Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Incarcerated People's Communications Services;	)	WC Docket No. 23-62
Implementation of the Martha Wright-Reed Act	)	
	)	WC Docket No. 12-375
Rates for Interstate Inmate Calling Services	)	

ORDER DENYING STAY PETITION

Adopted: October 2, 2024 **Released: October 2, 2024**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. On September 26, 2024, Securus Technologies, LLC (Securus) filed a petition requesting that the Commission stay its Report and Order, Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking in the captioned proceedings pending judicial review.[1] For the reasons discussed below, we deny Securus's stay request.

II. BACKGROUND

2. The *2024 IPCS Order* implemented the expanded authority granted to the Commission by the Martha Wright-Reed Just and Reasonable Communications Act of 2022 (Martha Wright-Reed Act or Act),[2] adopting comprehensive reforms that will significantly reduce the financial burdens incarcerated people face to communicate with their loved ones. The Act amended the Communications Act of 1934, as amended, (Communications Act) to require that the Commission "establish a compensation plan to ensure that all [Incarcerated People's Communications Services (IPCS)] providers are fairly compensated and all rates and charges are just and reasonable for completed" IPCS communications.[3] Consistent with this Congressional mandate, in the *2024 IPCS Order*, the Commission reduced existing per-minute rate caps for all incarcerated people's audio communication services, and established, for the first time,

[1] *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services*, WC Docket Nos. 23-62, 12-375, Report and Order, Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking, FCC 24-75 (rel. July 22, 2024) (*2024 IPCS Order* or *Order*, *2024 IPCS Reconsideration Order*, or *2024 IPCS Notice*); *see* Securus Technologies, LLC, Petition for Stay Pending Judicial Review, WC Docket Nos. 23-62, 12-375 (filed Sept. 26, 2024) (Securus Stay Petition); Declaration of Alex Dougherty In Support of Securus Technologies, LLC's Motion for Stay Pending Appeal, WC Docket Nos. 23-62, 12-375 (filed Sept. 26, 2024) (Dougherty Declaration). The Wright Petitioners, United Church of Christ Media Justice Ministry, Worth Rises, Pennsylvania Prison Society, and the Brattle Group (collectively, the Public Interest Parties) filed an opposition to the Securus Stay Petition as did Stephen A. Raher. *See* Opposition to Securus Petition for Stay Pending Judicial Review, WC Docket Nos. 23-62, 12-375 (filed Oct. 1, 2024) (Public Interest Parties Opposition); Opposition of Stephen A. Raher to Securus Technologies' Petition for Stay Pending Judicial Review, WC Docket Nos. 23-62, 12-375 (filed Oct. 1, 2024) (Stephen Raher Opposition).

[2] Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat. 6156 (2022).

[3] 47 U.S.C. § 276(b)(1)(A).

interim per-minute rate caps for incarcerated people's video communications services.[4] In establishing these rate caps, the Commission employed the used and useful framework it has used for decades in determining just and reasonable rates, a zone of reasonableness methodology that it had previously used to set rate caps for audio IPCS, and an industry-average cost methodology specifically permitted in the Martha Wright-Reed Act.[5] In setting the new rate caps, the Commission relied on cost and other data submitted by IPCS providers, including Securus.[6]

3. In the *2024 IPCS Order*, the Commission also ended IPCS providers' long-standing practice of paying site commission to carceral facilities, the costs of which were passed through to consumers via higher IPCS rates.[7] The *Order* strengthened the Commission's requirements for access to IPCS by incarcerated people with disabilities; adopted stronger consumer protection rules, including permanent rules addressing providers' treatment of unused funds in inactive IPCS accounts; and permitted providers, for the first time, to offer optional alternate pricing plans, subject to conditions to protect and benefit IPCS consumers.[8] Although many of the new requirements are effective 60 days after publication in the Federal Register, the Commission established staggered compliance deadlines for the new rate caps and the elimination of site commissions.[9]

4. On September 26, 2024, Securus filed a petition requesting that the Commission stay the effectiveness of the *2024 IPCS Order* pending judicial review. Securus contends that it is likely to prevail on the merits, alleging that the Commission committed errors in its statutory interpretations and ratemaking resulting in rate caps that fail to comply with the Martha Wright-Reed Act's dual requirements that the Commission's compensation plan ensure both that all IPCS providers are fairly compensated and that all rates and charges are just and reasonable, and because the Commission set a compliance timeline that is impossible for IPCS providers to meet.[10] Securus also claims that allowing the *2024 IPCS Order* to "go[] into effect as planned" will subject Securus to irreparable harm in lost revenue and compliance costs and that the balance of harms to other interested parties and the public interest support a stay.[11]

III. DISCUSSION

5. To qualify for the extraordinary remedy of a stay, a petitioner must show that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would

[4] *See, e.g.*, *2024 IPCS Order* at 60, para. 119.

[5] *See, e.g.*, *id.* at 65-66, para. 127 (discussing the adoption of rate caps derived from industry average costs); *id*. at 89-90, paras. 159-60 (discussing the used and useful framework and the zone of reasonableness approach).

[6] See *id.* at 102-04, paras. 184-85.

[7] *See, e.g.*, *id.* at 132, para. 245 (prohibiting IPCS providers from paying site commissions of any kind and preempting all state and local laws and regulations requiring or allowing IPCS providers to pay site commissions associated with IPCS).

[8] *See, e.g.*, *id.* at 229-49, 253-61, 261-91, paras. 427-471 (discussing alternate pricing plans), 482-98 (amending the Commission's rules to improve communications for incarcerated people with disabilities), 499-556 (discussing reforms to the Commission's consumer protection rules).

[9] *Id.* at 304-08, paras. 587-94. The Commission also issued the *2024 IPCS Reconsideration Order*, which resolved various petitions seeking reconsideration of, clarification of, or waivers from prior Commission orders. *See 2024 IPCS Reconsideration Order* at 309-12, paras. 599-607. Additionally, the Commission issued the *2024 IPCS Notice* to obtain additional public comment on IPCS-related issues that it could not resolve on the record then before it. *See 2024 IPCS Notice* at 312-319, paras. 608-24.

[10] Securus Stay Petition at 2, 4-16.

[11] *Id.* at 2-3, 13-17.

favor grant of the stay.[12] A stay is an "'intrusion into the ordinary processes of administration and judicial review,' . . . and accordingly 'is not a matter of right, even if irreparable injury might otherwise result'" to the movant.[13] The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.[14] Securus has failed to meet that burden.[15]

A. Securus Has Not Shown It Is Likely to Prevail on the Merits

6. To show likelihood of success on the merits, a petitioner must make a "strong showing" that they are likely to succeed;[16] a "mere possibility of relief" is insufficient.[17] As the D.C. Circuit has recognized, "[w]ithout such a substantial indication of probable success, there would be no justification for . . . intrusion into the ordinary processes of administration and judicial review."[18] Securus principally asserts that the *2024 IPCS Order* fails to ensure that all IPCS providers are fairly compensated pursuant to section 276(b)(1)(A) of the Communications Act and that the Commission erred in several respects in

[12] *See LightSquared Technical Working Group Report*, Order Denying Motion for Stay, IB Docket No. 11-109, 36 FCC Rcd 1262, 1266, para. 8 (2021) (*Ligado Stay Denial Order*) (citing *Nken v. Holder*, 556 U.S. 418, 425-26 (2009)).

[13] *Nken*, 556 U.S. at 427 (internal citations omitted).

[14] *Ligado Stay Denial Order*, 36 FCC Rcd at 1266, para. 8 (citing *Nken*, 556 U.S. at 433-34).

