Decision 22-04-038 April 7, 2022

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER DENYING REHEARING OF DECISION 21-08-037

I. INTRODUCTION

On September 21 and September 22, 2021, Network Communications International Corporation D/B/A NCIC Inmate Communications (U 6086 C) (NCIC) and Securus Technologies, LLC (U-6888-C) (Securus) filed, respectively, timely applications for rehearing of Decision (D.) 21-08-037 (Decision). In the Decision, we found that incarcerated persons calling services (IPCS) providers charge widely varying and, in some cases, excessively high prices in California for the same services, resulting in unjust and unreasonable rates. Our actions built on the work of the Federal Communications Commission (FCC) to regulate interstate inmate communications services, which came to similar conclusions regarding the interstate IPCS providers. As a result of Phase I in this proceeding, we adopted an interim cap on IPCS of seven cents ($0.07) per minute for debit, prepaid calls, and collect calls (Interim Rate Cap). We also: (1) prohibited the imposition of single-call, paper bill, live agent, and automated payment fees in association with intrastate and jurisdictionally mixed IPCS; (2) mandated the pass through, with no mark up, of third-party financial transaction fees, up to a limit of $6.95 per transaction; (3) permitted the pass through, with no mark up, of government taxes and fees for intrastate and jurisdictionally mixed IPCS; and, (4) prohibited the imposition of any other type of ancillary fee or service not explicitly approved by the Decision. We ordered IPCS providers to file proof of compliance within 45 days of issuance of the Decision.

In its application for rehearing, Securus asserts that that the Interim Rate Cap is invalid because it is erroneously based on a benchmark rate from a single, negotiated contract between the California Department of Corrections and Rehabilitation (CDCR) and another IPCS provider, Global Tel*Link Corporation (GTL) that has been since set aside. In addition to disputing the benchmark rate, Securus also argues that the Commission failed to solicit necessary evidence upon which to set the Interim Rate Cap and therefore the seven cents rate is unsupported by evidence in the record. Furthermore, Securus asserts that it is erroneous to impose the same interim rate cap on all types and sizes of incarceration facilities because size and type of the facility should determine the rates. Securus also argues that the Decision's adjustments to the Interim Rate Cap to mitigate for any differences in types and sizes of facilities, as well as to account for any additional permissible fees, are insufficient. Securus asserts that the Decision's setting of an interim rate cap and disallowance of recovery of certain fees and costs unconstitutionally impairs Securus' obligations under its current contracts with incarceration facilities and is confiscatory. Securus also disputes the Decision's definition and application of market power analysis.

For its part, NCIC asserts that the Decision erred in utilizing the GTL contract rate as the benchmark rate due to the economy of scale—that is, because GTL contracts with the state prisons and not local and county jails, GTL is able to offer substantially lower per-minute rates and recoup any losses through its other services. NCIC also argues that the Decision erred in prohibiting various ancillary fees by comparing those fees to other commercial calling services, which are a different market.

We have carefully considered all the arguments presented by rehearing applicants and are of the opinion that rehearing of the Decision is not warranted, as explained below. Securus' and NCIC's applications for rehearing of the Decision, therefore, are denied.

II. DISCUSSION

A. Securus Application for Rehearing

1. Interim Rate Cap

The instant proceeding was divided into two phases. Phase I was intended to "examin[e] the FCC's adopted and proposed rates and fee caps as starting points or models to provide interim relief to ensure access to just and reasonable communication rates … on an expedited basis."[1] We concluded that swift action to set an interim rate cap was necessary due to the financial hardships of maintain contact with incarcerated persons during COVID-19, when in person visits were not possible. Once the urgency of continued communication during the COVID-19 pandemic had been abated, Phase II would then commence to consider permanent rate caps.

Thus, in Phase I, we calculated the Interim Rate Cap by setting "an interim benchmark of the costs of providing IPCS at a reasonable rate" and then adding various allocations to arrive at the rate of $0.07.[2] The interim benchmark rate used was $0.025 per minute—the "per minute for adult local calls" rate negotiated by CDCR and GTL as a result of CDCR's Request for Proposals (RFP) for a contract "to furnish state inmates with improved telecommunications, including domestic and international telephone calling as well as calling by video" (CDCR-GTL Contract).[3] We took notice of the CDCR-GTL Contract rate pursuant to Evidence Code section 452(h) as "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."[4]

Securus argues that because the contract underpinning the benchmark rate was set aside, "it would be 'unjust' and 'unwarranted'" for us to rely on the rates negotiated as part of the RFP.[5] Securus also argues that the CDCR-GTL contract rate is

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[1] Scoping Memo, p. 15.

[2] Decision, p. 51.

[3] Securus App. Rhrg., Ex. A, pp. 1-3.

[4] Decision, p. 51.

[5] Securus App. Rhrg., pp. 7-9.

not reasonable because GTL was "allowed to propose rates for non-IPCS services that exceeded the [Not to Exceed (NTE)] caps," so it "conceivably may have [been able] to offer a very low IPCS rate."[6] GTL then could make up for that "very low IPCS rate" in other parts of its "multiservice contract," thereby unfairly (to Securus) undercutting that one component cost.[7]

Securus submits a Final Ruling by the Superior Court for the County of Sacramento on Securus' Petition for Writ of Mandate setting aside the CDCR-GTL Contract (Mandate Ruling).[8] The Superior Court held that CDCR erred in awarding the services contract to GTL because CDCR failed to equally impose the NTE requirement set out in the RFP.[9] The court did not engage in component price comparison or provide any directions to GTL or CDCR as far as contract or component pricing. The central issue was unfair advantage in the bidding process rather than reasonableness of costs.[10] The court also declined to award the contract to Securus.[11] CDCR has presumably commenced a new bidding process and GTL continues to provide existing services to CDCR "pursuant to one or more interim arrangements reached independently from the contract."[12]

Thus, the contract was set aside on procedural grounds—the California Department of Technology purportedly did not follow the procedures set out in the California Contracting Code.[13] As noted by the Public Advocates Office (Cal Advocates), the Superior Court's decision "did not rule on the reasonableness of the calling rates or costs of service, or negate the fact that GTL offered to provide IPCS

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[6] Securus App. Rhrg., p. 9.

[7] *Ibid*.

[8] Securus App. Rhrg., Ex. A, p. 1.

[9] Securus App. Rhrg., Ex. A, p. 2

[10] Securus App. Rhrg., Ex. A, p. 8.

[11] *Ibid*.

[12] Securus App. Rhrg., Ex. A, p. 9. The writ of mandate has been appealed to the Court of Appeal and is pending disposition there. (Third Appellate District, Case No. C095097.)

[13] Securus App. Rhrg., Ex. A, p. 7.

services at the contact rates."[14] Therefore, the issue of the validity of the CDCR-GTL Contract is distinct from the issue of the reasonableness of the included rate. That the court set aside the CDCR-GTL Contract does not, by itself, invalidate our reasoning or reliance on the contract rate.

