

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Veronica Fernandes
Re: Inmate Call Services (ICS) as discussed in *Securus Tech., Inc. v. Murphy*, 2019 WL 1244802 (App. Div. 2019)
Date: June 07, 2021

MEMORANDUM

Executive Summary

In New Jersey, inmate call services (ICS) in State or county correctional facilities provide the exclusive means for inmates to communicate via telephone with their families and friends.¹ In order to provide ICS, telecommunications companies frequently invest monies in infrastructure improvements to the existing communications systems at correctional facilities.

New Jersey's current Rate Control Law (RCL) caps the rate that a qualified vendor may charge and limits additional charges pertaining to the ICS.² In *Securus Tech., Inc. v. Murphy*, the service provider challenged the constitutionality of the RCL claiming that it amounted to a taking.³ Although the statute prohibits the ICS provider from billing any party a "service charge" or "additional fee", it does not mention infrastructure improvements.

On February 20, 2020, the Commission authorized Staff to engage in additional research determine whether this subject matter might give rise to a project for the Commission.⁴ Staff considered the District Court's opinion in *James v. Glob. Tel*Link Corp.*,⁵ the most recent treatment of the subject matter by the Federal Communications Commission, and the use of emerging technologies in this field of communication.

Statute Considered

New Jersey's statute regarding telephone service contracts for inmates in State or county correctional facilities, N.J.S. 30:4-8.12, provides in relevant part:

- a. All telephone service contracts for inmates in State or county correctional facilities shall be subject to the procurement provisions set forth in chapter 34 of Title 52 of the Revised Statutes and chapter 11 of Title 40A of the New Jersey Statutes; provided, however, the State Treasurer or appropriate person on behalf of the county or private correctional facility shall contract with the qualified vendor whose rate shall not exceed 11 cents per minute for domestic debit, prepaid, and collect calls and who does not bill to any party any service charge or additional fee

¹ See N.J. Stat. Ann. § 30:4-8.12 (West 2021).

² *Id.*

³ *Securus Tech., Inc. v. Murphy*, No. A-5465-16T3, 2019 WL 1244802 *4 (App. Div. Mar. 18, 2019).

⁴ N.J. LAW REV. COMM'N (2020) 'Inmate Call Services (ICS)'. *Min. of NJLRC meeting 20 Apr. 2020*, Newark, N.J.

⁵ *James v. Glob. Tel*Link Corp.*, 2:13-cv-04989-WJM-MF (D.N.J. Oct. 20, 2020).

exceeding the per minute rate, including, but not limited to, any per call surcharge, account set up fee, bill statement fee, monthly account maintenance charge, or refund fee.⁶

* * *

Background

Securus Technologies, Inc. (Securus) was awarded contracts to provide inmate call services (ICS) to inmates at the Passaic County Jail and the Cape May County Correctional Center.⁷ These contracts were awarded to Securus in 2010 and 2013.⁸

In 2016, the New Jersey Legislature enacted the Rate Control Law (RCL) N.J.S. 30:4-8.11 to -8.14. The RCL provides that, “State, county and private correctional facilities may only contract for Inmate Calling Services (ICS) with a ‘qualified vendor’ that limits the rate charged to inmates to 11 cents per minute. N.J.S.A. 30:4-8.12(a).”⁹ These provisions of the RCL apply to “any new or renewal contract... in effect on or after the date of enactment.”¹⁰

In January 2017, Securus filed a complaint seeking injunctive and declaratory relief against various state officials.¹¹ Securus argued that the RCL violated the takings clauses of both the United States and New Jersey Constitutions.¹²

Securus alleged that during the contract periods, it invested monies in substantial infrastructure improvements at the facilities.¹³ Securus claimed that RCL’s statutory limit on ICS phone charges to inmates unconstitutionally restricted its ability to recoup costs that it had already expended, and the ability to seek renewal of its current contracts or to bid on future contracts.¹⁴ The infrastructure improvements, Securus contended, were necessary costs that any telecommunication provider would need going forward in bidding on future contracts.¹⁵

The State did not answer; it moved to dismiss the complaint with prejudice for failure to state a claim.¹⁶ In support of its motion, the State supplied the Passaic and Cape May County contract documents.¹⁷ The State argued that Securus lacked standing because the contract with Passaic had expired and a contract awarded a new vendor, and that the Cape May contract was not

⁶ See N.J. STAT. ANN. § 30:4-8.12 (West 2021).

⁷ *Securus Tech., Inc. v. Murphy*, No. A-5465-16T3, 2019 WL 1244802 *1 (App. Div. Mar. 18, 2019).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; See, U.S. CONST. amend. V; and N.J. CONST. art. I, para. 20.

¹³ *Securus Tech., Inc.*, 2019 WL 1244802 at *1.

¹⁴ *Id.*

¹⁵ *Id.* at *3.

