

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 22, 2003

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
James D. Bennett
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 APPROVING JURISDICTIONAL PORTION OF RATE

(Issued and Effective October 30, 2003)

BY THE COMMISSION:

INTRODUCTION

On August 14, 2003, MCI WorldCom Communications, Inc.
(MCI) filed proposed revisions to its PSC No. 5 Telephone tariff
to amend the rate structure for its Maximum Security Rate Plan
for New York State Department of Correctional Services' (DOCS)
telephone services to inmates. MCI proposed to amend the
current rate structure, now based on time-of-day and distance,

to a single flat rate for local, intraLATA and interLATA¹ service. The Commission concludes that jurisdictional portion is just and reasonable. The Commission will further direct MCI to refile its tariff consistent with the terms of this order.

BACKGROUND

On July 18, 2003, MCI filed proposed tariff revisions to its PSC No. 5 Telephone tariff to amend the rate structure for its Maximum Security Rate Plan for DOCS telephone services to inmates. The tariff was to be effective on ten days' notice, which was August 1, 2003. On or about August 6, 2003, the Office of Communications (OC) determined that the tariff revisions were not filed with proper notice.² MCI submitted other revisions to its tariff in the July 18 transmittal that

¹ A LATA is a Local Access and Transport Area. Sometimes these are areas served by a particular area code; for instance, Albany, New York and Plattsburg, New York are within the same LATA; but Albany, New York and Buffalo, New York are considered interLATA. An interLATA call is one that is placed in one LATA and terminated in another LATA. An intraLATA call is one that originates and terminates in the same LATA.

² Public Service Law §92(2)(a) requires, in pertinent part, that:

No change shall be made in any rate, charge or rental, or joint rate, charge or rental applicable to regulated basic services, ..., toll services within a local access and transport area ... except on thirty days notice to the Commission For the purpose of this paragraph, "regulated basic services" are defined as: residential, individual business, and public access line network access, connection charges for such network access, local usage, local coin usage rates, tone dialing, access to emergency services, statewide relay services, operator assistance services, director[y] listings, and provisions that affect privacy protections.

are unrelated to the provision of inmate telephone service. OC reviewed these pages and determined that they were filed properly on ten days' notice.

However, OC concluded that the tariff revisions pertaining to the provision of inmate telephone service should have been filed on 30 days' notice because the services provided by the tariff are toll services within a local access and transport area and operator assistance services. Since the proposed revisions were not filed on proper notice, the July 18, 2003 tariff was determined to be void. MCI was contacted and informed that a new tariff was to be filed on 30 days' notice. Further, the company was to issue credits to ratepayers who were billed at the higher, void rate from August 1, 2003 through August 14, 2003, which was when MCI filed revised pages.³ These pages had an issue date of August 15 and a proposed effective date of September 14, 2003. These proposed tariff revisions are now in effect.⁴

TARIFF FILING

The proposed tariff filing would revise the rate structure for the Maximum Security Rate Plan for DOCS. This filing proposes to change the per minute of use charge for local, intraLATA and interLATA collect calls from a time of day

³ We have been informed that customers are receiving bills at the higher, now void, rate. Counsel from MCI has assured us that incorrect billing would be credited in the next billing cycle.

⁴ While the tariff is now in effect, Public Service Law §92(2)(e) permits the Commission to review any tariff filing within 60 days from the date when the tariff would or has become effective and, on reasonable notice, hold a hearing concerning the tariff filing; at such time the Commission may suspend the tariff.

and distance sensitive charge to a flat rate per minute of use charge of \$0.16 per minute of use.⁵ 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 was \$0.23 for the first minute of use and \$0.16 for each additional minute.

The filing also proposes to standardize the collect station-to-station surcharge to \$3.00 per call for all local, intraLATA and interLATA calls and eliminate the person-to-person collect call surcharge.⁶ 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. Terms for payment will remain the same.

COMMENTS

Outside Connection, Inc. (Outside Connection) filed comments on the initial tariff filing. To ensure that

⁵ A flat rate charge is the same no matter what time of day a call is placed or what the distance of the call is from the originator to the terminator of the call.

⁶ 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 party 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.

interested parties had an opportunity to comment, on August 28, 2003, a Notice Inviting Comments was issued regarding the proposed revisions to MCI's Maximum Security Rate Plan. A summary of the comments is discussed below.

