

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on January 12, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman  
Thomas J. Dunleavy  
Leonard A. Weiss  
Neal N. Galvin

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 DENYING REHEARING

(Issued and Effective January 14, 2005)

BY THE COMMISSION:

INTRODUCTION

An Order Approving Jurisdictional Portion of Rate  
issued October 30, 2003 (Order) determined that the  
jurisdictional portion of a proposed rate change in the MCI  
WorldCom Communications, Inc. (MCI) PSC No. 5 tariff was just  
and reasonable, pursuant to Public Service Law (PSL) §97(1).  
Before the tariff change, the rate structure for MCI's Maximum  
Security Rate Plan (Rate Plan) for New York State Department of  
Correctional Services (DOCS) telephone services to inmates was  
based on time-of-day and distance. Under the tariff revisions,  
the rate structure was amended to be a single per minute flat

rate for local, intraLATA, and interLATA.<sup>1</sup> The flat rate is a charge of \$0.16 per minute of use.<sup>2</sup> Previously, the maximum effective day rates for local and intraLATA calls ranged from \$0.36 for the first minute of use and \$0.198 for each additional minute; the maximum for a night and weekend call ranged from \$0.126 for the first minute of use and \$0.069 for each additional minute. The maximum effective day rate for interLATA calls was \$0.36 for the first minute of use and \$0.22 for each additional minute; the maximum night and weekend rate of \$0.23 for the first minute of use and \$0.16 for each additional minute.

Also, the tariff revision standardized the station-to-station surcharge to \$3.00 per call for all local, intraLATA, and interLATA calls, and the person-to-person collect call surcharge was eliminated.<sup>3</sup> Previously, this surcharge was \$1.58 for local and intraLATA calls, \$3.00 for an interLATA call, and \$3.49 for a person-to-person collect call.

The Order determined that after a competitive bidding process MCI and DOCS entered into an exclusive contract in 2001, whereby DOCS would receive a commission in the amount of 57.5% of the monthly gross revenue received from inmate calls. The Commission concluded that it had no jurisdiction to review the DOCS commission, and that the jurisdictional portion of the rate

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<sup>1</sup> A LATA is a Local Access Transport Area. An intraLATA call is one that originates and terminates in the same LATA. An interLATA call is one that is placed in one LATA and terminated in another LATA.

<sup>2</sup> A flat rate charge is the same no matter what time of day or what the distance of the call from origination to termination.

<sup>3</sup> A station-to-station call is one that is directly dialed from one telephone number to another. A person-to-person call is where the calling parties will ask an operator to place a call to a specific number and ask for a specific person. If that person is not available, the call will not be completed and no charge will apply.

structure was just and reasonable, as required by Public Service Law §97.<sup>4</sup> DOCS was not providing a telephone service and the 57.5% commission was received by DOCS as a requirement of the contract with MCI. The Commission therefore determined it did not have jurisdiction over the 57.5% DOCS commission.<sup>5</sup>

The Commission reviewed the jurisdictional portion retained by MCI by comparing those rates to the rates that MCI charged for an analogous service, station-to-station calling from payphones. Based on this analysis, the jurisdictional portion was found to be just and reasonable.<sup>6</sup> The Commission directed MCI to file new tariffs identifying the bifurcation of the total rate into a jurisdictional rate and a DOCS commission. This bifurcation would notify end-user customers that there is a commission assessed by DOCS on all phone calls and that the commission is part of the charge that appears on their bills.<sup>7</sup>

Finally, the Commission determined that the rate increase was not a "major change", as defined by Public Service Law §92(2).<sup>8</sup> The Commission determined that a "major change" produces an increase in aggregate revenues by two and one-half percent. The tariff amendment did not increase the aggregate revenue for services provided by MCI by two and one-half percent, and thus, it was determined not to be a "major change". Therefore, a hearing was not required as prescribed by Public Service Law §92(2)(e).<sup>9</sup>

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<sup>4</sup> Order at pgs. 22-23.