[15] Securus requests that we stay the *2024 IPCS Order on Reconsideration* and the *2024 IPCS Notice*, but makes no claims regarding the former, and no attempt regarding the latter to show that the extraordinary remedy of preventing the Commission from further developing the record meets the stay criteria. The *2024 IPCS Order on Reconsideration* dismissed as moot Securus's Petition for Clarification and Petition for Waiver because the *Order* effectively provided Securus the clarification and waiver it had requested. *See 2024 IPCS Reconsideration Order* at 311-12, paras. 604-606. There is no reason to suppose Securus suffered any cognizable harm from the Commission's dismissal of its Petition for Clarification as moot. *See 2024 IPCS Reconsideration Order* at 312, para. 604. Securus requested clarification of whether, under the existing rules, "providers [could] pay additional site commissions from end user revenues," over and above the $0.02 per-minute allowance for contractually prescribed site commissions under those rules. *See id.* (quoting Securus Petition for Clarification at 3). Clarification on this point was necessary, Securus argued, because without it "some providers [could be] competitively disadvantaged in the bidding process" for new IPCS contracts. *Id.* (quoting Securus Petition for Clarification at 4). The *2024 IPCS Order* eliminates any such risk by clarifying that, once the new rules take effect, IPCS providers will no longer be able to bid for new contracts under the terms of the old rules, even though the Commission has allowed staggered periods of time to bring "contract[s] existing as of June 27, 2024," into compliance with the new rules. *2024 IPCS Order* at 305-06, para. 587. Likewise, it is unclear what harm Securus could plausibly claim from the dismissal as moot of its request for waiver of sections 64.6030 and 64.6090 of the Commission's existing rules, the first of which prescribes that IPCS providers adhere to per-minute rate caps for interstate and international calls and the second of which prohibits providers from offering flat-rate calling for such calls. *See* 47 C.F.R. §§ 64.6030, 64.6090. Securus sought a waiver of those rules so that it could offer subscription calling plans as an alternative to assessing only per-minute rates for interstate calls. *See 2024 IPCS Order* at 232, para. 430. In the *2024 IPCS Order*, the Commission expressly acknowledged the benefits of Securus's alternative pricing plans and, *id.* at 234, para. 432, and decided to permit such plans under the new rules, *see id.* at 235, para. 435; *see also id.* at 236-50, paras. 437-471. Thus, the Commission correctly recognized that Securus's waiver request was moot under the new rules. *See 2024 IPCS Reconsideration Order* at 313, para. 606. Securus's waiver request was also moot with regard to the application of the existing rules, given Securus's representation to the Commission, in March 2022, that it had suspended its alternative pricing plans in 2021, *see 2024 IPCS Order* at 232-33, para. 430 & n.1552.

[16] *Nken*, 556 U.S. at 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

[17] *Nken*, 556 U.S. at 434 (internal quotation marks omitted).

[18] *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

setting IPCS rate caps.[19] Securus also argues that the Commission erred in not deferring compliance with certain rules adopted in the *2024 IPCS Order*.[20]

7. *Fair Compensation for IPCS Providers*. As the Commission concluded in the *2024 IPCS Order*, the IPCS compensation plan the Commission adopted is fully consistent with the requirement that "all payphone service providers are fairly compensated" as required by section 276(b)(1)(A).[21] Securus, however, asserts it is not.[22] Securus argues that "Congress's use of 'all'— rather than qualifying or limiting the class of providers that the Commission must ensure are fairly compensated—makes clear that the Commission's compensation plan must assure that *every* IPCS provider is made whole."[23] Securus previously raised this argument in the rulemaking and the *2024 IPCS Order* squarely addressed it.[24] As the Commission explained, the statutory mandate of fair compensation "need not be evaluated on a provider-by-provider basis."[25] The Martha Wright-Reed Act is clear that the Commission may use "industry-wide average costs" in setting just and reasonable rates under section 276(b)(1)(A).[26] Indeed, this language was added to the text of the Martha Wright-Reed Act in response to *GTL v. FCC*, where the court found that Commission's use of "industry-wide averages in setting the rate caps" in the *2015 ICS Order* was incompatible with section 276 as then written.[27] Thus, Congress envisioned just and reasonable rate regulations being set on an industry-wide, rather than provider-by-provider, basis. Consistent with that harmonized understanding of the statutory mandates, the Commission concluded that "a provider will be fairly compensated if the rates and fees it is permitted to charge will afford it an opportunity to recover industry-average costs associated with prudent investments used and useful in providing IPCS and associated ancillary services at the facilities the provider serves."[28]

8. Considering the statutory framework as a whole, along with the record before it, the Commission concluded in the *2024 IPCS Order* that rate caps "based on costs evaluated on an aggregated basis generally will satisfy the requirement that all payphone service providers be fairly compensated."[29] And "[a]cross the industry, the[] rate caps will allow providers to generate sufficient revenue from the audio and video communications they provide (1) to recover the actual, direct costs of each communication, and (2) to make a reasonable contribution to their indirect costs related to IPCS."[30] The Commission sensibly "decline[d] to set rate caps that ensure cost recovery for providers with unusually

[19] Securus Stay Petition at 4-11.

[20] *Id.* at 11-13.

[21] *See, e.g.*, *2024 IPCS Order* at 122, para. 219 (finding that "a provider will be fairly compensated if it is afforded an opportunity to recover the industry average of [the prudently incurred investments and expenses that are used and useful in the provision of IPCS] on a company-wide basis"); 47 U.S.C. § 276(b)(1)(A).

[22] Securus Stay Petition at 4.

[23] *Id.* at 5 (emphasis in original).

[24] *2024 IPCS Order* at 122, para. 219 n.777 (noting that "Securus argues that the Martha Wright-Reed Act requires that *each provider* be able to recover its average costs") (emphasis in original); Public Interest Parties Opposition at 3 (noting that "Securus spends much of its discussion of its likelihood of success on the merits simply rehashing an argument that the Commission has already rejected: that Section 276(b)(1)(A) . . . requires that the new rate caps account for costs on a provider-by-provider basis, rather than using an industry average").

[25] *2024 IPCS Order* at 37, para. 69; Public Interest Parties Opposition at 3.

[26] *2024 IPCS Order* at 65-66, para. 127 (citing, among other things, Martha Wright-Reed Act § 3(b)(1)).

[27] *Global Tel* Link v. FCC*, 866 F.3d 397, 414 (D.C. Cir. 2017) (*GTL* or *GTL v. FCC*); *see 2024 IPCS Order* at 37, para 69.

[28] *2024 IPCS Order* at 38, para. 71.

[29] *Id.* at 122, para. 219 n.777.

[30] *Id.* at 122, para. 220.

high costs because to let unusual cases determine rates generally would result in unjust and unreasonable rates," contrary to the independent mandate of section 276(b)(1)(A).[31] Instead the Commission made clear that "if such providers exist, they can seek a waiver."[32]

9. Securus also asserts that the Commission's rate caps are "below cost for one-third of IPCS providers" and that when costs are "appropriately accounted for—including necessary safety costs the Commission excludes from its lower bound and the massive compliance costs that the Commission ignores—*more than half* of all industry providers will be unable to recover costs for audio services they provide under the new rate caps."[33] Securus's argument is premised in part on the notion that the Commission has not "appropriately accounted" for provider costs because it has excluded certain costs. But excluding certain costs is precisely the task that Congress required the Commission to perform to ensure, consistent with the Martha Wright-Reed Act, that all "payphone service providers are fairly compensated, and all rates and charges are just and reasonable, for completed intrastate and interstate communications."[34] As explained in the *2024 IPCS Order*, the Commission relied on the used and useful framework and its associated prudent expenditure standard "to assess the costs that should either be included or excluded from [the Commission's] rate cap calculations to ensure just and reasonable rates and charges for IPCS."[35] This is "a familiar task of the sort the Commission has long undertaken when seeking to ensure just and reasonable rates and charges, where it has evaluated costs and expenses of various kinds of which providers sought recovery through regulated rates."[36] In deriving its rate caps in this way, the Commission afforded "providers an opportunity to recover the used and useful costs incurred to provide IPCS" and also ensured that IPCS rates are "affordable for incarcerated people and their loved ones."[37] The extent to which certain costs and expenses were not included in the Commission's rate cap calculations is the result of the Commission's application of the longstanding used and useful framework to determine whether such costs and expenses are not used and useful in the provision of IPCS and therefore not recoverable through IPCS rates.