Outside Connection urges in its August 5, 2003 comments that the Commission reject or suspend the tariff revisions pending an investigation since these revisions double the price for a typical local call while lowering the price for a typical in-state toll call by five percent. Outside Connection states that §92(2)(e) of the Public Service Law prohibits the Commission from allowing any tariff filing proposing a "major change"⁷ in price to go into effect without investigation. It contends the tariff revision appears to make a "major change" in pricing because the revised rates are likely to increase MCI WorldCom's revenues by about 4.5%, nearly double the 2.5% threshold for automatic rejection or suspension.

In the alternative, Outside Connection argues, if §92(2)(e) did not require rejection or suspension, §97(1) would justify suspension when there is a question about whether the new rates are "just and reasonable." Outside Connection states there is a serious question whether the overnight doubling of the rate of local calls for New York State inmates is "just and reasonable" especially since those who pay for calls from inmates are, on average, less able to afford a price increase than the population as a whole. According to Outside Connection, this statement is supported by a DOCS and MCI report that a typical local call from an inmate will cost \$6.04 under

⁷ Public Service Law §92(2)(c) states, in part, that a "'major changes' shall mean an increase in rates, charges and rentals which would increase the aggregate revenues of the applicant more than the greater of three hundred thousand dollars or two and one-half percent."

the new tariff but \$3.00 under the previous tariff. Further, Outside Connection complains about the negative impact the revision would have on the ability of carriers to compete with MCI in providing long distance phone service to friends and relatives of inmates incarcerated in New York prisons.⁸

MCI responded on August 8, 2003 to Outside Connection's comments. MCI states the revenue increase does not constitute a "major change" as defined in Public Service Law §92(2)(c), which MCI argues is an aggregate revenue test and not a service-specific revenue test. MCI submits that the increase of aggregate revenues here is approximately 0.4%.

MCI also states that Outside Connection, as a remote call forwarder, has created an unlawful service based on the differential between MCI's higher long distance service and lower local service rates. MCI rejects Outside Connection's statement that it is a provider of "end-to-end long distance" service that it combines with MCI's service because MCI has not authorized Outside Connection to utilize its service. Further, MCI states that its contract with DOCS requires it to block all call-forwarding services because of the security risks it creates. MCI states that, at the direction of DOCS, it has been forced to eliminate the difference between local and long-distance collect call rates upon which Outside Connection's service is based.

⁸ Outside Connection is seeking to provide alternative long distance phone service to friends and relatives of New York inmates. Outside Connection has filed a petition with the Federal Communications Commission (FCC) seeking a ruling declaring that federal telecommunications policy requires that competitors be permitted to provide long distance service in this manner. Outside Connection's petition is pending before the FCC.

MCI argues that its rates are just and reasonable. MCI refers to DOCS' statement that rates will increase for only 17% of inmates and there will be a rate decrease for the remaining 83%. DOCS, according to MCI, believes that the new rate structure is a fairer rate structure. MCI further notes that MCI is not free to set any rates for inmate telephone services, but requires the written approval of DOCS and was, in fact, directed by DOCS to implement this rate restructuring by August 1, 2003.

MCI rejects Outside Connection's argument that the rate restructuring is unjust and unreasonable because it will impede Outside Connection's ability to compete with MCI. MCI states that this was a competitively-bid contract and Outside Connection did not participate in the process. Outside Connection could have participated if it wanted to provide services to inmates. MCI contends that its agreement is lawful and that Outside Connection's service is unlawful and poses security risks.

In Outside Connection's August 13, 2003 reply comments, it asserts that the core question is whether the public interest justifies an overnight doubling of the prices MCI charges without an investigation. Outside Connection reiterates that Public Service Law §92(2)(e) requires a hearing in the event of a "major change," and disputes MCI's claims that the statute applies only when a carrier proposes a rate increase that increases the combined revenues for all services more than 2.5%. Outside Connection also rejects MCI's contention that the proposed rate is just and reasonable because it will affect only 17% of the inmate population, or because the rate increase was initiated by DOCS since DOCS has no jurisdiction under the Public Service Law to determine whether the rates are just and reasonable. Finally, Outside Connection states there is no

merit to MCI's claim that the doubling of rates will eliminate competitors because MCI and DOCS successfully prevented competition under the previous tariff by blocking all competing services.

Howard J. Hubbard, Bishop of the Diocese of Albany, seeks an investigation by the Commission, including hearings, and a meeting with New York State officials in order to discuss this matter since, in some instances, families will pay double what they are presently paying for calls from prison inmates.