<sup>5</sup> Order at pg. 23.

<sup>6</sup> Order at pgs. 23-24.

<sup>7</sup> Order at pg. 24.

<sup>8</sup> Order at pgs. 25-26.

<sup>9</sup> Order at pg. 26.

Public Utility Law Project (PULP) and Outside Connection, Inc. (Outside Connection) filed petitions for rehearing on November 26, 2003 and November 7, 2003, respectfully.<sup>10</sup> Said filings will be denied. Contrary to PULP's and Outside Connection's claims, the Commission does not have jurisdiction over the DOCS commission portion of the rate charged. Additionally, the Commission did not ignore record evidence, and the Commission's determinations in the Order were supported by the record.

PLEADINGS

PULP's Petition For Rehearing

PULP claims that the Commission has jurisdiction over both the 42.5% jurisdictional portion and the 57.5% DOCS commission portion of the Rate Plan in PSC No. 5 telephone tariff. PULP's claims are based on its interpretation of Public Service Law §5.1(d), §92 and §97.<sup>11</sup> PULP claims that pursuant to PSC §5.1(d), the PSC has "jurisdiction, supervision, powers and duties" which extend to "every telephone line which lies partly within and partly without the state and to persons or corporations owning, leasing, or operating such telephone line."<sup>12</sup> Furthermore, PULP generally claims that the Commission has broad jurisdictional authority to "review contracts involving telephone service, without any exclusion of a telephone company's contracts with the State", pursuant to Public Service Law §§91, 92, 94, 97.<sup>13</sup> Also, PULP claims the

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<sup>10</sup> Outside Connection's filing was filed within the thirty day time period specified in Public Service Law §22 and claims that the Order contained errors of fact and law. Therefore, Outside Connection mis-named its filing a request for reconsideration, which will be considered as a petition for rehearing.

<sup>11</sup> PULP November 26, 2003 Petition for Rehearing at pgs. 2-8.

<sup>12</sup> PULP November 26, 2003 Petition for Rehearing at pgs. 2-3.

<sup>13</sup> PULP November 26, 2003 Petition for Rehearing at pg. 3

Commission failed to "realistically appraise" that MCI is providing a telephone service to the end-user customers who receive and pay the total charge per call, including the DOCS commission portion.<sup>14</sup> Finally, PULP claims the bifurcation of the entire rate charged into a jurisdictional portion and DOCS commission portion is "artificial" and cannot be sustained as a matter of law.<sup>15</sup>

Outside Connection's Request For Rehearing

Outside Connection requests that the Commission grant rehearing of several findings, upon which it relied to reach the determination that MCI's tariff amendment to the Rate Plan was just and reasonable. First, Outside Connection claims the Commission should reconsider whether Public Service Law §97 permits the exclusion of the 57.5% DOCS commission based on the MCI/DOCS contract requirement that MCI give DOCS that percentage as a commission.<sup>16</sup> Outside Connection claims that numerous other governmental and non-governmental contracts provide for a percentage of the revenue a particular service produces for the service provider to be given back to these particular agencies, and that this portion is not excluded pursuant to Public Service Law §97. As examples, Outside Connection alleges Verizon pays fees to government entities pursuant to a contract. Outside Connection claims that the Commission has never determined to exclude these fees from service revenues because said fees were required by contract.<sup>17</sup> Therefore, Outside Connection claims the Commission has set a precedent to exclude the costs of providing

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<sup>14</sup> PULP November 26, 2003 Petition for Rehearing at pg. 4.

<sup>15</sup> PULP November 26, 2003 Petition for Rehearing at pgs. 4-7.

<sup>16</sup> November 7, 2003 Request for Rehearing at pg. 2.