But, even if we were to disregard the $0.025 rate from the GTL-CDCR Contract, there are ample comments in the record supporting a lower rate cap than the rates proposed by Securus.[15] Therefore even without relying on the CDCR-GTL Contract, the Interim Rate Cap is based on substantial evidence. In reviewing Commission decisions, the courts must consider all the "relevant evidence in the record," but it is "for the agency to weigh the preponderance of conflicting evidence."[16] "Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency."[17] In considering whether our findings are supported by substantial evidence, "[c]onflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test."[18] "It is for this reason that the Commission's factual findings are almost always treated as 'conclusive' [citation], 'final and not subject to

[14] R.20-10-002, *Public Advocates Office Response to Applications for Rehearing of Decision 21-08*-037 (Cal Advocates Reply to Rehearing) Oct. 7, 2021, p. 5.

[15] R.20-10-002, *Opening Comments of The Public Advocates Office on the Administrative Law Judge's Ruling Providing Staff Interim Rate Relief Proposal for Comment* (Cal Advocates Opening Comments), April 30, 2021, p. 8; R.20-10-002, *Opening Comments of The Utility Reform Network on the Staff Interim Rate Relief Proposal* (TURN Opening Comments), April 30, 2021, p. 13; R.20-10-002, *Comments of the Center for Accessible Technology on the Administrative Law Judge's Ruling Providing Staff Interim Rate Relief Proposal for Comment* (CforAT Opening Comments), April 30, 2021, p. 6; R.20-10-002, *Opening Comments of Californians for Jail and Prison Phone Justice Coalition on Staff Interim Rate Relief Proposal* (Justice Coalition Opening Comments), April 30, 2021, p. 5.

[16] *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal.App.4th 641, 649–650.

[17] *Ibid*.

[18] See D.03-08-072, *In Re San Diego Gas & Elec. Co.*, Aug. 28, 2003, pp. *20-21.

review.' [Citation.]"[19] "The fact that [parties] disagree with our conclusions in the Decision does not demonstrate legal error…."[20]

Cal Advocates proposed a rate cap of $0.05 per minute for all intrastate voice calls.[21] Cal Advocates reasoned that a 5 cent interim rate cap was appropriate because (1) it was the rate "consistent with the prior proposed California Senate Bill (SB) 555"; (2) data demonstrated that "at least 14 states have prison voice calling rates of $0.05 cents per minute or less for intrastate ICS service"; and, (3) Congress' proposed legislation includes "interim rate caps of $0.04 per minute for debit calling or prepaid calling and $0.05 per minute for collect calling."[22] The Utility Reform Network (TURN) argued that "a proper percentage reduction would be thirty percent from the 2021 FCC rates" because "intrastate service is less costly to provide than interstate service, and, therefore, the rates for intrastate calling should be lower than interstate."[23] Californians for Jail and Prison Phone Justice Coalition (Justice Coalition) proposed a maximum interim rate cap of $0.11 per minute for all intrastate calls because that is the cap the FCC set on prepaid intrastate calls in 2015 but advocated for interim rate caps significantly lower based on evidence from across the nation.[24] In sum, multiple parties provided data in support of their position that a lower rate cap would be reasonable. Although Securus asserts that the data is faulty and insufficient, Securus failed to provide any data to the contrary. As we explained, "Provision of cost information in response to discovery data requests does not constitute provision of cost information in the record of this

[19] *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 839.

[20] D.06-04-074, § III.C.

[21] Cal Advocates Opening Comments, p. 8.

[22] Cal Advocates Opening Comments, pp. 8-12.

[23] TURN Opening Comments, pp. 11-12.

[24] Justice Coalition Opening Comments, p. 5; R.20-10-002, *Reply Comments of Californians for Jail and Prison Phone Justice Coalition on Staff Interim Rate Relief Proposal* (Justice Coalition Reply Comments), May 12, 2021, pp. 3-4.

proceeding."[25] That we gave greater consideration to the data presented by the other parties does not demonstrate legal error.

2. FCC's Data and Rate Caps

Securus' multiple "insufficiency of evidence" arguments[26] are premised on the same underlying objection: that the Interim Rate Cap is lower than the one set by the FCC.[27] Securus believes that in Phase I "the question at hand was whether to adopt the FCC's approach to rate caps on an interim basis" so there was no notice or need to submit other evidence.[28]

The Scoping Memo, contrary to Securus' assertions,[29] described Phase I as "examining the FCC's adopted and proposed rate and fee caps as *starting points* or models to provide interim relief to ensure access to *just and reasonable communication service rates* for California inmates and their families in 2021 *on an expedited basis*."[30] The issues identified for Phase I included:

> 3. Should the Commission provide *immediate interim relief* to meet the inmate communication service needs of incarcerated people and their families *at just and reasonable rates*, including those with communication disabilities? If so, *how*?
> 4. Should FCC regulations over interstate and international calls *inform* the Commission's approach to intrastate inmate communication services? If so, *how*? Should the Commission *use some elements of FCC orders but not others as models* for ensuring *just and reasonable, and affordable, inmate communication services rates* in California?[31]

The Scoping Memo contemplated considering the FCC orders in deciding "the just and reasonable rates" warranted for interim relief but did not state that the FCC

[25] Decision, p. 57.

[26] Securus App. Rhrg., p. 10.

[27] Securus App. Rhrg., pp. 11-18.

[28] See Securus App. Rhrg., pp. 10-12.

[29] See Securus App. Rhrg., p. 11.

[30] Scoping Memo, p. 15 (emphasis added).

[31] Scoping Memo, p. 25 (emphasis added).

rates were the only ones to be considered or adopted. Instead, the Scoping Memo solicited proposals on what rates would be appropriate. It also explicitly contemplated that parties would be involved in other data gathering and discovery.[32] Multiple parties urged us to adopt an interim rate cap lower than the FCC rates and submitted various data in their comments in support of their positions.[33]

The parties were also provided the Communications Divisions Staff Proposal (Staff Proposal) for comment.[34] The Proposal Ruling asked the parties to provide general comments as well as specific feedback on (1) "the Staff Proposal's recommendation for the Commission to adopt the FCC's interim rate caps of $0.21 per minute for debit and prepaid calls and $0.25 per minute for collect calls," (2) "Staff's proposal that if the FCC further lowers its interstate rate caps," the Commission should modify rates accordingly, and (3) whether the Commission should adopt the Staff Proposal.[35]

Securus had ample opportunity to participate regarding the lower rate cap. While the Staff Proposal was provided for parties' review and feedback, the Proposal Ruling did not state that the FCC rates where the only rates being considered or that parties could not provide other proposals or feedback on the staff proposal. To the contrary, the Proposal Ruling asked for any objections or additional comments to the staff proposal, as well as for general comments, which other parties provided in their opening and reply comments. If Securus "had relevant evidence to present on that issue but failed

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[32] Scoping Memo, p. 22.

[33] Cal Advocates Opening Comments, p. 8; TURN Opening Comments, p. 13; CforAT Opening Comments, p. 6; Justice Coalition Opening Comments, p. 5. The Scoping Memo also notes: "the Public Utilities Commission of Ohio eliminated site commission fees and reduced intrastate calling rates to $0.05 per minute. The New Jersey Board of Public Utilities similarly recently awarded a state prisons contract that eliminated site commission fees and reduced rates below $0.05 per minute." R.20-10-002, *Assigned Commissioner's Scoping Memo and Ruling* (Scoping Memo) Jan. 12, 21, pp. 18-19.

