

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1280

September Term, 2013

FCC-78FR67956

Filed On: January 13, 2014

Securus Technologies, Inc.,

Petitioner

v.

Federal Communications Commission and
United States of America,

Respondents

Consolidated with 13-1281, 13-1291, 13-1300

BEFORE: Henderson, Brown,* and Srinivasan, Circuit Judges

ORDER

Upon consideration of the motions for stay, the oppositions thereto, and the replies, it is

ORDERED that the motions for stay be granted in part and denied in part. The following provisions of the Federal Communications Commission's "Report and Order and Further Notice of Proposed Rulemaking," FCC 13-113 (Sept. 26, 2013), are stayed pending the court's resolution of these petitions for review: 47 C.F.R. §§ 64.6010, 64.6020, and 64.6060. With respect to these provisions, petitioners have satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2013). It is

* Circuit Judge Brown would grant a stay of the entire rule.

- Exhibit 1

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FURTHER ORDERED, on the court's own motion, that the parties submit proposed formats for the briefing of these cases within 30 days of the date of this order. The parties are strongly urged to submit a joint proposal and are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. Whether the parties are aligned or have disparate interests, they must provide *detailed* justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Timothy A. Ralls

Deputy Clerk/LD



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
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DA 14-1206

Released: August 20, 2014

WIRELINE COMPETITION BUREAU ADDRESSES THE PAYMENT OF SITE COMMISSIONS FOR INTERSTATE INMATE CALLING SERVICES

WC Docket No. 12-375

In the 2013 *Inmate Calling Report and Order and FNPRM*, the Commission took numerous steps to address high interstate inmate calling services (ICS) rates.¹ First, the Commission reiterated its numerous earlier determinations that “interstate ICS, typically a common carrier service, falls within the mandates of section 201” of the Communications Act of 1934, as amended (the Act).² Section 201(b) of the Act provides that “charges, practices, classifications, and regulations for and in connection with [interstate common carrier] service, shall be just and reasonable.”³

Second, the Commission addressed site commission payments, which include “payments in money or services from ICS providers to correctional facilities or associated government agencies, regardless of the terminology the parties to the agreement use to describe them.”⁴ The Commission found that “where site commission payments exist, they are a significant factor contributing to high rates.”⁵ The Commission also concluded that, as a category, site commission payments “are not costs that are reasonably and directly related to the provision of ICS.”⁶ Despite this statement, questions have arisen surrounding the ongoing payment of site commissions based on interstate ICS revenue.⁷ These questions

¹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (*Inmate Calling Report and Order and FNPRM or Order*), *pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014) (*Partial Stay Order*); *pets. for review pending sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases).

² *Id.* at 14114, para. 13. The Commission also recognized its jurisdiction to regulate interstate ICS under section 276 of the Act. *See id.* at 14115, para. 14.

³ *Id.* (quoting 47 U.S.C. §201(b)).

⁴ *Id.* at 14135, para. 54 n.199. The Commission also noted that it would treat “in-kind” payments similar to site commission payments. *Id.* at 14137, para. 56.

⁵ *Id.* at 14125, para. 34.

⁶ *Id.* at 14136-37, para. 55. The *Order* acknowledges the possibility that some portion of payments to correctional facilities “may, in certain circumstances, reimburse correctional facilities for . . . costs,” such as security costs, that the Commission would likely consider reasonably and directly related to the provision of ICS. *Id.* at 14135, para. 54 n.203; *see id.* at 14134, para. 53 n.196.

⁷ “The FCC should reiterate that site commissions should not be included in ICS rates and should enforce that rule to ensure a level playing field for ICS carriers.” Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed May 15, 2014). “The discussion [with Commissioner Clyburn and staff] covered [t]he regulatory uncertainty and competitive distortions created by the *Order and FNPRM* regarding the lawfulness of the continued payment of site commissions on interstate ICS

(continued...)

- Exhibit 2 -

came to our attention after the United States Court of Appeals for the District of Columbia Circuit issued a partial stay of the *Order*.⁸

We take this opportunity to remind interested parties that the *Partial Stay Order* by the United States Court of Appeals for the District of Columbia Circuit in January 2014 does not affect the ordinary operation of the Commission's complaint process under section 208 of the Act.⁹ Moreover, the *Partial Stay Order* issued did not disturb the Commission's determinations regarding site commissions.¹⁰

Pursuant to a complaint that challenges the lawfulness of an ICS provider's interstate ICS rates, the Commission will conduct an adjudication to determine whether those rates are just and reasonable under section 201 of the Act.¹¹ As part of that review, the Commission will follow its established practice and consider whether the challenged rates exceed the reasonable costs of providing ICS and, in that connection, will examine any payment of site commissions by ICS providers to correctional facilities. Any interstate ICS rates that are found to exceed the recovery of costs reasonably related to the provision of ICS may be found unjust and unreasonable under section 201 of the Act.¹² Such a finding may result in lowering interstate ICS rates (even if those rates are already at or below the interstate ICS rate caps adopted in the *Order*). It may also result in an order of refunds to end users.

For further information on this proceeding, please contact Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, at (202) 418-1520 or lynne.engledow@fcc.gov.

- FCC -

(Continued from previous page) _____
calls." Letter from Chérie R. Kiser, Counsel for Global Tel*Link Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed May 29, 2014). "Pay Tel discussed its positions of record in this proceeding, including the need for clear direction from the FCC on the permissibility of paying commissions from interstate ICS revenues. Pay Tel discussed the confusion in the marketplace that has arisen over this issue and that some providers appear to be continuing to pay commissions from interstate revenues." Letter from Marcus W. Trathen, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed July 10, 2014). "Securus again requested Commission input as to the payment of site commissions out of interstate calling revenue. The market disruption Securus previously has reported has grown even worse." Letter from Stephanie A. Joyce, Counsel to Securus Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 1 (filed July 23, 2014). "CenturyLink also explained that it continues to pay site commissions required by its contracts with correctional facilities because it does not have a basis to stop paying site commissions." Letter from Thomas M. Dethlefs, Assoc. General Counsel – Regulatory, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (filed Aug. 14, 2014).

⁸ See generally *Partial Stay Order*.

⁹ See 47 U.S.C. § 208.

¹⁰ See generally *Partial Stay Order*.

¹¹ The Commission may *sua sponte* initiate investigations.

¹² We note that the Commission could also find ICS rates to exceed what is just and reasonable for reasons other than the payment of site commissions.

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

PETITION TO COMMENCE RULEMAKING)
PROCEEDING FOR INSTITUTIONAL)
OPERATOR SERVICE PROVIDERS)
) Case No. 10-00198-UT
INMATE CALLING SOLUTIONS, LLC, AND)
PUBLIC COMMUNICATIONS SERVICES,)
INC.,)
)
) Petitioners.)
)
)

FINAL ORDER AND FINAL RULE

THIS MATTER comes before the New Mexico Public Regulation Commission (NMPRC or the Commission) upon the record in this case; whereupon, being duly advised, the Commission finds and concludes as set forth below.

STATEMENT OF THE CASE

1. In January 2012, this Commission issued a Notice of Proposed Rulemaking (NOPR), commencing a rulemaking proceeding for the purpose of creating a rule under 17.11.12 NMAC governing the provision of telecommunications services by institutional operator service providers (IOSPs).

2. The purpose of this rulemaking has been to seek comments for the purpose of developing a rule and regulations specifically applicable to all IOSPs that would address: establishing rate caps; developing phase-in language for existing contracts that IOSPs have at institutional facilities; creating consumer protection criteria; identifying and prescribing complaint procedures; developing transparency provisions to be used by IOSPs; addressing service quality issues; establishing notices and information at facilities; and establishing variance/waiver processes at the Commission. The rule should ensure that the IOSPs have tariffs on file that reflect all services and fees and that

the IOSPs provide quality of service and customer protection to inmates and their families/sponsors. All IOSPs doing business within New Mexico, as well as any IOSP that might want to do business in New Mexico in the future, were encouraged to participate in this rulemaking proceeding, along with other entities and individuals.

3. By way of background, this rulemaking came before the Commission pursuant to Decretal Paragraph C of the *Final Order Partially Approving Certification of Stipulation* issued by the Commission on June 24, 2010 involving three separate proceedings concerning the provision of service by IOSPs¹ (*Final Order*), and the *Order to File Consensus Draft Rule* issued by the Commission in this case on December 23, 2010. Decretal Paragraph B of the *Order to File Consensus Draft Rule* directed Public Communication Services, Inc. (PCS) and Inmate Calling Solutions, LLC d/b/a ICSolutions (ICS) to file a Notice of Proposed Rulemaking in Case No. 10-00198-UT which “attaches a complete consensus, draft Rule Concerning Institutional Operator Service Providers no later than February 15, 2011.” In addition to PCS, ICS and NMPRC Staff, other IOSPs participated in the development of the proposed rule.

4. Affidavits attesting to the publication of the *Notice of Proposed Rulemaking* in at least two newspapers of regular circulation *in the State of New Mexico*, and in the NEW MEXICO REGISTER, were filed in the record.

¹ See *Certifications of Stipulation* submitted to the Commission on May 11, 2010 in the following cases: *In the Matter of a Commission Inquiry into the Rates and Charges of Institutional Operator Service Providers* (Case No. 07-00316-UT); *In the Matter of an Investigation into the Billing Practices of Public Communications Services, Inc.* (Case No. 07-00364-UT); and *In the Matter of an Investigation of Non-Tariffed Charges of Institutional Operator Service Providers* (Case No. 07-00442-UT). The Commission issued an *Order to Amend Final Order Partially Approving Certification of Stipulation* in all three of those cases on July 6, 2010.

5. Due and lawful notice has been provided.

6. On March 12, 2012, Staff filed its initial comments in this case with respect to the consensus draft rule proposed rule filed by Public Communications Services, Inc. ("PCS") and Inmate Calling Solutions, LLC d/b/a ICSolutions ("ICS") on February 5, 2012. Staff proposed alternative or additional language for certain sections of the consensus draft rule with which Staff took issue. Also on March 12, 2012, comments about the consensus draft rule were filed by three Institutional Operator Service Providers ("IOSPs") - Global Tel*Link Corporation ("GTL") and Securus Technologies, Inc. and T-Netix Telecommunications Services, Inc 1 (collectively, "Securus") - and by the New Mexico Criminal Defense Lawyers Association ("NMCDLA").

7. A public hearing on the proposed rule language was held on May 2, 2011 at the offices of the Commission before Commissioner Jason A. Marks.

