Small LECs) at 1-2.

[5] *Opening Brief of Global Tel*Link Corporation D/B/A Viapath* Technologies, January 28, 2022 (Opening Brief of GTL) at 6-7. As discussed further throughout this brief, the arguments made by GTL, other IPCS providers, and the small LECs are vague and ambiguous and often equivocate. Providers appear to be taking a very scattershot approach to presenting arguments, presumably in the hopes that the Commission will view the whole of these arguments to be greater than the sum of the arguments themselves. However, as discussed further in this brief, providers' arguments are meritless, and, ultimately, meaningless. Accordingly, the Commission should not give these arguments weight.

[6] See Opening Brief of GTL at 6 (referencing the Scoping Memo at 4, which asks about "internet access services.").

[7] 47 C.F.R. § 8.1(b) (emphasis added) (quoted by GTL Opening Brief at 6, n.24 and accompanying text).

[8] 15 C.C.R. § 3041.3(b).

enabled," the services for which people who are incarcerated actually pay bear no resemblance to broadband internet access that consumers purchase outside of the carceral setting. Accordingly, GTL and the Small LECs' citations to generally applicable law on broadband access are misplaced. Joint Intervenors encourage the Commission to focus on VCS before tackling the unique intersection of broadband access and IPCS.

NCIC also seeks to introduce extraneous legal authority when it cites 47 U.S.C. § 230 for the proposition that "Congress has expressly declared [that] information services should remain unfettered by State regulation."[9] NCIC's reliance on Section 230 fails for two independent reasons. First, Section 230 does not apply to information services writ large, but rather to a specific subset of information services, defined in the statute as "interactive computer services."[10] The key defining quality of interactive computer services is that they "offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated *and stored* only on each computer service's individual proprietary network."[11] IPCS VCS simply provides for live transmission of audio and video signals without any retrieval of stored information, thus this technology is unlikely to qualify as an interactive computer service.[12] The second—and more categorical—reason NCIC's argument fails is that even if VCS were an interactive computer service, section 230 does not preempt state *rate* regulation. Section 230 (enacted as part of the Communications Decency Act, which was a component of the Telecommunications Act of 1996)[13] is concerned with protecting online

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[9] *Phase II Opening Brief of Network Communications International Corporation D/B/A NCIC Inmate Communications (U 6086 C)*, January 28, 2022 (Opening Brief of NCIC) at 2.

[10] 47 U.S.C. § 230(f)(2).

[11] *Zeran v. Am. Online*, 129 F.3d 327, 328-329 (4th Cir. 1997) (emphasis added); *see also Bennett v. Google*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (referring to *Zeran* as the "seminal case" in explaining § 230).

[12] Although IPCS systems allow for the recording and retrieval of calls for security purposes, these features are for management of the system, not for the end-user's benefit, and therefore do not constitute information services. *Petition for Declaratory Ruling by Inmate Comm'cns Services Providers*, Dkt. RM-8181, Declaratory Ruling ¶¶ 28-32, 11 FCC Rcd. 7362, 7374-7376 (released Feb. 20, 1996).

[13] Pub. L. 104-104, tit. V, 110 Stat. 56, 133-143 (1996).

content providers from tort liability for content created by users.[14] Accordingly, Section 230 not only speaks exclusively in terms of shielding interactive computer services from civil liability for defamation and similar claims, it also contains a savings clause that preserves the ability of states to regulate telecommunications rates notwithstanding an entity's classification as an interactive computer service provider.[15]

None of the arguments offered by providers limit the authority of the Commission to exercise jurisdiction over all or most of the services mentioned in Question 1 of Appendix 1 of the Phase II Scoping Memo. VCS is commonly found in California correctional facilities, current prices are substantially burdensome for consumers, the material qualities of the basic technology are not in dispute, and—as shown in the Joint Intervenor's opening brief—the Commission has clear authority to regulate such service. For these reasons, the Commission should prioritize regulation of IPCS VCS during Phase II of this proceeding and defer consideration of other technologies for a later time.

III. IPCS PROVIDERS MISCHARACTERIZE EXISTING LEGAL AUTHORITY REGARDING THE CLASSIFICATION OF VIDEO CALLING SERVICES.

Several IPCS providers filed opening briefs claiming that the Commission is powerless to regulate VCS because federal law prevents states from regulating information services. None of these arguments successfully rebut the analysis set forth in the Joint Intervenors' opening brief as further discussed below.

A. The D.C. Circuit's Holding in *GTL v. FCC* is Not an Impediment to Commission Action.

The IPCS Providers that filed opening briefs each cite *Global Tel*Link v. FCC (GTLv. FCC)*[16] as a roadblock to Commission regulation of intrastate IPCS VCS. These

[14] *Zeran*, 129 F.3d at 331 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers [via 47 U.S.C. § 230] to avoid any such restrictive effect.").

[15] 47 U.S.C. § 230(e)(3); *see City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363, 365-366 (7th Cir. 2010) (§ 230 is irrelevant to city's ability to tax providers of interactive computer services).

[16] *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017).

arguments lack merit for two reasons: (1) *GTL v FCC* says nothing about preemption of state authority over video calling, and (2) *GTL v. FCC* generally does not say what the providers claim it says.

Regarding preemption, Securus makes the surprising claim that the D.C. Circuit "confirmed" the FCC's "classification" of VCS as an information service.[17] Not only is this statement categorically unsupported by the court's actual opinion, it is irrelevant, since *GTL v. FCC* concerned the extent of the FCC's powers, not what California or any other state could do. The phrase "information service" appears nowhere in the D.C. Circuit's opinion, and the court could not have "confirmed" the FCC's classification of VCS as an information service because—as explained in the Joint Intervenors' opening brief—the FCC has never made such a classification. More fundamentally, *GTL v. FCC* says nothing about preemption as applied to *video* calling service, because the FCC had not attempted to preempt any state regulation of VCS. Rather, the only video-related rule at issue in *GTL v. FCC* was a simple data-collection requirement imposed on IPCS providers. While the D.C. Circuit vacated that rule, the court said nothing about the ability of states to regulate video calling services.

The IPCS providers inappropriately suggest that the D.C. Circuit prevented the FCC from regulating IPCS VCS.[18] But any reasonable reading of the judicial decision shows that the court was not ruling on the merits of the FCC's jurisdiction, but rather was making a factual finding that the FCC failed to adequately *explain* its authority. Indeed, the court's ruling is best understood as a reaction to ambiguous drafting on the FCC's part. In its Second Report and Order, the FCC described the video-calling reporting requirement at issue in *GTL v. FCC* as follows: "for ICS[19] providers that provided video visitation services, *either as a form of ICS or not*, during the reporting period, we require

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[17] *Opening Brief of Securus Technologies, LLC (U 6888 C) on the Commission's Authority to Regulate Rates, Fees, And/Or Service Quality of "Video Calling" and "Related Services,"* January 28, 2022 (Opening Brief of Securus) at 12-13.

[18] NCIC Opening Brief at 4 ("[A] 2017 decision by the US Court of Appeals raised serious questions as to whether video IPCS service can be regulated by the FCC"); GTL Opening Brief at 12.

[19] FCC regulations refer to IPCS as "inmate calling services" or "ICS."

that they file the minutes of use and per-minute rates and ancillary service charges for those services."[20] Citing this specific language, *GTL v. FCC* holds as follows:

> The [FCC] asserts that whether or not video visitation services are a form of ICS, they are still subject to the agency's jurisdiction. We disagree. *Before it may assert its jurisdiction* to impose such a reporting requirement, the [FCC] must first explain how its statutory authority extends to video visitation services as a "communication[] by wire or radio" under § 201(b) for interstate calls or as an "inmate telephone service" under § 276(d) for interstate or intrastate calls. The Order under review offers no such explanation.[21]

If the court had concluded that the FCC lacked jurisdiction over VCS, it certainly would not have enumerated the steps[22] that the FCC must take in order to regulate such services.[23]

Both Securus and GTL also misrepresent the impact of a recent administrative order approving the FCC's third mandatory data collection. The FCC delegated authority to design and implement data collection to the FCC's Wireline Competition Bureau and the Office of Economics and Analytics (the Bureaus).[24] In finalizing the rules governing data collection, the Bureaus declined a suggestion to collect data concerning VCS, referencing the *GTL* ruling and noting that "[t]he Commission has not reached this

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[20] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking ¶ 267, 30 FCC Rcd. 12763, 12891-12892 (released Nov. 5, 2015) (emphasis added).