10. We also reject Securus's argument about inadequate cost recovery insofar as it selectively relies on certain statements in the *2024 IPCS Order*.[38] Securus claims that the Commission acknowledged that costs incurred by four of the IPCS providers exceed revenues when the Commission revealed that "[p]otential revenues for eight out of 12 IPCS providers exceed their total reported costs when excluding site commissions and safety and security categories that generally are not used and useful in the provision of IPCS."[39] But Securus neglects the fact that those eight firms who will have adequate cost recovery under the Commission's Martha Wright-Reed Act paradigm "represent over 90 percent of revenue, 96 percent of [average daily population], and 96 percent of billed and unbilled minutes in the dataset."[40] Securus also fails to account for the Commission's conclusion that its estimates of providers'

[31] *2024 IPCS Order* at 38, para. 71 n.234; *see also* Public Interest Parties Opposition at 3.

[32] *Id.* at 38, para. 71 n.234.

[33] Securus Stay Petition at 6 (emphasis in original).

[34] 47 U.S.C. § 276(b)(1)(A).

[35] *2024 IPCS Order* at 25, para. 42.

[36] *Id.* at 186, para. 355.

[37] *Id.* at 60, para. 119.

[38] Securus Stay Petition at 6.

[39] *2024 IPCS Order* at 120, para. 216.

[40] *Id.*

average costs were "likely overstated," which made it "unlikely that any provider w[ould] be unable to recover its individual average costs of providing audio and video IPCS."[41]

11. *Treatment of Safety and Security Costs*. Securus argues that the Commission erred in its evaluation and treatment of safety and security costs in several respects. First, Securus asserts that the "Commission violated the 'fairly compensated' requirement by adopting a 'used and useful' approach that led it to ignore prerequisite safety and security costs."[42] Securus argues that "[m]easures that 'are required by state correctional institutions as a condition of doing business' are 'condition[s] precedent' to IPCS providers' services, and thus must be part of the calculus in determining 'fair compensation.'"[43] We disagree.

12. In the *2024 IPCS Order*, the Commission observed that IPCS providers may be required to make site commission payments to correctional institutions that fund various safety and security measures.[44] To the extent that IPCS providers were required to pay site commissions, "the D.C. Circuit's decision in *GTL v. FCC* suggests that the fair compensation requirement in section 276(b)(1)(A) requires that IPCS providers be able to recover those payments through IPCS rates and charges."[45] The Commission in the *2024 IPCS Order* recognized that site commissions interfere with its ability to implement the dual statutory requirements of determining just and reasonable rates and charges and fair compensation for IPCS providers.[46] To remedy this problem, the Commission precluded providers from paying site commissions altogether, thereby eliminating "the factual predicate—the payment of site commissions as a condition precedent to providing IPCS—which led the court in *GTL* to hold that site commissions could not be wholly excluded from the Commission's ratemaking calculus."[47] The Commission also prohibited IPCS providers from "enter[ing] into a contract with a correctional facility for the provision of IPCS where, as a condition precedent to providing IPCS, the provider must agree to pay a site commission of any kind."[48] In eliminating site commission payments, including those that may fund various safety and security measures, the Commission "best ensure[d] fair compensation and just and reasonable rates and charges for IPCS."[49]

13. Second, Securus argues that the Commission "misapplies" the used and useful standard, which Securus argues "was created for rate-of-return regulation for services sold to end-user customers and cannot be applied to IPCS."[50] Securus also asserts that the Commission's application of the used and useful framework "ignores Congress's requirement that the Commission consider necessary safety and

[41] *Id.* at 120, para. 216 n.765; *see also 2024 IPCS Order* at 111, para. 199 ("Most critically, providers' total reported costs across the industry for 2022 exceed their total reported revenues by approximately $219 million. The existence of such a disparity, let alone its magnitude, strongly suggests that reported costs are inflated, given that rational firms are profit seeking."). And in the event providers are unable to recover their used and useful IPCS costs, the Commission reminded providers that they would be free to seek a waiver of the Commission's rules. *See, e.g.*, *2024 IPCS Order* at 120 n.765; *see also 2024 IPCS Order* at 250-53, paras. 475-81 (describing the waiver process).

[42] Securus Stay Petition at 7.

[43] *Id.* (quoting *GTL v. FCC*, 866 F.3d at 413).

[44] *2024 IPCS Order* at 137, para. 251 & n.873; *id.* at 204, para. 382.

[45] *Id.* at 158, para. 296.

[46] *Id.*

[47] *Id.* at 165, para. 307.

[48] *Id.* at 175, para. 331.

[49] *2024 IPCS Order* at 175, para. 332.

[50] Securus Stay Petition at 8.

security costs *on top of* the Commission's pre-existing obligation to ensure just and reasonable rates."[51] The Commission considered and rejected these same arguments in the *2024 IPCS Order*. Addressing such assertions in the *2024 IPCS Order*, the Commission observed that the used and useful framework "remains the most practical and effective method for determining the costs providers and facilities reasonably incur in providing IPCS."[52]

14. We also disagree with Securus that the Commission ignored the Martha Wright-Reed Act's directive to consider necessary safety and security measures in determining just and reasonable rates and charges for IPCS.[53] As the Commission explained, "[w]hile section 3(b)(2) of the Martha Wright-Reed Act requires [the Commission] to 'consider' certain safety and security costs when determining just and reasonable rates . . . [the Commission] employ[s] the 'used and useful' framework to determine what costs and expenses can be recovered through just and reasonable IPCS rates."[54] Thus, the Commission's "consideration of safety and security costs as required by section 3(b)(2)—and with respect to other safety and security costs raised in the record—occurs within the context of that 'used and useful' analysis."[55] And that is precisely what the Commission did in the *2024 IPCS Order* in considering and evaluating "all of the arguably recoverable costs in the record, including costs associated with safety and security measures, to distinguish those costs that should be included in [the Commission's] ratemaking calculus from those that should not."[56] In doing so, the Commission arrived at a "middle ground that properly balances 'the equitable principle that public utilities must be compensated for the use of their property in providing service to the public' with the '[e]qually central . . . equitable principle that ratepayers may not fairly be forced to pay a return except on investment which can be shown directly to benefit them.'"[57]

15. Third, Securus contends that "the Commission applied the used and useful standard arbitrarily and capriciously" by, for example, excluding recovery for safety and security measures that benefit consumers and allowing recovery for measures that do not benefit consumers.[58] This argument ignores the context in which the Commission's evaluation of safety and security measures took place. The Commission acknowledged that the categories of safety and security costs reported in the 2023 Mandatory Data Collection were "imprecise."[59] It also acknowledged that "providers' allocations of their safety and security costs are at times inexact among these categories."[60] To account for the imperfect nature of the data, the Commission evaluated the categories of safety and security measures "based on the nature of the preponderance of tasks or functions within each category. If the predominant use of tasks and functions within a category [were] not used and useful, the entire category [was] treated as not used and useful."[61] The Commission also adjusted its rate setting within the zones of reasonableness "to

[51] *Id.* (emphasis in original).

[52] *2024 IPCS Order* at 27, para. 44; Public Interest Parties Opposition at 4; *see also, e.g.*, *2024 IPCS Order* at 186-204, paras. 355-82 (discussing the relevant statutory considerations in the specific context of reported safety and security costs).

[53] Martha Wright-Reed Act § 3(b)(2).

[54] *2024 IPCS Order* at 195, para. 370.

[55] *Id.*

[56] *Id.* at 208, para. 389.

[57] *Id.* at 208, para. 389 (quoting *American Telephone and Telegraph Company The Associated Bell System Companies*, Docket No. 19129, Phase II Final Decision and Order, 64 F.C.C.2d 1, 38, para. 111 (1977).

[58] Securus Stay Petition at 8.

[59] *2024 IPCS Order* at 205-06, para. 385.

[60] *Id.*

[61] *Id.*

develop overall rate caps that recognize the imprecision of both the seven defined safety and security categories in the 2023 Mandatory Data Collection, and the inconsistencies in the narrative descriptions and varied allocations made in provider responses."[62] These adjustments provided the Commission with a workable methodology to conduct a thorough and orderly review of the safety and security cost data in the record under the used and useful standard.

