

Public Utility Law Project

90 State Street Suite 601
Albany, New York 12207-1715
Website: www.pulp.tc

Phone: (518) 449-3375
Fax: (518) 449-1769
E-Mail: info@pulp.tc

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Hon. Jaclyn A. Brillling
Acting Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: 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*

Dear Secretary Brillling:

In a filing dated August 15, 2003, MCI WorldCom Communications ("MCI") requested approval of telephone service rates and charges billed to New York state residents for calls from inmates of state prison facilities operated by the New York State Department of Correctional Services ("DOCS"). The tariff changes, if approved, would be effective September 14, 2003.¹ On August 28, 2003 the Public Service Commission issued a *Notice Inviting Comments on Tariff Filing*, requesting public comment on the August 15 MCI filing. The Public Utility Law Project of New York, Inc. ("PULP") responds as follows.

Initially, PULP welcomes the Commission's invitation for comment on this important rule making matter. Rates and charges for calls from state prison inmates involve significant sums and affect many households who pay for them. According to a New York State Department of Corrections ("DOCS") Press Release issued July 31, 2003, "[i]nmates completed nearly 7 million collect-only calls between September 2001 and August 2002, the base year used when computing the rate change plan. Those calls totaled more than 124 million minutes, generating gross revenues exceeding \$39 million. The Department's commission rate is 57.5 percent on those revenues."² Another DOCS press release on inmate telephone issues, also dated

¹ September 14, 2003 being a Sunday, the rates would become effective Monday September 15, 2003. A copy of the proposed tariff is attached as Exhibit A.

² "Prison system implementing new inmate collect call phone rates; Reducing costs for the 83 percent of inmates furthest from home," DOCS Press Release, July 31, 2003.

<http://www.docs.state.ny.us/PressRel/phones.html>

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July 31, 2003,³ indicates that under contracts for inmate telephone services, the state received commissions totaling \$109 million during the period April 1, 1996 through March 31, 2001.

Reasonable rates and charges for telephone service for service between prison inmates and their families and friends raises important telecommunications and issues and affects the public interest.⁴ The issues of rates and charges for inmate telephone calls is a relatively new matter for the Commission, arising at a time when technological advances and automation have made far greater use of secure telephone service possible for inmates, their families and friends, and in an era of regulatory trends favoring competitive pricing, price cap regulation, and relatively light handed regulation of telephone service rates in situations where genuine competition is found to exist. Because of the need for a full airing of facts, the complexity of the matters involved, exploration of broad policies needed to inform the Commission's decision making, and jurisdictional issues, PULP suggests that the Commission withhold final approval of MCI's request at this time, and establish interim rates subject to refund to consumers at a later date, after completion of further proceedings and a final decision is made. Because there are serious questions whether forces of competition are working properly and whether rates are reasonable, PULP further suggests that the Commission direct MCI promptly to file a rate case in which it will bear the traditional burden to justify the reasonableness of all its rates, charges, and terms and conditions of service, including the cost elements related to payment of commissions.

There is apparently an interrelationship between the tariff filing and a new or revised contract between MCI and DOCS that affects costs to consumers. It is not clear whether this contract between DOCS and MCI is contingent upon PSC review and approval before rates or costs addressed by the contract are binding. According to a DOCS press release,

*"The new rates have been approved by the state Public Service Commission. The Office of the State Comptroller has approved the updated contract with MCI, the vendor operating the Inmate Call Home Program, that incorporates the new rates with no other changes. Inmates were advised last month of the new rates via a memo posted in English and Spanish in all state prisons. Rate change notices were also published last month in newspapers as required by law."*⁵

³ *"Inmate pay phone access fosters family ties, enhances security for all,"* DOCS Press Release, July 31, 2003, <http://www.docstate.ny.us/PressRel/phoneinfo.pdf>

⁴ See, e.g., *New York State Earns Top Dollar From Collect Calls by Its Inmates*, New York Times, Nov. 30, 1999; *When Johnny Calls Home From Prison*, Editorial, New York Times, Dec. 6, 1999.

⁵ *Id.* (Emphasis added).

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Despite the assertion by DOCS that the PSC has already approved the proposed MCI rates, PULP is aware of no contemporary order of the Commission which has done so, and the *Notice Inviting Comments* clearly indicates that no action has been taken as of this time.⁶ The statement does, however, indicate the expectation that PSC approval of the rates is required.

Adding further complexity, in contrast to the DOCS assertion that the PSC already has approved the proposed rates, a press report discusses an ongoing review of the MCI filing by the PSC, and cites a PSC spokesman for the proposition that

“The Commission does not have regulatory reach over the underlying contract between the Department of Correctional Services and MCI.... Thus the Commission cannot do anything about the inmate families’ complaints with MCI or the state contract, the PSC spokesman said.”⁷

The August 15 MCI filing supercedes one filed in July 2003, which was withdrawn.⁸ The currently proposed rates would reduce rates and charges for long distance service within the state while at the same time very substantially raising rates and charges for local calls – more than doubling the rates in some instances. Notwithstanding the reduction of rates and charges for the long distance calls, PULP urges the Commission conduct a full investigation, review and evidentiary hearings to determine whether both the long-distance rates and the local rates, as proposed by MCI, and the tariff terms and conditions of service are just and reasonable, including the cost element of commissions paid to the state.