8. The following entities appeared and presented comments at the public hearing:²

**GTL,
Securus,
NMCDLA, and
NMPRC Utility Division Staff.**

² The Commission specifically invited the NM Attorney General, NM Association of Counties, NM Municipal League, NM Sheriffs' and Police Association, NM Department of Corrections, NM Criminal Justice Association, NM Sentencing Commission, the State Bar of New Mexico, New Mexico Legal Aid, and the American Civil Liberties Union ("ACLU") of New Mexico to participate. However, none of those organizations submitted comments in this rulemaking.

DISCUSSION

9. This Commission has jurisdiction over telecommunications companies and specifically IOSPs in the State of New Mexico as provided by the New Mexico Constitution, Article XI, Section 2 and by the New Mexico Legislature pursuant to NMSA 1978, §§ 63-9A-1 *et seq* (New Mexico Telecommunications Act); and NMSA 1978, §§ 8-8-4 *et seq.* (the Public Regulation Commission Act).

10. We have reviewed all of the comments submitted before and during the hearing, as well as all materials filed in accordance with the oral order of the presiding Commissioner at hearing regarding post-hearing submissions.

11. Staff observed in its initial filed comments that the February 15, 2011 consensus draft rule as filed by PCS and ICS did not include alternative language for those sections of the rule where no consensus was reached. Staff proposed alternative or additional language for certain sections of the consensus draft rule that Staff did not support. In its subsequent response comments, Staff stated that it and a number of IOSPs participated in extensive discussions to reach a consensus on a draft rule, and that, while a consensus was reached for the "lion's share" of a draft rule, Staff had concerns with a small number of critical provisions that generally pertain to the transparency of terms and conditions of inmate telephone service and to the impact of a per-call rate structure on unintentionally short calls. Staff set forth its concerns in its response comments.

12. Having reviewed those portions of the rule language submitted by Staff in its initial comments, we find that much of Staff's proposed language has merit, is consistent with our purpose in this rulemaking, and should be adopted.

13. As an IOSP, GTL noted in its comments several places in the draft consensus rule that should be clarified to reflect current technology and to increase precision regarding rate caps.

14. Having reviewed those portions of the rule language submitted by the IOSPs subsequent to their submittal of the draft consensus rule, and the comment and partial consensus reached on certain items during the public hearing, we find that we should adopt as our Final Rule the language contained herein in Exhibit A. Our Final Rule also includes suggestions made by NMCDLA.

15. Our Final Rule, attached to this Final Order as Exhibit A, includes Addendum A, consisting of the Rate Cap schedule we adopt today. The companies that were parties in the cases referenced herein at footnote 1 (or their successors) may petition the Commission for a blanket variance from the Addendum A rate caps based on the rates determined by the Commission to be just and reasonable in those prior cases.

IT IS THEREFORE ORDERED:

A. The Commission hereby adopts and promulgates its Final Rule in this proceeding. A copy of the Final Rule is attached to this Final Order as Exhibit A. Attached to the Final Rule is Addendum A, consisting of the Rate Cap schedule referenced herein at ¶ 15.

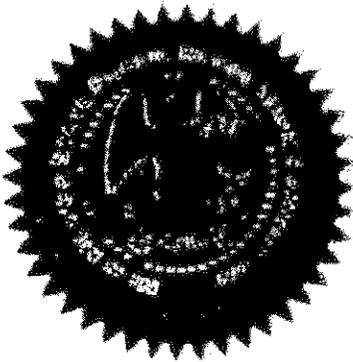
B. This Final Order is effective immediately.

C. Copies this Final Order, together with Exhibit A hereto (including Addendum A), shall be served via e-mail upon all persons listed on the attached Certificate Of Service whose e-mail addresses are known, or otherwise via regular mail.

D. This Docket is closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico this 8th
day of November, 2012.

NEW MEXICO PUBLIC REGULATION COMMISSION



Patrick H. Lyons

PATRICK H. LYONS, CHAIRMAN

Theresa Becenti-Aguilar

THERESA BECENTI-AGUILAR, VICE-CHAIR

Jason Marks

JASON MARKS, COMMISSIONER

Douglas J. Howe

DOUGLAS J. HOWE, COMMISSIONER

Ben L. Hall

BEN L. HALL, COMMISSIONER

FINAL RULE

TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES
CHAPTER 11 TELECOMMUNICATIONS
PART XX INSTITUTIONAL OPERATOR SERVICE PROVIDERS

17.11.12.1 **ISSUING AGENCY:**

New Mexico Public Regulation Commission.

17.11.12.2 **SCOPE:**

This rule is applicable to all Institutional Operator Service Providers ("IOSPs") certified to operate within the State of New Mexico and also to those IOSPs who apply to the Commission to operate within the State of New Mexico.

17.11.12.3 **STATUTORY AUTHORITY:**

This rule is adopted pursuant to Article XI, Section 2 of the New Mexico Constitution and NMSA 1978, §§ 8-8-4 *et seq.*, §§ 63-7-1 *et seq.*, and §§ 63-9A-1 *et seq.* (New Mexico Telecommunications Act).

17.11.12.4 **DURATION:**

Permanent.

17.11.12.5 **EFFECTIVE DATE:**

This rule shall be effective on its date of publication in the New Mexico Register in accordance with NMSA 1978, § 14-4-5.

17.11.12.6 **OBJECTIVE:**

The purpose of this rule is to establish statewide uniform regulations governing IOSPs so as to ensure reasonable rate regulation for IOSPs while protecting consumers against unreasonable rates and inadequate service.

17.11.12.7 **DEFINITIONS:**

As used in this rule, the following terms have the meanings provided, unless a different meaning is clearly expressed in the context in which the term is used. The Commission will interpret the definitions broadly enough to ensure compliance with the purpose of this rule.

- A. **Commission** means the New Mexico Public Regulation Commission.

- B. **Complaint** means an oral or written expression of dissatisfaction with an IOSP's rates, fees, charges, or services, including a request for repair involving service outage, made to the IOSP, Correctional Institution, or to the Commission by or on behalf of a Consumer.
- C. **Consumer** means a person who is an account holder or one who funds, initiates or receives a telephone call from an Institutional Phone. For purposes of those portions of this rule that apply to the funding of prepaid accounts, Consumer also means a person who funds a prepaid account for IOSP services.
- D. **Correctional Institution** means a jail, prison, penal facility or other confinement facility.
- E. **Institutional Operator Service** means intrastate telecommunications services initiated by a confined person in a Correctional Institution that includes, as a component, automatic or live assistance to arrange for completion or billing, or both, of an intrastate telephone call, consistent with 47 C.F.R. § 64.708(i).
- F. **Institutional Operator Service Provider (IOSP)** means a provider of Institutional Operator Service.
- G. **Institutional Phone** means a telephone instrument accessible only to confined persons in a Correctional Institution.
- H. **Local Call** means a telephone call which originates on an Institutional Phone and terminates to a telephone number within the same local calling area as defined by the local exchange company for the area in which the call originates.
- I. **Postpaid Collect Call** means a call for which the rate or charge is billed to the call recipient on the monthly bill from the recipient's local telephone company, or from the IOSP, or from a third-party IOSP billing agent.
- J. **Prepaid Collect Call** means that the rate or charge of the call is deducted from an account funded in advance by the call recipient for this purpose.
- K. **Prepaid Institutional Call** means a call for which the confined person pays the rate or charge for the call by purchasing, generally from the commissary at the Correctional Institution, either a prepaid card from which the rate or charge for the call is subtracted or, if without a prepaid card, by setting up a prepaid account from which the rate or charge of the call can be deducted.
- L. **Rate Cap** means the maximum allowable rates, fees and charges for intrastate calls initiated from an Institutional Phone as approved by the Commission.
- M. **Toll Call** means a telephone call which originates on an Institutional Phone and terminates to a telephone number in a different local calling area as defined by the local exchange company for the area in which the call originates.

17.11.12.8 **EXEMPTIONS:**

IOSPs are exempt from 17.11.15 NMAC, Rule Concerning Payphone Providers, 17.11.16.11 NMAC, Consumer Protection, Access to Service and Rate Information, and SCC 94-02-TC, Rule Concerning Operator Services Providers.

17.11.12.9 **APPLICATION FOR CERTIFICATION OF REGISTRATION:**

A. Providers currently offering institutional operator service to persons housed in Correctional Institutions in New Mexico as of the Effective Date of this rule shall submit an expedited application for registration in the format prescribed by the Commission within ninety (90) days of the Effective Date of this rule as described in this section.

- (1) Staff shall review an application for a certificate of registration within thirty (30) calendar days after filing to determine whether it is complete. If the application is complete the Director of the Utility Division, or the Director's designee, shall issue a certificate of registration if it finds that the applicant is fit to provide Institutional Operator Services, and that issuance of the certificate of registration is in the public interest.
- (2) If the application is incomplete, Staff will return it to the applicant. A certificate of registration may be denied for failure to provide the required information or documents, or for failure to remit the required fees. Notice of denial will include a statement indicating the reason for rejection. Denial may be cured if corrected within thirty (30) days of service of the Notice.

B. Providers seeking to offer or provide any telecommunications service through an Institutional Phone must register with the Commission in the format provided by the Commission.

- (1) In addition to the application for registration, the IOSP must file a copy of the information to be posted or supplied at every Institutional Phone or otherwise provided to the confined persons containing all the information as spelled out in this rule.
- (2) Registration may be denied for failure to provide the required information or documents, or for failure to remit the required fees. Notice of denial will include a statement indicating the reason for rejection. Denial may be cured if the stated reasons for rejection are made within thirty (30) days of service of the Notice.

C. Registration shall be renewed annually by filing an annual report on a form prescribed by the Commission. The annual report shall be submitted by April 1st of each year and shall contain information regarding the prior year. At a minimum, the IOSP shall update any information contained in its original application for registration or last annual report, as appropriate.