[21] *Global Tel*Link*, 866 F.3d at 415 (citations omitted, emphasis added).

[22] *Global Tel*Link*, 866 F.3d at 415 (stating "[b]efore [the FCC] may assert its jurisdiction . . . the Commission must first explain how its statutory authority extends to video visitation services . . .under § 201(b) for interstate calls or as an inmate telephone service under $ 276 (d) for interstate or intrastate calls.").

[23] Securus correctly notes that the FCC has not yet taken up the issue of VCS following the D.C. Circuit's ruling; but the company then goes on to declare that the FCC "plainly views video visitation services as outside of its authority to regulate rates for communications services to correctional facilities." Securus Opening Brief at 13. This is incorrect. The FCC's lack of action is not a ruling, and GTL's characterization of the reason for the agency's inaction is mere speculation.

[24] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order ¶ 2 (DA 22-52) (released Jan. 18, 2022).

question on remand."[25] Contrary to the representations of Securus and GTL, this decision by the Bureaus is not—— an indication of "the FCC's" position. The Bureaus very clearly declined to collect VCS data because the presidentially appointed commissioners (i.e., "the FCC") have not yet provided guidance on this important policy question. The Bureaus report to the FCC; the Commission here does not. Accordingly, the Commission has its own independent obligations and authorities regarding VCS, as Joint Intervenors presented in opening briefs and explained below. The Commission should chart its own course unhindered by the ruling in *GTL* or by FCC bureau level processes that have no impact to the Commission's work.

B. The IPCS Providers Attempt to Clutter the Record with Irrelevant Concepts.

The IPCS providers have spilled considerable ink raising matters that are not germane to the Commission's current inquiry. Perhaps most telling is Securus's casual remark that, "[a]lthough using different terminology, such as video conferencing or two-way interactive video services, the FCC has repeatedly identified services enabling two-way video sessions as information services."[26] But terminology is critical (even dispositive at times) in the law, and the IPCS Providers' invocation of extraneous concepts appears to be nothing more than an attempt to muddy the waters and delay Commission action. The Commission should give no weight to none of the various irrelevant concepts that the IPCS Providers present.

As noted above, Securus claims that the FCC has "repeatedly" classified VCS as an information service. But even a quick reading of the authorities cited by Securus reveals that this claim is not true. Securus cites four authorities, none of which contain the classification that Securus alleges.[27] First, Securus cites paragraph 107 of the FCC's 2010 Broadband Notice of Inquiry. Joint Intervenors already provided a comprehensive

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[25] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order ¶ 23 (DA 22-52) (released Jan. 18, 2022).

[26] Opening Brief of Securus at 12-13.

[27] Opening Brief of Securus at 13, n.23.

explanation of why this cherry-picked citation does not classify VCS as an information service.[28]

Second, Securus cites 47 U.S.C. § 271(g)(2), a statute that does not reference information services one single time. Subsection (g)(2) of this statute classifies "two-way interactive video services . . . to or for elementary and secondary schools" as a type of "incidental interLATA service"—a concept that has absolutely no bearing on the present proceeding.

Third, Securus cites paragraph 205 of the FCC's fifth annual report on competition in the video-programming delivery market.[29] Notably, the information/ telecommunications service distinction is relevant for classifying services subject to either Title I or II of the Communications Act of 1934. Video-programming distribution (commonly known as "cable television") is regulated under Title VI of the Communications Act. There is therefore no reason to expect that the FCC's annual report contains anything of relevance to the present debate, and indeed no salient provisions can be found. Securus points to paragraph 205 of the FCC report, which refers to cable operators providing "digital services, including voice, video, data and other enhanced services, such as faxing and video-conferencing."[30] This off-hand reference (which, again, has nothing to do with title II) is not a finding or conclusion of the FCC, and it clearly uses "enhanced service" in the informal sense. Indeed, the report was issued several years after the passage of the Telecommunications Act of 1996 which rendered *Computer II*'s terminology of "enhanced service" obsolete.[31]

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[28] Opening Brief of Joint Intervenors at 11-12.

[29] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Dkt. No. 98-102, Fifth Annual Report, 13 FCC Rcd. 24284 (released Dec. 23, 1998).

[30] *Annual Assessment* ¶ 205, 13 FCC Rcd. at 24394.

[31] Opening Brief of Joint Intervenors at 8.

Finally, Securus cites a 1998 ruling[32] concerning the "comparably efficient interconnection" ("CEI") requirement contained in the FCC's *Computer III* Phase II Order.[33] As explained in greater detail in the following section, the ruling cited by Securus actually treated video calling as a basic service, not an enhanced service—completely undercutting Securus's current argument. Combined, Securus' sources are not directly related to the issues at hand and are not ultimately helpful in answering the questions posed in the Scoping Memo.

GTL, for its part, continues to rely on highly irrelevant arguments concerning the Twenty-First Century Communications and Video Accessibility Act ("CVAA"),[34] which Joint Intervenors addressed in our opening brief. The CVAA deals strictly with access requirements for disabled telecommunications users and contains no provisions that preempt state regulation of telecommunications services.

NCIC joins with its competitors in blurring the lines when it states that "the FCC has found that platforms offering both audio and video components were information services."[35] NCIC cites to a 1996 FCC ruling involving Cisco WebEx's liability for universal service fund assessments.[36] The classification of the WebEx service was not at issue and is not relevant to IPCS VCS.

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[32] *AT&T Co. Comparably Efficient Interconnection Plan for Codec Conversion Service*, DA 88-1116, Memorandum Opinion & Order [hereinafter "Codec Conversion CEI Opinion"], 3 FCC Rcd. 4683 (released Jul. 29, 1988).

[33] *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Dkt. 85-229, Report & Order [hereinafter "*Computer III* Phase II Order"), 2 FCC Rcd. 3072 (released May 22, 1987).

[34] Pub. L. 111-260, 124 Stat. 2751 (2010).

[35] Opening Brief of NCIC at 5.

[36] *Universal Service Contribution Methodology; Request for Review of A Decision of the Universal Service Administrator by Cisco WebEx LLC*, WC Dkt. 06-122, 31 FCC Rcd. 13220 (released Dec. 16, 2016).

C. Securus's Protocol Conversion Argument is an Example of the "Contamination Theory" that the FCC Rejected in 1987

After presenting a litany of numerous unexplained technological references,[37] Securus presents a legal theory based on the shakiest of foundations: a 1988 FCC ruling concerning AT&T's "codec conversion service."[38] In brief, Securus points to 1980s-vintage technology and argues that because Securus's current VCS uses similar technology, video calling must be an information service (the modern-day term for enhanced service). This represents a textbook application of the "contamination theory," under which "the enhanced component of an offering 'contaminates' the basic component and the entire offering is treated as enhanced."[39] The FCC rejected the contamination theory as part of the *Computer III* proceeding.[40] The ruling cited by Securus actually refutes the company's legal argument.

As explained in Joint Intervenors' opening brief, *Computer II* created the categories of basic and enhanced services (now known as telecommunications and information services, respectively).[41] *Computer III* focused on adapting the FCC's regulatory framework in light of the breakup of AT&T and the further growth of a competitive (unregulated) computer services market.