<sup>17</sup> Id.

a service required by a contract between a carrier and third party.<sup>18</sup>

Second, Outside Connection believes that the Commission incorrectly found the jurisdictional portion was just and reasonable by comparing the jurisdictional, non-commission portion to the full price of a local payphone collect call.<sup>19</sup> Outside Connection claims that the jurisdictional portion should have been compared to the rate of a local payphone collect call minus any commission paid to the property owner where the payphone is located. Outside Connection also claims that a comparison of 42.5% charged for local payphone collect calls and MCI's charge for a typical 19-minute call would result in a \$1.68 charge for a local payphone collect call and a \$2.57 charge for an inmate call.<sup>20</sup> It claims such a difference requires further Commission consideration concerning whether the jurisdictional portion of the Rate Plan is just and reasonable.

Third, Outside Connection claims the Commission ignored record evidence without an explanation. Specifically, Outside Connection contends the Commission ignored an August 13, 2003 reply comment that included a study showing that a typical inmate service provider's cost to provide local inmate service is \$2.44 per call, and another study showing that the price for inmate local calls in New York may be the highest in the country and triple the price in 18 other states.<sup>21</sup>

Finally, Outside Connection claims there is no support for the Commission's assumption: i) that the total costs a service provider must incur providing local inmate telephone service are comparable to the total costs incurred providing

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<sup>18</sup> November 7, 2003 Request for Rehearing at pgs. 2-3.

<sup>19</sup> November 7, 2003 Request for Rehearing at pg. 3.

<sup>20</sup> Id. at fn. 7.

<sup>21</sup> November 7, 2003 Request for Rehearing at pg. 3-4.

local collect payphone service; ii) that the costs MCI incurs in providing security features that are uniquely applicable to inmate service are equal to or greater than the costs applicable to payphone service that MCI must incur; and, iii) that DOCS' decision to give MCI the ability to provide inmate service pursuant to a competitive bidding process creates an incentive for MCI and DOCS to keep local inmate service rates as low as reasonably possible.<sup>22</sup>

DOCS Comments In Response To  
PULP and Outside Connection

DOCS filed a Response to Petition for Rehearing requesting that Outside Connection's request for rehearing and PULP's petition for rehearing be denied, or, in the alternative, that the Commission approve the MCI tariff revisions to the Rate Plan as just and reasonable without bifurcation of the Rate Plan rate structure.<sup>23</sup>

DOCS disagreed with PULP's claim that the commission paid to DOCS by MCI results in an unreasonable rate.<sup>24</sup> DOCS found fault with several facts stated by Outside Connection and any inferences drawn therefrom. Initially, DOCS contends that the Commission's reference to the competitive bidding process was to recognize that it does not have jurisdiction over the DOCS/MCI contract, and not, as Outside Connection claims, to determine that a competitive bidding process creates an incentive to keep the rates for inmates service "as low as possible."<sup>25</sup>

Second, DOCS claims that Outside Connection inaccurately bases its rehearing request on analysis of only

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<sup>22</sup> November 7, 2003 Request for Rehearing at pg. 4.

<sup>23</sup> DOCS Response at pgs. 1-2.

<sup>24</sup> DOCS Response at pg. 2.

<sup>25</sup> DOCS Response at pg. 3.

"MCI's new local inmate service pricing."<sup>26</sup> DOCS points out that MCI's tariff filing revised the rates for inmate operator services for local, intraLATA and interLATA collect calls, which would result in an increase in charges for approximately 17% of the inmate population and a reduction in charges for 83% of the inmate population.<sup>27</sup> DOCS claims that the Commission properly considered whether the flat rate for all inmate collect calls placed from DOCS facilities (local, intraLATA, and interLATA) was just and reasonable, not just whether the rate for local collect calls was just and reasonable.<sup>28</sup>

Third, DOCS contends that the Commission has a great deal of discretion in making rate determinations, and can consider or ignore any particular factor, or assign whatever weight it deems appropriate on any particular factor.<sup>29</sup> Therefore, DOCS states that the Commission's comparison of the jurisdictional portion of the Rate Plan rate to the rate charged for analogous station-to-station calling was proper. DOCS also contends that an alternate rate comparison that would compare the rates as a whole to an analogous service would also support the conclusion that the Rate Plan rates are comparable to, and in some instances less than, the rate charged many users of public payphones.<sup>30</sup>

Fourth, DOCS claims that Outside Connection's comparison using 42.5% of the MCI rate for a typical 19-minute station-to-station collect call is misleading because the comparison was based on the lowest possible rate for such

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<sup>26</sup> Id.