CONTENTS OF APPLICATION FOR REGISTRATION:

An application for a certificate of registration to provide Institutional Operator Services must contain:

- A. the name, address, e-mail address and telephone number of the applicant;
- B. the name, address, e-mail address, and telephone number of the person responsible for regulatory contacts and customer dispute resolution on behalf of the applicant;
- C. a description of the applicant's existing operations and general service and operating areas in any other jurisdictions;
- D. a statement that the applicant is aware of and will comply with the Commission's rules;
- E. disclosure of any formal actions against it by any court or state or federal regulatory agency that resulted in any type of penalty or sanctions within the five (5) years prior to the date of filing the application. If such action has occurred, the applicant shall file a report regarding such action and any remedial actions taken;
- F. disclosure of any settlement or stipulation with any state or federal regulatory agency within the three (3) years prior to the date of filing the application that resulted in a payment to the agency with or without any admission of wrongdoing;
- G. if the applicant is a corporation, evidence that the applicant is authorized by the Corporations Bureau of the Commission to do business in New Mexico and that it is in good corporate standing in New Mexico;
- H. if the applicant is other than a corporation, a description of the form of ownership, the names and addresses of all principal owners and managers, the applicant's agent for service of process in New Mexico, and the date the entity was created;
- I. initial tariffs for regulated telecommunications services, including a narrative description of the services to be offered and the geographic area and markets to be served. Initial tariffs shall not contain misleading, potentially misleading, deceptive, or fraudulent names, rates, fees, charges, terms, or conditions;
- J. if the applicant is a regulated carrier, any other information the Commission may reasonably require to accomplish the purpose of this rule; and
- K. a list of the applicant's parent, subsidiary, and affiliated companies that are carriers in New Mexico, together with the principal address and telephone numbers of each: [See 17.11.19.10.D and 17.12.21.11.D NMAC]

17.11.12.11 **DISCLOSURE OF RATES, FEES AND CHARGES:**

A. All IOSPs must disclose their rates, fees, and charges.

- (1) For all Local Calls,, and intrastate Toll Calls the IOSP shall comply with all rate disclosure requirements adopted by the Federal Communications Commission in Title 47 C.F.R. § 64.710 (Operator Services for Prison Inmate Phones), including any amendments thereto.
- (2) Rates, fees and charges applied pursuant to this rule shall be made available to the Consumer prior to the commencement of the transaction without the Consumer having to dial a separate telephone number or access a separate web site. Such information shall include an equally prominent disclosure of alternative funding or refunding mechanisms that are free of transactional fees.

B. The information required by this section must be delivered to the Correctional Institution by the IOSP for posting on or near the Institutional Phone, in plain view of confined persons, provided that such signage is allowed by the Correctional Institution. The posted signage must clearly and simply disclose all applicable rates, fees and charges for Institutional Operator Services set forth in this rule and provide the contact information for the IOSP for Consumer complaints as well as the mailing address of the Commission's Consumer Relations Division for unresolved Consumer complaints.

C. An IOSP shall disclose all rate information, including all applicable per-call and per-minute rates, in simple and clear language.

D. All required information and instructions, if allowed by the Correctional Institution, must be provided in both English and Spanish, and an IOSP must supply each facility it serves with a display placard or other means of informing confined persons.

E. Consumers who are not confined persons shall be advised of contact information for Consumer complaints on their bill when that bill includes charges for postpaid collect calls, or each time a funding transaction related to a prepayment account takes places, and shall have access to the IOSP's customer service representative.

17.11.12.12 **COMPLAINTS:** Complaints regarding violations of this rule shall be governed by 1.2.2.13 through 1.2.2.20 NMAC and 17.11.16.22 NMAC. All other procedural matters shall be handled in accordance with 1.2.2 and 1.2.3 NMAC.

17.11.12.13 **ENFORCEMENT:**

A. Initiation of proceedings: Upon receipt of a Complaint alleging a violation of this rule, or on its own motion, the Commission may initiate proceedings in accordance with its Rules of Procedure NMAC 1.2.2.13 through 1.2.2.15.

- B. Penalties: Following notice and hearing and upon a proper finding that a violation of this rule has occurred, the Commission may, consistent with its statutory authority, assess fines or penalties or other such remedies as may be provided for by law, including revocation of authority to provide Institutional Operator Service. The remedy imposed by the Commission may be reduced or rescinded if violations or findings of non-compliance are corrected within 30 days from the date of the Commission's Final Order.
- C. Other penalties: The assessment of any penalty by the Commission for a violation of this rule shall not preclude the assessment of a penalty by any other New Mexico agency for violation of its rules arising from the same cause.

17.11.12.14 **INSTITUTIONAL OPERATOR SERVICE RATES, FEES AND CHARGES:**

- A. All IOSPs must file tariffs with the Commission which set forth the services provided along with any rates, fees, or charges for those services and list each Correctional Institution to which those rates, fees, or charges apply. Tariffs shall also identify the billing and collection methods utilized by the IOSP such as Postpaid Collect, Prepaid Collect, Prepaid Institution and any other payment alternatives. No tariff or proposed tariff shall contain misleading, potentially misleading, deceptive, or fraudulent names, rates, fees, charges, terms or conditions.
- B. Rate Caps shall be determined periodically by the Commission on its own motion following notice and a public hearing, but no more frequently than once every three years. In the absence of a hearing by the Commission, the Rate Caps previously established will remain in effect.
- C. Any changes in IOSP rates, fees or charges and any cessation or commencement of Institutional Operator Service at a particular Correctional Institution resulting from a new, renewed, or amended contract between an IOSP and the Correctional Institution must be reflected in a proposed tariff amendment filed no later than ninety (90) days after the final award of the contract to the IOSP or after any agreement to change the rates, fees or charges is reflected in a renewed or amended contract.
 - (1) The IOSP shall file with the Commission an original and five (5) copies of the proposed tariff changes within the time frame provided for in this rule. The IOSP shall include in its filing a sequentially numbered transmittal letter, (e.g., 2010-1, 2010-2, etc.) containing a description of the proposed tariff changes. The proposed tariff change shall comply with all applicable Commission rules. The proposed tariff changes may go into effect ten (10) business days after the tariff filing unless Staff notifies the IOSP within said ten (10) business days of its concerns regarding the proposed tariff changes. If Staff and the IOSP are able to resolve Staff's concerns within ten (10) business days after the tariff filing, the proposed tariff changes may go into effect and no public hearing shall be required.
 - (2) If Staff and the IOSP are unable to resolve Staff's concerns, Staff shall file a protest with the Records Management Bureau of the Administrative Services Division, and

promptly send a copy to the IOSP and the proposed tariff change shall not go into effect. The Records Management Bureau shall assign a docket number to Staff's protest. Staff's protest shall include a case caption and a heading that states "Staff Protest". The protest shall include as an attachment the proposed tariff changes filed by the IOSP and any additional information furnished to Staff by the IOSP. The applicant shall have the burden of showing, after notice and hearing, why the proposed new service, promotion, or tariff change is in the public interest.

- (3) On the same day it files paper copies of the proposed tariff changes with the Commission, the IOSP shall also submit an electronic copy of the transmittal letter containing the identity of the telecommunications company, a summary of the proposed new service, promotion or tariff change, and its effective date. The Commission may prescribe additional form, content, manner of filing, or other requirements.

D. Any other changes in IOSP rates, fees, charges, or type of service, and any addition of a new service must be reflected in a proposed tariff amendment. No such change may be effectuated by the IOSP prior to Commission approval of the tariff amendment.

- (1) The IOSP shall file with the Commission an original and five (5) copies of the proposed tariff changes within the time frame provided for in this rule. The IOSP shall include in its filing a sequentially numbered transmittal letter, (*e.g.*, 2010-1, 2010-2, etc.) containing a description of the proposed tariff changes. The proposed tariff change shall comply with all applicable Commission rules. The proposed tariff changes may go into effect ten (10) business days after the tariff filing unless Staff notifies the IOSP within said ten (10) business days of its concerns regarding the proposed tariff changes. If Staff and the IOSP are able to resolve Staff's concerns within ten (10) business days after the tariff filing, the proposed tariff changes may go into effect and no public hearing shall be required.
- (2) If Staff and the IOSP are unable to resolve Staff's concerns, Staff shall file a protest with the Records Management Bureau of the Administrative Services Division, and promptly send a copy to the IOSP and the proposed tariff change shall not go into effect. The Records Management Bureau shall assign a docket number to Staff's protest. Staff's protest shall include a case caption and a heading that states "Staff Protest". The protest shall include as an attachment the proposed tariff changes filed by the IOSP and any additional information furnished to Staff by the IOSP. The applicant shall have the burden of showing, after notice and hearing, why the proposed new service, promotion, or tariff change is in the public interest.
- (3) On the same day it files paper copies of the proposed tariff changes with the Commission, the IOSP shall also submit an electronic copy of the transmittal letter containing the identity of the telecommunications company, a summary of the proposed new service, promotion or tariff change, and its effective date. The Commission may prescribe additional form, content, manner of filing, or other requirements.

E. Every Institutional Phone in New Mexico shall provide access to the services listed below without the use of coins or cards of any type, and without any charge to the Consumer:

- (1) Any call to obtain a refund;
- (2) Access to automated operator services necessary to establish a call.; and

F. An IOSP may not bill any rate, fee, or charge that is not part of its tariff. Any per call charge, surcharge or fee shall not be billed or charged by the IOSP before the second minute of the call begins.

G. An IOSP may not bill or charge any transactional fee in connection with the establishment of, funding to, or refunding from an account in the Consumer's name used for the prepayment of Institutional Operator Service that has not been previously approved for that purpose by the Commission.

H. An IOSP may assess fees that are included in the IOSP's filed tariffs.

I. Effective Dates: The Rate Caps established pursuant to this rule

- (1) will not apply to any contract that was executed prior to the Effective Date of this rule,
- (2) will not apply to any contract for which a response to a Request for Proposal was submitted prior to the Effective Date of this rule,
- (3) will apply to any contract executed ninety (90) days following the Effective Date of this rule, and
- (4) will apply to any contract that is renewed or renegotiated ninety (90) days following the Effective Date of this rule.

17.11.12.15

RESPONSIBILITIES OF THE INSTITUTIONAL OPERATOR SERVICE PROVIDER:

- A. An IOSP shall not contract for any intrastate operator services or interexchange services with any entity that is out of compliance with the applicable certification requirements of the Commission.
- B. The IOSP shall be responsible for all public access line charges associated with the provision of Institutional Operator Service.
- C. The IOSP shall be responsible for paying all required regulatory fees to the Commission.