Under the *Computer III* framework, Bell operating companies (BOCs) were allowed to offer an enhanced service on a non-common-carrier basis, but only after obtaining FCC approval of a comparably efficient interconnection (CEI) plan that allowed other data processing companies to access the BOC's network for purposes of their own, competing, operations. CEIs were required to include three components: (1) a

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[37] Opening Brief of Secrurus at 14-17.

[38] Codec Conversion CEI Opinion, *see supra*, note 32 (cited in Securus Opening Brief at 15, n.30).

[39] *See Computer III* Phase II Order ¶ 18, n.21, 2 FCC Rcd. at 3111 (brackets and international quotation marks omitted).

[40] *Computer III* Phase II Order ¶¶ 64-68, 2 FCC Rcd. at 3081-3082; *see also Independent Data Commc'ns Mfrs Assoc Petition for Declaratory Ruling*, DA 95-2190, Memorandum Opinion and Order ¶ 42, 10 FCC Rcd. 13723 (released Oct. 18, 1995) (affirming *Computer III*'s rejection of the contamination theory).

[41] *See* Opening Brief of Joint Intervenors at 5-6.

description of the enhanced service covered by the plan; (2) a description of how competing enhanced service providers could access the underlying basic service; and (3) how the BOC would comply with other *Computer III* requirements that are not relevant to the issues in this proceeding.[42]

In the ruling cited by Securus, AT&T sought approval of a CEI for its codec conversion service (CCS). The FCC described the CCS as "an enhanced service that provides protocol conversion to facilitate communications between different types of picture processing equipment used in video teleconferencing services."[43] Securus myopically seizes upon the introductory paragraph in which the CCS is described as an enhanced service; however, a CEI addresses two separate technologies: the *enhanced* service the BOC sought to offer on the open market, and the *basic* service that the BOC had to open to its competitors.

In the CEI proceeding cited by Securus, the CCS was the enhanced service that AT&T wished to sell on a non-common carrier basis. The CCS allowed AT&T to operate a video teleconferencing service branded as ACCUNET Reserved Service (Accunet).[44] As the FCC's ruling plainly indicates, Accunet was provided by AT&T as "a regulated *basic service*, under tariff."[45] Accordingly, the very authority cited by Securus proves Joint Intervenors' point: video calling has long been regulated as a basic (or telecommunications) service.

The error in Securus's reasoning is further illustrated in *Computer III*'s treatment of protocol conversion technology. While protocol conversion was *generally* classified as an enhanced service, the FCC recognized an exception for so-called "no-net" protocol processing services, defined as "protocol processing . . . involving internetworking (conversions taking place solely within the providers' network to facilitate provision of a

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[42] Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 CommLaw Conspectus 37, 62-63, n.217 (1999).

[43] Codec Conversion CEI Opinion ¶ 1, 3 FCC Rcd. at 4683.

[44] Codec Conversion CEI Opinion ¶ 3, 3 FCC Rcd. at 4683.

[45] Codec Conversion CEI Opinion ¶ 6, 3 FCC Rcd. at 4683 (emphasis added).

basic network service, that result in no net conversion to the end-user)."[46] Indeed, this exception (first articulated in *Computer III*) is embodied in the current statutory carve-out from the definition of "information service," which excepts technology used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[47] The FCC has affirmed that "no net" protocol processing services fall within this category of excepted services.[48]

In an attempt to reach its desired result, Securus has combined a willfully obtuse smattering of techno-jargon with an arcane FCC ruling from 1988—with this cocktail in hand, the company asks the Commission to forgo any effort to ensure economic fairness for users of IPCS VCS. Technology may have changed dramatically in the intervening decades, but one theme remains true as illustrated in Joint Intervenors' opening brief: video calling has been, and remains, a telecommunications service under federal law and the Commission is empowered to regulate intrastate VCS in incarceration facilities.

IV. THE COURTS CONTINUE TO STRIKE DOWN IPCS PROVIDER ARGUMENTS THAT THE FCC PREEMPTS INFORMATION SERVICES.

The ICPS Providers bend over backward to argue that the FCC has designated VCS as a "Title I information service,"[49],\ perhaps because they think that classification as a Title I information service would preempt the Commission from regulating VCS. But this argument is fundamentally wrong and has been consistently rejected by the courts. For purposes of the Commission's jurisdiction, it is irrelevant whether the FCC has designated VCS as a "Title I information service." If the FCC designates VCS as an

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[46] Non-Accounting Safeguards Order ¶ 106, 11 FCC Rcd. at 21957-21958 (citing *Computer III* Phase II Order ¶¶ 64-71, 2 FCC Rcd. at 3081-3082). The FCC has reaffirmed the validity of this exception under the Telecommunications Act of 1996. Non-Accounting Safeguards Order ¶ 106, 11 FCC Rcd. at 21958 (citing 47 U.S.C. § 153(20)). Section 153(20), the statutory definition of information service, has subsequently been renumbered as § 153(24), but the language remains unchanged).

[47] 47 U.S.C. § 153(24).

[48] The same logic holds true for the call-management features listed by Securus at 15-16 of its Opening Brief. These are also information services used for management of a telecommunications service and therefore do not contaminate the status of Securus's video telecommunications services.

[49] *See* Opening Brief of Securus at 12-18. Opening Brief of GTL at 12-16. Opening Brief of NCIC at 4-6.

information service, as the IPCS Providers argue, then the Commission is not preempted by the FCC because the FCC has no authority to regulate the service since it has bowed out from regulating Title I information service. If the FCC does not designate VCS as an information service, the Commission is not preempted by the FCC because the FCC has taken no action that would conflict with the Commission. In either instance, there is no basis to find that the FCC has preempted the Commission's jurisdiction over VCS.

The IPCS Providers argue that the FCC labels VCS as an information service under the FCC's *2018 Restoring Internet Freedom Order* (2018 *Internet Order*). The intent of the 2018 *Internet Order* by the FCC was to set forth a policy of de-regulation of broadband services.[50] Thus, according to the IPCS Providers, the FCC's de-regulation policy preempts any potential state regulation of broadband.[51] They further attempt to expand the FCC's 2018 *Internet Order* beyond its original intent to include VCS.[52] This preemption argument is without merit. Since *Mozilla*, courts have continuously ruled that the mere labeling of a service as an information service does not have an express preemptive effect.[53] The FCC achieved its de-regulatory policy in the 2018 Internet Order by abdicating its regulatory authority over broadband. And if the FCC has no authority to regulate, it cannot preempt the Commission.[54]

In their opening brief, Securus and GTL argue that their information services argument is still controlling precedent in the Ninth Circuit Court of Appeals.[55] This is

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[50] *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018).

[51] Opening Brief of Securus at 17.

[52] As described in Section II above, it is doubtful that the FCC intended IPCS VCS to be included in its 2018 *Internet Order*.

[53] *See ACA Connects v. Frey*, No. 1:20-cv-00055 (D. Me. July 7, 2020); *ACA Connects v. Bonta*; *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

[54] *Mozilla* at 98 ([I]n any area where the [FCC] Lacks the authority to regulate, it equally lacks the power to preempt state law.").

[55] Opening Brief of Securus at 24-27. "Controlling precedent in the Ninth Circuit has long held that state regulations that undermine the FCC's regulatory regime over information services cannot stand." at 25. Opening Brief of GTL at 13, 16. "Neither D.C. Circuit's *Mozilla* decision nor the recent *ACA Connects* decision from the Ninth Circuit upset this longstanding federal-state jurisdiction dichotomy concerning the regulation of information services." at 13.

incorrect and outdated. On the day parties filed their opening briefs in this proceeding, the Ninth Circuit released its opinion in *ACA Connects v. Bonta*.[56] This case reviewed Senate Bill (SB) 822,[57] a net-neutrality law passed by California in 2018. Internet service providers[58] challenged the law, making the same arguments that the IPCS Providers in this case do.[59] The internet service providers pointed out that the FCC's 2018 *Internet Order* classified broadband as a Title I information service. They then argued that the 2018 *Internet Order* intended to take a "light-touch" de-regulatory approach to broadband internet regulation, and California's SB 822 would conflict with that intent.[60] The Ninth Circuit disagreed.[61]

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[56] *ACA Connects v. Bonta*, No. 21-15430 (9th Cir. January 28, 2022) (*appeal pending*).