[34] R.20-10-022, *Administrative Law Judge's Ruling Providing Staff Interim Rate Relief Proposal for Comment* (Proposal Ruling), April 2, 2021.

[35] Proposal Ruling, pp. 2-3.

to do so, that was [its] own strategic decision and [it] cannot now be heard to complain."[36]

In response to proposals for lower rate caps, Securus argued that there was no basis for "a generalized finding that California ICS rates are unjust and unreasonable" because "whether a rate is reasonable or not requires an assessment of the provider's underlying costs to provide the service, including a reasonable rate of return" as well as "consideration of required site commission payments."[37] However, Securus chose not to provide any actual cost data. Instead, Securus only argued that the data and evidence submitted by other parties were erroneous or otherwise faulty.[38] That Securus disagreed with the submitted data and arguments is insufficient reason for us to only consider FCC's rates.

3. Single Uniform Interim Rate Cap

Securus further argues that setting all California IPCS rates against the same benchmark and at the same rate cap is erroneous because there are "well-documented differences in costs to provide IPCS to facilities of different types and sizes."[39] First, Securus argues that the CDCR-GTL Contract rate makes a "poor benchmark for the rest of the industry" because that contract is for "an array of communications services to approximately half of all incarcerated persons" in state prisons which confers "substantial economies of scale and scope" that cannot be matched by other contracts.[40] According to Securus, the CDCR-GTL rate does not account for increased costs of serving smaller jails, for example, or for site commission costs, and the cap adjustments to accommodate these variables are "woefully inadequate."[41] Securus

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[36] *BullsEye Telecom, Inc. v. California Public Utilities Com.* (2021) 66 Cal.App.5th 301, 327.

[37] R.20-10-022, *Reply Comments of Securus Technologies, LLC (U 6888 C) to Administrative Law Judge's Ruling Providing Staff Interim Rate Relief Proposal for Comment* (Securus Reply Comments), May 12, 2021, p. 3.

[38] Securus Reply Comments, pp. 9-10.

[39] Securus App. Rhrg., p. 13.

[40] Securus App. Rhrg., p. 14.

[41] Securus App. Rhrg., pp. 14-15.

also argues that because GTL offers services other than phone calls, it was able to offer a lower rate by spreading its costs across all services offered.[42]

That we took note of the CDCR-GTL rate as a benchmark does not nullify the extensive reasoning and data discussion resulting in the $0.07 interim rate cap. For example, Cal Advocates provided detailed analysis on intrastate rates in jails and concluded that close to 40 percent of California jails already charge rates at or below 5 cents per minute for intrastate voice calls.[43] Cal Advocates also reviewed intrastate rates in prisons, and similarly concluded that 5 cents per minute was an appropriate rate, using (1) information from the current CDCR-GTL contract for the state prison system, (2) work on prior multi-stakeholder legislative efforts that proposed a 5-cents-per minute rate for voice calls, and (3) information on rates charged in ten other states.[44] Similarly, CforAT described the economies of scale enjoyed by the handful of IPCS providers serving the state with the most incarcerated persons in the country that goes beyond GTL's economies of scale through the CDCR contract. CforAT provided examples from other states and noted GTL and Securus' statements in the record that their companies provided "fee call credits" that resulted in "341 million free [sic] minutes of phone collection time."[45]

Second, Securus faults us for our purportedly "arbitrary pick-and-choose approach to FCC's findings."[46] Securus particularly notes the frequent turnover at local jails which results in additional added costs even where the total population remains the

[42] Securus App. Rhrg., p. 15.

[43] Cal Advocates Opening Comments, pp. 12-13 & Fig. 2 (presenting analysis based on data responses from GTL, ICSolutions, NCIC, and Securus).

[44] Cal Advocates Opening Comments, pp. 9-12, 14-15, 19-20 & Fig. 3 (presenting analysis from data showing that 73% of California prison and jail facilities have intrastate voice calling rates at or below the Staff Proposal); Decision, pp. 7-8 (discussion of legislative negotiations on IPCS rates).

[45] R.20-10-002, *Reply Comments of the Center for Accessible Technology on the Administrative Law Judge's Ruling Providing Staff Interim Rate Relief Proposal for Comment* (CforAT Reply Comments), May 12, 2021, p. 7, fn. 25; Decision, p. 49.

[46] Securus App. Rhrg., p. 17.

same.[47] The Interim Rate Cap's accounting for these differences by doubling the benchmark rate to five cents per minute and adding two cents for all site commissions is insufficient according to Securus.[48] Specifically, Securus argues that any reliance on FCC's 22-25 percent differential is misplaced because that cost differential was expressly applicable to large jails only (1,000 or more) and based on average costs.[49]

We are not bound to follow the FCC's findings exactly. It is within our discretion to decide what arguments and evidence we consider most persuasive. We summarized the information in the record about the variations in rates among facilities at length.[50] We then concluded that "it is unlikely that it costs IPCS providers more than double the cost of providing call services to the California state prison system to provide IPCS to jails of all sizes" while recognizing "[t]he difficulty the FCC has had in identifying legitimate provider security costs."[51] We also acknowledged that the FCC's 22-25 percent cost differential is applicable to large jails and uses the percentage comparatively as a point of reference.[52] Lastly, we explained our rationale in adopting or deviating from FCC findings, and explicitly stated that the adoption of the Interim Rate Cap is intended to "account for the cost to serve smaller facilities" despite the failure by providers to introduce concrete cost data.[53]

Finally, for the same reasons, Securus argues it is improper for us to compare rates in other state prisons because, as with the CDCR-GTL Contract, the rates are only comparable to California state prisons and not local and county jails.[54]

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[47] Securus App. Rhrg., p. 19.

[48] Securus App. Rhrg., p. 19.

[49] Securus App. Rhrg., p. 19.

[50] See Decision, pp. 52-56.

[51] Decision, p. 52 & fn. 174.

[52] Decision, p. 52.

[53] See Decision, pp. 52-55, 58, 99 (for example, the Decision notes that PayTel did not provide specific examples of the cost differential to serve the 68 incarcerated persons in the Siskiyou County Jail.)

[54] Securus App. Rhrg., p. 22.