Ramona Austin stated that by having to pay the proposed rates, which are unfair and unjustifiable, families who have not committed crimes are being punished as if they had. Moreover, she avers that 90% of the inmate programs and all the educational programs that DOCS' commission is to fund have been cut. Further, prison families already pay state tax and, with these increased rates, there is no reason that DOCS has to tax families twice for programs that do not exist. In her view, DOCS and MCI are only interested in profit. According to Ms. Austin, 17% of the prison families will experience a \$5.00 increase for a 30 minute call. Those accepting collect long distance calls will experience a decrease of about \$0.25 per 30 minute call. Ms. Austin states that inmate families need alternative calling options to maintain ties to their incarcerated family members, ties that are important to their rehabilitation.

Denise Barnes-Hill also stated that MCI has a monopoly on this aspect of the telephone system and is in direct conflict with the anti-trust laws and the public should be informed of the bidding process.

An individual stated that prison families are not rich; MCI "gouges" the user, and the privilege of phoning is a collective punishment when the poor will fare worse than their

"white collar" counterparts. This individual wants the MCI prison contract to be renegotiated or cancelled and wants this telephone service made competitive.

The Center for Constitutional Rights (the Center) states that it has filed challenges to the MCI-DOCS contract governing services for the State of New York's 72 correctional facilities. One of these challenges, Byrd v. Goord, is pending before the Honorable George Daniels, United States District Judge, in the Southern District of New York. A companion case, Bullard v. State, is currently on appeal in the New York State Court of Appeals. In substantial part, according to the Center, the lower court decision in Bullard rested on the determination that the Public Service Commission must first address the issues raised in that case before the matter is properly heard in the State's courts of general jurisdiction. The Center now seeks to raise these issues in this proceeding, specifically, the restriction of calls to collect only, the limitation of satellite service to only one provider, and the commission payable to DOCS.

According to the Center, the families of inmates, as well as other recipients of inmate phone calls, are being unconstitutionally taxed. While the commission payable to DOCS, which goes into the State's General Fund, is earmarked for inmate programs, these are programs that the State would have to pay for even in the absence of the commission. The Center argues that there is no legal basis to force family members, by the commission paid to DOCS on phone calls, to pay for these programs because DOCS has no authority to impose its inmate telephone system tax upon families and other call recipients. Moreover, the Center argues that the single provider/collect call only system violates inmates' families' free speech and association rights, and there are less burdensome alternatives

that could be implemented at no greater cost to the state, e.g., debit account systems used by the Federal Bureau of Prisons. The Center requests a hearing to consider these issues more fully and, in the interim, the rejection the tariff.

The Center filed supplemental comments urging the Commission to stay the revised tariff pending an investigation of whether the increase is a major change, as defined in Public Service Law §92(2), or whether the proposed rate is "just and reasonable" as required by Public Service Law §97(1). The Center states that the tariff revision will result in the doubling of the price that MCI charges for local collect calls from inmates. The Center refutes MCI's contention that Public Service Law §92(2) does not require an investigation here, given that the rate charge will increase MCI's aggregate revenues from all inmate services by far more than the statutory 2.5%.

Further, the Center believes that once the Commission undertakes an investigation to determine whether the proposed rate is just and reasonable, it will conclude that the rate will fail to meet the statutory requirements. First, the Center states, the rate is "plainly confiscatory given that it imbeds the unlegislated tax levied by the Department in the form of the commission it demands." Further, due to the commission, MCI's proposed rate is unconnected to any legitimate operating cost of the company. The Center also argues that the exclusive contract arrangements between prisons and service providers for inmate calling services have resulted in a lack of competition in the market and high rates for such services. In addition, the Center argues that the exclusive arrangements are not necessary in order to carry out security functions and these concerns can be met while permitting inmates to use other services as well. The Center also contends that the exclusive arrangements are anti-competitive, unreasonably restrict consumer choices, and

result in unreasonably excessive rates. They further state that New Jersey has authorized competition in the provision of inmate calling services and the Florida Public Service Commission has asserted that debit cards would prevent rate shock.