[57] Senate Bill (SB) 822, Wiener, California Internet Consumer Protection and Net Neutrality Act of 2018, codified as Civil Code Section 3100, et.al.

[58] The law was challenged by the internet provider trade association "American Communications Association." In addition to losing their challenge in the Ninth Circuit, they also lost a challenge to a law passed by Maine imposing privacy requirements on broadband providers. *See ACA Connects* v. Frey.

[59] *ACA Connects v. Bonta* at 9. "The service providers here nevertheless contend that the California statute is preempted on the basis of both conflict and field preemption. They argue first that SB 822 is preempted because it conflicts with the policy underlying the FCC's reclassification decision; that policy was to eliminate all net neutrality regulation of broadband services, not to replace federal regulations with what could become a checkerboard of state regulations. The service providers additionally contend that SB-822 is preempted because it conflicts with the Communications Act itself and its limitations on federal government. They argue as well that even if there is no preemption by virtue of any identifiable conflict, federal law occupies the field of interstate services and therefore preempts state laws regulating intrastate services that intrude upon the field of interstate services."

[60] *ACA Connects v. Bonta* at 9. "[The service providers] point out that the FCC made the reclassification decision in reliance on its policy judgement that a light-touch regulatory framework would be most effective. They contend that, because the D.C. Circuit upheld these policy-based grounds for the FCC's decision, the FCC's policy behind the decision forms a valid predicate for conflict preemption."

[61] *ACA Connects v. Bonta* at 21. "Yet the Supreme Court has expressly rejected the argument that an agency's policy preferences can preempt state action in the absence of federal statutory regulatory authority. The Supreme court warned that to permit preemption on the basis of policy rather than legislation would allow a federal agency to confer power upon itself and override the power of congress. As the Supreme Court said, '[t] his we are both unwilling and unable to do.'" Citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-375.

In a 3-0 decision, the Ninth Circuit upheld a decision by the Eastern District of California, which rejected preemption arguments in that case.[62] The Ninth Circuit relied heavily on the precedent set forth by the D.C. Circuit in *Mozilla,*[63] which again clashed with the internet service providers' preemption argument. The Ninth Circuit ruling focused on the assertion that California is preempted from regulating broadband because of the FCC's policy of de-regulation in its 2018 *Internet Order*. The Circuit Court noted that the legal result of the reclassification of broadband as an information service only diminished the FCC's own authority to regulate broadband.[64] In reducing its authority to regulate broadband, the FCC also diminished its authority to preempt states from regulating broadband.[65]

Securus and GTL try to reconcile *Mozilla* and *ACA Connects* by pointing out that *Mozilla* was limited to only express preemption but left the door open for conflict preemption or the impossibility doctrine.[66] Securus cites *Ray v. Atlantic Richfield Co.*[67] for the theory that the federal government has the power to preempt state regulation in areas where it has opted not to regulate.[68] *ACA Connects* addressed this very issue, again

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[62] *ACA Connects v. Bonta* at 9. "We conclude the district court correctly denied the preliminary injunction. This is because only the invocation of federal regulatory authority can preempt state regulatory authority.

[63] *ACA Connects v. Bonta* at 9. "Neither party challenges the validity or finality of *Mozilla*, so we look to the D.C. Circuit's analysis to guide our own."

[64] *ACA Connects v. Bonta* at 25. "The legal effect of the reclassification, and the adoption of the Transparency Rule, was to diminish federal authority."

[65] *ACA Connects v. Bonta* at 25. "As a result…, the agency no longer had the requisite authority to adopt federal net neutrality rules and could not preempt states from adopting them."

[66] Opening Brief of Securus at 32. "Any suggestion that *Mozilla* broadly bars the FCC from preempting any state regulation of information services conflicting with federal policy of non-regulation would, as *Mozilla* admonished, confuse the express power to regulate with the preemptive effect of the FCC's regulatory choices." Opening Brief of GTL at 13. "The question presented in *Mozilla* was whether the FCC had express statutory authority to prospectively preempt all 'state or local measures that would effectively impose rules or requirements' on broadband services imposed by the FCC's 2018 *Restoring Internet Freedom* decision."

[67] *Ray Atlantic Richfield Co.*, 435 U.S. 151 (1978). Congress granted the Secretary of Transportation authority to regulate size and speed of tankers in Puget Sound but opted not to ban large tankers. The Court held that the decision not to ban tankers had preemptive effect.

[68] Opening Brief of Securus at 31.

shutting down the argument that the FCC's non-action has a preemptive effect. The Court explained that the difference between *Ray* and the FCC's *2018 Internet Order* was the legal effect of the FCC's action surrendering authority to regulate broadband.[69] The FCC did not just say it would not regulate broadband; it said it did not have the authority to regulate broadband. This distinction is key because for an agency's regulations to have preemptive authority, the agency must possess regulatory authority.

The IPCS Providers correctly observe that *Mozilla's* consideration of preemption was limited to only express preemption, as the court was not presented with a state law to examine for preemption,[70] and the FCC offered no conflict preemption argument.[71] The court could not rule on a question that was not before it. Both GTL and Securus are quick to point out that the *Mozilla* case was "limited in scope,"[72] but it remains to be seen whether any state law would be preempted by the *2018 Internet Order*.[73] To answer this question, both GTL and Securus cite a federal district court case from New York, *New York State Telecomm Ass'n v. James*.[74] There, New York passed a law requiring internet service providers to make low-income broadband plans available to low-income households.[75] The District Court ruled that the New York law was preempted via both

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[69] *ACA Connects v. Bonta* at 18-19. "The service providers in this case urge us to rely on *Ray*. What happened in *Ray*, however, is not what happened here. By reclassifying broadband services under Title I, the FCC gave up its authority to regulate broadband services as common carriers and hence surrendered the authority it had to adopt federal net neutrality rules."

[70] *Mozilla* at 104.

[71] *Mozilla* at 104.

[72] Opening Brief of Securus at 32. Opening Brief of GTL at 13-14. "The *Mozilla* court made clear that its decision would therefore not preclude a party from challenging a particular state law by 'invoking conflict preemption.'"

[73] The dissenting justice in *Mozilla* seems to agree, saying the "majority's view of preemption seems to render any conflict unimaginable," observing that the majority "never explains how a state regulation could ever conflict with the federal white space to which its reasoning consigns broadband." *Mozilla* at 106 (Williams, J., dissenting).

[74] Opening Brief of Securus at 32-33. Opening Brief of GTL at 14-15.

[75] *New York State Telcom. Assoc., Inc. v. James*, F. Supp. 3d, 2021 WL 2401338, (E.D.N.Y. June 11, 2021).

conflict and field preemption by the FCC's 2018 *Internet Order*.[76] The Court ruled that the FCC's intent in the 2018 *Internet Order* was to decline to treat broadband as a Title II carrier, which New York's law would have done.[77] This decision flies in the face of the ruling in *Mozilla*. Again, as held in *ACA Connects v. Bonta*, the legal effect of the FCC policy to designate broadband as within the scope of Title I was to remove its own regulatory authority.[78] It is true that after the reclassification of broadband to an information service the FCC no longer has the authority to treat broadband as a Title II service. But the FCC cannot preempt states from exercising its dual role.