16. Because the Commission evaluated the safety and security cost data based on the preponderance of tasks within each category, it is not surprising that, in some cases, such as for law enforcement support services, some functions within a given category might benefit consumers.[63] But that does not mean they are necessarily recoverable under the used and useful standard when evaluated as a whole. Indeed, in the case of law enforcement support services, the Commission noted that certain tasks, while potentially beneficial, "do not facilitate the provision of IPCS and are therefore not used and useful in the provision of IPCS."[64] Conversely, in other circumstances there may be categories that have no direct benefit to the consumer but that the Commission concluded were used and useful and therefore recoverable.[65] Should a given provider be able to demonstrate in a given instance that a particular safety and security cost not generally included in the rate caps is, in fact, used and useful, it is free to seek a waiver dealing with its special circumstances.[66]

17. Finally, Securus argues that "the Order's finding that IPCS providers must comply with CALEA and its determination of which safety and security measures are necessary reversed decades of contrary practice with no reasoned explanation."[67] Securus is mistaken. Regarding CALEA, the Commission concluded in the *2024 IPCS Order* that "[c]ontrary to Securus's claim that [the Commission has] departed from Commission precedent without proper notice, [the Commission is] not modifying such precedent."[68] IPCS providers that offer both payphone services and audio communications services, including telecommunications services and VoIP, have been and will remain subject to CALEA requirements.[69]

18. The Commission also has not reversed practice or precedent without explanation in connection with its determination of which safety and security measures are necessary for IPCS. In the *2024 IPCS Order*, the Commission determined that while it has "historically recognized that safety and security measures were, at least in some sense, inherent in providing communications services for incarcerated people, it has been clear from the outset that only certain safety and security costs should be recovered through regulated rates."[70] Until the *2024 IPCS Order*, however, the Commission had not

[62] *Id.* at 206, para. 387.

[63] *See id.* at 212, para. 394 (recognizing that "some functions in this category may provide a benefit to incarcerated people").

[64] *Id.* at 213, para. 394.

[65] In the case of CALEA compliance measures, the Commission was "not persuaded that the functionalities associated with CALEA compliance generally would directly benefit IPCS users" but concluded that they are used and useful in the provision of IPCS primarily because "without CALEA compliance, IPCS providers could not offer their audio and certain advanced communications services." *Id.* at 209, para. 391.

[66] *Id.* at 205-06, para. 385 n.1384; *see also id*. at 124, para. 222 n.787 (explaining how the Commission has relied on similar approaches to identifying recoverable costs in other contexts in the past).

[67] Securus Stay Petition at 9.

[68] *2024 IPCS Order* at 210, para. 391 n.1402.

[69] *See id.*

[70] *Id.* at 198, para. 375.

decided which safety and security measure costs should be recoverable in IPCS rates.[71] The Commission therefore rejected Securus's "suggestion that 'Commission precedent is crystal clear that the costs of safety and security measures such as recording, monitoring, biometrics, and related services are inherent in the provision of communications services to the incarcerated.'"[72] And, as the Commission noted, "[t]he mandate in section 276(b)(1)(A) that [the Commission] ensure just and reasonable rates for consumers, in conjunction with the Martha Wright-Reed Act's requirements that [the Commission] consider safety and security costs 'necessary' to the provision of IPCS, requires that [the Commission] reevaluate this precedent at any rate."[73]

19. *Reliance on Total Costs.* In determining the upper and lower bounds of its zones of reasonableness, the Commission calculated industry average costs per minute by dividing total costs (the sum of the costs of both billed and unbilled minutes) by total minutes, based on its finding that this approach more accurately reflected providers' average costs per minute than an approach that used billed minutes as the denominator.[74] Securus maintains that in so doing, the Commission departed from its prior practice without sufficient explanation.[75] Securus argues that the Commission's reliance on total minutes "violates the fairly compensated requirement," and guaranteed that IPCS providers would be unable to fully recover their costs of providing IPCS.[76]

20. The Commission explained in the *2024 IPCS Order* that "[t]he use of both billed and unbilled minutes is an improvement from the *2021 ICS Order*, which divided expenses by paid minutes, and better reflects the cost of actual minutes."[77] Securus's arguments ignore the adverse effects rate caps based on only billed minutes would have on IPCS consumers, as well as the variability of unbilled minutes practices now and in the future.[78] As an initial matter, the industry-wide average cost per minute of providing IPCS equals total costs divided by total minutes, a mathematical fact that Securus does not appear to dispute. Instead, Securus contends, in effect, that the Commission should have inflated that average in recognition of the possibility that, once the rate caps are implemented, IPCS providers may continue to provide incarcerated people with "free" minutes, either in response to correctional institution requirements or at their volition. But, as the Commission explained, "the ratio of billed minutes to unbilled minutes varies across facilities, and rate caps based on the average cost of a billed minute would allow over recovery of costs, and therefore unreasonably high rates, in facilities" with relatively high ratios, "while allowing under-recovery in other facilities."[79] Given this, the Commission correctly concluded that Securus's approach would result in the Commission "effectively requiring incarcerated people who receive relatively few free minutes to subsidize other users."[80] Further, as the Commission recognized, "the relative proportions of billed to unbilled minutes [might] shift" once the rate caps are

[71] *Id.* Additionally, the "relevant statutory language did not dictate the inclusion of any particular safety and security costs." Stephen Raher Opposition at 3.

[72] *2024 IPCS Order* at 198-99, para. 375 (quoting Securus Technologies, LLC Comments, WC Docket Nos. 23-62 and 12-375, at iii (filed May 8, 2023)).

[73] *2024 IPCS Order* at 199, para. 375.

[74] *Id.* at 107, para. 190.

[75] Securus Stay Petition at 10.

[76] *Id.* at 9-10.

[77] *2024 IPCS Order* Appx. E at 378, para. 4.

[78] *2024 IPCS Order* Appx. E at 378, para. 4 n.8.

[79] *Id.*

[80] *Id.*

implemented.[81] If that were to happen, rate caps calculated by dividing total costs by billed minutes "would become outdated."[82]

21. Correctional institutions currently require many IPCS providers to provide certain types of communications (e.g., calls to public defenders) that, from the incarcerated person's perspective, are "free."[83] Securus argues that the Commission's failure to set rate caps at levels that provide for the recovery of the costs of these communications violates the fairly compensated requirement.[84] But under the rules adopted in the *2024 IPCS Order*, nothing requires IPCS providers to bear the costs of such calls themselves at the behest of correctional institutions.[85] Indeed, providers may enter into contractual arrangements under which a correctional authority pays a provider for such calls.[86] And, if providers choose to allow incarcerated people to make additional communications without charging them or those they communicate with, that approach is fully consistent with the Commission's compensation plan for IPCS, which sets rate caps rather than prescribing rates that providers must charge and thus allows providers to charge rates at or below the caps.[87] Rate caps set in anticipation of such voluntary action by providers would be unreasonably high.

22. *Other Methodology Issues*. Securus claims "the Commission made several additional methodological errors in setting its zone of reasonableness."[88] It concludes that "[e]ach of these errors (and others) further drove down the boundaries of the zone of reasonableness caps to confiscatory levels and further demonstrates that the Commission's Order is both arbitrary and capricious and contrary to law."[89] As an initial matter, setting the upper and lower bounds of the zones of reasonableness for IPCS rate caps, while part of the rate setting process, does not set rates and therefore cannot be considered, by itself, to be confiscatory. These bounds and the zones they prescribe are intermediary steps in the rate cap setting process and function as only several of the many parameters the Commission used to make its final determinations of IPCS rate caps.

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[81] *Id.*

[82] *Id.*; Public Interest Parties Opposition at 5. Given these considerations, the Commission correctly departed from the approach it have followed in the *2021 ICS Order*. Additionally, as the Public Interest Parties argue, "the number of unbilled minutes is {[ ]}, and would have at most only *de minimis* impact on Securus and other providers." *Id.* For example, based on the Brattle Group's analysis, the total reported unbilled audio minutes as a percentage of total audio minutes is approximately {[ ]} for Securus and approximately {[ ]} for all providers. *Id.* Thus, "excluding unbilled minutes in the calculation of the rates is unlikely to materially impact the actual rate caps." *Id.* Material set off by double brackets {[ ]} is confidential and is redacted from the public version of this document.

