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***
Date: **February 10, 2020**

M E M O R A N D U M

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 a qualified vendor may charge and limits the 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.

Statute

N.J.S. 30:4-8.12

Telephone service contracts for inmates in State or county correctional facilities

> 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 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.

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[1] *See* N.J.S. 30:4-8.12.

[2] *Id.*

[3] *Securus Tech., Inc. v. Murphy,* 2019 WL 1244802 *4 (App. Div. 2019).

Background

Securus Technologies, Inc. (Securus) provided inmate call services (ICS) to inmates at the Passaic County Jail and the Cape May County Correctional Center.[4] These contracts were awarded to Securus in 2010 and 2013.[5]

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)."[6] These provisions of the RCL apply to "any new or renewal contract… in effect on or after the date of enactment."[7]

In January 2017, Securus filed a complaint seeking injunctive and declaratory relief against various state officials.[8] Securus argued that the RCL violated the takings clauses of both the United States and New Jersey Constitutions.[9]

Securus alleged that during the contract periods, it invested monies in substantial infrastructure improvements at the facilities.[10] In addition, Securus alleged 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.[11] The infrastructure improvements, Securus contended, were necessary costs that any telecommunication provider would need going forward in bidding on future contracts.[12]

The State did not answer, but instead moved to dismiss the complaint with prejudice for failure to state a claim for relief.[13] In support of its motion, the State provided the Passaic and Cape May County documents regarding the contracts.[14] The State argued that Securus lacked standing because the contract with Passaic had expired and the county had awarded a new contract to a different vendor, and the Cape May contract was unaffected by RCL.[15] The State also argued that Securus had no defined "property interest" in future contracts and could not invoke the Declaratory Judgment Act (DJA), because there was no "justiciable controversy."[16]

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[4] *Id.* at *1.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id. See,* United States Constitution, Amendment V; and the Takings Clause of the New Jersey Constitution at N.J. Const. art. I, par. 20.
[10] *Securus Tech., Inc.,* 2019 WL 1244802 at *1.
[11] *Id.*
[12] *Id.* at *3.
[13] *Id.* at *1.
[14] *Id.*
[15] *Id.*
[16] *Id.*

The trial court accepted that Securus no longer had the contract with Passaic County, and that its contract with Cape May was not subject to the RCL, since the statute only applied prospectively.[17] The Court also accepted the State's argument that Securus lacked standing under the DJA and dismissed Securus complaint "with prejudice," stating it had failed to "plead facts stabling an actual controversy."[18]

On appeal, Securus maintained that it should have been permitted to file an amended complaint because the dismissal with prejudice was improper.[19] The Court considered these arguments and reversed and remanded for further proceedings.[20]

An examination of the trial court docket indicates that the matter was ultimately dismissed by the parties. Thus, 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.[21] 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.[22] In order to establish ICS, providers are often required to make substantial infrastructure improvements to the correction facilities' telecommunication equipment.[23] These predicate costs were traditionally recouped by way of a per-call charge to inmates.[24]

The Federal Communications Commission (FCC) has a long history of setting rates for ICS.[25] The New Jersey judiciary has recognized that the setting of rates is "[…] an issue […] of significant public and governmental interest."[26] Thus, in 2016, the Legislature enacted New Jersey's Rate Control Law (RCL).[27] Under the RCL, State, county and private correctional facilities may only contract for inmate call services (ICS) with a "qualified vendor."[28] In addition, the Act limited the rate charged to inmates to eleven cents per minute for any new or renewal contract.[29]

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[17] *Id.*
[18] *Id.*
[19] *Id.* at *2.
[20] *Id.*
[21] *Id.* at *3.
[22] *Id.*
[23] *Id.* at *1.
[24] *Id.* at *3.
[25] *Global Tel*Link v. FCC*, 866 F.3d 397, 404 (D.C. Circ. 2017).
[26] *Securus Tech., Inc. v. Murphy,* 2019 WL 1244802 at n.3.
[27] N.J.S. 30:4-8.11 to -8.14.
[28] N.J.S. 30:4-8.12.
[29] N.J.S. 30:4-8.12(a).

In *Securus,* the Plaintiff invested monies in infrastructure improvements in two county correctional facilities.[30] These improvements were necessary predicate costs that any telecommunication provider would have to incur when bidding on future contracts.[31] By capping the per-call charges to inmates, the Plaintiff argued that the RCL statute unconstitutionally restricts the ability of ICS providers to recoup their costs already expended and their ability to bid in the future.[32]

"The New Jersey Constitution provides protections against governmental takings of private property without just compensation."[33] This constitutional protection is "coextensive with the Takings Clause of the Fifth Amendment of the United States Constitution."[34] Further, 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.[35]

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[….]"[36] 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 [….]"[37] The statute prohibits a provider from charging any of the enumerated fees. The statute does not expressly address charging for "predicate costs" or "infrastructure" fees.

Conclusion

Staff seeks authorization to conduct additional research and outreach to determine whether it would be appropriate to modify the RCL to address the issue of charging infrastructure fees to inmates or their families.

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[30] *Securus Tech., Inc. v. Murphy,* 2019 WL 1244802 at *3.
[31] *Id.*
[32] *Id.*
[33] *Id.* at *4.
[34] *Id.* at *4; citing *Klumpp v. Borough of Avalon*, 202 N.J. 390, 405 (2010).
[35] *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).
[36] N.J.S. 30:4-8.12(a).
[37] *Id.*