- D. Subject to compliance with any access requirements of the Correctional Institution, IOSPs will make available to the Commission, subject to notice and coordination, any Institutional Phone for purposes of making test calls, free of charge, to telephone numbers of the Commission's choosing.
- E. All Institutional Phones and the telecommunications facilities used for the transmission of service are subject to periodic inspections to ensure compliance with Commission requirements. Findings of non-compliance will be brought to the attention of the IOSP and the Correctional Institution by letter and the IOSP will have thirty (30) days to restore compliance with Commission requirements.
- F. The IOSP shall be responsible for repairing, servicing and maintaining in good repair the Institutional Phones through which it provides service.
- G. All Institutional Phones installed in New Mexico shall comply with state and local laws, Commission rules, current National Electrical Code and National Electrical Safety Code requirements, and the generally accepted telecommunications industry technical standards of the National Association of Regulatory Utility Commissioners.
- H. All calls initiated from an Institutional Phone will be outbound automated operator calls that are either Postpaid Collect Call, Prepaid Collect Call or Prepaid Institution Call.
- I. An IOSP shall provide a means for a confined person who has not had an opportunity to arrange for prepaid calling services to make an outgoing Postpaid Collect Call.
- J. The minimum allowance for the duration of a call initiated from an Institutional Phone shall be determined by the correctional institution.
- K. No more than three Institutional Phones will share a common voice-grade (non-broadband) access line or channel, unless otherwise specifically authorized by the Commission.
- L. Institutional Phones operating in New Mexico must comply with all applicable federal, state and local laws regarding accessibility by hearing impaired or physically disabled persons.
- M. All IOSPs must provide both local and toll service at each Correctional Institution they serve.
- N. Institutional Operator Service transmission quality shall be at least equivalent to generally accepted industry standards for wireline, voice-grade circuits, except that IOSPs will not be held responsible for calls terminating to cordless landlines, cell phones, or other non-traditional landline devices. There will be no transmission delay, feedback, excessive noise, or echo perceptible to either the inmate or the called

party. The Commission will make the final determination as to the acceptable level of transmission service quality.

17.11.12.16 **RESTRICTIONS ON INSTITUTIONAL TELEPHONE SERVICE:**

Operators of Correctional Institutions have the authority to limit or deny access to Institutional Phones telephones at times and in circumstances deemed proper by the Correctional Institution.

17.11.12.17 **RATE CAP VARIANCES:**

- A. The Commission may permit an IOSP to impose rates higher than the Rate Caps as provided for by Addendum A to this rule as may be amended from time to time or as stated in a separate Commission Order for good cause shown. Such permission shall not be unreasonably withheld.
- B. An IOSP seeking a variance under this rule must file a Petition for Variance with the Commission providing the following information:
 - (1) The Correctional Institution(s) at which the rate that exceeds the rate cap would be applied.
 - (2) The rate to be applied and the respective existing Rate Cap.
 - (3) The reason for which a higher rate will be applied shall include the following information about the proposed service for the call type(s) for which the variance is sought:
 - (a) Projected monthly and yearly call volume by call type
 - (b) Projected monthly and yearly revenue by call type
 - (c) Projected monthly and yearly average call duration by call type
- C. The Petition must include a sworn statement by a knowledgeable representative of the Petitioner attesting to the truth and accuracy of its contents.
- D. The Petition shall be accompanied by a proposed tariff change that incorporates the higher rate that the Petitioner seeks to impose. All IOSP tariffs shall include a section for rate variances in which all such higher rates are to be listed.
- E. At the request of the Petitioner, the information provided pursuant to subsections (B)(1) and B(3) herein will be treated as confidential and will not be disclosed to any person other than an employee or member of the Commission until the Petitioner consents in writing to such disclosure.

- F. Staff shall review the Petition for Variance within thirty (30) days to determine whether it is supported by the information provided. Staff may file a written statement with the Commission in support of or opposition to the Petition within the same thirty-day (30-day) period. The IOSP shall have ten (10) days to respond to any Staff position.
- G. In the absence of any Commission action on the Petition, the Petition will be deemed granted and the proposed tariff change will be deemed approved forty-five (45) calendar days from the filing of the Petition.
- H. IOSPs are not subject to Section 1.2.2.40 NMAC for matters related to rate variances pursuant to this rule.

17.11.12.18 CONSUMER PROTECTION:

- A. The IOSP shall complete a call only upon a positive response from the Consumer that the Consumer accepts all previously disclosed charges for the call. The provider shall allow Consumers the opportunity to decline and thus terminate the call at no charge to the Consumer. If the IOSP does not receive a positive response within a period not exceeding 20 seconds from the last prompt, the call shall be terminated without charge. IOSPs shall not charge for any calls that are not accepted by the called party.
- B. Where not superseded by the express language of this rule, the Commission's Consumer Protection rule, 17.11.16 NMAC, applies, except for those provisions that by their language apply only to non-IOSPs.

17.11.12.19 REPORTING REQUIREMENTS:

- A. Existing IOSPs shall report to the Commission not later than April 1 of the calendar year following the effective date of this rule and new IOSPs shall report to the Commission within 90 days of certification the type of access line(s) and the number of Institutional Phones installed by correctional facility for each correctional facility in New Mexico served by the Provider on December 31 of the preceding year or, in the case of new IOSPs, the latest date such information is available. IOSPs shall update this information upon Staff's request.
- B. IOSPs shall report to the Commission not later than April 1 the number and percentage of calls initiated from an Institutional Phone with a duration of 60 seconds or less by correctional institution for the preceding calendar year.
- C. Upon request from the Commission, IOSPs must, in a timely manner, and in accordance with confidentiality agreements between the IOSP and Commission Staff as necessary, submit data requested by the Commission relating to its New Mexico operations, including but not limited to, revenue, expenses and facilities/usage data by inmate facility.
- D. IOSPs shall report to the Commission not later than April 1 the complaints it received about the service provided in New Mexico during the preceding calendar year. Complaints shall be categorized by type of complaint with a description of how each complaint was

17.11.12.21 NOTICE OF CHANGE IN CIRCUMSTANCE:

An IOSP shall notify the Commission in writing of the following change in circumstances:

- A. a change in the IOSP's name, address, or phone number;
- B. a change in the name, address, or phone number of the person responsible for regulatory contacts and Consumer dispute resolution;
- C. merger of the IOSP with another provider;
- D. acquisition of the IOSP by another provider;
- E. acquisition by the IOSP of another provider;
- F. transfer of the IOSP's certificate;
- G. transfer of a significant portion of the IOSP's assets to another provider; and
- H. any other change in control of the IOSP.

17.11.12.22 DISCONTINUANCE OF SERVICE:

A. Prior to discontinuing service, an IOSP shall, no later than thirty (30) days prior to discontinuing service, file with the Commission a notice of discontinuance of service showing the number of Correctional Institutions affected.

B. This section does not apply to individual service withdrawals of an IOSP.

17.11.12.23 WAIVERS:

The Commission recognizes that public health and safety and the requirements of the Correctional Institution may require exceptions to requirements contained in this rule. In those cases, the IOSP may petition the Commission for a waiver of a particular requirement, which shall not be unreasonably withheld.

17.11.12.24 SEVERABILITY:

If any part of this rule is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

handled. The categories of complaints shall include at least the following: service, billing, rates, and other.

E. Not later than March 15 of each year, Commission Staff will provide a letter to each Correctional Institution in New Mexico and to the respective IOSPs with information about the Commission's jurisdiction over IOSPs.

17.11.12.20 TRANSFER OF CERTIFICATE:

Any holder of a certificate of registration to provide Institutional Operator Services in New Mexico seeking to transfer the certificate to another person shall first apply to the Commission for approval of the transfer. The Commission shall approve an application for transfer of a certificate of registration upon receipt of a completed application and a copy of the tariff proposed to take effect upon approval of the transfer. The application shall meet the requirements of 17.11.XX.10 NMAC.

17.11.12.24 VARIANCES:

- A. Any IOSP may request a variance from any requirement of this rule.
- B. A petition for a variance shall be supported by an affidavit signed by an officer of the applicant or a person with authority to sign for the applicant.
- C. Any variance must contain the information required by the Commission's procedural rules under 1.2.2.40 NMAC.

ADDENDUM A – RATE CAPS⁴

Intrastate	Prepaid Inmate	Prepaid Collect	Collect
Local per call	\$0.00	\$0.00	\$1.00
per minute	\$0.15	\$0.15	\$0.15
15-min call	\$2.25	\$2.25	\$3.25
IntraLATA			
per call	\$0.00	\$0.00	\$1.00
per min	\$0.15	\$0.15	\$0.15
15-min call	\$2.25	\$2.25	\$3.25
InterLATA			
per call	\$0.00	\$0.00	\$1.00
per min	\$0.15	\$0.15	\$0.15
15-min call	\$2.25	\$2.25	\$3.25
Processing	Call-In	Web	
Credit Card/Check by Phone-Initial	\$3.00	\$3.00	
Credit Card/Check by Phone-Subsequent	\$3.00	\$3.00	
Refund of Unused Balance	\$3.00	\$3.00	

⁴ See Amended Joint Stipulation Between Public Communications Services, Inc. and NMPRC Utility Division Staff, at p. 7 (para 23), filed July 6, 2010.

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION TO)
COMMENCE RULEMAKING PROCEEDING)
FOR INSTITUTIONAL OPERATOR SERVICE)
PROVIDERS.)

INMATE CALLING SOLUTIONS, LLC AND)
PUBLIC COMMUNICATIONS SERVICES, INC.,)
PETITIONERS.)

Case No. 10-00198-UT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Final Order and Final Rule adopted November 8, 2012, was sent on November 13, 2012, by first class postage pre-paid mail and, when possible, by electronic mail to the individuals listed below.

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DATED this 13th day of November, 2012

NEW MEXICO PUBLIC REGULATION COMMISSION


Ana C. Kippenbrock, Paralegal

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATER OF A COMMISSION)
INQUIRY INTO THE RATES AND) Case No. 07-00316-UT
CHARGES OF INSTITUTIONAL OPERATOR)
SERVICE PROVIDERS)
_____)

ORDER REMANDING CASE ON THE ISSUE OF RATE-OF-RETURN

THIS MATTER comes before the New Mexico Public Regulation Commission ("Commission") upon the Recommended Decision of the Hearing Examiner ("Recommended Decision") issued by Lee W. Huffman on November 4, 2010. Having considered the Recommended Decision, the record in this case, the Briefs, Exceptions, and other pleadings submitted, and being fully informed in the premises,

THE COMMISSION FINDS AND CONCLUDES:

1. The Commission has jurisdiction over the parties and the subject matter of this case.
2. The Commission accepts and adopts the Hearing Examiner's Statement of the Case through the time of the issuance of the Recommended Decision.
3. Securus Technologies, Inc. (formerly Evercom Systems, Inc.) and T-Netix Telecommunications Services, Inc. (jointly referred to as, "E & T") timely filed Exceptions to the Recommended Decision of the Hearing Examiner on November 19, 2010 ("Joint Exceptions").
4. E & T's request for oral argument in its Joint Exceptions is not well taken and should be denied.
5. The Telecommunications Bureau Staff ("Staff") of the Commission's Utility Division, timely filed its Response to the Joint Exceptions on December 3, 2010 ("Staff's Response" or "Response").

6. The Commission accepts and adopts the Hearing Examiner's Discussion, Introduction, Legal Background and Analysis, paragraphs A, B, C - 1, 2, 3, 4 and 5, D and E as the Discussion of the Commission.