According to Securus, the Interim Rate Cap is unreasonable in light of the $0.31 average rate for serving county jails.[55] However, our reasoning here was again based on the evidence presented by multiple parties. The Justice Coalition presented data demonstrating that "[i]n Illinois, prison phone calls run $0.009 per minute. In Dallas County, jail phone calls run $0.0119 per minute. In New York City, where jail phone calls are free to families, the City pays $0.03 per minute."[56] This data cited costs in county and local jails, as opposed to state prisons only. Cal Advocates provided extensive analysis on intrastate rates in jails and concluded that close to 40 percent of California jails already charge rates at or below 5 cents per minute for intrastate voice calls.[57]

Securus did not offer any actual cost data for county or local jails. To the extent Securus asserts that the rates relied on by other parties are not indicative of market rates or somehow artificially depressed, Securus does not point to any evidence in the record to support this position aside from citing the $0.31 per minute average rate calculated by Cal Advocates. This average resulted from rates ranging between $0.00 and $3.65 per minute with majority of the jails at or below $0.05 per minute.[58] 22 percent of jails are above $0.05 but at or below $0.21 per minute; 38 precent of jails are above $0.21 per minute.[59] Cal Advocates' analysis does not provide a further breakdown of the actual rates, so it is unclear whether there are outliers that inflate or deflate the average rate. The available evidence in the record shows most jails either charge below 5 cents or above 21 cents per minute, which suggests a wide discrepancy in costs and

[55] Securus App. Rhrg., p. 22. It is unclear if Securus asserts that this is the national average rate. It appears Securus is citing Cal Advocates Opening Comments for the $0.31 figure based on complication by Cal Advocates of "Data Request responses provided by four of California's largest ICS providers, GTL, Securus Technologies (Securus), Inmate Calling Solutions, (ICSolutions), and Network Communications International Corp. (NCIC)" as of April 2021. See Cal Advocates Opening Comments, p. 6, fig. 1.

[56] Justice Coalition Reply Comments, p. 3; see Decision, p. 53.

[57] Cal Advocates Opening Comments, pp. 12-13 & Fig. 2 (presenting analysis based on data responses from GTL, ICSolutions, NCIC, and Securus).

[58] Cal Advocates Opening Comments, p. 12.

[59] *Ibid*.

considerations. As it stands, the evidence in the record shows that a $0.05 per minute rate is feasible to achieve in jails and, overall, there is a downward trend in rates across both California and the US.

4. Site Commissions

In determining what constitutes a just and reasonable interim rate cap, we also discussed the impact of site commissions. Site commission fees are a percentage of calling service revenues that intrastate calling service providers might pay to state and local incarceration facilities.[60] In California, site commissions are authorized by Penal Code section 4025.[61] SB 81 banned site commission fees for state prison facilities to reduce inmate calling rates.[62] The FCC has proposed to cap any costs that are "directly related to the provision of inmate calling services and that represent a legitimate cost for which providers of inmate calling services may have to compensate facilities," including site commission fees, to $0.02 per minute.[63]

Securus argues that the Decision's limitations on site commission cost recovery to $0.02 per minute is not supported by substantial evidence and contravenes the Penal Code.[64] Because the Penal Code does not limit the amount of site commissions that local authorities may seek, Securus contends that "more than half of all its California revenue" is paid toward site commissions and the Decision's allowance of $0.02 is insufficient.[65] Securus argues that the Decision's adoption of FCC's $0.02 allowance is inappropriate because "FCC allowance for site commissions is designed to recover only a correctional facility's costs that are *directly* related to providing IPCS, for example,

[60] Scoping Memo, p. 15 (citing 47 CFR 64.6000(t).)

[61] Pen. Code, § 4025.

[62] SB 81, States 2007 Ch 175, Sec. 32.

[63] Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No, 12-375 (rel. Aug. 7, 2020), at 36-37.

[64] Pen. Code, § 4025.

[65] Securus App. Rhrg., pp. 23-24.

educating incarcerated persons on the use of IPCS."[66] Whereas the allowance in the Interim Rate Cap is meant to cover any and all site commission costs levied.[67]

Securus' arguments here overlook our approach to site commissions. We explained that not "all site commission costs [are] essential or necessary costs to provide intrastate IPCS" and "[l]ike the FCC, we reason that, if collection of site commissions to support facility costs beyond those incurred to enable IPCS were prohibited, facilities would not stop providing IPCS to incarcerated people."[68] FCC's Third Order recognizes two categories of site commissions—"[(1)] site commission payments in an amount that is prescribed under formally codified laws or regulations and [(2)] other site commission payments that ultimately are embodied in contracts with correctional facilities or systems."[69] The FCC reasoned that in situations where IPCS providers offer site commissions in their contract bids above "the level required to cover the institutions' own costs," it is a "marketplace choice different in kind from the scenario where site commissions at a given level are required by a statute or rule."[70]

Securus asserts that Penal Code section 4025 "authorizes local correctional authorities to collect site commissions to fund welfare related programs for incarcerated persons."[71] However, section 4025, subdivision (d), merely requires that "any money, refund, rebate, or commission received from a telephone company or pay telephone provider when the money, refund, rebate, or commission is attributable to the use of pay telephones which are primarily used by inmates while incarcerated" must be deposited into the inmate welfare fund. Thus, "[t]his section could be read as either an authorization or a limitation."[72] That is, section 4025 merely instructs the county as to

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[66] Securus App. Rhrg., p. 24.

[67] Decision, p. 55.

[68] Decision, p. 56.

[69] FCC Third Order, ¶ 116.

[70] FCC Third Order, ¶ 120.

[71] Securus App. Rhrg., p. 23.

[72] *Salazar v. County of Los Angeles* (C.D. Cal., Sept. 27, 2016, No. CV-15-09003-MWF-JC) 2016 WL 11746844, at *14.

what it must do with any applicable funds received from an IPCS provider and, by implication, permits a county to collect such funds. Section 4025 does not, as suggested by Securus, require that counties collect site commissions or set a specific amount that must be paid.[73] The FCC's reasoning pertaining to contractual site commission offers is applicable here: "if providers offer site commissions at levels that are not recoverable under the [FCC's] interstate and international rate caps, … they do so as a matter of their own business judgment" and such commissions are not "a condition precedent of doing business at correctional institutions."[74]

5. Ancillary Fees

Securus' asserts that we erred[75] in eliminating (a) the ancillary service fees for jurisdictionally mixed calls (other than the pass-through with no mark-up of third-party financial transaction fees and government taxes and fees), and (b) all single-call service fees except for those fees clearly associated with an interstate call.[76] Securus asserts that this conclusion is arbitrary, exceeds our authority, and is "ambiguous and unworkable."[77]

As to arbitrariness, Securus posits that because we did not explicitly include an allowance in its Interim Rate Cap calculation for ancillary fees, we cannot "make a factual finding that the cap is sufficient to cover the full cost of service without any ancillary fee revenues."[78] However, to the contrary, based on evidence regarding

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[73] Decision, p. 110, Conclusions of Law ¶ 9.

[74] FCC Third Order, ¶ 120.

[75] The Decision prohibited "the imposition of any automated payment fees, paper bill/statement fees, live agent fees, and single-call fees in association with intrastate and jurisdictionally mixed calls and require intrastate IPCS providers to directly pass through third-party financial transaction fees to consumers with no markup, and to cap these fees at a limit of $6.95 per transaction" and restricted "collection of mandatory government taxes and fees in association with intrastate and jurisdictionally mixed calls to pass through without markup and prohibit IPCS providers from charging any other ancillary service fees not identified and explicitly approved here." Decision, p. 62.

[76] Securus App. Rhrg., p. 39.

[77] Securus App. Rhrg., pp. 39-42.