[83] *2024 IPCS Order* Appx. E at 378-79, para. 4 nn.8-9.

[84] Securus Stay Petition at 10.

[85] *See* 47 CFR § 64.6015 (prohibiting site commissions); *id*. § 64.6000 (site commission "means any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Incarcerated People's Communications Services or affiliate of a Provider of Incarcerated People's Communications Services may pay, give, donate, or otherwise provide to an entity that operates a Correctional Institution, an entity with which the Provider of Incarcerated People's Communications Services enter into an agreement to provide Incarcerated People's Communications Services, a governmental agency that oversees a Correctional Facility, the city, county, or state where a Facility is located, or an agent of any such Facility").

[86] *2024 IPCS Order* Appx. E at 379, para. 4 n.9.

[87] *Id.* at 130, para. 237 (declining to preempt state or local laws and regulations requiring rates lower than the caps the Commission adopted in the *2024 IPCS Order*).

[88] Securus Stay Petition at 10.

[89] *Id.* at 11.

23. *Inflation*. Securus mistakenly claims that the Commission "refused to account for the impact of inflation when setting its rate caps."[90] The Commission expressly acknowledged accounting for inflation as one of a number of factors used in setting its rate caps. It stated that "[s]etting rate caps above the lower bounds will help to account for . . . any inflation not offset by productivity growth."[91] In addition, the Commission acknowledged advocacy in the record in favor of incorporating an inflation factor in its rate caps but found that an inflation factor was not appropriate.[92] It noted that commenters favoring the use of an inflation factor "generally fail to acknowledge the role that productivity increases play in offsetting inflation."[93] As a point of comparison, the Commission acknowledged its findings in a separate proceeding for price cap carriers that inflation and productivity gains generally tended to offset each other.[94] Finally, the Commission noted that inflation in the telecommunications industry was generally lower than in the economy as a whole.[95]

24. *Compliance Costs*. Securus asserts that the Commission "excluded the costs of complying with its new rules from its rate cap calculations."[96] While the Commission stated that it generally excluded one-time implementation costs as being inappropriate for inclusion in permanent rate caps,[97] it nonetheless included compliance costs as a factor in its rate setting, contrary to Securus' argument. Specifically, in deciding to set rate caps above the lower bounds of the zones of reasonableness, it factored into its calculations the possibility that providers' costs of implementing the Commission's actions "may, on balance, exceed their ongoing savings from" implementing Commission rules that lower their costs.[98] The Commission took "the conservative approach of setting [its] rates somewhat above the lower bounds to account for" these and other costs providers may incur.[99]

25. *Omitting Facility Costs From Lower Bounds*. Securus claims that the Commission erred in "omitt[ing] all facility costs from the lower bound," which it claims contributed to driving down the

[90] *Id.*

[91] *2024 IPCS Order* at 118-19, para. 213 ("Setting rate caps above the lower bounds will help to account for the possibility that the adjustments we applied to providers' reported costs to obtain the lower bound estimates were too aggressive, to account for the possibility that aspects of our evaluation of used and useful costs to provide IPCS may be inaccurate to some degree, to account for any inflation not offset by productivity growth, and to ensure that providers will be better able to recover their costs of providing TRS.").

[92] *Id.* at 67-68, para. 129.

[93] *Id.* at 68, para. 129.

[94] *Id.* at 68, para. 129 n.433. *See Business Data Services in an Internet Protocol Environment, et al*., WC Docket No. 16-143 et al., Report and Order, 32 FCC Rcd 3459, 3559, para. 244 (2017), remanded in part sub nom., *Citizens Telecomms. Co. of Minn, LLC v. FCC*, 901 F.3d 991 (2018) (finding, in a price cap setting, that productivity gains over a period of 12 years "were almost exactly offset by inflation").

[95] *See 2024 IPCS Order* at 68, para. 129 n.431 ("Over the last decade, the average annual change of the Telecommunications PPI was 0.7%, as compared to the average annual change of the broader GDP Deflator over the same time period of 2.6%."); *see also* Letter from Chérie R. Kiser, Cahill Gordon & Reindel LLP, Counsel to Global Tel*Link Corporation d/b/a ViaPath Technologies, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 23-61 and 12-375, Attach., Report in Support of *Ex Parte* Presentation of Global Tel*Link Corp., at 26-28 (filed June 13, 2024) (showing that, historically, growth in the Telecommunications PPI has been lower, on average, than general measures of inflation); Public Interest Parties Opposition at 6 (noting that "[p]ermitted costs in the telecommunications industry have either declined or been stable for a significant period, suggesting it is not clear whether an adjustment for inflation would increase or decrease rates").

[96] Securus Stay Petition at 11.

[97] *2024 IPCS Order* at 119, para. 214.

[98] *Id.*

[99] *Id.*

zones of reasonableness "to confiscatory levels."[100] Here again, Securus focuses only on an intermediary step in the Commission's rate setting process—the lower bounds. While the Commission appropriately excluded any estimate of facility costs from the lower bound of the zone of reasonableness given the absence of reliable facility cost data,[101] Securus fails to acknowledge that the Commission included a generous estimate of facility costs in the upper bound.[102] The Commission observed that "[t]his balancing reflects our recognition, on the one hand, that correctional facilities may well incur used and useful costs in allowing access to IPCS, with the absence of any basis in the record that would enable us to estimate those costs with any degree of precision."[103] The Commission concluded that "[g]iven the likelihood that the estimate we accepted for the upper bounds is overstated, we find that using a lower estimate of these costs at the lower bounds minimizes reliance on flawed data while we still provide for the opportunity to recover costs for providing IPCS through our process for determining rate caps."[104] Ultimately, contrary to Securus's assertions, the Commission incorporated facility costs into its final rate caps by utilizing facility costs as one of several factors in driving its final rate caps above the lower bounds.[105]

26. *Cost of Capital*. Securus contends that the Commission "adopted too low a cost of capital for its lower bound that ignored record evidence of the actual costs of capital," which it claims contributed to driving down the lower bounds of the zones of reasonableness to "confiscatory levels."[106] Securus was one of two IPCS providers that sought to demonstrate a higher cost of capital than the default cost of capital most IPCS providers used in their data submissions.[107] The Commission conducted a detailed analysis of Securus's claims for its cost of capital and found that certain aspects of its cost of capital analysis were flawed.[108] It found that "Securus relies on a number of aggressive and insufficiently justified assumptions to develop its [cost of capital] estimate."[109] The Commission concluded that Securus "failed to meet [its] burden of justifying the alternative [cost of capital]" it proposed and therefore determined that "the most reasonable approach for factoring the [cost of capital] into our lower bounds is to apply the default [cost of capital] figure."[110] While Securus claims that the cost of capital

[100] Securus Stay Petition at 11.

[101] *2024 IPCS Order* at 92, para. 166 ("Despite these numerous and repeated public attempts to obtain relevant data, commenters have neither provided updated facility cost data nor proposed a methodology that would allow the Commission to accurately estimate used and useful correctional facility costs.").

[102] *Id.* at 93, para. 168 (conceding that "even the 2021 data analysis suggested that the $0.02 per minute interim allowance might have been too high"). *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, 36 FCC Rcd 9519, 9579-80, 9755-56, paras. 135-36 & Appx. H (2021) (*2021 ICS Order*).

[103] *2024 IPCS Order* at 93, para. 168.

[104] *Id.* at 111, para. 201; *see also, e.g.*, *id*. at 121, para. 218 (discussing the Commission's conclusion "that our rate caps do not threaten providers' financial integrity such that they could be considered confiscatory").

[105] *Id.* at 118-19, para. 214 (recognizing "several specific factors that guide us to select rate caps above our lower bounds" including that "facilities may incur certain costs that are used and useful in the provision of IPCS"). And in the unlikely event that a given provider can demonstrate that the adopted rate caps would result in confiscatory rates under its specific circumstance, it can seek a waiver.

[106] Securus Stay Petition at 11.

[107] *See, e.g.*, *2024 IPCS Order* Appx. I at 410-14, paras. 3-37.