The Public Utility Law Project (PULP) requests that the Commission deny MCI's request for approval of rates and that proceedings be held to determine expeditiously whether the long distance and local rates, as proposed by MCI, are just and reasonable, including the cost element of the commissions paid to the state. To support its view, PULP states that in 1998, the Commission issued an order approving MCI's rates for calls from state prison inmates. PULP alleges there was no notice of the proceeding, newspaper notice was waived, and there was no objection lodged at the time by consumers who would pay the rates. Subsequent to this, friends and families of inmates, clergy and community organizations filed a lawsuit in state court (Bullard v. DOCS (N.Y. Ct. of Claims No. 103138, May 1, 2002) (Collins, J.) to invalidate the rates. The trial court dismissed the complaint stating that "... Although claimants might have sought rate relief from the PSC for the intrastate calls at issue here, it does not appear the claimants ever chose to do so." The Appellate Division, Third Department, affirmed the dismissal of that case on the basis that the filed rate doctrine bars judicial proceedings against regulated utilities when the allegation is that the rate is unreasonable.⁹

According to PULP, the Commission has now received complaints about the proposed September 14, 2003 rates. PULP further contends that the Federal Communications Commission (FCC) urged states to review more closely the rates for calls from inmates, stating, "...any solution to the problem of high

⁹ Bullard v. DOCS, 307 A.D.2d 676 (3d Dept. July 31, 2003).

rates for inmates must embrace the states. States are encouraged to examine the issue of significant commissions"¹⁰ PULP suggests that, because of the complexity and seriousness of the issues and the need to proceed in a deliberate fashion, the Commission should establish interim rates pending the investigation. MCI should be directed to file rate case quality data in support of all cost elements of the requested rates, including commissions, and an administrative law judge should be assigned to schedule further proceedings and a hearing. PULP states there should also be an opportunity for customers to present customer service issues related to the tariffs and customer service practices to determine if MCI billing and collection practices are reasonable and consistent with Commission regulations and policies.

Finally, PULP contends there should be a full briefing on the question of whether the PSC lacks jurisdiction or power to examine the reasonableness of any cost element of the rate, including DOCS' commission. In PULP's view, Public Service Law §§ 91, 92, 94 and 97 give the Commission full power to review telephone rates set by contract, without any exclusion of contracts with the State that affect telephone service.

Gail Sullivan states that the collect call rates cause financial hardships for the prison families and prevent them from maintaining communication with loved ones. According to Ms. Sullivan, communication is important between families and prisoners because it cultivates community ties that keep released inmates out of prison. Ms. Sullivan states that "[e]xploiting the poor is not a nice thing." Further, she

¹⁰ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Remand and Notice of Proposed Rulemaking, CC Docket No. 96-128.

states that the individuals who accept the collect calls are working people trying to make ends meet. Ms. Sullivan believes that she is a victim who had nothing to do with the crimes.

Ms. Sullivan requests that there be a public hearing so those who pay the bills will be afforded an opportunity to review the rate structure. She also urges that there be a choice of provider, a voice in prison telephone decision making and the preservation of safe and adequate inmate/family-based programming.

The Justice Fellowship urges in their August 21, 2003 comments that the proposed filing be rejected or suspended pending an investigation into the lawfulness of the rates on the basis that the requested increase is a "major change," as defined in Public Service Law §92(2)(e). It is their understanding that data furnished by MCI and DOCS show that the requested tariff change would increase MCI's aggregate revenues by 4.5%, which is more than double the 2.5% threshold for automatic rejection or suspension. In the alternative, they argue that Public Service Law §97(1) requires suspension because there is a question whether the proposed rates are "just and reasonable."

The Justice Fellowship states that telephone communication is a "critical element" in efforts to rehabilitate offenders and prepare them for reentry into the community. Other than limited visitations, the Justice Fellowship states that the telephone is the only interpersonal communication that the inmate has with outsiders. In the Justice Fellowship's view, access to the telephone is denied if the cost of obtaining it is prohibitive.

In a supplemental filing, the Justice Fellowship questions MCI's September 4, 2003 letter asking the Commission to afford trade secret status to an analysis MCI filed to show

that the doubling of local inmate calling rates is in the public interest. The Justice Fellowship states that such information is available through periodic reports of DOCS, which were attached to the comments. They assert that MCI's recent conduct gives additional cause to question its credibility in light of the July 17, 2003 tariff, its subsequent withdrawal and refiling on August 14, 2003. The Justice Fellowship states that MCI claims it will refund unlawful billings, however, customers have no way of knowing when the new rates become lawful. Therefore, they urge the Commission to order MCI to cease all billing at the higher prices until the tariff amendment goes into effect and immediately refund all overcharges to its customers for all calls made between August 1, 2003 and the effective date of the tariff amendment.