[78] Securus App. Rhrg., pp. 39-40.

practices in other jurisdictions, we made a reasoned determination that IPCS carriers are able to operate without charging ancillary fees.[79] This includes evidence that "fifteen state prison systems have eliminated automated payment/automated deposit fees entirely and that GTL does not currently impose this fee on incarcerated persons in multiple facilities in California"; one state prohibited paper bill/statement fees since 2015; and that many of the ancillary fees are not imposed outside of the IPCS market.[80] NCIC provided evidence that "third-party financial organizations are charging anywhere from three to five percent credit card transaction fees directly to family members, not IPCS providers, due to an FCC definitional oversight that allows 'credit card charges' to be passed through as part of 'financial transaction fees.'"[81] Prison Policy Institute "documented a provider charging both a $3.00 automated payment fee and passing through their own payment-card processing fees."[82] Moreover,

> this Commission heard significant confusion and customer complaints about IPCS ancillary fees during our April 28, 2021 and April 29, 2021 PPHs, making clear that the current ancillary fees are a major burden to families of the incarcerated as they strive to stay in communication with their loved ones.[83]

As a result of this evidence, we concluded that the record did not support the imposition of ancillary fees on "the incarcerated and their families [which are] not required in commercial calling services…."[84] We rejected IPCS providers' proposal to simply adopt all of FCC's 2013 Order ancillary fee caps because "adopting the FCC's Third Order ancillary fee caps in California is insufficient to address these hardships."[85]

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[79] Decision, pp. 66-69.

[80] *Ibid*.

[81] Decision, p. 70 (citing NCIC Inmate Communications, Comments on Proposed Decision, p. 4.)

[82] Prison Policy Institute, Comments on Staff Proposal at 5.

[83] Decision, p. 73.

[84] Decision, p. 73.

[85] Decision, p. 108, Findings of Fact ¶ 46.

As to the scope of our authority, Securus asserts that the FCC has asserted jurisdiction over all jurisdictionally mixed ancillary services fees and therefore any Commission regulation is preempted.[86] FCC's Third Order explicitly rebuts Securus' argument stating, "[t]o the extent that state law allows or requires providers to impose rates or fees lower than those in our rules, that state law or requirement is specifically not preempted by our actions here."[87] Securus interprets this statement to mean that "barring ancillary services altogether is not tantamount to setting a lower fee"[88] but the plain language of FCC's order supports the setting of a ceiling on ancillary rates, not a floor.

The FCC's Third Order is concerned with conflict preemption, noting that "state laws imposed on inmate calling services providers that do not conflict with [federal statutes] or rules adopted by the [FCC] are permissible."[89] Conflict preemption as defined in federal law is triggered when "it is impossible to comply with both state and federal requirements" or when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[90] Conflict preemption is particularly disfavored in the context of telecommunications regulation, where Congress has envisioned a dual regulatory scheme where states have an acknowledged role to play.[91] Here, there is no conflict because a carrier can comply with both state and federal law by not charging ancillary fees. Nor do we obstruct federal law, given that the FCC has spoken approvingly of independent policymaking in California.[92]

Furthermore, our authority is not limited to intrastate IPCS ancillary fees as Securus posits.[93] This is because the FCC found that "ancillary service charges generally

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[86] *Ibid*.

[87] Decision, p. 76 (quoting FCC Third Order, ¶ 217).

[88] Securus App. Rhrg., p. 40.

[89] FCC Third Order, ¶ 217.

[90] *MetroPCS Calif. v. Picker* (9th Cir. 2020) 970 F.3d 1106, 1117-1118.

[91] *Id*. at 1118.

[92] FCC Third Order, ¶ 217, fn. 683 (listing, with approval, several state proceedings, including California PUC Rulemaking 20-10-002).

[93] Securus App. Rhrg., p. 41.

cannot be practically segregated between interstate and intrastate jurisdiction except in the limited number of cases[.]"[94] Ancillary fees are, by their nature, "jurisdictionally mixed."[95] As to California law, our jurisdiction does not extend to interstate commerce "except insofar as such application is permitted under the Constitution and laws of the United States."[96] Here, the laws of the United States (both the Communications Act of 1934 and the relevant FCC orders) permit us to exercise jurisdiction over ancillary fees. Accordingly, California law (in tandem with FCC guidance) grants us authority to regulate jurisdictionally mixed ancillary fees which we do appropriately here.

Finally, Securus' argues that our findings as to, and regulation of, the ancillary fees are "ambiguous and unworkable" because we do not specify which "jurisdictionally mixed" calls are subject to the ancillary fee limitations.[97] But we have addressed this issue. A call's jurisdictional nature can be identified by "the end points of a call" as discussed in the FCC 2020 Order.[98] We explain that "in the rare cases when a provider cannot definitively determine the end points of a call, the FCC 2020 Order clarifies that the provider should treat the call as jurisdictionally mixed and thus subject to the FCC's ancillary service requirements adopted for interstate calls at that time."[99] The FCC's Third Order further discusses this issue, providing that for "jurisdictionally mixed" services, "where it is impossible or impractical to separate the service's intrastate from interstate components, state law or requirements that impose fees lower than the FCC are 'specifically not preempted by [FCC] actions'" and therefore may govern.[100] "Thus, when the end-points of a call cannot be definitely determined, the call should be

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[94] Decision, p. 75.

[95] Decision, p. 75 (citing FCC Third Order, ¶¶ 218, 271; *Rates for Interstate Inmate Calling Services*, FCC Dkt. 12-375, Report & Order on Remand and Fourth Further Notice of Proposed Rulemaking ¶ 31 (Aug. 7, 2020).).

[96] Pub. Util. Code, § 202.

[97] Securus App. Rhrg., p. 42.

[98] Decision, pp. 101-102.

[99] Decision, p. 102.

[100] Decision, p. 102.

classified as jurisdictionally mixed, and the adopted ancillary service fee requirements adopted [by the Decision] apply."[101] In light of this extensive reasoning, supported by the FCC's Third Order, it is unclear what the basis for Securus' objections here are. Although Securus disagrees with our assertion of jurisdiction to regulate jurisdictionally mixed services, FCC's guidance supports our actions.

6. The Relevant Market and Market Power

Securus asserts that we erred in concluding that IPCS providers "operate as locational monopolies" and exercise "market power" within facilities because the bidding market, and resulting contracts, prevent utilities from unilaterally setting or changing rates.[102] Securus also argues that we erroneously focused on the "consumer market" for similar reasons.[103] The considerations of IPCS market and providers' market power are relevant to the Decision's finding that the unregulated rates are unjust and unreasonable.

We discussed, at length, its findings regarding the IPCS market, market power of IPCS providers, and the existence of locational monopolies operated by IPCS providers.[104] We noted that "[n]either Staff nor any party identified an instance in California where an incarcerated person has a choice of IPCS provider."[105] As a result, we concluded that "[i]ncarcerated people are effectively a captive customer class who have no choice in service provider…."[106] We reviewed the FCC's finding that a locational monopoly exists "when a location owner attempts to limit the entry of new competition to increase profitability and demand a share of the profits in the form of a location rent or commission fee."[107] Having done so, we concluded "that IPCS providers operate locational monopolies" because California "[i]ncarceration facilities typically

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[101] Decision, p. 102.

[102] Securus App. Rhrg., pp. 33-35.

[103] Securus App. Rhrg., pp. 36-38.

[104] See Decision, pp. 33-39.