7. The Recommended Decision, in Analysis, paragraph C - 6, pages 71 through 97, adopts rates for E & T which include a ten percent (10%) rate-of-return. All of this Discussion, except for that portion which sets the ten percent (10%) rate-of-return, are accepted and adopted as the Discussion of the Commission.

8. The Commission accepts and adopts the Hearing Examiner's Findings and Conclusions as the Findings and Conclusions of the Commission except paragraph number 12 where paragraph number 12 is inconsistent with this Order.

9. The Commission finds that the evidence in this case for the rate-of-return set by the Hearing Examiner in the Recommended Decision is insufficient. The Commission further finds, therefore, that this case should be remanded to the Hearing Examiner for the limited purpose of further developing the record in this case on what rate-of-return is appropriate to determine in E & T's new rates.

10. In Exception I¹, E & T provides its response to the Hearing Examiner's charges of misconduct in E & T's post-hearing briefs in the Recommended Decision, Section C 1. None of these actions are relevant to the merits of this Final Order and so will not be discussed further. Staff's Response to this Joint Exception will not be addressed for the same reason.

¹ Exception I - The Recommended Decision Should be Clarified in Four Respects.

11. In Joint Exception II, E & T argues the Recommended Decision is unlawfully discriminatory because it sets Rate-of-Return rates for E & T but not for any other IOSPs.² E & T is incorrect for several reasons. First, that portion of the Recommended Decision proposed rates that do not include a rate-of-return are based solely on the cost data E & T provided and accepts this cost data as complete and accurate without regard to what costs are included in the figures.

Second, given the Commission's authority to set rates for IOSPs, it would be unreasonable to require that all IOSPs' rates be set at the same time. Rates are set based on the costs and circumstances affecting a particular regulated entity.

Third, the Recommended Decision finds that, of the two parties' rates that remain at issue, only E & T's rates are unjust and unreasonable necessitating new rates be set. Finally, the Hearing Examiner simply exercised his discretion, so as not to delay matters further, to proceed with the investigation into the reasonableness of E & T's and Conversant Technologies, Inc.'s ("CTI") rates without including two IOSPs that began providing service in New Mexico well into this inquiry.

12. In Joint Exception III, E & T argues the Recommended Decision is unlawful because it sets Rate-of-Return rates for E & T without finding E & T is dominant in the market.³ E & T is incorrect and is, in effect, attempting to avoid the procedure set up in the New Mexico Telecommunications Act in this regard. The Hearing Examiner states at page 25 of the Recommended Decision that the Commission has not issued an order finding that IOSP services are effectively

² Exception II – The Recommended Decision is Unlawfully Discriminatory Because it Subjects Only the Securus Respondents to Rate-of-Return Regulation and Analysis.

³ The Recommended Decision is Unlawful Because it Imposes Rate-of-Return Regulation on the Securus Respondents Without any Finding of Dominance or Market Power.

competitive and therefore entitled to relaxed regulation pursuant to NMSA 1978, Section 63-9A-8 (2004). Section 63-9A-8(A) specifically states that:

In accordance with the policy established in the New Mexico Telecommunications Act [63-9A-1 NMSA 1978], the commission shall, by its own motion or upon petition by any interested party, hold hearings to determine if any public telecommunications service is subject to effective competition in the relevant market area.

Emphasis added. Although E & T has the right to do so, it has voluntarily elected not to request the Commission to determine whether E & T is subject to effective competition in the market and, thus, eligible for modified rate-making treatment. Under these circumstances, setting Rate-of-Return rates is an appropriate rate-making methodology to employ. Staff is correct in its Response that the Hearing Examiner need not find dominance or market power to set rate-of-return rates.

13. In its Joint Exception IV, E & T argues the Recommended Decision exceeds the Commission's authority in three ways. First, E & T maintains the Recommended Decision "enforces" or "implements" a corrections statute, NMSA 1978, Section 33-14-1 (2001). This is incorrect. The Hearing Examiner interprets this statute as it relates to the Commission's exclusive authority and obligation to set just and reasonable rates and then applies this interpretation in the ratemaking process. Only the Commission has authority to ensure prohibited costs are not included in rates because only the Commission has the jurisdiction to set rates.

Second, E & T argues the Recommended Decision imposes these requirements on existing contracts causing E & T to abrogate these contracts. This is equally incorrect. In fact, the Final Order does not affect E & T's contracts at all. The Commission has no jurisdiction over the contracts entered into between E & T and correctional facilities or jails and has no power to enforce those contracts in any

ORDER REMANDING CASE ON
THE ISSUE OF RATE-OF-RETURN
CASE NO. 07-00316-UT

way. The contracts involve services E & T will provide the facilities and the amount E & T will pay the facilities in order to provide those services. Rates are paid by the inmates to the facility and are not essential to the contracts.

That portion of the Recommended Decision which interprets NMSA 1978, Section 33-14-1 and finds certain types of "other payments . . . based on amounts billed . . ." illegal under the statute, orders these payments be excluded only from the rates charged the inmates and so does not impair the contracts between E & T and correctional facilities or jails. Thus, it is arguable that the Commission could require E & T to exclude the prohibited payments from rates contained in existing contracts at the same time it files its new tariffs set forth in the Recommended Decision. The Recommended Decision does not do so consistent with the Commission's earlier Final Order in Case No. 3317. That is, the Hearing Examiner orders that IOSP's shall not continue to operate under tariffs that include the prohibited payments " . . . for any new, amended, renewed, extended or renegotiated contract . . ." from the date of the final order in this case.

Third, E & T maintains the Recommended Decision attempts to regulate the sale of prepaid cards by IOSP's to correctional institutions. This is also incorrect. Nothing in the Recommended Decision prohibits the sale of discounted prepaid calling cards (or rent for space payments) between E & T and facilities. It simply prohibits E & T from collecting these amounts from the inmates through the rates. The IOSP's are paying a commission or other payment to correctional facilities by providing them with discounted calling cards. The facilities pay the IOSP's less than the value of the calling cards and sell the calling cards at full value to the inmates. The difference in what the facilities pay the IOSP and receive from the inmates is the amount they "earn" on the transaction. Since this added value is based

**ORDER REMANDING CASE ON
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on the amounts they bill the inmates for the prepaid cards, the payment is the type of charge prohibited by the Legislature in NMSA 1978, Section 33-14-1(B) (2001). Again, the Commission is not prohibiting E & T from selling discounted pre-paid calling cards. It is only applying this prohibition to E & T's tariffs, prospectively as discussed above, pursuant to its exclusive authority over rates and its obligation to assure rates charged are just and reasonable.

14. Discussion of E & T's Joint Exceptions V and VII is reserved until after the record in this case concerning what rate-of-return should be set for E & T is further developed and a Final Order is issued in this case.

15. E & T's Joint Exception VI states that the, "Recommended Decision is Arbitrary and Capricious Because it Presents a Radical Change in Commission Policy with Regard to IOSP Rates." This Joint Exception is without merit. The Hearing Examiner's action in setting rates in this case is not a radical change in Commission policy regarding IOSP rates for the simple reason that the Commission has not set IOSP rates before and nothing in this Recommended Decision is inconsistent with the Commission's Final Order in Case No. 3317.

16. In its Joint Exceptions VIII⁴ and IX⁵, E & T argues that the Recommended Decision misinterprets NMSA 1978, Section 33-14-1 (2001) without notice or explanation and radically alters its interpretation in Case No. 3317. First, E & T Joint Exception VIII does not directly address the Hearing Examiner's analysis of rent for space payments. The Hearing Examiner explains at length in the

⁴ Exception VIII – The Recommended Decision Misinterprets NMSA 1978, Section 33-14-1 and Is Therefore Inconsistent with the Law.

⁵ Exception IX – The Recommended Decision is arbitrary and Capricious Because it Radically Alters the Commission's Interpretation of NMSA 1978, Section 33-14-1 Without Notice or Explanation.

**ORDER REMANDING CASE ON
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CASE NO. 07-00316-UT**

Recommended Decision the evidentiary basis for the Commission's finding that there is no economic basis for charging rent for space at a jail or correctional facility. The Commission finds, based on a preponderance of the evidence, that the correctional facilities do not have alternative paying tenants for the space occupied by the telephone equipment and thus, this space does not have any economic rental value.

Second, E & T's assertion that the Hearing Examiner's interpretation of "other payments" is not affected by the phrase "based upon amounts billed," is simply incorrect. This is clear throughout Section C - 4 of the Recommended Decision and particularly in the discussion beginning at the bottom of page 63.

Third, E & T maintains in Exception IX that the Recommended Decision presents a radically different interpretation of NMSA 1978, Section 33-14-1 than the Commission adopted in Case No. 3317, without notice. This argument is without merit. The Notice of Inquiry makes clear in its Findings and Conclusions that this case would include discussions and interpretations of this statute. In addition, the Commission in Case No. 3317 only finds that,

[i]ariffs containing any rates filed by ISOPs for contracts entered into, renewed or amended after the effective date of [the statute] cannot include the costs of the commissions or other costs prohibited by [the statute].

Recommended Decision of the Hearing Examiner, Case No. 3317, paragraph 12, page 30. The Hearing Examiner in Case No. 3317 does not prohibit any specific costs pursuant to the statute and so this Recommended Decision, by doing so, cannot be inconsistent.

ORDER REMANDING CASE ON
THE ISSUE OF RATE-OF-RETURN
CASE NO. 07-00316-UT

17. E & T never specifically states in the Joint Exceptions that the end-result or total effect of this Final Order is unreasonable. For all of the above reasons, the Commission should reject the Joint Exceptions except where further discussion is reserved.

18. To the extent that this Order does not address a specific issue raised by the Joint Exceptions, it should not be inferred that the Commission concurs with any of the arguments presented in the Joint Exceptions.

IT IS THEREFORE ORDERED:

A. The Hearing Examiner's Discussion, Introduction, Legal Background and Analysis, paragraphs A, B, C – 1, 2, 3, 4 and 5, D and E, as set forth in the Recommended Decision, are ADOPTED, APPROVED, and ACCEPTED by the Commission.

B. The Hearing Examiner's Analysis, paragraph C – 6, pages 71 through 97, as set forth in the Recommended Decision, except for that portion which sets the ten percent (10%) rate-of-return, are ADOPTED, APPROVED, and ACCEPTED by the Commission.

C. The Hearing Examiner's Findings and Conclusions, as set forth in the Recommended Decision, except paragraph number 12 where paragraph number 12 is inconsistent with this Order, are ADOPTED, APPROVED, and ACCEPTED by the Commission.