The Prison Families Community Forum (PFCF), a group of families with incarcerated family members, requests that the Commission hold evidentiary and public hearings on MCI's proposed tariff. For the past year, PFCF members have been researching and compiling information concerning the MCI/DOCS contract "in order to better understand the obstacles to abolishing this for-profit monopoly." They state that the families of prisoners pay approximately \$8.00 for a 30-minute call from a prisoner outside the calling area; local 30-minute calls cost approximately \$2.99. In their view, these high rates have the effect of impoverishing families who want to maintain contact with their family member in prison.

Because of the high costs, PFCF states that many families have used new companies that offer remote call forwarding via the Internet. They state that DOCS implemented disciplinary measures against inmates for having remote call forwarding numbers on their call lists. In addition, DOCS has

increased the local charge to \$3.00, which PFCF states is DOCS' means of limiting the use of remote call forwarding.

PFCF states that they are particularly concerned that the Commission views MCI as the utility and DOCS as the customer; the families, friends, clergy and attorneys who incur the financial responsibility for the collect calls are not being considered. PFCF specifically petitions the Commission for the following: First, PFCF requests the classification of prisoner calls be reviewed. Calls are billed as station collect/operator assisted, however, a computer manages the calls. These calls should be billed as station collect/automated and the charge should be reduced to \$1.50 per call, which should be retroactive. Second, PFCF requests billing and collection practices be reviewed, which include inaccurate bills, and double or late bills that may result in blocks being placed on lines. In addition, calls from prisons are frequently interrupted requiring that the call be re-instituted, which results in an additional operator surcharge of \$3.00. In these instances, the \$3.00 surcharge should be eliminated if a call to the same number is made within minutes. In addition, for those with answering machines, very often the consumer is charged for a one minute call even though the call is not completed but picked up by the answering machine.

Third, PFCF argues that the rate structure should be reviewed and compared to all inmate telephone services, including county and federal rates. The commissions received by DOCS are equal to 57.5% and MCI, in addition, makes a profit from these calls. This organization also wants an interim rate structure instituted until a new system is in place and wants alternatives to the collect call system, such as the Debit-

Commissary system used by the federal penitentiaries or a choice of service providers.¹¹

Barbara Bowen was a prison volunteer for Alternatives to Violence Project (AVP) and the Quakers. She maintains contact with several men in prison. The cost of calls has been a hardship and will become more of one as a typical 30-minute call from the prison closest to her will increase from \$2.89 to \$7.60 pre-tax - a 163% tax increase. The DOCS' rationale that those closest to prison should not pay less because they have the opportunity to visit is invalid because a personal visit could mean the loss of a day's income if the visit is during the week. Increases in rates and unfriendly visiting policies only reduce contact between prisoners and the outside.

According to Ms. Bowen, DOCS nets around \$22 million from the phone system after MCI earns its huge fees and this money comes from those most unable to afford the cost of the phone calls. She disagrees that DOCS expends these funds for programs that benefit inmates. In her view, it is DOCS' responsibility to support rehabilitative programs and the cost of these programs should not be borne by those who pay for collect calls. She contends that the agreement between MCI and DOCS, as it currently stands, should be voided; prison families and friends should be included in the decision making process; and the best practices of other states, federal entities and other countries should be researched in an effort to drastically reduce the cost of phone calls and increase prisoner access to family, friends and others.

The Office of the Appellate Defender (OAD) urges the Commission to conduct a thorough investigation of the manner in

¹¹ Anecdotal remarks were also included that reflected some of the personal hardships and concerns that families with incarcerated family members have.

which MCI was awarded the contract, the rates it charges, and the services it provides. The OAD serves an indigent client population, most of whom are incarcerated in state prisons. The OAD states that it is imperative to have regular communication with clients. The OAD relies heavily on telephone communications because face-to-face meetings are often impossible or impractical. The OAD states that MCI's rates are exorbitant and the service quality is poor. On several occasions, incoming calls from inmates have been blocked solely due to administrative errors by MCI. Because of the high costs, the OAD sought to establish its own 800 number for clients, but the request was denied by DOCS. Further, OAD states that they are aware that many families are unable to communicate with inmates because of MCI's high rates.