[105] Decision, p. 31.

[106] Decision, p. 32.

[107] Decision, pp. 33-34.

limit provision of IPCS within a facility to one provider and often collect commission fees for their own purposes…."[108]

We addressed Securus' objections to the adopted definition of market power, the existence of two markets, and the finding of locational monopoly.[109] Securus' arguments were rejected largely because Securus (and other IPCS providers) did not "file cost data to justify their claims,"[110] "[n]o competitive forces within incarceration facilities constrain providers from charging rates that far exceed the costs such providers incur in offering service,"[111] and, "once selected, the IPCS provider, as the operator of the locational monopoly, exercises the market power transferred to it by the incarceration facility."[112] We explained why the data provided by other parties and the findings resulting from that data were more persuasive than Securus' unsupported arguments.[113]

Securus does not dispute the existence of two markets: the bidding market and the consumer market. Although Securus asserts that we failed to address evidence of competition in the bidding market, in fact, we recognized that such a market exists,[114] that there is no data in the record demonstrating that "incarceration facilities have ever selected more than one IPCS provider to serve the same facility,"[115] and that "[n]o competitive forces within incarceration facilities constrain providers from charging rates that far exceed the costs such providers incur in offering service."[116] We simply rejected IPCS providers' arguments that the bidding market "is functioning to provide just and reasonable rates for the incarcerated."[117]

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[108] Decision, pp. 33-34.
[109] See Decision, pp. 32-36.
[110] Decision, p. 32.
[111] Decision, p. 34.
[112] Decision, pp. 35-36.
[113] Decision, pp. 32, 46-59.
[114] Decision, p. 35.
[115] *Ibid*.
[116] *Ibid*.
[117] Decision, p. 36.

Moreover, our findings as to the IPCS market "align[] with the FCC's recent findings on a national scale."[118] The FCC explained that once an incarceration facility chooses an IPCS provider "often resulting in contracts with providers lasting several years into the future—incarcerated people in such facilities have no means to switch to another provider, even if the chosen provider raises rates, imposes additional fees, adopts unreasonable terms and conditions for use of the service, or offers inferior service."[119] The FCC additionally found, "[N]o competitive forces within the facility constrain providers from charging rates that far exceed the costs such providers incur in offering service…. [T]here are no competitive constraints on a provider's rates once it has entered into a contract to serve a particular facility…."[120] Thus, any semblance of competition in the bidding market, "is not the type of competition [the FCC] recognizes as having an ability to 'exert downward pressure on rates for consumers[.]'"[121]

Securus argues that IPCS providers do not have market power because they may not unilaterally set or raise rates[122] but overlooks the control IPCS providers have over creating the initial bids. Securus' argument here also ignores our finding that, once selected, incarceration facility operators effectively transfer market power over IPCS rates to providers in exchange for site commission fees. Securus does not dispute that incarcerated persons or their families have no choice of IPCS providers. Moreover, Securus does not point to any evidence in the record regarding the cost of "numerous security-related services that correctional authorities require"[123] that makes the standard commercial telephone services market an inapt competitive market for comparison.

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[118] Decision, p. 37.

[119] Decision, p. 38 (citing FCC Third Order, ¶ 33.)

[120] *Ibid*.

[121] *Ibid*.

[122] Securus App. Rhrg., p. 36.

[123] Securus App. Rhrg., pp. 36-37.

Our findings here are sufficient to support the imposition of the Interim Rate Cap. Still, as stated in the Decision,[124] we intend to further examine IPCS bidding and contract conditions during Phase II of this proceeding.

7. Public Utilities Code Section 728

Securus asserts that the Interim Rate Cap was improperly set without evidentiary hearings in violation of section 728.[125] Securus argues that section 728 permits us to set rates only "after a hearing."[126] Securus contends that the only question for consideration in Phase I was "whether to adopt the FCC's interim rates that were based on cost data already provided in response to data requests" and there was no indication that the Commission was considering "an alternative rate cap below the IPCS providers' cost to provide services."[127] But, contrary to Securus' assertions, the Scoping Memo did not limit the consideration of the interim rate cap to FCC's rates only,[128] and Commission and Court precedent has established that an evidentiary hearing is not mandatory to comply with due process and other statutory requirements. Issuing the Decision without an evidentiary hearing is therefore not in error.

Section 728 provides,

> Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

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[124] Decision, p. 37.

[125] Securus App. Rhrg., p. 12-13.

[126] Securus App. Rhrg., p. 32 (citing *City of Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680.)

[127] Securus App. Rhrg., pp. 11-12.

[128] See *supra* Section II.A.2.

City of Los Angeles explained that "the purpose behind the hearing requirement of section 728 … is to air the policy considerations behind various rate proposals and to establish controverted facts[.]"[129] However, we have previously held that section 728 does not mandate evidentiary hearings.[130] Instead, "a hearing" as used in section 728 merely requires "an opportunity to be heard, but does not necessarily mean an evidentiary hearing."[131] It is "for the Commission to determine whether a proceeding requires an evidentiary hearing and to determine the type of hearing (quasi-legislative, adjudicatory, or ratesetting) that is required."[132]

The proceeding here was categorized as ratesetting and divided into two phases, with evidentiary hearings set for Phase II.[133] None of the parties objected to this ruling. Moreover, in describing the scope of Phase I, the Scoping Memo explained that the schedule for Phase I provided "for expedited action to adopt interim relief for inmates and their families by mid-2021 … due to the critical importance of supporting continued family contact during the COVID-19 pandemic, which has hit incarceration and detention facilities particularly hard."[134] None of the parties requested evidentiary hearings in Phase I following this description of the scope of Phase I and the schedule, which did not include evidentiary hearings. A separate ruling was thereafter issued, requesting comments on the Staff Proposal.[135] Again, none of the parties requested evidentiary hearings to be held at that point. Public participation hearings were held on April 28 and

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[129] *City of Los Angeles*, *supra*, 15 Cal.3d at 697.

[130] Rulemaking (R.) 11-10-003, *Order Modifying Decision (D.) 12-05-037 and Denying Rehearing of Decision, as Modified* [D.13-04-030] (Apr. 22, 2013), at *12.

[131] *Ibid*. (citing *Order Granting Limited Rehearing to Modify Decision (D.) 97-11-074 and Denying Rehearing of Modified Decision* [D.99-02-044] (1999) 85 Cal.P.U.C.2d 71, 81, fn. 8; *Order Modifying Decision 94-08-022 and Denying Rehearing* [D.95-03-043] (1995) 59 Cal.P.U.C.2d 91, 98.)

[132] *Ibid*. (citing Pub. Util. Code, § 1701.1).

[133] Scoping Memo, pp. 29-20.

[134] Scoping Memo, p. 21.

[135] See Proposal Ruling.

29, 2021.[136] The Proposed Decision, adopting the $0.07 interim rate cap, was issued on July 12, 2021.[137] Parties submitted opening and reply comments to the Proposed Decision, but no party requested evidentiary hearings.