[108] *Id.*

[109] *Id.* at 426, para. 37.

[110] *2024 IPCS Order* at 112-13, para. 203; Public Interest Parties Opposition at 6 (arguing that "Securus has not provided any evidence that the riskiness of IPCS is greater than that of the telecommunications sector in general to justify using a cost of capital value that is higher than the standard" cost of capital).

adopted by the Commission was too low, it fails to explain why the Commission's decision was not reasonable or provide any additional information or analysis that would rebut the Commission's findings.

27. *Use of Brattle Group Model as a Validator*. Securus also claims that the Commission's limited use of the results of the Brattle Group Model represented a methodological error in setting its IPCS rate caps.[111] The Brattle Group developed and introduced in the record a model estimating the costs of providing IPCS.[112] The "model carrier approach . . . set rates by reference to general telecommunications industry-average costs for non-IPCS calls" and "adjust[ed] for costs that may be particular to the provision of service in incarceration facilities."[113] The Commission considered the model but "decline[d] to adopt a model carrier approach to establish the rates for either audio or video IPCS."[114] Instead, the Commission analyzed the model as one of three different sources to validate its lower bounds.[115] The limited reliance the Commission placed on the model as one of several sources to validate its lower bounds does not rise to the level of a methodological flaw that would justify a stay.[116] This is particularly true given the Commission's assessment that the validation provided by the Brattle Group model was treated as merely supportive—rather than dispositive—to the Commission's lower bound determination, which was itself a step removed from the actual establishment of rate caps above that lower bound.

28. *Compliance Date for Ancillary Service Charges*. Securus argues that the *2024 IPCS Order* "is ambiguous about when its prohibition of separate fees for ancillary services takes effect."[117] It asks "the Commission [to] clarify . . . the compliance deadline for the elimination of ancillary service charges.[118] On the contrary, the Commission in the *2024 IPCS Order* makes clear that the prohibition on separate fees for ancillary services takes effect 60 days after notice in the Federal Register. Securus even appears to concede this lack of ambiguity when it correctly resolves its own uncertainty, stating elsewhere in its Petition that "the Order unambiguously provides an extended compliance date only for its new rate caps and its elimination of site commissions" and further states that "the Order is clear that other changes – except those subject to OMB review under the Paperwork Reduction Act – go into effect on

[111] Securus Stay Petition at 11.

[112] The initial model was filed on July 12, 2023 and a revised model was filed on February 11, 2024. *See* Wright Petitioners et al. Reply, WC Docket Nos. 23-62 and 12-375, Appx. A, Brattle Report (filed July 12, 2023); Letter from Gregory R. Capobianco, Jenner & Block, LLP, Counsel to Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 23-62 and 12-375, Appx. A, Brattle Report (filed Feb. 11, 2024).

[113] *2024 IPCS Order* at 65, para. 126. Securus also claims that the "Brattle Group Model [] purported to derive an 'industry' model relying heavily on retail rates of resellers of *a single European company*." Securus Stay Petition at 11 (emphasis in original). Securus, however, does not claim that the wide range of rates the Brattle Group used to estimate VoIP costs are not representative of per minute costs generally in the VoIP industry. *See* Letter from Gregory R. Capobianco, Jenner & Block, LLP, Counsel to the Wright Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 23-62 and 12-375, Appx. A, Brattle Group, Response to the FCC's Implementation of the Martha Wright-Reed Act, at III-7, fig. 1 (filed July 12, 2024) (Brattle July 12, 2024 Report) (showing a range of cost per minute of 64 VoIP providers between $0.000 and $0.024). Even at the high end of that range, the Brattle Group Model would generate cost estimates that would validate the Commission's audio IPCS rate caps.

[114] *2024 IPCS Order* at 65, para. 126.

[115] *Id.* Appx. I at 425-28, paras. 69-79.

[116] *Id.* at 428, para. 79 ("Staff acknowledge that the model carrier is not a substitute for a fully distributed cost analysis of provider investments and expenses." . . . However, staff are encouraged that the benchmark audio IPCS rates estimated by the revised model align closely with the lower bounds we have established, which helps to validate both our lower bound estimates and the rate caps that we ultimately adopt.").

[117] Securus Stay Petition at 11.

[118] *Id.* at 12.

November 19, 2024."[119] The *2024 IPCS Order* is clear: the "reforms eliminating site commission and [the] new permanent audio and interim video rate caps will take effect 60 days after notice of them is published in the Federal Register, but compliance with those reforms will be required on a staggered basis."[120] It further provides that "all other rules and requirements adopted in this Order also will take effect 60 days after notice is published in the Federal Register."[121] The rules adopted by the Commission in the Order are equally clear regarding the applicability of compliance deadlines. The rules addressing rate caps and site commissions include provisions imposing different compliance deadlines depending on the status of the contract, the size of facility, and whether site commissions are legally mandated[122] The rule prohibiting ancillary service charges does not.[123]

29. Securus asserts that "the Order fails to explain why this one aspect of its rate structure reform should take effect earlier than the rest of it."[124] Securus is incorrect. As the Commission explained in the *2024 IPCS Order*, the compliance dates for the rate caps and the site commission prohibition as opposed to other reforms were deferred because "[t]hese timeframes recognize that, as a general matter, IPCS providers, governmental officials, and correctional officials may need additional time . . . to renegotiate contracts" and, in the case of legally mandated site commissions, "more time may be needed to accommodate the legislative process to amend state or local laws and regulations that currently require site commission payments."[125] Securus claims that it "detailed the difficulties in complying with the many operational changes that the Order imposes on IPCS" but fails to cite any source detailing its alleged challenges in implementing the changes to the ancillary service rules.[126] Apart from citing revenues it will forego, Securus makes no claim that it would experience any specific operational difficulties eliminating ancillary service charges. It also does not claim that any State or local law mandates ancillary service charges. In short, the rationales for extending the compliance dates for rate caps and the site commission prohibition generally do not apply to eliminating ancillary service charges.[127] Securus provides no rational basis to upend the Commission's previous conclusion that it does "not view these other reforms as involving similar complexities such that a longer effective date period is necessary."[128]

30. Securus thus has failed to establish that its challenges to the Commission's actions are likely to succeed on the merits.

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[119] *Id.* at 11; *see also* Stephen Raher Opposition at 3 (noting that the effective date of the Commission's prohibition of separate ancillary service charges is "not ambiguous").

[120] *2024 IPCS Order* at 304, para. 587.

[121] *Id.* at 308, para. 595.

[122] 47 CFR §§ 64.6010(d), 6015(a)(2), (3).

[123] 47 CFR § 64.6020.

[124] Securus Stay Petition at 12.

[125] *2024 IPCS Order* at 305, para. 588.

[126] Securus Stay Petition at 12.

[127] Securus claims that it {["
."]} *Id.* at 14. The Commission determined that "the compliance dates we adopt for our new audio and video rate caps and site commission reforms "'strike[] a reasonable balance between []' . . . the need for expedited reform contemplated by the Martha Wright-Reed Act with the need to allow IPCS providers and correctional facilities sufficient time to adapt to our rules." *2024 IPCS Order* at 305, para. 589. Extending compliance dates for implementing the Commission's ancillary service charge reforms did not represent the same balance of interests. The Commission did not consider ceasing to assess ancillary service charges on consumers to fall outside of the normal scope of a change of law provision.

[128] *2024 IPCS Order* at 308, para. 595.

B. Securus Fails to Show It Will Suffer Irreparable Harm

31. Securus likewise fails to demonstrate that it would suffer imminent and irreparable harm without a stay. To establish irreparable harm, a petitioner must show that it will suffer injury that is "'both certain and great,' 'actual and not theoretical,' 'beyond remediation,' and 'of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.'"[129] In doing so, the petitioner must present actual evidence to "substantiate [its] claim" of injury.[130] "'Bare allegations of what is likely to occur are of no value' under this factor, because we 'must decide whether the harm will *in fact* occur.'"[131] Securus has not met its burden to make and substantiate these showings.[132]

32. Securus alleges it will "suffer {[ ]}" if the *2024 IPCS Order* is not stayed, and that the prohibition on ancillary service charges will amount to a loss of "{[ ]}"[133] Securus also asserts that even if the prohibition on ancillary service charges were to take effect beginning January 2025, it would nonetheless {[ ]}[134] We find Securus has not substantiated these contentions. To the contrary, as described in the *2024 IPCS Order*, the new rate caps include recovery of all costs of providing ancillary services.[135] Claims of lost revenue are therefore misleading; in the long term, the Commission's IPCS rate caps allow providers to recover all ancillary service charge costs as part of their per-minute charges.[136] Further, to the extent that Securus will not have fully instituted the new rate caps, they will continue to charge above-cost rates in the interim.[137] We therefore find claims of such ongoing losses meritless, and find no irreparable harm stemming from Securus's purported lost revenues.

