

# centerforconstitutionalrights

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September 5, 2003

By Federal Express

Honorable Jaclyn A. Brillling  
Acting Secretary  
New York Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

Re: Petition to Commence Proceeding and Stay Proposed 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 in Case No. 03-C-1058

Dear Judge Brillling:

The Center for Constitutional Rights (“Center”) petitions the New York State Public Service Commission (“Commission”) to institute a proceeding to review the proposed 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 in Case No. 03-C-1058.<sup>1</sup> The Center also respectfully requests that the implementation of the revised tariff be stayed pending a thorough assessment of whether the public interest justifies the substantial rate increase under Section 92.2 of the Public Service Law and whether the proposed rate is “just and reasonable” within the meaning of Section 97.1 of the Public Service Law. A copy of MCI WorldCom Communication, Inc.’s (“MCI”) new tariff filing is attached hereto as Exhibit A.

Prison administrators typically enter into exclusive dealing agreements with telecommunications carriers for inmate calling services. The parties typically try to justify such exclusive dealing arrangements under the rationale that allowing more than one carrier to provide service jeopardizes a prison’s security and anti-fraud measures and undermines other penological goals. These arrangements, however, preclude effective competition for inmate calling services and result in extremely high calling rates. In New York, inmates are also limited to collect calling services and are not offered the alternative of debit card or debit account calling services, which are typically less costly.

The Center requests that the Commission reconsider the long-standing assumption that

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<sup>1</sup>The Center is a national not-for-profit, legal, educational and advocacy organization dedicated to maintaining civil, constitutional and human rights.



security and other penological considerations justify the practice, on the part of private correctional facility administrators, of entering into exclusive service arrangements for the provision of inmate calling services. As other observers have noted, the penological justifications for exclusive inmate calling service arrangements are factually unsubstantiated and pretextual.<sup>2</sup> In fact, at least one state, New Jersey, has authorized competition in the provision of inmate calling services.<sup>3</sup> As demonstrated in the attached expert affidavit of Douglas A. Dawson (“Dawson Affidavit”), it is technically and economically feasible for multiple carriers to offer telephone services to inmates at any given prison consistent with all legitimate security and other penological goals.<sup>4</sup> The Commission should conclude that:

- (i) any previous assumption that prison security, anti-fraud and other penological goals can be met only when one carrier provides all telephone services to inmates in a prison is incorrect because it is technologically and economically feasible to permit prison inmates to choose among multiple carriers in the manner described in the Dawson Affidavit, consistent with all legitimate security and other penological concerns;
- (ii) all legitimate security and other penological concerns can be met while offering inmates debit card or debit account calling services as an alternative to collect calling services;
- (iii) the excessive rates charged for inmate calling services result primarily from the lack of competition in the provision of inmate telephone services and the commissions that carriers pay to prison administrators as a part of their exclusive contracts to provide inmate calling services – here the commission that MCI pays to the New York State Department of Correctional Services (“Department”);
- (iv) such commissions are driving calling rates up; and
- (v) such commissions are justifiable only if, and to the extent, they are to reimburse the costs actually incurred by prison administrators in connection with the provision of telecommunications services to inmates.

Accordingly, the Commission should find that the Department must permit competition in the provision of interstate inmate calling services, and inmate service providers must be required to offer debit card and debit account calling services in addition to collect calling services for all interstate calls. Alternatively, if the Department cannot or will not open its facilities to competition,

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<sup>2</sup> See Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 Fed. Comm. L.J. 391, 394 (May 2002) (“Carver”). A copy of the Carver article is attached hereto as Exhibit B.

<sup>3</sup> *Executone Information Systems, Inc.*, 141 P.U.R. 4th 519 (N.J. Bd. Reg. Comm’rs Apr. 5, 1993).

<sup>4</sup> A copy of the Dawson Affidavit is attached hereto as Exhibit C.

the Commission should at least require the carrier providing service to prison facilities to cost-justify its rates using criteria as stringent as those formerly applied by the FCC to dominant interexchange carriers ("IXC").

## **Background**

### History of the New York State Inmate Telephone System

Prior to 1986, each and every one of New York State's correctional facilities was free to (and did) contract for its own inmate telephone services. Operating with the exact same security and penological concerns as exist today, each facility was able to acquire the best rates available for the services rendered. With the free market at work, and with the State not acting as a market participant, telephone rates were affordable for the Plaintiffs and class members. However, in 1986 - - with absolutely no valid penological justification - - the system was drastically changed.

At this time, the Department - - with profit as its motivation - - became a market participant. The Department monopolized the entire market and bid out a contract for inmate telephone services for all of its facilities. Moreover, in order to assure itself of its desired profit, it required that the rates charged for inmate calls would be the highest possible and that it would receive at least a 47% commission from the revenues generated thereon. Since that time, New York State has received over \$125,000,000.00 from inmate telephone calls, in what is essentially an unlegislated tax upon inmates' families, loved ones, ministers and others.<sup>5</sup>

### The Department of Correctional Services - MCI Contract

In 1996, the Department entered into a contract with MCI under which MCI became the sole provider of the only telephone service available to family members to receive telephone calls from their relatives and loved ones who are incarcerated in any of the Department's 70 correctional facilities (the "MCI Contract").<sup>6</sup> In return for this exclusive right, MCI agreed to pay to the Department an upfront signing bonus and commissions of 60% of gross annual revenues.

The motivation for this single-provider/collect call-only system is plainly the profit that flows from the yearly 60% commission paid by MCI to the Department, and the revenues which result from the monopoly created. Upon information and belief, MCI's total revenue from inmate calls since the contract's inception has exceeded \$155 million. From those revenues, MCI has paid more than \$93 million in commissions to the Department. These commissions now currently run at approximately \$25 million per year. Furthermore, MCI - - in return for the exclusive services

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<sup>5</sup>The State uses the sums received from MCI to offset the cost of various State-funded programs. A copy of the revenue receipts from the operation of the inmate telephone system is attached hereto as Exhibit D.

<sup>6</sup>For ease of reference, the class of persons receiving inmate telephone calls will be referred to as "family members."

contract - - cut the rates for the Department's administrative (non-inmate) telephone calls.<sup>7</sup>

The profits from the MCI contract are guaranteed in as much as the Department and MCI have imposed the system on those with no choice. In addition to the State's commission, the Department and MCI, via the exclusive services contract, have imposed a single provider/collect call-only system on family members. The inmates, who cannot receive calls, must use MCI's collect call-only service, and family members are barred by the system from using less expensive service options pursuant to validly filed tariffs, such as those with their chosen providers. Moreover, MCI's fees, with 60% surcharges for placing collect calls from Department facilities, are well above those typically charged for collect calls by other persons between the same locations.

The high surcharges burden the users of the single provider/collect call-only system by limiting the number and duration of collect calls that family members can afford to receive. The exclusive services contract and the attendant system foisted on family members violate their rights to freedom of speech and association, United States Constitution, Amendment I; their procedural and substantive due process rights, United States Constitution, Amendment XIV §1; their rights to equal protection of the laws, United States Constitution, XIV §1; and their rights to enter into contracts of their choice without impairment by the Government, United States Constitution, Amendment I, §10. Security considerations cannot justify the injuries sustained by inmates and family members. Those considerations can be equally served at no greater cost to the Department by far less onerous telephone systems.

In sum, under the MCI Contract:

- (i) The Department restricts telephone communication between family members and inmates to station to station collect calls only, through service provided by MCI only;
- (ii) As a general rule in the telephone industry – and as insisted by the Department in its contract with MCI for inmate phone calls – collect calls carry the highest per minute rates as well as the highest connection surcharges (Dawson Affidavit at ¶49 n.3);
- (iii) 60% of the charge for every call accepted by family members from a Department inmate is taken by the State in the form of a commission paid by MCI;
- (iv) The 60% in commissions on revenues paid by MCI to the State go into the State's general fund;

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<sup>7</sup>The term of this contract ran from April 1, 1996 through March 31, 1999. Free to walk away at any time thereafter, the Department and MCI entered into new contracts for one-year terms on April 1, 1999, April 1, 2000, April 1, 2001, and upon information and belief, for a three-year term on April 1, 2002.