<sup>27</sup> DOCS Response at pg. 3.

<sup>28</sup> Id.

<sup>29</sup> DOCS Response at pg. 3.

<sup>30</sup> DOCS Response at pg. 4.

service.<sup>31</sup> Additionally, DOCS contends that the costs to MCI associated with maintaining security features are significant, and MCI is contractually required to bear the cost of providing each inmate with an assigned PIN and monitors a 15 telephone number active list, call blocking, and other related security features.<sup>32</sup> DOCS states that the Federal Communications Commission (FCC) has recognized such additional security costs, and the Commission has the discretion to recognize that these additional costs contribute to a higher rate.<sup>33</sup>

Finally, DOCS contends that the issue of competitive bidding limiting competition and producing higher rates as a result of a greater DOCS commission was not before the Commission. DOCS asserts that if the issue was before the Commission, the rates charged under the Call Home Program contract had not changed since 1994, supporting its contention that the competitive bidding process does not result in higher rates.<sup>34</sup>

#### DISCUSSION

PULP and Outside Connection have not shown that the Order incorrectly decided that the jurisdictional portion of the Rate Plan rate was just and reasonable. The Commission properly determined that it had jurisdiction to review only the non-DOCS commission portion of the Rate Plan. Furthermore, the Commission correctly concluded that this jurisdictional portion was just and reasonable.

Contrary to the claims of PULP and Outside Connection, the Commission properly determined that it has jurisdiction only to determine whether the non-commission portion of the Rate Plan

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<sup>31</sup> DOCS Response at pg. 4.

<sup>32</sup> DOCS Response at pgs. 5-6.

<sup>33</sup> DOCS Response at pg. 6.

<sup>34</sup> DOCS Response at pgs. 6-7.

rate was just and reasonable.<sup>35</sup> Public Service Law §97 gives the Commission jurisdiction over rates "demanded, exacted, charged or collected by any telegraph corporation or telephone corporation."<sup>36</sup> Clearly, DOCS is not a telephone corporation, and therefore, Public Service Law does not establish jurisdiction over DOCS or the commission it charges. The Commission correctly decided it has no jurisdiction over the 57.5% DOCS commission portion of the rate charged.

Furthermore, DOCS is acting pursuant to its governmental power, legislatively delegated, when it entered into the MCI/DOCS contract that provides access to telephone service to inmates.<sup>37</sup> In doing so, DOCS is not acting as a telephone corporation, which reinforces the lack of PSC jurisdiction over the contractual DOCS commission.<sup>38</sup>

Additionally, contrary to PULP's contention (Rehearing Petition, pg. 4), the bifurcation of a jurisdictional and non-jurisdictional portion of the rate is not analogous to rates charged hotel guests and is not refuted by case law. In People of the State of New York ex rel. v. New York Telephone Company, 262 A.D. 440 (3<sup>rd</sup> Dept. 1941), the Court decided whether hotels may charge for service in connection with intrastate telephone calls in excess of, or below, the rate specified in utility tariff schedules for service to hotel customers.<sup>39</sup> The Court held that telephone companies were required, pursuant to Public

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<sup>35</sup> Order at pg. 23.

<sup>36</sup> Public Service Law §97.

<sup>37</sup> The MCI/DOCS contract was approved by the New York State Attorney General on April 11, 2001 and the New York State Office of the Comptroller on August 1, 2001.

<sup>38</sup> The remedy petitioners seek would be to mandate that neither MCI, nor other telephone service providers, enter into a contract requiring a DOCS commission, thereby indirectly controlling DOCS commission without any legal authority.

<sup>39</sup> New York Telephone at 441.