Nahdiyyah Jarnagin, the wife of a New York State inmate, demands that the Commission hold a public hearing on the proposed rates. She states the rates cause financial hardship and prevent families from maintaining contact with incarcerated loved ones. She wants fair and equitable rates, a choice of providers, a voice in prison telephone decision making, and adequate inmate/family based programming.

Kathie Greenblatt states that an inmate can benefit from the opportunity to maintain regular contact. Inmates, college students, hospital patients, travelers and all others who use the phone, she avers, should be paying the same rate to any vendor to call home collect. She requests that the Commission reconsider the contract and establish a community advisory panel to review prisoner and prison family benefits.

Prison Families of New York requests that the Commission deny the current MCI request for a tariff change and conduct a full investigation, including public hearings in Albany, New York City, and Buffalo or Rochester. The

investigation would focus on the use of funds netted from the current telephone system. It also requests that the Commission meet with family representatives, public defense attorneys, members of faith-based communities and others who want the contract between MCI and DOCS stopped.¹² Prison Families also requests that the Commission "grant prison families the 'access to reliable and low-cost utility services' that your website promises 'all New Yorkers.'" The comments further describe incidents when MCI put blocks on calls when there were no delayed payments. Blocks are also placed when there are billing disputes due to double billing.

While the costs to many in a local calling area are being doubled, Prison Families states that it does not see that any rates are being reduced in half. Further, in areas where the local calling area is geographically large, it is difficult to have visits, especially where there is no public transportation.

Leslie J. Brown, the parent of an inmate, states that it is unfair that MCI can raise rates without a hearing and that there ought to be a choice of providers for services. Further, MCI has netted \$22 billion on the phone charges, yet conditions are deplorable.

Jonathan S. Fishbein, an assigned appellate counsel, states that he accepts collect calls from his assigned clients. Mr. Fishbein states that the counties will be hurt by the increased rates because the counties pay for the calls from inmates to their assigned counsel. Mr. Fishbein states that the

¹² Prison Families of New York appended to its comments a petition demanding an end to the contract, fair and equitable rates, a choice of service providers and a voice in prison telephone decision making. There are over 1,500 e-mail signatures, with comments, on the petition.

county governments are most likely unaware of this cost because, while the voucher submitted by the assigned counsel to the Appellate Division includes the attorney's time and expenses (including the costs associated with accepting collect calls), the Order issued by the Appellate Division directs the County Treasurer to pay the total amount. Hence, the counties are unaware of the impact of the collect calls on the assigned counsel expenses.

Mr. Fishbein also states that assigned counsel will be hurt by this increase. Assigned counsel must first pay the bill to MCI then must wait up to four months after the case is decided for payment from the Appellate Division, which may be a year or more after the collect call from the inmate-client was accepted. Mr. Fishbein states that this will be an additional hardship for assigned counsel, who are only paid \$40.00 per hour for appellate work and must bear this cost until they are later reimbursed. He avers that these costs are one more reason that assigned counsel are difficult to find.

The Department of Correctional Services states that MCI and DOCS operate the inmate telephones as a means for inmates to communicate with families and friends. MCI's exclusive contract to provide this service extends from April 1, 2001 through March 31, 2006, with the possibility of two one-year extensions. Pursuant to the terms of the contract, MCI provides collect calling to inmates and provides DOCS with a number of security features that are not usually associated with collect calling. DOCS states the contract was constructed to meet DOCS' needs, including the single provider component of the contract, and was competitively bid in accordance with State procurement laws.

DOCS avers that there is no constitutional right for an inmate to have access to communications with families and

friends. It has, however, established the Inmate Call Home Program as one method to help inmates maintain contact with loved ones. DOCS states that it has placed limitations on inmate calling as a means of balancing the benefits of providing this program with the risks of providing open communication. Some of these limitations include PIN numbers, a list of approved numbers, and call-blocking capabilities. DOCS also indicates that, in addition to the FCC mandated "call branding" that identifies the rates for the collect telephone call, a pre-recorded message is played at the beginning of each inmate call informing the recipient that the call is being placed by an inmate and identifying the inmate by name. As a result of the numerous security control and system management features, DOCS avers that the phone charges under the Inmate Call Home Program are higher, which charges are necessary to employ these stringent controls and state-of-the-art hardware and software associated with these features.

DOCS states that the FCC has recognized the unique security concerns of inmate telephone services and has not subjected this service to the majority of rules pertaining to competition in the telephone industry. DOCS indicates that the FCC has recognized that callers using inmate-only telephones are restricted to the provider selected by the prison. In a later proceeding, the FCC ordered the use of call branding but rejected other consumer protection rules.