- (v) Since April 1, 1996, MCI has been the sole provider of inmate telephone services at Department facilities. Originally set to expire on March 31, 1999, MCI's exclusive services contract was renewed and extended through March 31, 2001, and then again up through the present;
- (vi) Pursuant to its contract with the Department, MCI is obligated to install, operate and maintain the inmate telephone system at no cost or expense to the Department – thereby making the 60% commission pure profit to the State;
- (vii) The State uses the monies received from MCI (which are paid by family members) to support and offset the cost of various State funded programs;
- (viii) While the power to tax and to determine what transactions are taxable is vested in the State Legislature, and the law is clear that only after the Legislature has, by clear statutory mandate, levied a tax on a particular activity, and has set the rate of that tax, may it delegate the power to assess and collect the tax to an agency, the New York State Legislature has not adopted an enactment which delegates taxing authority to the Department; nor has it provided the Department with the specific authority to levy taxes upon the inmates' families through the inmate telephone service as a means of raising revenue to cover costs of any sort; and
- (ix) The collect call-only/single provider/60% commission features of the inmate telephone system that Claimants challenge are totally and completely unrelated to any legitimate security and/or penological concern of the Department (Dawson Affidavit at ¶¶ 33-48).

#### The Center's Legal Challenges to the Collect Call Only/Single Provider/Commission System

In 2000, the Center filed a lawsuit in the United States District Court for the Southern District of New York on behalf of a class of inmates' family members, loved ones, ministers, counselors, and legal service organizations challenging three aspects of the inmate telephone system: (a) the restriction of calls to collect only; (b) the limitation of statewide inmate telephone service to one provider only; and (c) the 60% commission taken by the State. Defendants in that case – which because of the Eleventh Amendment bar sought only declaratory and injunctive relief – the Department and MCI, filed motions to dismiss based in part on the doctrine of primary jurisdiction and the filed rate doctrine, arguing that the case falls within the exclusive jurisdiction of the PSC and FCC, that the Complaint attacked the tariffed rates for inmate telephone calls, and that all of the claims hinge upon a determination of the “reasonableness” of its rates. The plaintiffs contended in

response that they are also challenging conduct outside (or incidental to) the tariffed rates passed upon by the PSC and FCC.<sup>8</sup> Specifically, MCI's tariffs did not discuss it being the single provider of inmate telephone services for all State correctional facilities, thereby barring plaintiffs from using their chosen providers. The PSC and FCC did not approve the single provider/collect call-only system because it was not in the tariffs. Thus, plaintiffs argued, given the extraneousness of at least some of their claims to the regulatory process, the filed rate doctrine is inapplicable as to those claims. The court in *Byrd v. Goord*, 00 Civ. 2135 (GBD), has not yet ruled on the motions to dismiss.

Concomitant with the federal court challenge, the Center also filed a complaint in the New York Court of Claims alleging nine counts paralleling those delineated in the federal case and anchoring those claims in the New York State Constitution, the New York General Business Law, and the Donnelly Act. The Court of Claims lawsuit, *Bullard v. State*, sought money damages against the State for the imposition of an unlawful tax. The State moved for summary judgment before the Honorable Francis T. Collins on the grounds that the court lacks personal and subject matter jurisdiction. Without reaching any other grounds for the State's motion, and without addressing the merits of the Claim, Judge Collins dismissed the Claim in its entirety on jurisdictional grounds. In doing so, the court concluded that because the "[t]he central source of the claimants' alleged injury is that the rate they are charged is excessive . . .," plaintiffs claims should have brought an Article 78 proceeding to challenge the underlying determination made by the PSC.<sup>9</sup> The Appellate Division, Third Department, on appeal, affirmed the decision of the Court of Claims.<sup>10</sup>

In light of the decisions of the Court of Claims and Appellate Division, Third Department, the Center brings this petition to seek a determination by the Commission regarding the propriety of the single provider/collect call-only/commission system and the rates filed by MCI pursuant to it.