Service Law §92, to establish and file with the Commission tariffs showing rates, rentals and charges, which are presumed to be reasonable, and which must be attacked initially in an administrative proceeding before the Commission. It further noted that the Commission had treated telephone service in hotels as regulated, a policy that, as discussed below, the Commission has subsequently changed. Therefore, the Court found that hotels could not add an additional surcharge, because such a surcharge was not permitted by the tariff over which the Commission had jurisdiction. New York Telephone Company is distinguishable from this case because it involved private entities that had "no independent right for furnishing a public utility service" and could "only do so in the capacity of agents for the telephone company whose facilities are used to furnish such service." 262 A.D. at 444. In contrast, DOCS is a public entity, which could create its own telephone system without any control by the Commission. The Public Service Law does not give the Commission any jurisdiction to review the 57.5% DOCS commission, and therefore, properly determined only whether or not the 42.5% jurisdictional portion of the rate was just and reasonable.

Furthermore, the Commission later determined not to continue regulating the prices charged by hotels, motels and hospitals for telephone service, because such "service (did) not foster innovations, (did) not advance the public interest, and (did) not represent (the Commission's) commitment to minimization of government restraint on competitive

activities".<sup>40</sup> Subsequently, the Commission's determination was codified in 16 N.Y.C.R.R. §647.1, entitled "Resellers of Telephone Services," which states that "hotels, motels, and hospitals are not resellers of telephone service, insofar as they are providing service only to their transient guests or patients within the confines of their own institutions"<sup>41</sup>, thereby deregulating the Commission's jurisdiction over such telephone service pricing. Likewise, in this case the Commission's determination follows the established policy to not regulate the pricing of telephone service offered by "intermediaries", such as DOCS.<sup>42</sup>

Also, the Commission's determination that MCI is the provider of a telephone service to DOCS pursuant to the competitively bid contract was proper. PULP's contention that New York Telephone Company v. State of New York, Division of State Police, 85 A.D. 2d 803 (3<sup>rd</sup> Dept. 1981) aff'd 58 N.Y. 2d 658 (1982), supports the Commission's jurisdiction over contracts between a telephone company and a state agency is incorrect; that case is distinguishable from this case. The Court found that the contract between the phone company and the State to furnish telecommunications services provided that rates would be in tariffs filed with, and subject to approval by, the PSC. The Court held that the PSC was statutorily authorized under PSL §97(1) to grant a rate increase, as well as, having

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<sup>40</sup> Case 27762 and 27765, Order Directing Filing of Tariff Revisions at pg. 655, Petition of Hotel Association of New York City, Inc.; New York State Hotel and Motel Association, Inc.; Hilton New York Corp.; S&H Grossinger, Inc.; and Wayfarer Inns of New York, Inc. for Deregulation of Hotel Surcharges on Guest Telephone Calls and Petition of Hospital Association of New York State, Inc. for Tariff Revisions to Eliminate the Ceilings on Rates Charged for Bedside Local Telephone Service (issued and effective February 19, 1981).

<sup>41</sup> 16 N.Y.C.R.R. §647.1 (effective December 7, 1982).

<sup>42</sup> Id. at 654.

such authority pursuant to the contract. Therefore, the rate increase was upheld because it was properly approved by the PSC, and the contract provisions were approved by the New York State Comptroller's Office. The Court in Division of State Police held that "[t]he agreement provided that [New York Telephone Company] would obtain approval for the rates to be charged defendant for the services by filing tariffs with the Public Service Commission. . . ." <sup>43</sup> Division of State Police did not involve a commission to be paid pursuant to a contract, or otherwise determine that the PSC had jurisdiction over any such commission. In contrast, Commission jurisdiction over the contractually mandated DOCS commission is not supported by statute or case law.

Furthermore, pursuant to §2.14 entitled "Rate Charges" of the MCI/DOCS contract, "[f]iling tariffs with the PSC or FCC does not circumvent DOCS authority." Pursuant to the agreement, DOCS maintained its jurisdictional authority over the commission paid by MCI. Therefore, in this case, the PSC has jurisdiction only over the non-commission portion of the rate, and properly determined that such portion of the rate was just and reasonable.