Securus (and other parties) had waived any objections to a lack of evidentiary hearings by failing to raise this issue despite multiple opportunities to do so. The California Supreme Court has explained that "[i]f no party seeks to challenge a proposed order except by merely submitting written comments on its merits, the commission is not required to hold a hearing."[138] "[T]here is nothing remarkable in the concept that one who is entitled to a hearing may waive his right thereto by failing to assert it."[139] Securus was not only able to submit multiple rounds of comments in response to the Scoping Memo, the Staff Proposal, and the Proposed Decision, but also able to request evidentiary hearings at any point if it believed that hearings were necessary. Securus' assertion that the Decision was issued without hearing in violation of section 728 is, therefore, not supported by established precedent. As we also noted, Securus was able to do—but did not—seek to supplement the record in Phase I by including data with its comments or requesting leave to file evidence.[140]

8. The Contract Clause

Securus argues that the Interim Rate Cap unreasonably impairs its obligations under existing government contracts by requiring Securus, others IPCS providers, and corrections agencies to change all intrastate rates and resulting site commissions.[141] Securus also asserts that 45-day transition period is insufficient to renegotiate and

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[136] See R.20-10-002, *Public Participation Hearing Transcript Vol. 1*, April 28, 2021, and *Public Participation Hearing Transcript Vol. 2*, April 29, 2021. Individuals were also able to provide written comments. R.20-10-002, *Public Participation Hearing Transcript Vol. 1*, April 28, 2021, p. 9.

[137] See R.20-10-002, *Proposed Decision Adopting Interim Rate Relief for Incarcerated Person's Calling Services*, July 12, 2021.

[138] *California Trucking Assn. v. Pub. Util. Com.* (1977) 19 Cal.3d 240, 245.

[139] *Id.* at 245, fn. 7.

[140] Decision, p. 93 & fn. 257.

[141] Securus App. Rhrg., p. 25.

implement the contracts between IPCS providers and the facilities, and a 90-day period similar to that adopted by the FCC is more appropriate.[142]

The Contract Clause is contained in both the State and federal Constitutions.[143] It prohibits a state from passing a law "impairing the obligation of contracts."[144] Not every impairment "runs afoul of the contract clause."[145] The United States Supreme Court has observed, "Although the Contract Clause appears literally to proscribe 'any' impairment, ... 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."[146] In other words, application of the Contract Clause "demands that contracts be enforced according to their 'just and reasonable purport'; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order."[147] To determine whether there has been a violation, both state and federal courts examine (1) whether there is a contract relating to the law's subject matter, (2) whether the change in the law impairs the contract, and (3) whether the impairment is substantial.[148]

The U.S. Supreme Court has recognized "[t]he general authority of the Legislature to regulate, and thus to modify, the rates charged by public service corporations" as it pertains to the Contract Clause.[149] "One whose rights, such as they

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[142] *Ibid*.

[143] U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.

[144] *Ibid*.

[145] *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119.

[146] *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 21.

[147] *City of El Paso v. Simmons* (1965) 379 U.S. 497, 508.

[148] *Energy Reserves Group v. Kansas P. & L. Co.* (1983) 459 U.S. 400; *Valdes v. Cory* (1983) 139 Cal.App.3d 775, 789-790.

[149] *Home Bldg. & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 438.

are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."[150] "In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U.S. 372 [citation], a statute fixing reasonable rates, to be charged by a corporation for supplying electricity to the inhabitants of a city, superseded lower rates which had been agreed upon by a contract previously made for a definite term between the company and a consumer. The validity of the statute was sustained."[151] Similarly, "where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of a business, it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 363 [citation]."[152] Practically speaking, this has resulted in the courts considering the extent of the potential impairment by considering whether the industry at issue has been regulated in the past.[153]

The U.S. Supreme Court has previously affirmed the Commission's order setting rates that resulted in modifications of utility contracts, stating "Those who made these contracts for water made them subject to the power of the commission to change them for the benefit of the public, and that is all that has been done in this case by the commission's order."[154] Even if the specific item was not regulated in the past, the U.S. Supreme Court upheld subsequent regulation where the "supervision of the industry was extensive and intrusive."[155] Where the regulation of prices is foreseeable, the sellers' "reasonable expectations have not been impaired by the Act."[156]

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[150] *Hudson County Water Co. v. McCarter* (1908) 209 U.S. 349, 357.

[151] *Home Bldg. & Loan Ass'n, supra*, 290 U.S. at 438.

[152] *Ibid*.

[153] *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 242, fn.13 (citing *Veix v. Sixth Ward Bldg. & Loan Assn.* (1940) 310 U.S. 32, 38).

[154] *Sutter Butte Canal Co. v. Railroad Commission of California* (1929) 279 U.S. 125, 138.

[155] *Energy Reserves Group*, *supra*, 459 U.S. at 413-414.

[156] *Id*. at 416.

As applied in the instant case, while we have not regulated IPCS rates specifically in the past, we have long regulated the larger telecommunications industry and adopted regulations regarding rates and fees. Additionally, the FCC has begun to regulate IPCS rates on the federal level and requested that state's address IPCS rates at the intrastate level. Therefore, California's regulation of IPCS rates was foreseeable.

Finally, even if an impairment is substantial, the Contract Clause is not violated where the state has a significant and legitimate public purpose for the regulation, such as to remedy a broad and general social or economic problem.[157] "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[158] Securus argues that the impairment it sees here is not "necessary to serve an important public purpose" because the Commission could have adopted a waiver process, held evidentiary hearings to evaluate actual costs before adopting a rate cap, or considered other alternatives."[159] Securus' arguments here, however, focus on the hardships to the providers and do not speak to the significant and legitimate public purpose identified in the OIR—the need for just and reasonable rates in IPCS. In *Energy Reserves*, the Court held that a finding "that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes" was a legitimate and substantial public purpose.[160] So too here. We found that "IPCS rates charged in California vary widely and are exorbitantly high, in some cases, resulting in unjust and unreasonable IPCS rates for incarcerated people and their families."[161] This presents a sufficient and legitimate public purpose for the Interim Rate Cap. There is no legal basis for Securus' assertions that we were obligated to consider alternatives favorable to the IPCS providers.

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[157] *Id*. at 411-412.

[158] *Id*. at 412.

[159] Securus App. Rhrg., p. 26.

[160] *Energy Reserves Group*, *supra*, 459 U.S. at 411.

[161] Decision, p. 104, Findings of Fact ¶ 11.

9. Confiscation

Securus believes that the Interim Rate Cap is confiscatory in violation of the U.S. and California constitutions because "[i]t is well below the FCC's new interim rate caps, which the FCC already concluded are just and reasonable."[162] Additionally, Securus argues that "the confiscatory nature" of the cap is compounded by the disallowance for certain ancillary service fees.[163] Securus raised a substantially similar argument in its comments on the Proposed Decision and the Decision rejected Securus' position, finding that Securus failed to carry its burden in demonstrating that the Interim Rate Cap was confiscatory.[164]

The burden is on the utility to demonstrate that a rate established by the Commission is "clearly confiscatory."[165] "That is, there must be a clear showing the rate of return was '*so "unjust" as to be confiscatory*,' such as by demonstrating the rate is so unreasonably low it will threaten the utility's financial integrity by impeding the utility's ability to raise future capital or adequately compensate current equity holders."[166] Even if the adopted rate is "lower than the utility asserts is necessary," it may still be "reasonable or within a range of reasonableness, constitutionally speaking, if it is 'higher than a confiscatory level.'"[167] The burden to demonstrate unreasonableness is "coupled with a strong presumption of the correctness of the findings and conclusions of the [C]ommission, which may choose its own criteria or method of arriving at its decision, even if irregular, provided unreasonableness is not clearly established."[168] This is because the "responsibility for rate fixing, insofar as the law permits and requires, is

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[162] Securus App. Rhrg., p. 29.