DOCS argues that a comparison of rates offered to residential users or at a public payphone are not appropriate because the calls are operator-assisted calls handled by an automated operator. Further, these rates take into account the significantly higher cost of providing service to an inmate population due to the numerous security features.

The existing rate structure, according to DOCS, was unfair to a majority of families who receive calls from inmates. Therefore, it sought to implement a revenue-neutral change that would result in a flat rate for all calls, without regard to time of day or distance.¹³ DOCS notes that the connect fee of \$3.00 remains the same for most families and there is a decrease in the per minute cost. DOCS indicates that the maximum per minute rate approved by the Commission in 1998 is higher than the proposed rate.

The change in the flat rate will result in a higher charge to 17% of the families. DOCS states that those are individuals who are closest to their incarcerated family members and can more easily enjoy face-to-face visits with family members. The new rate structure will result in a decreased rate for 83% of the families of inmates.

DISCUSSION

After a competitive bidding process, MCI and DOCS entered into an exclusive contract in 2001 for the provision of telephone service to inmates. The contract requires MCI to provide DOCS with unique security mechanisms in order to monitor inmate calls, including site monitoring equipment, call blocking capabilities, and calling protocols for each call placed through

¹³ DOCS notes that the rate charge is "expected to be approximately revenue neutral." If calling patterns remain unchanged, DOCS states that there may be an increase of 1.7% in revenues. However, should families of inmates opt to visit the prison rather than incur the cost of the higher rate, DOCS expects revenue to be unchanged.

the system.¹⁴ MCI is required to assume all liability for billing and collection for all completed calls and MCI's name appears on all of the bills to customers. DOCS also receives a commission in the amount of 57.5% of the monthly gross revenue received from inmate calls.

MCI filed amendments to its tariff that will restructure the rates that are applicable to collect calls originating from facilities operated by DOCS. The new tariff eliminates the distinction between local and long distance calls, removes the varying rates for time of day and distance, and introduces a single surcharge of \$3.00 for all inmate calls and the same per minute rate of 0.16/minute, without regard for time of day or distance. MCI states that the tariff change was introduced at the "direction of DOCS ... to eliminate the difference between the local and long distance collect call rates upon which OC's [Outside Connection's] unlawful call forwarding service has been built."¹⁵ MCI states Outside Connection has used this differential to offer telephone services to inmates that are not permitted by the contract with MCI and are in contravention of DOCS regulations that prohibit call-forwarding.¹⁶

We have reviewed the parties' comments and conclude that the jurisdictional portion of the proposed rate retained by MCI is just and reasonable. Public Service Law §97 requires the

¹⁴ Such protocols include the use of collect calls only, the provision of personal identification numbers for inmates, and an announcement to the party called that the collect call is from an inmate at a correctional facility with an option to accept or decline the call.

¹⁵ MCI comments dated August 8, 2003, p. 6.

¹⁶ 7 NYCRR §723.3(e)(11).

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.¹⁷ 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.¹⁸

In our review of the jurisdictional portion retained by MCI, we compared those rates to the rates that MCI charges for an analogous service, which is station-to-station calling from pay phones. For station-to-station calling, MCI assesses a surcharge of \$1.80 per call and applies varying minutes-of-use rates based on time-of-day and distance, which range from a low of \$0.17 for the first minute and \$0.11 for each additional minute to a high of \$0.36 for the first minute to \$0.22 for each additional minute. Based on this analysis, the jurisdictional

¹⁷ "Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All," New York State Department of Correctional Services, August 2003, p.4.

¹⁸ For the purposes of this analysis, 42.5% of the surcharge and the minute-of-use rate will be considered the jurisdictional rate and 57.5% will be the DOCS' commission. Therefore, the \$3.00 surcharge will be bifurcated: \$1.275 is the jurisdictional rate and \$1.725 is DOCS' commission. The 0.16/minute charge will be bifurcated: .068 is the jurisdictional rate and 0.092 is DOCS' commission.

portion is less than these comparable rates.¹⁹ Moreover, this rate also includes the costs to MCI of maintaining the unique secure features of the service. Finally, the terms of MCI's contract with DOCS were subject to a competitive bidding process. Therefore, we conclude that the jurisdictional portion of the rate, which reflects the rate that MCI charges for the provision of inmate calling services, is just and reasonable.