D. The Hearing Examiner's Orders, as set forth in the Recommended Decision, except that portion of paragraph F that concern filing of new rates by E & T, are ADOPTED, APPROVED, and ACCEPTED as Orders of the Commission.

E. The Recommended Decision is ADOPTED, APPROVED and ACCEPTED except where inconsistent with this Order.

ORDER REMANDING CASE ON
THE ISSUE OF RATE-OF-RETURN
CASE NO. 07-00316-UT

F. E & T's Joint Exceptions are denied consistent with the provisions of this Final Order.

G. E & T's request for oral argument on its Joint Exceptions is denied.

H. This case is remanded to the Hearing Examiner in this case for the limited purpose of developing a record and issuing an Amended Recommended Decision and Final Order on the issue of an appropriate rate-of-return that should be included in E & T's new rates.

I. All parties to this case, except E & T and Staff, may file testimony and supporting evidence as to the appropriate methodology for setting rate-of-return on equity for IOSPs no later than January 18, 2011.

J. E & T shall file supporting testimony and evidence, which is limited solely to and fully explains E & T's reasoning with regard to, (i) whether E & T should receive a return on its costs or on its equity, (ii) what the amount of the proposed return should be and (iii) the rates that result from E & T's proposed return and E & T's costs as already determined in this Order. All of this testimony and supporting evidence shall be filed with the Commission no later than January 18, 2011.

K. Staff shall file supporting testimony and evidence, which is limited solely to and which fully explains Staff's reasoning with regard to, (i) whether E & T should receive a return on its costs or on its equity, (ii) what the amount of the proposed return should be and (iii) the rates that result from Staff's proposed return and E & T's costs as already determined in this Order. All of this testimony and supporting evidence shall be filed with the Commission no later than January 18, 2011.

ORDER REMANDING CASE ON
THE ISSUE OF RATE-OF-RETURN
CASE NO. 07-00316-UT

L. A public hearing, through the undersigned Hearing Examiner, will be held on these matters, beginning at 9:00 a.m. on February 8, 2011, at the Commission's offices, in Santa Fe, New Mexico.

M. The Amended Recommended Decision shall be issued by February 15, 2011. Any Exceptions to the Amended Recommended Decision are due by February 18, 2011 and any Responses to Exceptions are due by February 22, 2011.

N. This Order is effective immediately.

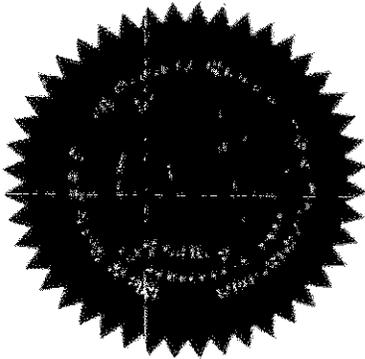
O. A copy of this Order shall be served upon each person listed on the attached Certificate of Service. Copies of this Order shall be e-mailed to all persons on the attached Certificate of Service if their e-mail addresses are known. If their e-mail addressees are not known, then the same materials shall be mailed to such persons via regular mail.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this
21st day of December, 2010.

NEW MEXICO PUBLIC REGULATION COMMISSION



DAVID W. KING, CHAIRMAN





JEROME D. BLOCK, VICE CHAIRMAN



JASON A. MARKS, COMMISSIONER



THERESA BECENTI-AGUILAR, COMMISSIONER

 vote no

SANDY JONES, COMMISSIONER

ORDER REMANDING CASE ON
THE ISSUE OF RATE-OF-RETURN
CASE NO. 07-00316-UT

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF A COMMISSION INQUIRY)
INTO THE RATES AND CHARGES OF)
INSTITUTIONAL OPERATOR SERVICE PROVIDERS) Case No. 07-
00316-UT)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Remanding Case on the Issue of Rate-of-Return issued December 21, 2010, was sent on December 22, 2010 by first-class postage prepaid mail to the parties listed below and by electronic mail to those whose email addresses were available.

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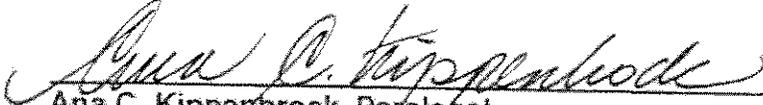
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Hand-delivered to:

Mary Howells, Esq.
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Santa Fe, NM 87501

DATED this 22nd day of December, 2010

NEW MEXICO PUBLIC REGULATION COMMISSION



Ana C. Kippenbrock, Paralegal

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF A COMMISSION INQUIRY)
INTO THE RATES AND CHARGES OF)
INSTITUTIONAL OPERATOR SERVICE PROVIDERS)
_____)

Case No. 07-00316-UT

AMENDED RECOMMENDED DECISION
OF THE HEARING EXAMINER ON REMAND

Lee Huffman, Hearing Examiner for this case, submits this Amended Recommended Decision to the New Mexico Public Regulation Commission ("Commission" or "NMPRC") pursuant to 1.2.2.29.D(4) and 1.2.2.37.B NMAC. The Hearing Examiner recommends that the Commission adopt the following Statement of the Case, discussion, findings of fact, conclusions of law and decretal paragraphs in its Final Order. This Amended Recommended Decision On Remand ("Amended R.D.") supplements and does not replace the initial Recommended Decision ("R.D.") issued in this case on November 4, 2010.

STATEMENT OF THE CASE

On December 21, 2010, the Commission issued its Order Remanding Case on the Issue of Rate-of-Return. That Order remanded this case to the Hearing Examiner "for the limited purpose of developing a record and issuing an Amended Recommended Decision and Final Order on the issue of an appropriate rate-of-return that should be

included in E&T's new rates." Order, p.9, Ordering para. H. Both Staff and E&T¹ were ordered to:

file supporting testimony and evidence, which is limited solely to and fully explains [their] reasoning with regard to, (i) whether E&T should receive a return on its costs or on its equity, (ii) what the amount of the proposed return should be and (iii) the rates that result from E&T's proposed return and E&T's costs as already determined in this Order.

On January 3, 2011, the Securus Companies ("E&T") filed a Motion for Rehearing.

Also on January 3, 2011, E&T filed an Expedited Motion for Stay of Remand Proceeding or, in the Alternative, for Amended Procedural Schedule.

On January 6, 2011, the Commission issued an Order Amending Procedural Schedule and Denying Motion for Rehearing.

On January 13, 2011, E&T filed a Petition For a Writ of Mandamus at the Supreme Court of New Mexico in Docket No. 32,809, concerning this Commission case.

On January 20, 2011, the Court issued an Order (without having received a response from the Commission) denying the Petition for a Writ and request for stay.

On February 15, 2011, E&T filed the Pre-filed Testimony of Curtis L. Hopfinger on behalf of Securus Technologies, Inc. and T-Netix Telecommunications Services, Inc. ("Hopfinger Remand Testimony").

¹Securus Technologies, Inc. (formerly Evercom Systems, Inc.) and T-Netix Telecommunications Services, Inc. will continue to be jointly referred to as "E&T". "Both Securus Technologies, Inc. ('Securus') and T-NETIX Telecommunications Services, Inc. ('T-Netix') are wholly-owned subsidiaries of Securus Technologies Holdings, Inc. the holding company." S/T [Securus/T-Netix Remand] Hearing Exhibit 1 (Hopfinger Direct), p.2.

Also on February 15, 2011, Staff filed the Prepared Testimony Concerning Rate-of-Return of John J. Reynolds ("Reynolds Remand Testimony").

On February 16, 2011, the Hearing Examiner issued an Order Allowing Rebuttal Testimony stating that E&T and Staff had the right to file Rebuttal Testimony on February 28, 2011.

On February 28, 2011, E&T filed the Prefiled Rebuttal Testimony of Curtis L. Hopfinger on behalf of Securus Technologies, Inc. and T-Netix Telecommunications Services, Inc. ("Hopfinger Remand Rebuttal").

Also on February 28, 2011, Staff filed the Prepared Rebuttal Testimony Concerning Rate-of-Return of John J. Reynolds ("Reynolds Remand Rebuttal").

On March 4, 2011, Staff filed two Errata Notices correcting the Testimony of John J. Reynolds and the Rebuttal Testimony of John J. Reynolds. These Errata were distributed during the hearing.

On March 7, 2011, E&T filed the Errata to Prefiled Initial Testimony and Rebuttal Testimony of Curtis L. Hopfinger. This document was served via electronic mail on all parties.

On March 8, 2011, a hearing was held in this Case 316 Remand. Before the close of the hearing, the Hearing Examiner stated that E&T and Staff could file post-hearing briefs by 12:00 p.m. Mountain Time on March 14, 2011, and post-hearing reply briefs by 5:00 p.m. Mountain Time on March 15, 2011. All briefs were to be sent via-electronic mail by those deadlines to the persons on the Certificate of Service, which was amended by order of the Hearing Examiner on the record.

At the hearing on March 8, 2011, the following appearances were entered:

For Evercom and T-Netix:

Patricia Salazar Ives, Esq.
Stephanie Joyce, Esq.

For PCS:
(now Global Tel*Link)

Jeffrey Albright, Esq.

For Staff:

Cydney Beadles, Esq.

No members of the public appeared at the hearing to offer public comment. Mr. Albright stated that he would observe. The following witnesses appeared at the hearing and testified.

For E&T

Curtis L. Hopfinger

For Staff:

John J. Reynolds

On March 14, 2011, Staff and E&T filed their respective post-hearing briefs and on March 15, 2011 they filed their reply briefs. The Commission required that this Amended Recommended Decision be issued by March 18, 2011.

DISCUSSION

Introduction

This case was remanded to the Hearing Examiner "for the limited purpose of developing a record and issuing an Amended Recommended Decision ... on the issue of an appropriate rate-of-return that should be included in E&T's new rates." Order Remanding Case On The Issue Of Rate-Of-Return, p.9, para. H. E&T was given clear direction on the type of testimony it should file: "which is limited solely to and fully explains E&T's reasoning with regard to, (i) whether E&T should receive a return on its costs or on its equity, (ii) what the amount of the proposed return should be and (iii) the

rates that result from E&T's proposed return and E&T's costs as already determined in this Order." Id., para. J. (emphasis supplied).

In this remand proceeding, E&T place their emphasis on the first underlined word, whether, rather than on the second underlined word, or. The position they take is that all of their rates are just and reasonable, and the rate-of-return approach to setting utility rates does not apply to them or any IOSP (Inmate Operator Service Provider). Their testimony and legal argument are essentially limited to these positions and do not provide a proposed rate of return and do not choose as between costs and equity.

E&T also argue (and testify) that they have been singled out for rate-of-return regulation, while the other IOSPs in the case avoided this scrutiny by either reaching a settlement (PCS and ICS) with Staff, albeit at generally lower rates, or had all of their rates (CTI) approved.