Securus calls *New York State Telecomm Ass'n v. James* "highly persuasive authority."[79] It is unclear why a district court case from New York should be highly persuasive for a California agency, particularly when there is a Ninth Circuit ruling on point. Notably, also in the Second Circuit, a challenge to Vermont's net-neutrality law was put on hold, awaiting ruling from the Ninth Circuit in *ACA Connects v. Bonta*.[80] Vermont and New York are both in the Second Circuit and the District Court reviewing the Vermont law could have relied on *New York v. James*, but it appears to have opted to wait for a Ninth Circuit ruling instead. Therefore, despite Securus' reliance on the district case in the Second Circuit, the Second Circuit is going outside of its jurisdiction and watching with interest the Ninth Circuit's approach.

Finally, Securus and GTL each argue that the regulation of interstate services is left exclusively to the FCC.[81] This argument relies in part on the outdated Ninth Circuit precedent as outlined above and predates *Mozilla*.[82] An obvious counter to this argument

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[76] *New York State Telecom* at 6-7.

[77] *New York State Telecom* at 7-8.

[78] *ACA Connects v. Bonta* at 25. "The legal effect of the reclassification, and the adoption of the Transparency Rule, was to diminish federal authority."

[79] Opening Brief of Securus at 32.

[80] Am. Cable Ass'n v. Scott, No. 2:18-CV-00167 (D. Vt. Sept. 25, 2020).

[81] Opening Brief of Securus at 26. Opening Brief of GTL at 12.

[82] Opening Brief of Securusn at 24-27.

is that the Commission does not intend to regulate VCS in other states. But the notion that any state regulation that impacts interstate communication service is the exclusive jurisdiction of the FCC is also wrong. The IPCS Providers rely on Section 152 of the Communications Act for this argument.[83] But Section 152 only excludes the FCC from regulating intrastate communications, leaving any intrastate regulation to the states.[84] As noted in Joint Intervenors' Opening Brief[85] and emphasized in *Mozilla*,[86] Congress envisioned the Communications Act of 1934 as part of a "dual federal-state authority and cooperation" in the regulation of communication services. To see this dual authority in action, one only needs to look at Section 706 of the Telecommunications Act of 1996, which gives state commissions the authority to further the deployment of advanced communications services[87], that enable services including video telecommunications.[88] Or Section 253, which empowers states to safeguard the "rights of consumers" of telecommunications services.[89] These sections demonstrate that Congress intended states to play a role in communication service regulation. This idea is also addressed in *ACA Connect v. Bonta,* which rejects the argument that the FCC has exclusive jurisdiction over communication services.[90] The Court makes the important point that "[i]f Congress had intended the Communications Act to preempt state regulation touching on any

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[83] 47 U.S.C. 152 (b)(1).

[84] 47 U.S.C. § 152 (b)(1). Stating "[t]he provisions of this chapter shall apply to all interstate and foreign communication…nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to…intrastate communication service."

[85] Opening Brief of Joint Interveners at 3, 17, 22-26.

[86] *Mozilla* at 104.

[87] "The term 'advanced telecommunications capability is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S. Code § 1302 (d)(1).

[88] 47 U.S.C. § 1302. Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, title VII, § 706, Feb. 8, 1996, 110 Stat. 153 (codified 47 U.S.C. § 1302))

[89] 47 U.S.C. § 253.

[90] *ACA Connect* at 29-33.

interstate communications, there would be no need for any express preemption provisions."[91]

V. IPCS PROVIDERS MISCHARACTERIZE IPCS VIDEO CALLING SERVICES AS INTEROPERABLE VIDEO CONFERENCING SERVICE.

IPCS VCS, among other Internet Protocol (IP)-enabled services, is enabled by high-speed broadband service.[92] IPCS VCS users purchase the ability to transmit their voice (and image) to a loved one on the other end, back and forth, and this ability is a telecommunication service as defined in 47 USC § 153(43). High-speed broadband service is how the transmittal occurs. Joint Intervenors' opening brief explains how IPCS VCS is a video telecommunications service covered by Section 706 of the Telecommunications Act of 1996, and that high-speed broadband enables this video telecommunication service.[93] Nonetheless, in their opening briefs, IPCS service providers seek to label and treat IPCS VCS as an interoperable video conferencing service. They attempt to support this conclusion with nonauthoritative sources, and they present other flawed analysis as further described below.

As further explained below, GTL argues that video calling services as described in the Scoping Memo, are types of interoperable video conference services.[94] To support this argument, GTL references parts of the Communications Act and related amendments pertaining to the definitions of both non-accessible and accessible communications.[95] GLT then purports to support its argument through a convoluted puzzle of outdated FCC statements or references to a very narrow subset of video services under federal communications accessibility rules.[96]

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[91] *ACA Connect* at 33.

[92] Opening Brief of Joint Interveners at 25, note 86 (referencing 47 USC § 1302(d)(1)).

[93] Opening Brief of Joint Interveners at 27-29 (referencing Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, title VII, § 706, Feb. 8, 1996, 110 Stat. 153 (codified 47 U.S.C. § 1302)).

[94] Opening Brief of GTL at 4-5.

[95] Opening Brief of GTL at 4-5, notes 11-12 (citing definitions in 47 U.S.C. § 153 and 47 CFR § 14.10).

[96] Opening Brief of GTL at 4-5, notes 11-17.

Similarly, Securus argues that its "video communication service," "Securus Video Connect," enables a video session[97] but this is not the appropriate framing for this proceeding. There are several flaws in its framing, including the blend of nonauthoritative support, the expanded use of accessible communications law to cover services beyond accessible communications, and the overcomplicated reliance on functionalities to incorrectly label video communications service.[98] As described in Joint Intervenors' opening brief and below, video communication service, or IPCS VCS, is a video calling service that is transmitted by high-speed broadband; in other words, per Section 706, IPCS VCS is "enabled" by high-speed broadband.

A. GTL and Securus inappropriately rely on accessible communications law for communications and issues that the law does not cover.

Both GTL and Securus use the narrow niche of accessible communications law to draw the conclusion that all video sessions (accessible and non-accessible video sessions) are information services.

GTL cites the regulatory treatment of certain video services in statutes governing accessible communications and related regulatory decisions, and attempts to expand this specific authority to cover the entire portfolio of video calling services (beyond the accessible communications). This argument is an overreach. The argument also fails to persuasively show that video calling service is an interoperable video conference service, and it ultimately fails to preclude state action on video calling services.

In addition to the expansive use of accessible communications law, GTL inappropriately attempts to blend this with FCC work related to broadband to argue that any form of "video communication" "constitutes a form of interoperable video conferencing."[99] Specifically, GTL attempts to rely on the description in an FCC Notice

[97] Opening Brief Securus at 1-2.

[98] Above, this reply brief rebuts the Securus' argument that the video calling service is an information service.

[99] Opening Brief of GTL at 5.

of Proposed Rulemaking for broadband general deployment[100] and an FCC order for the implementation of a statute governing accessible communications.[101] Moreover, GTL attempts to glue together examples in the accessible communications setting[102] to conclude that generally "any form of video communications, whether offered through dedicated hardware or multipurpose electronic devices" is interoperable video conferencing.[103]

In addition, like GTL, Securus's argument contains a similar analytical flaw in its use of a narrow niche of communications law regarding accessible communications to assert that all video sessions (accessible and non-accessible video sessions) are information services. As previously discussed above, the CVAA and the term "interoperable video conference service" should be read in context and not outside of the

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[100] Opening Brief of GTL at 5, notes 15 and 16 (citing to *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report And Notice Of Inquiry On Immediate Action To Accelerate Deployment, GN Docket No. 14-126, 30 FCC Rcd 1375 (2015)).

[101] Opening Brief of GTL at 5, notes 15 and 16 (citing to *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report And Notice Of Inquiry On Immediate Action To Accelerate Deployment, GN Docket No. 14-126, 30 FCC Rcd 1375 (2015); *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, *et al*., Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 10-213, 26 FCC Rcd 14557 (2011)).