As background, in 1998 the Commission issued an order approving MCI rates for calls from state prison inmates.⁹ That order recognizes that the rates are established under a contract

⁶ PULP’s review of the State Register has not found any PSC notice of proposed rule making to review the proposed MCI tariff changes.

⁷ *Inmate Relatives Criticize New Call Fees*, Albany Times Union, August 25, 2003.

⁸ The now withdrawn MCI tariff was filed August 18, 2003 proposing rates to be effective August 1, 2003. The withdrawn tariff provided for a different maximum rate cap – \$9 per call and \$.48 per minute. According to a press report, the July 18, 2003 filing was withdrawn due to an error. The principal differences appear to be that the new filing eliminates the higher rate ceiling and has an effective date of 30 days after filing. A copy of the withdrawn filing is at <http://www.pulp.tc/MCIProposedRates8-1-03.pdf>

⁹ Case 98- C-1765, *Ordinary Tariff Filing of MCI Telecommunications Corporation to Introduce a General Service Description and Rates for MCI’s Maximum Security Rate Plan for the New York Department of Corrections*, (Order approving rates as reasonable and waiving newspaper publication requirement). <http://www.pulp.tc/PSC-MCI121798.pdf> A copy of that order is attached as Exhibit B.

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between MCI and DOCS. The order discussed and reviewed the contract and the nature of the service, and determined the rates to be reasonable. There was no notice of the proceeding, newspaper notice of PSC review proceedings was waived, and apparently there was no objection lodged at the time by consumers who would pay the rates. Friends and family of inmates, along with wide range of clergy and community organizations, subsequently brought a lawsuit in state court to invalidate the rates. In dismissing the complaint, the trial court stated:

"Telephone companies may not deviate from the rates filed with the PSC or FCC without filing and receiving approval of the new rates. *Although claimants might have sought rate relief from the PSC for the intrastate calls at issue here, it does not appear that claimants ever chose to do so.*"¹⁰

The Appellate Division, Third Department, recently affirmed the dismissal of that case on July 31, 2003, again relying on the Commission's 1998 approval of the inmate telephone rates, stating:

"[S]ince the alleged injury asserted by claimants arose directly from their payment of the filed rate *approved by the PSC*, '[t]he filed rate doctrine bars [judicial proceedings] against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable.'"¹¹

The 1998 order reveals no objection made to the PSC about the MCI rates for calls from inmates. In contrast, as indicated in the *Notice Inviting Comments*, now the Commission has received complaints about the proposed September 14, 2003 rates. There appear to be serious issues that need to be fully aired as to the appropriate procedural approach and scope of the Commission's review. It can be concluded from the DOCS press releases and from the court decisions that the Commission is expected to determine whether the rates and charges for calls from inmates are just and reasonable, and it is the PSC which is the forum in which consumers may be heard to contest the rates.

While a reading of the 1998 Commission order reveals that the Commission looked both at the rates and the nature of the underlying contract defining the services provided by MCI, however, it appears that review of the rate element relating to the substantial commissions paid by MCI to the state will be a principal source of controversy. According to the court decision, DOCS asked telecommunications providers seeking an exclusive contract to pay the state a

¹⁰ *Bullard v. DOCS*, (N.Y. Ct. of Claims No. 103138, May 1, 2002) (Collins, J.) (*Emphasis added*)
<http://www.pulp.tc/BullardvNYS.pdf>

¹¹ *Bullard v. DOCS*, __ A.D.2d __ (3d Dept July 31, 2003).

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commission of at least 47%, and MCI's winning bid in 1998 offered 60%.¹² This element of cost that must be recovered in rates to pay these commissions is obviously very significant, as recognized by the Federal Communications Commission:

"Typically, the confinement facility awards a contract to provide calling services by competitive bidding and grants the winning provider a monopoly on all inmate calling services. To have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility. In the case of state prisons, which are often located far from major population centers and where consequently most of the traffic is toll traffic and not subject to state ceilings for local calls, the confinement facility monopolies prove sufficiently remunerative to allow the ICS provider to offer generous commissions. *In fact, under most contracts, the commission is the single largest component affecting the rates for inmate calling service. **** [T]hese commissions have typically ranged between roughly 20 percent and 60 percent.*"¹³

The FCC also noted that although a form of competition is used by institutions to select providers, this amounts to selection of a winning monopolist, does not assure competitive rates and charges for those who pay for the service, and may even raise rates:

"Inmate calling is economically different than other payphone services in two respects. First, inmates have none of the alternatives available to non-incarcerated payphone customers. Inmates only have access to payphones, not cell phones, and inmates lack dial-around capacity. Therefore, neither the inmates who initiate the call nor the individuals who bear the cost of inmate calls – most often the inmates' families – have a choice among providers. Second, the competition that does exist – among ICS providers in the bidding process – does not exert downward pressure on rates for consumers. *Instead, perversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.*"¹⁴

¹² *Bullard v. DOCS*, (N.Y. