

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Ordinary Tariff Filing of MCI WorldCom
Communications to Change Maximum Security Rate
Plan for New York State Department of
Corrections from a Mileage-Sensitive Structure
for IntraLATA and InterLATA to a Flat Rate
Structure**

Case 03-C-1058

PETITION FOR REHEARING

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Introduction

The Public Utility Law Project of New York, Inc. ("PULP") petitions the Public Service Commission ("Commission") for rehearing and clarification of its October 30, 2003 "*Order Approving Jurisdictional Portion of Rate*" ("*Order*").¹ A brief procedural history of this case is contained in the *Order* and will not here be repeated.

The *Order* directed MCI WorldCom ("Company") to refile its proposed tariffs for charges paid by recipients of collect calls from state prison inmates, and to bifurcate the charges. The Company was ordered to separate the "jurisdictional" portion of charges the Commission held are subject to its regulation from a "non-jurisdictional" portion of the charges, which represent commissions paid by MCI WorldCom to the New York State Department of Correctional Services ("DOCS"), under the terms of a contract between MCI WorldCom and

¹ Case 03-C-1058, *Ordinary Tariff Filing of MCI WorldCom Communications to Change Maximum Security Rate Plan for New York State Department of Corrections from a Mileage-Sensitive Structure for IntraLATA and InterLATA to a Flat Rate Structure, "Order Approving Jurisdictional Portion of Rate,"* (Issued and Effective October 30, 2003).
<http://www.dps.state.ny.us/fileroom/doc13976.pdf>

DOCS which gives MCI WorldCom exclusive rights to provide the telephone service.² The *Order* specifies that 42.5% of the charges should be itemized in the MCI tariff for "the jurisdictional portion" and 57.5% of the charges will be identified as "DOCS commission." *Order* at 23, fn. 18.

In response to a Commission *Notice Inviting Comments on Tariff Filing* dated August 28, 2003, PULP'S comments dated September 10, 2003 had requested full review by the Commission of all charges for inmate telephone service, including the portion of the charges paid to DOCS. The *Order* denied that request. PULP petitions for rehearing and clarification because the *Order Approving Jurisdictional Portion of Rate* is affected by errors of law relating to Commission jurisdiction.

ARGUMENT

THE COMMISSION COMMITTED ERRORS OF LAW WHEN IT HELD THAT CHARGES PAID BY CONSUMERS FOR TELEPHONE CALLS FROM STATE PRISON INMATES ARE NOT WITHIN ITS JURISDICTION TO REVIEW AND DETERMINE REASONABLENESS OF EACH AND EVERY RATE AND CHARGE

Under the New York Public Service Law ("PSL"), the Commission has plenary power to review all telephone rates. Under its enabling statute, PSC "jurisdiction, supervision, powers and duties" extends to "every telephone line which lies wholly within the state and that part within the state of New York of every telephone line which lies partly within and partly without the state and to the persons or corporations owning, leasing or operating any such telephone

² There is no requirement in the *Order* that MCI WorldCom identify these items separately in bills to consumers. Presumably consumers are expected to pay the total bill to the utility, including the portion demanded for the commissions MCI WorldCom pays to DOCS.

line." PSL § 5.1(d). Every telephone corporation is required to "file with the commission schedules showing all rates, rentals and charges for service of each and every kind...." PSL § 92. The PSC has power to modify any "rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph corporation or telephone corporation subject to its jurisdiction," in order to remedy any charges that are "unjust, unreasonable, or unjustly discriminatory or unduly preferential or anywise in violation of law...." PSL § 97.1.

PULP noted in its September 10, 2003 comments the Commission's broad statutory jurisdiction to review contracts involving telephone service, without any exclusion of a telephone company's contracts with the State.³ The Commission in its *Order Approving Jurisdictional Portion of Rate* cites no statutory exemption of State contracts from its jurisdiction over rates and charges for telephone service, or the charges exacted from customers using that service.⁴ Rather, the Commission stated

Public Service Law §97 requires the Commission to determine whether the rates filed by a telephone corporation subject to its jurisdiction are just and reasonable for the provision of telephone service. DOCS is not providing telephone service pursuant to the Public Service Law. In this instance, MCI is the provider of telephone service to DOCS pursuant to contract. The 57.5% commission payable to DOCS is not retained by MCI, but is received by DOCS as a requirement of the contract with MCI. *Because DOCS is not a telephone corporation pursuant to the Public Service Law, the Commission does not have jurisdiction over DOCS.* Therefore, we will review only the jurisdictional portion of the rate that reflects what MCI retains from the provision of inmate calling services. *Order Approving Jurisdictional Portion of Rate at 22 -23 (emphasis added).*

³ For example, review of contracts involving telephone service is specifically mentioned in Sections 91, 92, 94 and 97 of the PSL. *PULP Comments in Response to Notice Inviting Comments on Tariff Filing*, Sept. 10, 2003, <http://www.pulp.tc/ganmcitariffinal.pdf>

⁴ In contrast, PSL § 66(12) specifically exempts some, but not all, "state, municipal, or federal contracts" involving electricity and natural gas services. There is no limitation on PSC jurisdiction of government contracts concerning the provision of telephone service.

As a result of the *Order*, the new MCI WorldCom tariffs prescribed by the Commission will contain one part, perceived by the Commission to be a regulated part, and another part, perceived to be unregulated, non utility charges collected by MCI WorldCom from recipients of collect telephone calls from inmates and paid as commissions to DOCS.⁵

The *Order* does correctly recognize that "DOCS is not a telephone corporation pursuant to the Public Service Law...." *Order Approving Jurisdictional Portion of Rate* at 22 -23. The Commission overlooked that as a matter of law, only telephone corporations like MCI WorldCom may provide and charge for telephone service, and that all its rates and charges are under PSC jurisdiction. A realistic appraisal of the situation supports the conclusion that MCI WorldCom is providing telephone service to the consumers who actually receive, who are billed for, and who must pay the total charges for the calls, including the commission component

The artificial bifurcation of the rate into one part for utility service and another part for DOCS commissions is unsustainable as a matter of law. In a strikingly analogous case involving rate surcharges for telephone service to hotel guests, who, like prison inmates, were required to pay surcharges to the hotel above the rates for telephone service, the Appellate Division stated:

These hotels which make an overcharge justify the practice on the ground that this charge is for hotel service only and not subject to regulation by the Public Service Commission. **** Whether this charge is called a telephone charge or a hotel service charge it is invariably made whenever a guest makes an outside call, and it is not made unless this takes place. We think the distinction sought to be made as to the type of charge is somewhat nebulous, but granting that some distinction exists and that extra service is provided in many cases the main purpose is to furnish the public telephone service. **** *A telephone within a hotel, used to*

⁵ Operator services are prohibited under official PSC regulations from paying "any commissions or other compensation to any entity" in connection with an exclusive arrangement for services. 16 NYCRR § 649.4.

*furnish service in connection with outside calls, must be considered as an extension of the telephone company's general system and subject to regulation; otherwise the public will be subjected to a variety of rates concocted under the guise of hotel service and completely unregulated. To avoid such an evil is one of the main purposes of the statute. *****

It is affirmatively required by statute that all telephone companies establish and file with the Public Service Commission schedules showing all rates, rentals and charges to be made for service of each and every kind by and over its lines in this State (*Public Service Law, § 92*). **** *The hotels are not public utilities and have no independent right for furnishing a public utility service."*

People ex rel. Public Service Commission v. New York Telephone Company, 262 A.D. 440, 29 N.Y.S.2d 513, 1941 N.Y. App. Div. LEXIS 5390 (3d Dept. 1941), *affirmed* 287 N.Y. 803 (1942) (*Emphasis added*). Similarly, DOCS is not a public utility, the entire service is dependent upon the services of MCI WorldCom, a telephone company, and there can be no bifurcation of charges to pay a non utility for using the MCI WorldCom service. The unanimous affirmance by the Court of Appeals suggests that the Commission's effort in this case to bifurcate MCI WorldCom rates into "utility" telephone services subject to PSC jurisdiction and DOCS prison charges not subject to PSC jurisdiction would suffer the same fate as the failed effort to segregate regulated utility charges from "unregulated" hotel surcharges paid by consumers to a non utility for telephone service. For the commission to regulate only part of the charges paid by consumers is tantamount to not regulating at all.

The *Order* suggests that the consumer is DOCS, and not the people who actually are billed for and who must pay the charges exacted by MCI WorldCom when they receive the calls from inmates.⁶ Even assuming the counter-factual proposition, however, that the telephone

⁶ "In this instance, MCI is the provider of telephone service to DOCS pursuant to contract." *Order* at 22.

service is provided by MCI WorldCom to DOCS, and that it is not the end use consumer but DOCS who is the customer, the contract between MCI WorldCom and DOCS must still be within PSC jurisdiction, and must still be just and reasonable in each and every respect. It is well established that the Public Service Commission has full jurisdiction over contracts between a telephone company and a State agency. *New York Telephone Company v. State of New York, Division of State Police*, 85 A.D.2d 803, 445 N.Y.S.2d 609 (3d Dept. 1981). In that case, the Commission initially approved rates set in a contract between the State Police and the telephone company, but later modified the rates in a general rate case, to the detriment of the State as the customer. As stated by the Appellate Division

[C]laimant New York Telephone Company and defendant State of New York, Division of State Police, entered into a contract whereby claimant was to furnish Dataspeed 40 telecommunications services for police teletype work to defendant. The agreement provided that claimant would obtain approval for the rates to be charged defendant for the services by filing tariffs with the Public Service Commission ... by March 1, 1974 and also that the tariffs would be subject to review and acceptance by the PSC. In due course the PSC approved the subject [contract] rates by accepting the filed tariffs, and, subsequently, in a general rate case ... The PSC, by order of October 22, 1975, directed the filing of tariffs increasing the Dataspeed 40 rates. ***** Not only is the PSC statutorily authorized on its own motion to grant a rate increase where the situation presented so warrants, even though the existent rate was prescribed by contract (Public Service Law, § 97, subd. 1), but in this instance the contract between the parties also explicitly provides, as noted above, that the tariffs at issue will without limitation, be subject to review and acceptance by the PSC. Moreover, in the contract, with this provision for review of the tariffs by the PSC, was admittedly approved by the Comptroller as required by subdivision 2 of section 112 of the State finance law, and it cannot be seriously argued that the parties herein could, by their contract negate the PSC's cited statutory authority to set rates which it deems just and proper.*"

Id. at 85 A.D.2d 804 (*emphasis added*).⁷ Accordingly, just as the PSC possesses jurisdiction to modify rates initially set in contracts between a telephone company and the State Police, the PSC has full jurisdiction to review the rates and charges set under the contract between MCI WorldCom and DOCS and to modify them if the Commission finds them to be unjust and unreasonable.

In sum, the *Order* is affected by a misapprehension of the law affecting the Commission's determination on jurisdiction over rates and charges collected by MCI WorldCom from consumers. Any misperception by the Commission that it lacks jurisdiction over charges collected by a telephone company as a condition of using its services is an important matter requiring correction. The Public Service Law establishes a bond between the regulator and the consumer, that no rate will be charged that is not subject to agency scrutiny for reasonableness. This rate results in 57.5% of amounts charged to be paid by the telephone company to a non-utility as an unreviewable commission. It allows the exaction of more than \$20 million per year beyond any reasonable cost of the telephone service from a highly vulnerable population, and may be limiting communications services in the public interest. This situation warrants a full and careful inquiry by the Commission into reasonableness of all the rates and charges. As the *Order Approving Jurisdictional Portion of Rate* indicates at pages 11 - 12, PULP does not seek immediately to modify the rate filed by MCI WorldCom, and only requests that a rate proceeding

⁷ Commissioner Leonard A. Weiss, then Judge, in dissent argued that if the PSC raised rates initially set by contract with the State it could create a conflict with the State Finance Law, in that a subsequent PSC-approved rate increase would require the State to pay more than had been approved initially in the contract. *Id.* at 85 A.D.2d 804 - 805 (Weiss, J., *dissenting opinion*). The majority, however, noted that the State contract provided that rates were subject to PSC review "without limitation," and that provision had been approved by the State Comptroller. *Id.* at 804.

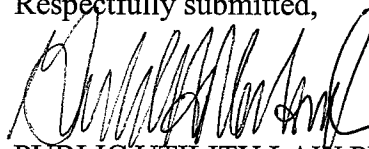
be commenced to investigate reasonableness of the MCI WorldCom rates, including review of the cost element of the commission paid by MCI to DOCS pursuant to its contract for exclusive provision of inmate telephone services.

CONCLUSION

For the previously stated reasons, the Commission should grant the petition for rehearing. and continue this proceeding to review whether all rates and charges paid by consumers to MCI Worldcom for the receipt of telephone calls from incarcerated persons in State prisons, including the portion of rates and charges related to commissions paid by MCI Worldcom to DOCs, are just and reasonable and in the public interest.

Dated: Nov. 26, 2003
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Respectfully submitted,



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