[102] Opening Brief of GTL at 5, notes 15 and 16. Footnotes 15 and 16 reference FCC-related documents for the implementation of Sections 716 and 717, which are from the Twenty-First Century Communications and Video Accessibility Act of 2010, a federal law governing accessible communications. *See* Pub. L. 111-260, § 104, Oct. 8, 2010, 124 Stat. 2751 (codified at 47 U.S.C. §§ 617-619).

[103] Opening Brief of GTL at 5, notes 15 and 16 (citing to *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report And Notice Of Inquiry On Immediate Action To Accelerate Deployment, GN Docket No. 14-126, 30 FCC Rcd 1375 (2015); *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, *et al*., Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 10-213, 26 FCC Rcd 14557 (2011)).

appropriate congressional framing. In the same vein, Securus's video session description does not mean that this service (currently available for non-accessible and accessible communications), must be treated under the FCC regulatory regime for accessible communications as "interoperable video conferencing services" as the FCC has used the term. It is evident that GTL and Securus both attempt to use the FCC's implementation of the CVAA to capture services beyond those identified by the FCC or the CVAA. Therefore, outside of these nonauthoritative sources, Securus provides no strong evidence that its IPCS VCS is an interoperable video conference service, or that this service is an advance communication service.

B. GTL and Securus inappropriately rely on nonauthoritative sources to draw conclusions about interoperable video conferencing.

GTL incorrectly relies on FCC dicta found in a notice of inquiry from June 2010 to conclude that "any form of video communications" constitutes a defined form of interoperable video conferencing."[104] This source is not authoritative since it is a notice of inquiry and not an FCC final order. Moreover, an FCC statement in a notice of inquiry where it said that it did not "intend to address . . . the classification of information services such as . . .video conferencing"[105] does not mean that the FCC has proactively deemed in an authoritative order that all forms of video communications are interoperable video conferencing. The FCC's statement explained the boundary of what the FCC intended to address at the time but fell short of providing a regulatory definition and treatment for video conferencing in all circumstances. Relatedly, this reference provides even less support for an argument that IPCS VCS is a type of interoperable video conferencing service.

Securus incorrectly relies on a blend of nonauthoritative sources to argue that video calling service is an information service. Securus attempts to shortcut the analysis

[104] Opening Brief of GTL at 5, note 17 (citing Framework for Broadband Internet Service, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866 (2010)).

[105] Framework for Broadband Internet Service, 25 FCC Rcd 7909-7910, para. 107.

by stating that "[a]lthough using different terminology, such as video conferencing or two-way interactive video service," that the FCC has "identified services enabling two-way video sessions as information services."[106] Terminology is very important because the definitions in most telecommunications law concepts are carefully crafted and should not be casually grouped in this way. Moreover, as explained above, Securus places inappropriate reliance on the DC Circuit's opinion;[107] the DC Circuit sought a more robust explanation from the FCC and did not affirmatively rule that IPCS VCS is an information service.[108] Subsequently, although Securus references a recent bureau-level document, an FCC bureau's decision declining to take action is not the same thing as an FCC's final order classifying video calling services as an information service. This lack of inaction relates back to the scenarios that the Ninth Circuit referenced in *ACA Connects v. Bonta*, see discussion above.

C. Functionalities of the IPCS VCS do not alter the fact that Securus IPCS VCS is delivered by broadband.

Joint Intervenors previously explained that under Section 706 of the Telecommunications Act of 1996, high-speed broadband enables—among other things—video telecommunications using any technology; this appears to describe IPCS VCS and other IPCS offerings.[109] Securus admits that its IPCS VCS "capabilities" are "delivered" by "broadband infrastructure" that has required investment in deploying fiber to facilities

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[106] Opening Brief of Securus at 12-13.

[107] Opening Brief of Securus at 13, notes 24-26.

[108] *Global Tel*Link v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017). The DC Circuit explained:

> The [FCC] asserts that whether or not video visitation services are a form of ICS, they are still subject to the agency's jurisdiction. We disagree. *Before it may assert its jurisdiction* to impose such a reporting requirement, the [FCC] must first explain how its statutory authority extends to video visitation services as a "communication[] by wire or radio" under § 201(b) for interstate calls or as an "inmate telephone service" under § 276(d) for interstate or intrastate calls. The Order under review offers no such explanation. (emphasis added).

[109] Opening Brief of Joint Interveners at 25-29. Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, title VII, § 706, Feb. 8, 1996, 110 Stat. 153 (codified 47 U.S.C. § 1302))

and deploying secured networks within the facility, such as Wi-Fi.[110] Securus further confirms that both traditional circuit-switched networks and broadband networks "enable" functionalities.[111] Even if a Securus video session includes a "sophisticated recording and monitoring cabilit[y]," [112] these elements does not change the fact that broadband transmits the video calling service. This is an important fact since pursuant to Section 706, high-speed broadband "enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[113] Despite Securus' granular presentation of the elements in relation to its video calling service,[114] this does not change the fact that the service is transmitted through high-speed broadband. Therefore, the Securus's video calling service is squarely within the authority of Section 706, as is the VCS provided by other IPCS, because it is a service enabled by high-speed broadband.

Thus, Securus's "video communication service" is accurately understood as a video calling service. Broadband transmits the video calling service back and forth between end users. This is the way that an incarcerated person transmits their voice (and image) to their loved one. This framing is bolstered by the fact that Securus explains that it has "invested approximately $50 million each year in technology and broadband infrastructure in order to bring advance services to incarcerated individuals."[115] Moreover, Securus explains that "[t]hese investments enable video sessions,"[116] and that

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[110] Opening Brief of Securus at 8.

[111] Opening Brief of Securus at 8-9.

[112] Opening Brief of Securus at 9. Securus also presents other elements of its video calling service program offered to end users, but these do not transfigure the result. *See* Securus Opening Brief at 15-16. More generally, see above for a detailed discussion about Securus' argument that its video calling service is an information service, a conclusion that we dispute.

[113] 47 U.S.C. § 1302(d)(1).

[114] Opening Brief at 14-16, and see discussion above about Securus' video session attributes of an information service.

[115] Opening Brief of Securus at 6.

[116] Opening Brief of Securus at 6.

"video communications technology has enabled . . . Video Relay Service ("VRS") to deaf incarcerated persons."[117]

Ultimately, Securus and GTL lack authoritative support for their arguments to treat IPCS VCS as interoperable video conferencing service. Their attempt to use accessible communications law to cover both accessible and non-accessible communications is an overreach, even if the terms sound similar. Rather than accept these flawed arguments, the Commission should focus on the fact that these IPCS VCS and other services like them, are transmitted by high-speed broadband. With this understanding, the Section 706 analysis is very simple for the Commission. Since Congress granted the Commission a dual role under Section 706,[118] Congress granted the Commission the jurisdiction to address broadband and its ability to enable video telecommunications using any technology, such as IPCS VCS.

VI. THE COMMISSION SHOULD REJECT ICPS PROVIDERS' ATTEMPT TO RELITIGATE ISSUES ALREADY SETTLED IN D.21-08-037.

Several providers argue that that the Commission should not adopt rate caps or limits on ancillary fees for video and related services because it would "stifle the growth" of those services[119] or because those caps or limits would stifle competition.[120] Providers instead suggest that the Commission follow the FCC's "light-touch" regulatory policies, citing the FCC Order in which the FCC abandoned its regulatory authority over information services.[121] The Commission should reject these arguments as nothing more than an attempt to relitigate issues that the Commission definitively resolved in its Phase

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[117] Opening Brief of Securus at 8.

[118] *See* 47 U.S.C. § 1302(a) (stating "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."). *See also*, Joint Intervenors Opening Brief at 29-34.

[119] Opening Brief of GTL at 16.

[120] Opening Brief of GTL at 17-18; Opening Brief of Securus at 9-10.

[121] Opening Brief of GTL at 16-17; Opening Brief of Securus at 9-10.