[163] *Ibid*.

[164] Decision, pp. 92-94.

[165] *Ponderosa Telephone Co. v. California Public Utilities Com.* (2019) 36 Cal.App.5th 999, 1016–1017.

[166] *Ibid*. emphasis added?

[167] *Ibid*.

[168] *Ibid*.

placed with the [C]omission, and unless its action is clearly shown to be confiscatory the courts will not interfere."[169]

Securus relies on the data collected by the FCC to assert that the Interim Rate Cap is unreasonable and confiscatory. But, as discussed above, Securus failed to present any evidence or introduce any data about its actual costs or any other data to demonstrate that "the rate is so unreasonably low it will threaten the utility's financial integrity by impeding the utility's ability to raise future capital or adequately compensate current equity holders."[170] Securus does not assert any facts—beyond relying on cost data provided to the FCC and to Cal Advocates in response to data requests[171]—that clearly demonstrate a denial of Securus' constitutional rights. It is not enough for Securus to assert "in general language" that the Interim Rate Cap is confiscatory.[172] Securus is required to specifically set forth facts from which "it must clearly appear that the rates would *necessarily* deny to plaintiff just compensation and deprive it of its property without due process of law."[173] Securus fails to do so here and therefore fails to demonstrate legal error.

B. NCIC Application for Rehearing

NCIC's Application for Rehearing raises many of the same objections argued by Securus. Specifically, NCIC requests that we reconsider the Interim Rate Cap as to incarceration facilities below 1,000 in Average Daily Population (ADP) because the rate cap, combined with elimination of certain ancillary fees, would result in operational revenues below NCIC's actual costs.[174] NCIC also requests reconsideration of the elimination of certain ancillary fees and the capping of the third-party financial

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[169] *Ibid*.

[170] *Ibid*.

[171] Securus App. Rhrg., p. 29.

[172] *Ponderosa Telephone Co.*, *supra*, 36 Cal.App.5th at 1017.

[173] *Ibid*. (citing *Public Service Com'n of Montana v. Great Northern Utilities Co.* (1933) 289 U.S. 130, 136-137 (emphasis added).)

[174] NCIC App. Rhrg., p. 1.

transaction fees at $6.95 per transaction because the lack of fee revenue would negatively impact IPCS providers as well as site commission fees.[175] But, similar to Securus, although NCIC disagrees with our findings and ultimate holdings, NCIC fails to demonstrate a lack of evidentiary support in the record.

1. The Interim Rate Cap

NCIC argues that we erred in using the CDCR-GTL Contract Rate (of $0.025 per minute) as the benchmark rate for calculating the Interim Rate Cap because that rate was taken out of context of the other services in the CDCR-GTL Contract.[176] NCIC asserts that the $0.025 per minute rate is an inappropriate benchmark for county and local jails because of the economies of scale afforded to IPCS providers servicing state prisons (such as GTL).[177] Using such a benchmark to cap the telephone rates at $0.07 would be "fundamentally unfair" to providers like NCIC who "recently assumed IPCS contracts in more than 30 local correctional institutions that most certainly will not generate the minutes of use, nor the income arising from the CDCR contract with GTL."[178]

Foremost, as discussed above, although we referenced the CDCR-GTL rate as a benchmark, there is substantial evidence in the record from other parties proposing a $0.05 per minute rate.[179] NCIC, on the other hand, does not point to any evidence in the record regarding its actual costs, minutes of use from the local correctional facilities it services, or projected income. IPCS providers did not independently introduce evidence about their own services into the record in this proceeding to bolster their support of the FCC rate. NCIC's arguments regarding the Interim Rate Cap do not demonstrate legal error for the same reasons as discussed above.[180]

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[175] NCIC App. Rhrg., p. 3.

[176] NCIC App. Rhrg., pp. 5-6.

[177] *Ibid*.

[178] NCIC App. Rhrg., p. 7.

[179] See *supra* Section II.A.1.

[180] See *supra* Section II.A.1-3.

2. Ancillary Fees

NCIC also argues that we abused our discretion in eliminating certain ancillary fees altogether, instead of merely adopting the FCC caps on an interim basis.[181] NCIC asserts that our error was in comparing the IPCS market with commercial calling services—the latter "involve largely unregulated businesses that compete directly for customers."[182] By eliminating certain ancillary fees (and adopting the Interim Rate Cap), NCIC believes that "the public will suffer greater harm than that caused by the FCC-mandated ancillary service fee caps."[183] This is because IPCS providers will eliminate certain customer services, reduce site commissions, and be compelled to pass on overhead costs to the correctional agencies, restrict incarcerated persons access to telephone services, and impose other changes to separate regulated and unregulated services.[184] Instead of eliminating certain ancillary fees entirely, NCIC believes we should adopt FCC's ancillary services rates and cap the single-call ancillary service fees at $3.00[185]

Foremost, as discussed above, although we relied on the data, reasoning, and findings made by the FCC at various points in our discussion and holdings, we are not limited to adopting FCC rates. We also did not ignore the FCC's approach to ancillary fees; we merely declined to adopt the same approach based on the conclusion that the FCC's rules did not adequately address the financial hardships that ancillary fees created for consumers in California.[186] Nor did we rely solely on a comparison to competitive commercial services—the Decision referenced numerous correctional systems that have eliminated various ancillary fees, thus showing that IPCS carriers are

[181] NCIC App. Rhrg., pp. 7-9.
[182] NCIC App. Rhrg., p. 8.
[183] NCIC App. Rhrg., p. 8.
[184] NCIC App. Rhrg., pp. 8-9.
[185] NCIC App. Rhrg., p. 9.
[186] Decision, p. 108, Findings of Fact ¶ 46. See also, Decision, p. 73.

able to provide service without this revenue source.[187] And, when we referenced general commercial practices, we did so in connection with the remark that no carrier provided evidence showing why existing ancillary fee practices were just and reasonable.[188]

Although NCIC provides a list of possible consequences from our holding,[189] it did not introduce any data purporting to forecast such consequences. Nor does NCIC present such evidence in its application for rehearing. Here again, NCIC fails to demonstrate legal error for the same reasons as previously discussed.[190]

III. CONCLUSION

For above reasons, we deny rehearing of the Decision.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.21-08-037 is denied.
2. This proceeding remains open.

This order is effective today.

Dated April 7, 2022, at San Francisco, California.

ALICE REYNOLDS
President
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
DARCIE L. HOUCK
JOHN R.D. REYNOLDS
Commissioners

[187] Decision, pp. 66-67.

[188] Decision, p. 73.

[189] See NCIC App. Rhrg., pp. 8-9.

[190] See *supra* Section II.A.5.