33. In addition, Securus speculates that it "{[ ]}" to account for the prohibition of ancillary service charges.[138] Again, Securus provides no support for this assertion, demonstrating neither the necessity of renegotiation nor the scope of affected contracts. As the Commission observed in the *2024 IPCS Order*, the record suggests that "providers can

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[129] *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)); *see Ligado Stay Denial Order*, 36 FCC Rcd at 1267, para. 10.

[130] *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[131] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, CC Docket No. 96-98, 11 FCC Rcd 11754, 11757, para. 8 (1996) (quoting *Wis. Gas*, 758 F.2d at 674).

[132] We note that in alleging irreparable harm, Securus does not claim harm specifically resulting from the *2024 IPCS Order on Reconsideration* nor the *2024 IPCS Notice* . *See generally* Securus Stay Petition at 13-17.

[133] Securus Stay Petition at 2, 14.

[134] *See id.* at 14; *see also* Dougherty Declaration at 3, para. 10. Securus offers little to no concrete evidence to support the increasing scale of losses which it claims, and it ignores relief from the associated costs. *See* Public Interest Parties Opposition at 7 ("[E]conomic loss ordinarily 'does not, in and of itself, constitute irreparable harm.' . . . Securus has failed to provide any evidence that the various types of revenue loss it claims it would suffer could not be recovered through subsequent legal action." (quoting *In re NTE Conn., LLC*, 26 F.4th 990, 990–91 (D.C. Cir. 2022)).

[135] *See 2024 IPCS Order*, at 68-75, paras. 130-37 (describing ancillary services costs as folded into the rate cap calculation).

[136] *See 2024 IPCS Order*, at 220-29, paras. 408-26.

[137] And insofar as the prohibition on separate charges for ancillary services takes effect before the new rate caps, the new rate caps are in all cases *lower* than the existing rate caps. *See id.* at 3-4, para. 3. Thus, there likewise could be no financial harm while the existing rate caps remain in place.

[138] Securus Stay Petition at 14.

amend their contracts very quick[l]y, or even immediately, following a new statute or regulation," undercutting the purported harm.[139] Securus then stacks speculation upon speculation, asserting that its "{[ ]}" and would be provided "{[ ]}"[140] Again, nothing in the record suggests the same and we reject such assertions as speculative and conclusory.

34. Securus similarly alleges that it will "suffer additional losses when the rate caps begin to apply," up to {[ ]}. However, lower rates are inherently part of rate regulation and entirely consistent with the intent of the Martha Wright-Reed Act to make IPCS more affordable for incarcerated persons and their loved ones.[141] Furthermore, Securus fails to take into account the likelihood that demand for IPCS will increase as a result of the newly adopted rate caps and consequently reduce the average per-minute costs it observes.[142]

35. Securus also claims that it will face "sizeable compliance costs" as a consequence of the reforms adopted in the *2024 IPCS Order* and that the Commission "does not account for" these costs.[143] Securus fails to acknowledge the Commission's consideration of such costs when establishing its rate caps. In the *2024 IPCS Order*, the Commission "exclude[d] one-time implementation costs" when calculating the lower bounds for its rate caps, explaining that one-time costs "are inappropriate for inclusion in permanent rate caps."[144] The Commission nonetheless recognized that "providers' ongoing costs of implementing this Report and Order may, on balance, exceed their ongoing savings" under the new rules ("from, for example, not having to process site commission payments").[145] The Commission accordingly took "the conservative approach of setting [the] rate[] caps somewhat above the lower bounds."[146] Securus has not shown that it cannot recover its asserted compliance costs within the cushion allowed in the Commission's rate caps. Thus, Securus fails to demonstrate that that these costs are "beyond remediation."

36. Securus further alleges that {

]}[147] We find

[139] In fact, record evidence instead suggests that renegotiation may be significantly less burdensome. *See 2024 IPCS Order* at 74, para. 137 n.466 (suggesting that contact renegotiation can be completed in a 30-day transition period, and finding arguments of "thousands of hours" of renegotiation unpersuasive (internal citation and quotation omitted)).

[140] Securus Stay Petition at 14.

[141] *See, e.g.*, *2024 IPCS Order* at 16, para. 26 n.96; *id.* at 20-21, para. 31 & n.123.

[142] *See, e.g.*, *id.* at 120-21, 301, paras. 217, 581. The *2024 IPCS Order* cited the Commission's previous estimate of demand elasticity for audio calling services from the *2021 ICS Order* and stated that it "continue[s] to rely on this demand elasticity estimate." *Id.* at 301, para. 581. In 2021, the Commission relied in part on estimates submitted by Securus and its consultant, FTI Consulting, Inc. *See 2021 ICS Order*, 36 FCC Rcd at 9608, para. 200 & n.610.

[143] Securus Stay Petition at 15 (addressing costs related to {

]}). *But see* Public Interest Parties Opposition at 7 (arguing that "Securus fails to provide any evidence to support the compliance costs its describes").

[144] *2024 IPCS Order* at 119, para. 214.

[145] *See id.*; *see also id.* at 108-09, 118-19, paras. 193, 213.

[146] *Id.* at 119, para. 214.

[147] Securus Stay Petition at 16; *see also* Dougherty Declaration at 5-6, paras. 18-22 (claiming that Securus {[

]}).

(continued….)

Securus has not substantiated this allegation. The *2023 IPCS Notice* specifically proposed both of the reforms in question thereby putting Securus on notice that such reforms were under consideration.[148] In particular, Securus should have prepared for the possibility of a per-minute video rate structure, especially given the Commission's historical prohibition on any pricing structure other than per-minute rates.[149] In sum, Securus has been on notice since March 2023, if not earlier, that these reforms might be adopted.[150] Securus also fails to acknowledge the availability of the waiver process, which seems particularly applicable to these concerns, given the variability in the relevance of the reforms in question to the practices of the industry as a whole.[151]

37. Based on the foregoing, we therefore conclude that Securus has failed to demonstrate any imminent, actual irreparable harm resulting from the *Order*.[152]

(Continued from previous page)
Securus further alleges that, in light of this compliance challenge, they will {[.]} Securus Stay Petition at 15.

[148] *See 2023 IPCS Notice*, 38 FCC Rcd at 2688, para. 46 (proposing that providers be required to offer video communications services at per-minute rates), 2698-99, paras. 75-76 (observing that "[w]ith the addition of this new category of services to the definition of 'advanced communications services,' some of these services, as well as some equipment used for such services, regardless of technology used, may be newly subject to accessibility requirements under section 716 of the Communications Act," and proposing to amend the Part 14 definition to conform with the statutory definition).

[149] The disability access requirements identified by Securus are primarily concerned with codifying the expanded definition of "advanced communications services" established by the Martha Wright-Reed Act into the Commission's Part 14 rules. *See 2024 IPCS Order* at 253-55, paras. 483-85. Indeed, as the Commission observed, "[t]he record does not indicate to what extent, if at all, there are other audio and video communication services offered by IPCS providers that were not previously included in the definitions of 'telecommunications service' or 'advanced communications services,' and that, accordingly, are newly subject to accessibility requirements under section 716 of the Communications Act and Part 14 of our rules." *Id.* at 255, para. 485. Securus fails to explicate whether, let alone the extent to which, their services and equipment are newly subject to these accessibility requirements.