I Decision. That Decision found that "*[p]roviders of IPCS* in California operate locational monopolies in the facilities they serve and exercise market power,"[122] and that "[o]nce selected, *IPCS providers*, whether individually or collaboratively within incarceration facilities use their locational monopoly status within facilities to exercise market power."[123]

The fact that IPCS providers are offering video or other IP-enabled services rather than (or in addition to) voice service does not change their monopoly status, because, as the Commission found in D.21-08-037, incarceration facilities "are limiting access to the provision of calling services to a single ICPS provider, and thus 'market competition,' in any sense of the word, does not exist for incarcerated users."[124] IPCS providers' arguments that Commission regulation will somehow harm competition in a monopoly market are ludicrous, and the Commission should reject those arguments. Similarly, the Commission should reject IPCS providers' arguments that the Commission should exercise "light-touch" regulation, because in D.21-08-037, the Commission found that regulation was necessary to "exercise its authority and jurisdiction over telephone corporations, including VoIP providers, to regulate intrastate IPCS rates and fees in California.[125]

VII. CALIFORNIA LAW GIVES THE COMMISSION THE AUTHORITY TO REGULATE ADVANCED COMMUNICATION SERVICES.

IPCS providers engage in a tortured line of reasoning to argue that the Commission's jurisdiction is somehow narrowly limited to voice-only service. In doing so, they rely on profound misinterpretations of statute and case law. IPCS providers disregard the Commission's broad Constitutional and statutory authority to regulate advanced communications services, and instead falsely characterize the Commission's jurisdiction as limited through, once again, the use of cherry-picked language from a

[122] D.21-08-037 at 109, Conclusion of Law 8 (emphasis added).

[123] D.21-08-037 at 105, Finding of Fact 18 (emphasis added).

[124] D.21-08-037 at 34.

[125] D.21-08-037 at 111, Conclusion of Law 13.

handful of cases and facially incorrect interpretations of past Commission decisions. IPCS providers' arguments are devoid of meaningful analysis or intellectual rigor, and the Commission should resoundingly reject those arguments.

A. IPCS Providers Ignore and Mischaracterize Pertinent Sections of Article XII of the California Constitution.

IPCS providers attempt to characterize the Commission's Constitutional authority as limited to narrow authority over only "offerings by companies that enable the ability to speak and listen over a distance."[126] As Joint Intervenors have explained, this flies in the face of the Commission's expansive powers as an authority that is "not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers."[127] In keeping with this broad authority, Article XII, Section 3 of the California Constitution does not address the Commission's jurisdiction over *services*, but rather *providers*. In pertinent part, Section 3 states that the universe of "public utilities" over which the Commission has jurisdiction includes "[p]rivate corporations and persons that own, operate, control, or manage a line, plant, or system for…the transmission of telephone and telegraph messages."[128] In other words, *if* an entity owns or manages facilities used to provide telephone services, *then* the Commission has jurisdiction over that entity.

Given that the Commission has clear authority over entities that provide telephone service, ICPS engage in a logical fallacy by arguing that the Commission lacks jurisdiction over an entity if the entity which owns or manages facilities used to provide services that are *not* telephone services (in addition to owning or managing facilities that are telephone services).[129] Regardless of what additional services IPCS providers may

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[126] Opening Comments of Securus at 20.

[127] Opening Comments of Joint Intervenors at 40.

[128] Cal. Const. Art. XII, § 3.

[129] This is perhaps the most basic logical flaw when analyzing logical statements: assuming that because a statement is true, the inverse of that statement is true. A classic example of this flaw demonstrates the absurdity of IPCS providers' argument: from the statement "all dogs have fur," it is impossible to conclude that if something is not a dog, it does not have fur.

offer, they indisputably own and operate telephone networks which they use to offer telephone services. Accordingly, those providers are public utilities providing a telephone service and are subject to the Commission's jurisdiction.

Additionally, Section 3 is not the only source of the Commission's authority applicable to IPCS providers. Article XII, Section 5 of the California Constitution states that "[t]he Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain." The Commission should reject providers' absurdly flawed and deeply self-serving argument that the Constitution grants the Commission only authority over voice-only services.

B. IPCS Providers Mischaracterize Statutory Law Regarding the Commission's Authority.

IPCS providers attempt to cherry-pick specific statutes to argue that the Commission has never had authority over broadband service. In some instances, those providers distort or misinterpret language in those statues. For example, GTL relies on language in Public Utilities Code section 275 requiring that the Commission collect data about the revenue from "unregulated Internet access service" to support GTL's theory that the Commission has no state-granted authority over broadband services.[130] However, the phrase "unregulated Internet access service" does not necessarily mean "internet access service over which the Commission has no jurisdiction." A better reading of the phrase is to give weight to the word "unregulated" because otherwise it would be surplusage. Therefore, the phrase "unregulated Internet access service" could include internet access service which the Commission did not regulate at the time section 275 was enacted. Accordingly, GTL's argument that the Legislature must have recognized

[130] Opening Brief of GTL at 10.

the Commission does not have ratemaking jurisdiction over broadband[131] falls flat.

The providers not only misrepresent specific statutes in their effort to argue that the Commission has no jurisdiction over IP-enabled services, they also neglect to address other statutes that demonstrate the Commission's authority. As Joint Intervenors noted in their Opening Brief, the Commission's police power to regulate services and infrastructure to protect the public health, safety, and welfare is vested in the Public Utilities Code, including Sections 451, 584, 701, 761, 768, and 1001, and the Commission's regulation of VCS and other IP-enabled services is a legitimate exercise of police power.[132] Additionally, as Joint Intervenors have previously noted, the Commission's exercise of regulatory authority is guided by the legislature's declaration of telecommunications policy, which includes encouraging the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services, bridging the "digital divide" by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians, and avoidance of anticompetitive conduct.[133] There is ample statutory authority giving the Commission jurisdiction over VCS and other IP-enabled services.

IPCS Providers attempt to ignore ample statutory authority that the Commission has power to regulate VCS and other IP-enabled services. Instead, those providers mischaracterize specific, limited language found in a handful of statutes while handwaving away any statutes they do not like. The Commission should reject ICPS providers' arguments.

C. ICPS Providers Mischaracterize Case Law Regarding the Commission's Authority.

Securus applies the same faulty reasoning regarding Constitutional authority, discussed above, to argue that two cases--*Commercial Communications Inc. v. Public*

[131] Opening Brief of GTL at 10.

[132] Opening Brief of Joint Intervenors at 36-37.

[133] Opening Brief of Joint Intervenors at 38.

Utilities Commission[134] and *City of Huntington Beach v. Public Utilities Commission*[135]-- somehow restrict the Commission's jurisdiction to voice-only communications.[136] Securus treats those cases' use of the term "telephone" as a magical incantation that would limit the Commission's jurisdiction to services that do nothing more than enable "the ability to speak and listen over a distance."[137] However, a plain reading of both *Commercial Communications* and *Huntington Beach* contradicts Securus' argument, because both cases describe the Commission's jurisdiction as expansive.

Commercial Communications noted that while telephony began as the transmission of two telephone instruments over a wire,

> "[m]any technological improvements in the art of telephony have since been made, including radiotelephony and the instruments used for carrying on conversations at distances greater than the human voice naturally carries. *The exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected is not prescribed by law*."[138]

In *Commercial Communications*, the Court held that the Commission had jurisdiction over private mobile communication and, separately, *private mobile communications equipment*.[139] Contrary to Securus' argument, *Commercial Communications* stands for the proposition that the Commission's authority extends beyond "voice-only" service and includes any communications equipment or medium of transmission which allows conversations at a distance. Additionally, Securus attempts to rely on language from *Commercial Communications* to argue that the Commission's regulatory authority must be germane to the regulation of "public utility telephone

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[134] Commercial Comm. Inc. v. Pub. Util. Comm, 50 Cal 2d. 512 (1958) (en banc) ("Commercial Comm.").

[135] City of Huntington Beach v. Pub. Utilities Com., 214 Cal.App.4th 566 (2013) ("Huntington Beach").