The Commission will direct MCI to file new tariffs that identify the bifurcation of the total rate as a jurisdictional rate and DOCS' commission. This will indicate that the Commission has reviewed and approved the jurisdictional portion of the rate. The tariff will also serve to notify end-user customers that there is a commission assessed by DOCS on all phone calls, which is part of the charge that appears on their phone bills.

The bifurcation of the rates signifies that the Commission does not have jurisdiction over DOCS, a government agency, or the manner in which it enters into contracts with providers. This contract was competitively bid and contains privately negotiated terms and conditions that were approved by the State Comptroller's Office. A material term of this agreement is the commission that is payable to DOCS by MCI.²⁰ DOCS also has a primary role in establishing the rates that MCI may charge and has determined the level of commission that MCI is to pay DOCS based on the revenues collected for all inmate

¹⁹ For further comparison, AT&T assesses a surcharge of \$2.25 for station-to-station collect calls and charges a flat rate of .30/minute. The jurisdictional rates proposed by MCI are below these rates as well.

²⁰ Although the Commission does not regulate payphone rates, as a part of placing a payphone on a premise, the premise owner typically receives a commission.

calls. Therefore, the identification in the tariff of the jurisdictional rate and DOCS' commission will reflect the jurisdictional boundaries of each agency for their portion of the charge.

Several parties have contended that this rate increase is a "major change" as described in Public Service Law §92(2).²¹ Outside Connection states that the "subject tariff revisions appear to make a 'major change' in pricing because the revised rates are likely to increase MCI's aggregate revenues by about 4.5 percent, nearly double the 2.5 percent threshold for automatic suspension or rejection."²² MCI responds that §92(2)(c) is an "aggregate test, not a service-specific one." Further, a rate increase is only a major change if it "increases the aggregate revenues of the company by more than two and one-half percent." (emphasis in the original).²³ MCI states that its gross intrastate operating revenues for 2002 were \$410,851,705 and that Outside Connection's \$141,000 estimated monthly revenue impact would only increase MCI's aggregate revenues by 0.4%. Outside Connection urges the Commission to reject MCI's claim that §92.2(e) authorizes a doubling of inmate rates without an investigation. Outside Connection doubts "that the legislature intended 92(2)(e) to apply only when a carrier proposes a rate

²¹ Section 92(2)(c) states, in part, "For the purposes of this subdivision, 'major changes' shall mean an increase in the rates, charges and rentals which would increase the aggregate revenues of the applicant more than the greater of three-hundred thousand dollars or two and one-half percent."

²² Outside Connection comments dated August 5, 2003, p.1.

²³ MCI comments dated August 8, 2003, p.2.

hike that increases the carrier's combined revenues for all services by more than 2.5 percent" (emphasis in the original).²⁴

The Commission agrees with MCI that the rate increase is not a "major change" as defined in Public Service Law §92(2)(c). MCI is correct that a rate increase is only a major change if it produces an increase in the aggregate revenues of the company by more than two and one-half percent. Since the tariff amendment will not increase the aggregate revenues by two and one-half percent, this is not a "major change." Therefore, there is no requirement that the Commission hold a hearing, which is required by Public Service Law §92(2)(e) when there is a "major change" in rates.

Many of the commenters indicated that there are service quality issues. However, there have only been a few complaints filed with the Office of Consumer Services pertaining to inmate telephone service to date. This is not the appropriate forum for the Commission to consider corrective action to remedy these alleged problem areas, e.g., call blocking and double billing. Service quality complaints may be filed with the Office of Consumer Services for assistance with resolution, though the unique features of this service will be recognized in handling the complaints.

CONCLUSION

The Commission concludes that the jurisdiction portion of the proposed rate is just and reasonable. In addition, the Commission will direct MCI to refile its tariff consistent with this finding.

²⁴ Outside Connection comments dated August 13, 2003, p. 2.

The Commission orders:

1. Pursuant to Public Service Law §97(1), the jurisdictional portion of the proposed rate change contained in the MCI WorldCom Communications, Inc. PSC No. 5 tariff is just and reasonable.

2. Within ten days of the date of this order, MCI WorldCom Communications, Inc. shall file tariff amendments consistent with this order. The tariff amendments shall take effect on ten days' notice.

3. For good cause shown, the requirement of newspaper publication of the tariff amendments is waived.

4. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Acting Secretary