CTI serves a single facility in New Mexico and all of its rates were approved in the initial Recommended Decision. Like other IOSPs, CTI has both local and instate long distance rates, and both of these can be collect or prepaid. In all, CTI has four rates at the single New Mexico facility it serves.

E&T serve many more facilities, for a current total of 27 (one has only prepaid rates, some have only collect). In all, E&T have 88 rates that were considered in this case. In the Recommended Decision, 42 were approved as just and reasonable and 46 were found unjust and unreasonable, so the Recommended Decision proposed that these 46 rates be lowered to rates that are just and reasonable, based on the cost data E&T supplied and based on a recommended 10 percent rate-of-return. All of this was done based on evidence of record and consistent with New Mexico law.

Recommended Decision, pp. 24-29, 44-52, 71-97. The discussion and analysis of E&T's rates that were disapproved are much longer and have greater detail and depth than the discussion of the rates that were approved. This approach provides a reviewing court with an adequate record for appellate review. For example, all of E&T's local collect call rates were approved in a single paragraph. Recommended Decision, p.89.

One subject that E&T do not broach is how any of their rates that the Recommended Decision found were unjust and unreasonable (in other words, too high to be fair) compare to rates of CTI that were approved as just and reasonable. At this point, a single example provides the largely legal issues that follow with some beneficial financial clarity.

In the initial phase of this case (before the March 8, 2011 Remand Hearing) the testimony at the five-day long hearing was that the costs to an IOSP of providing a prepaid call are lower than the costs for the corresponding collect call. Rationally, the expectation is that prepaid rates would be lower (or at least no higher) than a corresponding collect call from the same facility. This is usually not the case for E&T.

As Exhibits A and B to the November 4, 2010 Recommended Decision show, while E&T generally charge \$6.00 for a 15 minute instate long distance collect call, at 11 facilities they charge \$8.50 for the same call that is prepaid, even though the costs to E&T for the prepaid calls are lower. For local calls the disparity is even greater. At most facilities, E&T charge \$1.50 to \$2.30 (all approved) for a 15 minute local collect call. At 13 facilities E&T charge three to five times as much (\$7.50) for the same call that is prepaid. E&T make no mention of these inconvenient details. Instead of any

analysis of this evidence at all, they offer a blanket conclusion that their rates are just and reasonable.

In stark contrast to these \$7.50 and \$8.50 prepaid calls, CTI charges \$1.10 and \$3.75 respectively for 15 minute local and 15 minute instate long distance prepaid calls. In other words, compared to CTI, E&T charge more than six times as much for a local prepaid call and more than twice as much for a long distance prepaid call at most facilities. At the seven facilities where E&T charge much less for local prepaid calls and at the five where they also charge reasonable amounts for prepaid instate long distance calls, their prepaid rates were approved. R.D., pp. 90-94; Ex. B. While E&T use the phrase "substantial evidence" at times, this is the type of evidence they studiously ignore.

E&T Correctly Pointed Out In Their Initial Post-Hearing Briefs That New Mexico Law Requires That Rate-of-Return Regulation Applies to IOSPs.

Now that E&T's rates have been evaluated using the traditional² rate-of-return regulation long used in New Mexico and elsewhere, E&T argue that this form of regulation does not apply to them and the Commission cannot use it. By contrast, E&T, through counsel, told the Commission the following on August 17, 2009 in their Post-Hearing Reply Brief: "IOSPs are entitled to a reasonable rate-of-return, and indeed New Mexico law mandates that result" p. 9 (emphasis and capitalization deleted).

² "The traditional elements of the ratemaking process and the establishment of the total revenue requirement are (1) determination of the costs of the operation, (2) determination of the rate base which is the value of the property minus accrued depreciation, and (3) determination of the rate-of-return. C. Phillips, The Economics of Regulation, 178 (1972)." Hobbs Gas Co. v. New Mexico Public Service Commission, 94 N.M. 731, 733, 616 P.2d 1116 (1980). E&T rely on this case and argued, at the time, that they were so entitled. July 27, 2009 Post-Hearing Brief, p.13. At that time, they were attempting to fend off Staff's very low market-based rate proposal. Since then, E&T's views of the law have changed. The law has not.

The Recommended Decision explains in detail the basis and scope of the Commission's jurisdiction over and duty to set IOSP rates. R.D., pp. 24-29, 44-52. That discussion will not be repeated here. E&T now argue that such regulation no longer exists for telecommunications in general and IOSPs in particular. It is true that traditional regulation has been replaced in New Mexico for large companies like Qwest, but E&T and other IOSPs are not such large companies and traditional regulation still applies to them. "Section 63-9A-8.2(C) ordered the PRC to eliminate rate-of-return regulation ... for large telecommunications carriers like Qwest The PRC eliminated rate-of-return regulation for Qwest" Qwest Corp. v. New Mexico Public Regulation Commission, 140 N.M. 440, 447, 143 P.3d 478 (2006); See, Order, Case No. SCC [State Corporation Commission] 94-01-TC (April 11, 1994) para. 7, pp. 2-3 (traditional ratemaking principles apply to IOSPs).

In the first of the three post-hearing briefs they filed, E&T started out with a straightforward position. "The Commission's authority in this case is limited to making a determination, on a going-forward basis, as to the reasonableness of the telecommunications service rates of Inmate Operator Services Providers ('IOSPs') in New Mexico." E&T Brief Regarding The Commission's Scope Of Authority (July 15, 2009), p. 1. In a similarly reasonable vein, E&T later stated in the same brief the following. "The Commission's focus in this case thus should remain on reviewing the IOSP's existing rates. In the event the Commission finds that the existing rates are unjust or unreasonable, the Commission may then consider setting rates." Id. p. 6. These statements are consistent with the Commission's authority.

During the five-day long initial hearing held in early June, E&T heard several IOSP witnesses questioned about the level of profitability of IOSPs, including E&T, as a percentage of sales and as a return on investment. E&T did not object to these questions. E&T had the ability to include testimony on rate-of-return in their written testimony filed before the hearing, but did not do so.

Over the course of the summer, E&T then filed three post-hearing briefs in July and August. In those briefs E&T pointed out several times that under long established New Mexico Supreme Court precedent, they were entitled to both recover their costs and the opportunity to earn a reasonable rate of return. What E&T did not do in their three rounds of briefs filed in the months following the hearing is request an additional opportunity to file testimony on the subject of rate of return.

Now that they have had that opportunity again, they did not present evidence as to what a fair rate of return would be, or as to whether it should be based on their costs or equity. Instead, they now argue that such regulation does not apply to them at all. They took the opposite position, as shown below, in their initial post-hearing briefs.

Then	Now
<p>"IOSPs are entitled to a reasonable rate-of-return, and indeed New Mexico law mandates that result." August 17, 2009 Reply Brief, p.9; ("rates will be judged according to three criteria: cost of service; the utility's rate base; and whether the rate permits a rate-of-return." <u>Id.</u> p.10 (citation omitted).</p>	<p>"imposing rate-of-return ratemaking on [E&T] now ... would be a stark throw-back to intrusive, and unnecessary, hyper-regulation." E&T March 14, 2011 Post-Hearing Brief (Remand), p.8.</p>
<p>"New Mexico law requires that the Commission set utility rates at a level that will enable the service provider to recover its costs ... the PRC retains exclusive jurisdiction to and authority to set utility rates ... the Commission must 'provide a fair opportunity for the utility to receive just compensation for its investments' and 'the failure of [the Commission] to provide rates that will give the company a reasonable rate of return constitutes a violation of due process and taking of property without just compensation.'" July 27, 2009, Post-Hearing Brief, p.13 (citations omitted).</p>	<p>"Imposing rate-of-return ratemaking on [E&T] contravenes New Mexico law". <u>Id.</u>, p.6.</p> <p>"Rate-of-return ratemaking is inappropriate for the IOISP industry". <u>Id.</u>, p.8.</p> <p>"Mr. Hopfinger ... testified that with the 'advent of competition, regulatory bodies abandoned rate-of-return regulation.' [Hopfinger Remand Rebuttal] at 10". <u>Id.</u>, at p.7.</p>
<p>"The law prohibits forcing regulated utilities to provide service at rates that do not recover the costs." <u>Id.</u>, p.14. "New Mexico law requires the Commission to ensure 'a fair opportunity for the utility to receive just compensation for its investments'" <u>Id.</u>, p.20 (citation omitted).</p>	<p>The "Commission should not impose rate-of-return ratemaking ... on [E&T]...." <u>Id.</u>, p.12.</p>

E&T's only explanation for these inconsistencies is that "[t]he legal arguments of counsel, however, are not evidence in administrative proceedings." March 14, 2011 Post-Hearing Brief (Remand), p.6. While not provided under oath, and never viewed as evidence, counsel represents a client when arguing to a tribunal and always owes that tribunal a duty of candor. R.D. p. 45, n.4.

Mr. Hopfinger testified for E&T that "rate-of-return ratemaking methodology has never been applied to IOSPs in New Mexico ... and ... imposing a new form of IOSP regulation is not warranted." E&T Ex. 1 (Remand), p.3. He also testified that there was no "indication that the [cost] data submitted ... would be used to calculate rates based on a rate-of-return methodology." *Id.*, p.9.

Even if E&T had not asked for just this type of regulation in their post-hearing briefs filed in the months after the initial June hearing, decisions of the Supreme Court of New Mexico put E&T on notice that utility regulation in New Mexico includes rate-of-return ratemaking. The basic principles of ratemaking in New Mexico (and elsewhere) are described in the 1980 Hobbs decision of our Supreme Court. These principles are well known, and E&T relied on them in its initial post-hearing briefs. Because the New Mexico Legislature and this Commission have not excluded IOSPs (unlike Qwest) from traditional rate regulation, including rate of return, that traditional form of rate regulation applies to IOSPs.

The Supreme Court in Zia Natural Gas Co. v. New Mexico Public Utility Commission, 128 N.M. 728, 731, 998 P.2d 564, 2000 – NMSC – 011, ¶9, explained the principle that its decisions in prior utility cases give notice to New Mexico public utilities (even, as in Zia, in different areas such as natural gas and telecommunications) as follows. "In any case, as Mountain States 1954, 58 N.M. at 277-78, 270 P.2d at 696-97 indicates, Zia **should have been on notice** that a 100% equity capital structure could be detrimental to ratepayers and would not be the basis for setting rates." (emphasis supplied).