[136] Opening Brief of Securus at 18-20.

[137] Opening Brief of Securus at 20.

[138] Commercial Comm., 50 Cal. 2d at 523 (emphasis added).

[139] Commercial Comm., 50 Cal. 2d at 525 (emphasis added).

companies"[140] without noting that this case was decided in 1958, and without acknowledging the significant evolution in advanced communications services in the intervening decades.

Similarly, in *Huntington Beach,* the court stated that "the Legislature intended to define the term 'telephone corporation' broadly, *without regard to the particular manner* by which users of telephones are put into communication."[141] Securus' argument that "[u]nder this controlling judicial precedent, the Commission's jurisdiction is limited to offerings by companies that enable the ability to speak and listen over a distance"[142] is a profoundly mistaken and self-serving interpretation of the law.

Furthermore, even if Securus' argument were correct, Securus does not explain how VCS *does not enable the ability to speak and listen over a distance*. It is fair to assume that the voice component of a VCS call is critical to an incarcerated person's ability to communicate with their families or support systems.[143] VCS includes "the ability to speak and listen over a distance," and, according to California law, including the cases upon which the IPCS providers rely, VCS is "communication by telephone," and, accordingly, subject to the Commission's jurisdiction.

D. IPCS Providers Mischaracterize Commission Decisions Regarding the Commission's Authority.

IPCS providers cite to a number of past Commission decisions in an effort to develop their arguments. However, a review of the Commission decisions cited by IPCS providers demonstrates that those decisions do not establish restrictions on the

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[140] Opening Comments of Securus at 21, citing Commercial Comm., 50 Cal. 2d. at 520.

[141] Huntington Beach, 214 Cal.App.4th 585 (emphasis added). The court added, "The definition of "telephone corporations" for purposes of section 7901 is not limited to those entities utilizing technology invented at the time section 7901 or its prior iterations in the Civil Code were enacted. If an entity owns, controls, operates, or manages telephone lines in connection with telephone communication, the entity is a "telephone corporation" under section 7901."

[142] Opening Comments of Seucurs at 20.

[143] Admittedly, for incarcerated persons with hearing impairments that require sign language interpretation or captions, the voice component of a VCS call is likely not critical. However, those individuals likely make up a very small segment of the population.

Commission's authority. Instead, there are situations in which the Commission either declined to assert jurisdiction over specific IP-enabled services,[144] or specifically declined to address the issue of the Commission's jurisdiction.[145] For example, Securus cites to a Proposed Decision that was issued and then withdrawn in R.17-06-023,[146], a proceeding considering whether to apply surcharges to text messaging services, arguing that the withdrawn PD included a provision in which the Commission "restated" its lack of statutory authority over information services.[147] However, the language that Securus cites in support of that argument clearly refers to federal jurisdictional constraints on Commission authority, not constraints imposed by state law.[148] Additionally, in the Commission's Final Decision in that proceeding, it clarified the discussion by noting that it "*declines to exercise* authority under state law to assess surcharges or user fees on text messaging services which are classified as 'information services' under the Act."[149] Thus the final decision does not concede that the Commission has no authority under state law over information services. Instead, D.19-01-028 acknowledges the Commission's authority, but declines to exercise it. This directly contradicts Securus' argument.

IPCS providers also appear to argue that because the Commission has never exercised jurisdiction in the past, it may not do so now. GTL alleges that the Commission "has never asserted ratemaking jurisdiction over broadband or broadband-enabled services such as the video and related services under review by the Commission here despite numerous opportunities to do so."[150] However, any prior decisions to decline to exercise authority do not limit the scope of the Commission's legal

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[144] D.21-04-005 at 2. *See* Opening Brief of GTL at 9.

[145] D.20-07-032 at 34. *See* Opening Brief of GTL at 9.

[146] Order Instituting Rulemaking to Consider Whether Text Messaging Services are Subject to Public Purpose Program Surcharges, R.17-06-023 (June 29, 2017).

[147] Opening Brief of Securus at 23.

[148] ICPS providers' briefs repeatedly muddy the waters by implying that federal jurisdictional limitations are somehow written into California law.

[149] D.19-01-029 at 21, Conclusion of Law 2 (emphasis added).

[150] Opening Brief of GTL at 8-9.

jurisdiction. GTL's argument is the equivalent of arguing that because the Commission did not impose regulations on Transportation Network Companies prior to 2012, it did not have the authority to do so, an argument the Commission tacitly rejected in D.13-09-045.[151]

Securus raises the specter of the Commission abruptly taking action to regulate "hundreds, if not thousands of companies that are not public utilities."[152] This fails to recognize the context of IPCS services where the market power exercised by providers (and noted in the Phase 1 Decision) limits the use of other tools to protect vulnerable customers. As GTL has demonstrated, the Commission has not sought to expansively exercise the full extent of its regulatory authority. The current proceeding is focused on a unique communications environment where targeted action is needed to respond to the monopoly power of IPCS providers and the concurrent lack of competition, which has resulted in unjust and unreasonable rates charged to a captive and vulnerable customer base. The Commission's response to this specific set of circumstances does not create a slippery slope toward implementation of Securus' fear-mongering vision of an oppressive regulatory scheme for all IP-enabled services.

VIII. IT IS IN THE PUBLIC INTEREST FOR THE COMISSION TO ADOPT INTERIM AND PERMANENT RATE CAPS AND REGULATIONS ON VIDEO CALLING SERVICES.

The Commission has the authority and the responsibility to adopt regulations on VCS that lower rates and address service quality concerns.[153] Studies show that communication, including video calls, reduces recidivism and is a crucial part of the rehabilitation process for people who are incarcerated.[154] As Securus states in its opening brief, VCS is bridging a crucial gap in familial interactions caused by the reduction of in-

[151] D.13-09-045 at 13.

[152] Opening Brief of Securus at vi.

[153] Opening Brief of Joint Intervenors at 9.

[154] *Decision Adopting Interim Rate Relief for Incarcerated Person's Calling Services*, D.21-08-037, R.20-10-002, August 23, 2021, 4.

person visitation due to the ongoing pandemic.[155] However, as the Californians for Jail and Prison Phone Justice Coalition ("CJPPJC") points out, VCS interactions are often extremely expensive and may have significant service quality problems which could prevent or discourage the use of VCS.[156] CJPPJC also raised concerns about service providers' practice of bundling VCS with traditional telecommunication services. IPCS service providers often have one contract with incarceration facility operators to provide multiple services including voice and VCS, among other services.[157] Since the Commission appropriately adopted interim rate caps for voice services, IPCS service providers offering both voice and VCS have a perverse incentive to drive customers to the currently unregulated, higher cost VCS.[158] In fact, in response to the Commission's interim voice rates, NCIC's Application for Rehearing of D.21-08-037 mentions IPCS service providers may limit access to phones or calling hours to drive customers to unregulated services such as VCS.[159] Lowering rates and ensuring service quality protections for VCS will enhance communication between people who are incarcerated and their families[160] which reduces recidivism and closes the regulatory loophole which providers can use to drive customers towards more expensive communications alternatives.

IX. CONCLUSION

The IPCS Providers continue to incorrectly interpret the law. It is far past time for the Commission to recognize this misdirection and assert its authority on VCS. The Commission has the authority to regulate VCS and should exercise that authority to protect the users of these services from unreasonable cost impacts.

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[155] Opening Brief of Securus at 6.

[156] *Opening Brief of Californians for Jail and Prison Phone Justice Coalition on the Commission's Phase II Scoping Memo*, January 28, 2022 (Justice Coalition) at 24-25.

[157] Opening Brief of Justice Coalition at 18.

[158] Opening Brief of Justice Coalition at 18.

[159] Opening Brief of Justice Coalition at 9.

[160] Opening Brief of Joint Intervenors at 41.

Respectfully submitted,

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February 28, 2022

[161] *See* Footnote 1.