Contrary to Outside Connection's allegation, certain contracts between Verizon and certain governmental entities are not analogous to the DOCS/MCI contract and DOCS commission required thereunder. Such Special Pricing Arrangement tariffs (SPAs) provide rate discounts to governmental agencies for the agency's service, which are acceptable and do not violate Public Service Law §92(1) when such rates are i) kept open to the public, and ii) customers and competitors are aware of all prices charged in such special contracts in the form of an

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<sup>43</sup> Division of State Police at 803.

addendum to the tariff authorizing SPAs.<sup>44</sup> In this matter, the Commission has ordered that the DOCS commission portion of the rate charged be stated on all bills reflecting inmate charges, and was made public by being incorporated in MCI's amended tariff.

Finally, the Commission did not ignore record evidence, nor did it fail to explain why certain record evidence was not considered. The Commission considered the evidence before it to determine that MCI's amended tariff for local, intraLATA and interLATA collect calls was just and reasonable. Outside Connection's claim that the Commission did not consider record evidence for local inmate calls is a misstatement; the Commission in fact considered inmate calling patterns. The tariff amendment to the Rate Plan eliminated the distinction between local and long distance calls, and removed varying rates for time-of-day and distance by setting a single \$3.00 surcharge for all inmate calls with the \$0.16 per minute rate, regardless of the time-of-day or distance.<sup>45</sup> In fact, the record established that the tariff revision was filed by MCI "at the direction of DOCS . . . to eliminate the difference between the local and long distance collect call rates upon which [Outside Connection's] unlawful call forwarding service [had] been built."<sup>46</sup> The purpose of the tariff amendment was to establish a uniform rate structure, thereby eliminating the ability of Outside Connection to provide call-forwarding services in

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<sup>44</sup> Case 91-M-0927 - Order Concerning Tariffs Authorizing Individually Negotiated Contracts, Proceeding on Motion of the Commission as to the Administration of Utility Tariffs with Respect to Individually Negotiated Contracts Between Customers and Utilities (issued and effective May 8, 1992). See also, Matter of MCI Telecommunication Corporation v. Public Service Commission, 169 A.D.2d 143 (3<sup>rd</sup> Dept. 1991).

<sup>45</sup> Order at pg. 22.

<sup>46</sup> Id.

violation of DOCS regulations and not permitted by the contract between MCI and DOCS.<sup>47</sup>

The Commission compared the 42.5% jurisdictional portion of the Rate Plan retained by MCI to analogous station-to-station payphone rates. Based on this analysis the jurisdictional portion was just and reasonable.<sup>48</sup> Moreover, when the cost of MCI security features and the fact that MCI was awarded the contract via a competitive bidding process are additionally considered<sup>49</sup>, the Commission's determination that the jurisdictional portion was just and reasonable is further supported. Contrary to Outside Connection's claim, a comparison of the jurisdictional portion of the Rate Plan to the non-commission portion of only a local payphone collect call is not a proper rate comparison to all calls made from a DOCS facility (local, intraLATA, and interLATA). The flat rate structure for all calls benefits 83% of the billed recipients by providing a lower charge per intraLATA and interLATA call. Also, given the available data, the Commission could not compare the jurisdictional portion to the local payphone collect call rate minus any commission paid to the property owner. Finally, the Commission only has jurisdiction over the non-DOCS commission portion of the Rate Plan, and therefore, whether or not the competitive bidding process produces the lowest rate charged is not within the Commission's jurisdiction to determine.

The Commission orders:

1. The Petition for Rehearing of the Public Utility Law Project and the Request for Reconsideration of Outside Connection, Inc. are denied.

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<sup>47</sup> Id.

<sup>48</sup> Order at 23 and 24.

<sup>49</sup> Order at pg. 24.

2. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Secretary