Quite simply, the Court recognized in 2000 in Zia that an earlier Mountain States decision involving a telecommunications utility put Zia, a natural gas utility, on notice of the ratemaking principles decided in the 1954 Mountain States case. This means that the Court's description of basic ratemaking principles in Hobbs put all New Mexico utilities on notice that those principles apply regardless of whether the utility provides telecommunications, natural gas, electric or water service to the public. Unless expressly changed by the Legislature, as in the case of Qwest, those principles apply to all utilities and they all have notice. There is no exception, statutory or otherwise, for IOSPs.

E&T's rates were evaluated using the same ratemaking principles that apply to other utilities, including other IOSPs. The fact that two other IOSPs (PCS and ICS) settled this case and CTI had lower rates that were approved does not discriminate against E&T.

E&T argue that applying rate-of-return ratemaking to their rates "is unlawfully discriminatory The Recommended Decision relies on rate-of-return methodology to conclude that some rates of [E&T] are unjust and unreasonable. Recommended Decision at 83-85." E&T March 14, 2011 Post-Hearing Brief (Remand), p.4.

The conclusion referred to in the Recommended Decision that "some" of E&T's rates are unjust and unreasonable follows from a discussion and analysis of E&T's rates compared to their costs and this begins on page 71, rather than 83, of the Recommended Decision. Moreover, the rates in question were E&T's instate long distance collect call rates. Other rates were also evaluated in the Recommended Decision. All of E&T's local collect call rates were found to be just and reasonable in a

single paragraph. R.D., p. 89. The majority of its prepaid rates (local and instate long distance) were found to be unjust and unreasonable. R.D., pp. 90-94; Ex. B. And four of its instate long distance collect call rates were found just and reasonable, while 22 were not. R.D., pp. 94-97; Exs. C, D.

The basis for finding some of E&T's rates just and reasonable and others too high to be just and reasonable was that, taking into consideration E&T's costs, and adding a reasonable 10 percent profit margin opportunity (R.D., pp. 76-89) the Recommended Decision found that "the average call duration data and cost data provided by E&T show that their revenues greatly exceed their actual costs." R.D., p. 85. Accordingly, the Recommended Decision lowers the long distance instate collect call rates and prepaid rates that are not just and reasonable to levels that are. The other rates were not changed.

E&T claim that in New Mexico "three types of IOSP rates would be in effect: 'negotiated rates (PCS and ICS), competitive cost-based rates (CTI), and rate-of-return rates (Securus [E&T] Companies).' Hopfinger Remand Testimony at 13" Post Hearing Brief (Remand), p.4. Their complaint about PCS and ICS reaching a settlement with Staff, later approved by the Commission, in which PCS and ICS agreed to be bound by rate caps is not well taken. Parties to litigation, including utilities, are encouraged to settle cases by long-standing New Mexico policy encouraging settlement over protracted litigation. Attorney General v. New Mexico Public Service Commission, 111 N.M. 636, 808 P.2d 606 (1991).

Next, E&T contend that "the Recommended Decision did not review CTI's rates under rate-of-return methodology. Remand Tr. at 148" E&T Post-Hearing Brief

(Remand), p.5. They rely in part on Mr. Hopfinger's testimony at the March 8, 2011 hearing: "I can say that I don't believe rate-of-return was used." Tr. March 8, 2011, p.149. He did not hold himself out as an expert on rate-of-return ratemaking. *Id.*, p.155.

The Recommended Decision, as noted, approved CTI's prepaid rates, all of which are much lower than E&T's prepaid rates that were found unjust and unreasonable. And as previously stated, all of E&T's 26 collect call local rates were approved, most in a single paragraph on page 89 of the Recommended Decision. Several local collect call rates were changed (lowered) by E&T (R.D. 94-97) and these were also approved, as were rates at two facilities not previously served by E&T. R.D., Ex. 4. A local collect call under CTI's approved rate is a flat rate of \$1.50, regardless of duration. For 24 of 26 E&T facilities the rate is \$1.50 to \$2.30 for a 15 minute call, with one facility charging less and one more.

In approving these rates for both E&T and CTI, the Recommended Decision did what New Mexico law requires, it found the ultimate fact that the rates in question are just and reasonable. As the Supreme Court of New Mexico explained, "the Commission is not required to give reasons for its decision; ultimate findings phrased in the applicable statutory language are sufficient." Attorney General v. New Mexico Public Service Commission, 101 N.M. 549, 552, 685 P.2d 957 (1984).

Even so, the Recommended Decision described its conclusion that CTI's previously discussed prepaid rates and local collect call rate, and its in-state long

distance collect call rate (\$4.10 for a 15 minute call, R.D., p.105) are just and reasonable³ as follows:

"Having considered the evidence concerning CTI's rates and costs, and finding that Mr. Profanchik's testimony was candid and credible, the Commission finds that a preponderance of the evidence supports the conclusion that CTI's rates are just and reasonable. Accordingly, no changes are necessary to their rates or tariffs." R.D., p.106. (emphasis supplied).

This language does two things. First, it tracks the same type of language used to approve 42 rates for E&T. And second, it expressly finds that "Mr. Profanchik's testimony was candid and credible."

Mr. Profanchik's testimony, which the Recommended Decision found candid and credible, provided the principle basis for the conclusion reached on page 83 of the Recommended Decision that "it is reasonable for an IOSP in New Mexico to have an opportunity to earn 10 percent, expressed either as a return on equity, as a percentage of its sales that are profit, or as an increase over and above its costs of providing service, so as to potentially generate a profit of that level."

Mr. Profanchik testified on behalf of CTI, which he owns, that the return on investment for IOSPs "is about the same" as the percentage of sales as profit and is "between 9 and 12 percent." Tr. 786-787; R.D. p. 83. The Recommended Decision then relied on his testimony and credibility to conclude "that a preponderance of the evidence supports the conclusion that CTI's rates are just and reasonable."

³ The 22 E&T interstate long distance collect call rates that were found to be unjust and unreasonable were all significantly higher (1 at \$4.80, 2 at \$5.23 and 19 at \$6.00) Ex. 4 and were discussed at length, while the four that were found to be just and reasonable (1 at \$3.95 and 3 at \$2.00 Ex. 4) were all lower and their discussion and analysis were much shorter in length, and essentially the same in character as the discussion and analysis of the rates approved for CTI. Compare R.D. at pp.105-106 to pp.94-97.

R.D. p. 106. His testimony was relied on without qualification or limitation and it included testimony given at the initial hearing. This testimony specifically included his discussion of return on investment and the rate he identified, and on which the Recommended Decision relied, which was 9 to 12 percent. The Hearing Examiner chose 10 percent from within that range for the rate of return. R.D. p. 83.

E&T are simply wrong when they contend that "the Recommended Decision did not review CTI's rates under rate-of-return methodology." Post-Hearing Brief (Remand) p. 5. The approval of CTI's rates followed the same method of review that many of E&T's rates also passed, and that many of E&T's rates did not. In their three post-hearing briefs filed following the initial June hearing, E&T demanded rate-of-return regulation. Their complaint now about the outcome of the application of what they asked for to their rates has to do with the outcome. Their arguments on this subject are without merit.

E&T never proposed a specific alternative to the 10 percent rate of return proposed in the Recommended Decision. Their position is that their rates should not be changed. Mr. Hopfinger testified at the hearing that he has an opinion on what a reasonable return should be. March 8, 2011 Tr. 119. He would not give a specific number, instead stating that "I believe that our current existing rates provide a reasonable return on our investment" in New Mexico. *Id.*

Staff witness Reynolds used the traditional DCF approach and considered E&T's cost of debt to recommend a rate of return of 11.46%. Staff Ex. 1, p. 17. To obtain this result, he proposed raising the per-minute rate by one penny from 8 to 9 cents a minute, but only in the facilities in E&T's highest calling volume category. He admitted that

there were problems with applying the DCF (discounted cash flow) method to a privately held IOSP like E&T that does not pay dividends. *Id.*; March 8, 2011, Tr. pp. 62-64.

Having reviewed the evidence provided by Staff and E&T, and having considered the briefs filed and the evidence of record, the Hearing Examiner concludes that the rate of return of 10% first proposed in the Recommended Decision (p. 83) should be used for E&T, as provided in that Recommended Decision.

In sum, this Amended Recommended Decision does not propose any changes to the treatment of E&T's rates (some approved, some not, in the initial Recommended Decision).

The Hearing Examiner recommends that the Commission **FIND** and **CONCLUDE** that:

1. The Statement of the Case, the Discussion and all findings and conclusions contained therein, whether or not numbered or designated as such, are incorporated by reference herein as findings and conclusions.

2. The Commission has jurisdiction over the parties and the subject matter of this case pursuant to N.M. Const. article XI, Section 2, NMSA 1978, Section 8-8-4, (1998) and NMSA 1978, Section 63-7-1.1 (1999).

3. Due and proper notice of this case was provided.

4. The rate of return approved by this Amended Recommended Decision is 10 percent and E&T should receive this return on their costs.

The Hearing Examiner recommends that the Commission **ORDER** as follows:

A. The Statement of the Case, Discussion and all findings of fact and conclusions of law contained therein are incorporated by reference herein.

B. The Commission has jurisdiction over the parties and the subject matter of this proceeding.

C. The findings, conclusion, decisions, rulings, and determinations made and contained in this Amended Recommended Decision are ordered to be carried out and complied with.

D. The rate of return approved by this Amended Recommended Decision is 10 percent and E&T should receive this return on their costs.

E. Any Exceptions to this Amended Recommended decision shall be filed and delivered to Staff and E&T (by e-mail, fax or hand) by Friday, March 25, 2011. Responses to Exceptions shall be filed and served by Thursday, March 31, 2011.

F. This Amended Recommended Decision on Remand supplements and does not replace the Recommended Decision issued in this case on November 4, 2010.

G. Any matter not specially ruled on during the hearing or in this Amended Recommended Decision is disposed of consistent with this Amended Recommended Decision.

H. In accordance with 17.2.35.D NMAC, the Commission has taken administrative notice of all Commission orders, rules, decisions, and other relevant materials in all Commission proceedings cited in this Amended Recommended Decision.

I. Copies of this Amended Recommended Decision shall be served on all persons on the attached Certificate of Service via email if their email address is known, and if not known, via regular mail.

J. This Amended Recommended Decision is effective immediately.

K. This docket is closed.

ISSUED at Santa Fe, New Mexico this 18th day of March, 2011.

NEW MEXICO PUBLIC REGULATION COMMISSION



LEE HUFFMAN, Hearing Examiner

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**Indicates e-mail delivered on March 18, 2011.

DATED this 18th day of March, 2011.

NEW MEXICO PUBLIC REGULATION COMMISSION



Lee Huffman, Hearing Examiner