[150] Securus previously suggested that the reforms in question would require 12 months to implement. *See* Letter from Michael H. Pryor, Brownstein Hyatt Farber Schreck, LLP, Counsel to Securus Technologies, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 23-62 and 12-375, at 27-29 (filed July 11, 2024). By November 19, 2024, over 19 months will have elapsed since the publication of the *2023 IPCS Notice*, allowing Securus ample time to begin preparing for the contemplated reforms. Indeed, Securus seems to have actively contemplated the adoption of per-minute rates for video communications in its own comments in this proceeding. *See, e.g.*, Letter from Michael H. Pryor, Brownstein Hyatt Farber Schreck, LLP, Counsel to Securus Technologies, LLC, and Marcus W. Trathen and Christopher B. Dodd, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Counsel to Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 23-62 and 12-375, Attach. B, Joint Report by FTI Consultants and Wood and Wood, at 29-30, paras. 56-57 (filed June 10, 2024) (addressing the interquartile range (IQR) methodology applied by Securus's consultant – the approach recommended by Securus for determining rate caps – which derived per-minute video calling rates from providers' cost data).

[151] *See, e.g.*, *2024 IPCS Order* at 102, para. 183 n.653 (observing that Securus "does not quantify or otherwise substantiate" its claim that the new rules impose significant and new operational obligations, "nor does it demonstrate that the waiver process would be inadequate to address any unusual implementation costs that theoretically might arise for a given provider"); *id.* at 237-38, para. 443 (recognizing that "some providers have priced video services at flat rates, and others have priced video services by the minute").

[152] Securus argues that without a stay, it will "lose its ability to challenge the Order's 60-day compliance date." Securus Stay Petition at 16. Securus does not explain how legal challenge will be impossible, and we decline to entertain such unsupported claims.

C. Securus Has Not Shown that a Stay Is In the Public Interest and Would Not Harm Other Parties

38. Staying the *2024 IPCS Order* is not in the public interest, as a stay would inhibit or delay the Commission's ability to fulfill statutory obligations and policy objectives mandated by the Martha Wright-Reed Act and necessary to protect consumers.

39. Securus's primary argument that granting a stay would benefit the public interest is that, by "'undermining the investment-backed expectations of correctional facilities for their safety and security costs,' the Order 'could ultimately lead to a reduction in IPCS access or the loss of essential law-enforcement tools,'" with consequent "increases in crime, fraud, or violence for both incarcerated people and their friends and family."[153] The Commission found similar concerns raised in the record to be generally unsupported,[154] and Securus offers no further substantiation for such claims. Nevertheless, the Order explicitly accounts for these theorized harms by "extend[ing] the transition deadlines" for the new rate cap and site commission rules,[155] which Securus fails to acknowledge.[156]

40. Securus further argues that {[ ]} as a purported consequence of the losses it may face, offering this both as an irreparable harm as well as a result inimical to the public interest.[157] We are unconvinced by such speculation. The Commission is tasked with establishing a compensation plan that results in both just and reasonable rates for IPCS and fair compensation for IPCS providers. Contrary to Securus' claims, the rate setting methodology used by the Commission in the *2024 IPCS Order* accounted for the costs of research and development.[158] Securus also fails to recognize the varied benefits of lower prices and other reforms adopted in the *2024 IPCS Order*, such as increased demand for IPCS.[159]

41. By contrast, granting a stay would be contrary to the public interest because it would delay the benefits of comprehensive reform and otherwise inhibit the Commission's ability to protect consumers. A stay would effectively force consumers to pay prices above the just and reasonable rates determined in the *2024 IPCS Order* over a prolonged period, while also delaying the associated reforms

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[153] *Id.* at 17 (quoting *2024 IPCS Order* at 465 (Statement of Commissioner Carr)).

[154] *See 2024 IPCS Order* at 166-67, 209, 307-08, paras. 311-12, 390 n.1399, 594; *id.*, Appx. J at 455-56, para. 7.

[155] *Id.* at 465 (Statement of Commissioner Carr); *see also id.* at 304-08, paras. 587-94 (discussing the extended timeframes for implementing the new rate cap and site commission rules).

[156] Securus also bemoans the fact that "many [incarcerated people] will not see the benefits from the rate caps until 2026," and at the same time complains that those people "will lose out on the updated communications platforms and offerings" that Securus is allegedly stymied from offering due to requirements that apply before 2026. Securus Stay Petition at 17. The reforms adopted in the *2024 IPCS* Order necessarily entail a mix of costs and benefits to all parties with an interest in these proceedings. A stay would only further delay the benefits to incarcerated people from these reforms, a consequence Securus appears to concede is against the public interest.

[157] Securus Stay Petition at 16 (citing "{[ ]}"); Dougherty Declaration at para. 24.

[158] *See 2024 IPCS Order* at 38, para. 71 (finding that "a provider will be fairly compensated if the rates and fees it is permitted to charge will afford it an opportunity to recover industry-average costs associated with prudent investments used and useful in providing IPCS and associated ancillary services at the facilities the provider serves"); *id.* at 90, para. 159 ("Under the used and useful framework the Commission . . . looks to the 'equitable principle that ratepayers should not be forced to pay a return except on investments that can be shown to benefit them'."); *cf. id.* at 121, para. 217 (observing that "providers' continuing expansion of an investment into their video IPCS services" will likely result in decreasing providers' average costs per minute); *id.* at 154-55, para. 287 (addressing the use of site commissions to fund social welfare programs "or other costs unrelated to the provision" of IPCS); *see also 2024 IPCS Order* at 62, para. 121, n.398; *id.*, Appx. D at 370, nn.5-6.

[159] *See id.* at 16-18, para. 27.

that also inure to the public's benefit.[160] For example, and as the Commission observed in the Order, consumers stand to gain from the elimination of ancillary service charges, which are a source of consumer confusion and detrimental provider practices.[161] The public interest in seeing the Commission's reforms take effect on the schedule prescribed in the *2024 IPCS Order* is especially pronounced given the length of time that incarcerated persons and their friends and family have already shouldered undue financial burdens to keep in touch, particularly when Congress expressly directed the Commission to enact regulations to implement the Martha Wright-Reed Act within 24 months from the statute's enactment.[162]

42. For all these reasons, we find that Securus has not shown that a stay is in the public interest and would not harm other parties.

IV. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201(b), 218, 220, 225, 255, 276, 403, and 617, and the Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat 6156 (2022), and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91, 0.291, this Order Denying Stay Petition in WC Docket Nos. 23-62 and 12-375 IS ADOPTED.

44. IT IS FURTHER ORDERED, that the Petition of Securus Technologies, LLC for Stay Pending Judicial Review of the Report and Order, Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking (FCC 24-75) is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Wireline Competition Bureau

[160] *See, e.g.*, *id.* at 308, para. 594 ("Any further delays in requiring compliance with our rate cap and site commission reforms risks perpetuating unjust and unreasonable rates and charges for IPCS consumers or yielding unfair compensation for IPCS providers, contrary to the directives of the Martha Wright-Reed Act."); *id.* at 3-4, 229-30, 261-63, 277-78, 301-04, paras. 3, 427-28, 499-501, 530-31, 579-86 (discussing the compelling public interests served by the Order's reforms); Public Interest Parties Opposition at 8 (explaining that "[d]elayed implementation of the new rates would add many millions of dollars of financial burden for incarcerated people and their families each year").

[161] *See 2024 IPCS Order*, at 224-26, 227-29, paras. 418-19, 421-26.

[162] *See id.* at 6-12, paras. 9-20 (recounting over a decade of reform efforts); Martha Wright-Reed Act § 3(a). Additionally, as the Public Interest Parties argue, "[a] stay will cause tremendous harm by depriving consumers of the lower rates, and increased family connection, that Congress sought to achieve through the [Martha Wright-Reed Act]." Public Interest Parties Opposition at 9. "Such delay would prevent many incarcerated people from the health, safety, and wellbeing benefits that reliable communications with their loved ones could bring." *Id.* at 9-10; *see also* Stephen Raher Opposition at 5 (noting that the "public would be harmed by granting the Petition because a stay would extend the long history of unreasonable IPCS rates, even though lowering these rates was the primary motivation behind the enactment of the [Martha] Wright-Reed Act").