### The Current Revised Tariff

There can be no doubt that the tariff revision for which MCI currently seeks approval will result in the doubling of the price that MCI charges for local collect call inmate service in New York. Indeed, an anecdotal comparison of the charges before and after the revision imposed pursuant to MCI's July 18, 2003 filing reveals that families receiving local collect calls before the tariff revision paid an average of \$3.02 for each of these calls and after the tariff revision must pay more than \$7.00 for the same calls. A sample telephone bill from a family member reveals that a 30-minute call

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<sup>8</sup>See *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 989 F.2d at 1110 ("Even strained to simplification the railroad's anticompetitive behavior involved far more than the assessment of rates.").

<sup>9</sup>A copy of the Court of Claims decision is attached hereto as Exhibit E.

<sup>10</sup>A copy of the Third Department's decision is attached hereto as Exhibit F.

before the change cost \$2.36 and a call of the same duration after the change cost \$7.80.<sup>11</sup>

As correctly noted in the objections filed by Shook, Hardy & Bacon on August 13, 2003, MCI's contention that Section 92.2 of the Public Service Law does not require an investigation here is untenable given that the rate changes will increase MCI's aggregate revenues from all inmate services by far more than the statutory floor of 2.5 percent.<sup>12</sup> As noted by Shook, Hardy, an interpretation of the statutory provision like that proposed by MCI here would mean that Commission investigations and hearings would be held *solely* in those circumstances in which a carrier sought large rate increases in a service that itself produced the vast majority of the carrier's gross revenues while permitting the carrier to quadruple rates for a service that does not along produce the majority of its total revenues. In essence, such an interpretation would render the statutory proscriptions irrelevant to the vast majority of rate hikes and would be fundamentally inconsistent with the purpose of the Public Service Law – to guarantee to the public safe and adequate service at just and reasonable rates. *See* Public Service Law Section 91.

Further, while the revised tariff is being touted by the Department as “revenue neutral,” this claim means nothing more than that the State will not likely receive more than the 60% commission that is has already been guaranteed and received in the past. The new flat rate proposed by MCI merely reformulates the means by which sufficient revenues are collected to meet the Department's profit demand.

There can be little doubt that once the Commission undertakes an investigation into the issue of whether the proposed rate is “just and reasonable” within the meaning of the Public Service Law, it will conclude that the rate fails to meet the statutory requirements. First, the rate is plainly confiscatory given that it imbeds the unlegislated tax levied by the Department in the form of the commission it demands. Second, because of the commission, MCI's rate is unconnected to any legitimate operating cost of the company. Indeed, MCI and the Department contend that exclusive dealing arrangements for the provision of inmate calling services are necessary to meet prison administrators' legitimate security and other penological goals. Apparently, to date no party has challenged this assumption, nor has the Commission ever questioned whether there are other means to satisfy the security and other penological goals of prison administrators.

### Lack of Competition

The exclusive dealing arrangements between prison administrators and service providers for inmate calling services have resulted in a lack of competition in the inmate calling services market and high rates for such services. The market for inmate calling services works in reverse from the traditional telecommunications market, where competitive pressures drive prices down. Although

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<sup>11</sup>This increase is well over a 100% increase in cost. A copy of the telephone bill, redacted to ensure the privacy of the family member is attached hereto as Exhibit G.

<sup>12</sup>*See* MCI letter dated August 8, 2003 responding to Outside Connection's August 5, 2003 objections to the MCI tariff filing, at 2-3.