¹⁶ *Id.* at *1.

¹⁷ *Id.*

affected by the RCL.¹⁸ The State also argued that Securus had no defined “property interest” in future contracts and that there was no “justiciable controversy” so Securus could not invoke the Declaratory Judgment Act (DJA).¹⁹

The trial court accepted the State’s argument that Securus lacked standing under the DJA and dismissed Securus’s complaint with prejudice, stating that it had failed to “plead facts establishing an actual controversy.”²⁰

On appeal, Securus maintained that it should have been permitted to file an amended complaint because the dismissal with prejudice was improper.²¹ The Court reversed and remanded for further proceedings.²²

An examination of the trial court docket indicated that the matter was ultimately dismissed by the parties, leaving open the question of whether the statute could be clarified in order to avoid future litigation on this subject.

Analysis

All New Jersey correctional facilities are required, by statute, to provide ICS.²³ The ability of an individual who has been incarcerated to speak with their families and friends has been recognized as an issue of great public importance.²⁴ In order to establish ICS, providers are often required to make substantial infrastructure improvements to the correction facilities’ telecommunication equipment.²⁵ Providers, such as Securus, argued that “by capping the per-call charges to inmates, the RCL unconstitutionally restricts its ability to recoup its costs already expended....”²⁶

The Federal Communications Commission (FCC) has a long history of setting rates for ICS.²⁷ The New Jersey judiciary has recognized that the setting of rates is “an issue... of significant public and governmental interest.”²⁸

In 2016, the Legislature enacted New Jersey’s Rate Control Law (RCL).²⁹ Under the RCL, State, county, and private correctional facilities may only contract for inmate call services (ICS)

¹⁸ *Securus Tech., Inc.*, 2019 WL 1244802 at *1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at *2.

²² *Id.*

²³ *Id.* at *3.

²⁴ *Id.*

²⁵ *Id.* at *1.

²⁶ *Id.* at *3.

²⁷ *Global Tel*Link v. FCC*, 866 F.3d 397, 404 (D.C. Circ. 2017).

²⁸ *Securus Tech., Inc. v. Murphy*, 2019 WL 1244802 at n.3.

²⁹ N.J.S. 30:4-8.11 to -8.14.

with a “qualified vendor.”³⁰ The Act limited the rate charged to inmates to eleven cents per minute for any new or renewal contract.³¹

- *Securus Tech., Inc. v. Murphy*

In *Securus*, the Plaintiff invested in infrastructure improvements in two county correctional facilities.³² These improvements were necessary costs that any telecommunication provider would incur when bidding on future contracts.³³ By capping the per-call charges to inmates, the Plaintiff argued that the RCL statute unconstitutionally restricts the ability of ICS providers to recoup costs already expended as well as their ability to bid in the future.³⁴

“The New Jersey Constitution provides protections against governmental takings of private property without just compensation.”³⁵ This constitutional protection is “coextensive with the Takings Clause of the Fifth Amendment of the United States Constitution.”³⁶ New Jersey courts have recognized that a serious constitutional issue arises when a statute operates to affirmatively preclude a plaintiff from realizing a fair and reasonable rate of return on an investment a company has already made.³⁷

The plain language of the RCL provides that the rate of a qualified vendor, “shall not exceed 11 cents per minute for domestic debit, prepaid, and collect calls...”³⁸ The statute further provides that the qualified vendor shall not “bill to any party any service charge or additional fee exceeding the per minute rate, including but not limited to, any per call surcharge, account set up fee, bill statement fee, monthly account maintenance charge, or refund fee...”³⁹ The statute prohibits a provider from charging any of the enumerated fees but it does not expressly address charging for “predicate costs” or “infrastructure” fees.⁴⁰

- *James v. Glob. Tel*Link Corp.*⁴¹

In August of 2013, a group of plaintiffs brought a class action against Defendant Global

³⁰ N.J.S. 30:4-8.12.

³¹ N.J.S. 30:4-8.12(a).

³² *Securus Tech., Inc. v. Murphy*, 2019 WL 1244802 at *3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at *4.

³⁶ *Id.* at *4; citing *Klumpp v. Boro. of Avalon*, 202 N.J. 390, 405 (2010).

³⁷ *Id.* at *4; citing *N.J. Ass’n of Health Plans v. Farmer*, 342 N.J. Super. 536, 553 (2000). See *N.J. Ass’n of School Adm’rs v. Schundler*, 211 N.J. 535, 561 (2012) (Plaintiff has no constitutionally protected property right to *future* contracts).

³⁸ N.J.S. 30:4-8.12(a).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The litigation between *James, et al.* and *Global Tel*Link Corp.* lasted approximately seven years. The documents relied upon during the course of review were the decisions of the Court issued on Aug. 06, 2018, and Oct. 20, 2020. See *James v. Glob. Tel*Link Corp.*, 2:13-cv-04989-WJM-MF, 2018 WL 3736478 (D.N.J. Aug. 06, 2018) and *James v. Glob. Tel*Link Corp.*, 2:13-cv-04989-WJM-MF, 2020 WL 6197511 (D.N.J. Oct. 20, 2020).

Tel*Link (GTL) in connection with the company’s provision of inmate call services (ICS) to New Jersey’s state and county correctional facilities.⁴² While interstate calling services are subject to regulation by the Federal Communications Commission (FCC), neither federal nor state regulators historically sought to impose rate limits on New Jersey correctional facilities.⁴³

The Plaintiffs in this case were “inmates of New Jersey correctional facilities between 2006 and 2016 who used GTL's phone services, as well as non-inmates (generally, their friends and family) who used GTL's services to communicate with inmates during that time.”⁴⁴ Plaintiffs alleged that “in the absence of rate regulation, they were charged excessive rates and fees for ICS.”⁴⁵ The Plaintiffs maintained that they were overcharged more than \$150 million between 2006 and 2016.⁴⁶

“In 2005, GTL won an exclusive contract to provide ICS for the DOC and most county correctional facilities.”⁴⁷ With the exception of Passaic, the remaining counties entered “independent contracts with GTL.”⁴⁸ These contracts included the payment by GTL of a “site commission.”⁴⁹ A “site commission” was defined as “a straight percentage of all originating, billable revenue.”⁵⁰ Higher commission rates were associated with higher per-minute rates surcharges and “ancillary fees”⁵¹ incurred by GTL’s end users so that GTL could earn a profit.⁵² This “revenue sharing” arrangement formed the basis of the plaintiff’s argument that the “calling rates and fees were far in excess of the actual cost of providing ICS.”⁵³

On October 20, 2020, following “multiple rounds of mediation and settlement conferences overseen by the Court, the parties ... agreed on the terms of a settlement.”⁵⁴ The Class, as defined by the settlement, includes:

All persons of the United States, who, between 2006 and 2016, were incarcerated in a New Jersey prison or correctional institution and who used the phone system provided by Defendants, or who established an AdvancePay account with Defendants in order to receive telephone calls from a person incarcerated in New

⁴² *James v. Glob. Tel*Link Corp.*, No. 13-4989, 2018 WL 3736478 *1 (D.N.J. Aug. 6, 2018).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ An example of an “ancillary fee” charged by GTL was a 19% fee each time a non-inmate set up or deposited funds into a GTL Advance Pay account by telephone. *Id.* at *2.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *James v. Glob. Tel*Link Corp.*, No. 2:13-CV-04989-WJM-MF, 2020 WL 6197511 *1 (D.N.J. Oct. 22, 2020).

Jersey, excluding Essex County prior to June 2010, or persons receiving calls from persons incarcerated in Essex County prior to June 2011.⁵⁵

The settlement further provides that “[t]he Class is entitled to receive up to \$25 million in cash and credits from GTL in total compensation.”⁵⁶ The District Court’s opinion does not, however, address the issue of “infrastructure” charges.

- *The Federal Communications Commission*

In September of 2013, the Federal Communications Commission (FCC) issued a Report regarding the social and economic impacts of ICS.⁵⁷ The FCC determined that

[e]xcessive ICS rates...impose an unreasonable burden on some of the most economically disadvantaged in our society. Families of incarcerated individuals often pay significantly more to receive a single 15-minute call from prison than for their basic monthly phone service. We have received tens of thousands of comments from individuals, including many personal stories from inmates, their family members and their friends about the high price of staying in touch using ICS. These rates discourage communication between inmates and their families and larger support networks, which negatively impact the millions of children with an incarcerated parent, contribute to the high rate of recidivism in our nation's correctional facilities, and increase the costs of our justice system....⁵⁸

Shortly after the FCC issued its Report and the *James* Plaintiffs filed their lawsuit, the New Jersey Legislature enacted N.J.S. 30:4-8.12, which prohibits “site commissions in all state, county, and private correctional facilities... limit[s calling] rates to 11 cents per minute... and outlaw[s] ‘any service charge or additional fee exceeding the per minute rate, including but not limited to, any call surcharge, account set up fee, bill statement fee, monthly account maintenance charge, or refund fee.’”⁵⁹

In October of 2020, the FCC continued its effort “to ensure that rates for interstate and international phone calls are just and reasonable for all Americans....”⁶⁰ The FCC’s work included efforts to “rein in excessive rates and egregious fees on phone calls paid by some of society’s most vulnerable people: families trying to stay in touch with loved ones serving time in jail or prison.”⁶¹

⁵⁵ *Id.* See note 1 for a list of those excluded from the Class.

⁵⁶ *Id.*

⁵⁷ *James v. Glob. Tel*Link Corp.*, No. 13-4989, 2018 WL 3736478 *1 (D.N.J. Aug. 6, 2018). *Id.* at *2-3 citing FCC Report & Order & Notice of Further Rulemaking, FCC 13-13 (Sept. 26, 2013).

⁵⁸ *Id.*

⁵⁹ *Id.* at *3.

⁶⁰ FED. COMM’N COMM’N, Tel. Ser. for Incarcerated Individuals (2020).

⁶¹ *Id.*

The FCC recognized that “[t]elephone calling options for incarcerated individuals... are limited... [because] incarcerated persons typically cannot choose their own calling provider.”⁶² The absence of competition in this area, in addition to unrestricted rates, frequently results in “unreasonably high phone bills for incarcerated individuals and their families.”⁶³ Rate caps, however, “apply only to interstate long-distance calls... not to in-state long distance, local or international calls.”⁶⁴ To this time, the FCC has not addressed the issue of infrastructure charges.

- *Video Conferencing*

Video conferences are the “newest trend in revenue-generating communications in prisons and jails.”⁶⁵ Two of the leading corrections-focused tech companies, Securus and JPay, provide video services to 573 facilities nationwide according to their websites.⁶⁶ In 2017, “at least five of [New Jersey’s] 21 counties, largely in the southern part of the state, [had] systems that allow[ed] for video calls to an inmate from a cellphone or computer.”⁶⁷ To this time, nine counties use some form of video call service technology.⁶⁸

In 2016, and 2018, S2896 and S1808 respectively were introduced in the Legislature and would have imposed requirements on video visitation service contracts for inmates in certain correctional facilities.⁶⁹ Neither of these bills was enacted.

- *Preliminary Outreach*

On March 10, 2021, Staff contacted the New Jersey Department of Corrections⁷⁰ to ask whether N.J.S. 30:4-8.12a. would benefit from modification to include a reference to “predicate

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* See also Press Release, Fed. Comm’n Comm’n, “FCC Seeks to Reduce Rates and Charges for Inmate Calling Services” (Aug. 06, 2020) (available at <https://docs.fcc.gov/public/attachments/DOC-366002A1.pdf>).

⁶⁵ Nicole Lewis and Beatrix Lockwood, *Prisons tout video visitation’s convenience but families say they’re overpaying for bad service*, Feb. 05, 2020, <https://www.abajournal.com/news/article/prisons-tout-video-visitations-convenience-but-families-say-theyre-overpaying-for-bad-service>

⁶⁶ *Id.*

⁶⁷ Corinne Ramey, *Video Visits at New Jersey Jails Spark Controversy*, THE WALL STREET JOURNAL, Apr. 03, 2017, 6:34 pm ET, <https://www.wsj.com/articles/video-visits-at-new-jersey-jails-spark-controversy-149125888#:~:text=In%20New%20Jersey%2C%20video%20visits,inmates%20to%20receive%20more%20visitors.>

⁶⁸ See Camden County (<https://web.connectnetwork.com/facilities/camden-county-nj-correctional-facility/>); Cape May County (<http://www.cmcsheriff.net/visiting.html>); Cumberland and Gloucester County (<http://www.co.cumberland.nj.us/doc-visiting>); Essex County (<https://www.jailexchange.com/city-and-county-jails/new-jersey/essex-county/essex-county-correctional-facility/visit-an-inmate>); Hudson County (<https://hudsoncountynj.gtlvisitme.com/app>); Middlesex County (http://www.middlesexcountynj.gov/Government/Departments/PSH/Pages/adult_visiting_video-visit.aspx); Ocean County (<https://www.co.ocean.nj.us/OC/Corrections/frmInmateVisitation.aspx>); Passaic County (http://www.pcsheriff.org/passaic_county_jail/inmate_visitation.php); Salem County (<https://www.salemcountysheriff.com/corrections/visiting/>)

⁶⁹ See S.B. 2896, 217th Leg., First Ann. Sess. (N.J. 2016) and S.B. 1808, 218th Leg., First Ann. Sess. (N.J. 2018).

⁷⁰ Discussion with Karin M. Burke, Esq., Assistant Dir., Office Compliance and Strategic Planning, N.J. Dept. of Corr., (Mar. 09, 2021).

costs” or “infrastructure fees” and to ask about the availability of video visitation and the fees associated with this type of inmate communication.⁷¹

Conclusion

Staff seeks guidance from the Commission as to whether Staff should proceed with work on this project, including outreach to determine whether the RCL would benefit from modification to address the issue of charging “infrastructure fees” to inmates or their families.

⁷¹ *Id.* See e-mail from Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm’n to Karin M. Burke, Esq., Assistant Dir., Office Compliance and Strategic Planning, N.J. Dept. of Corr. (Mar. 10, 2021, 3:37 PM EST) (on file with the NJLRC).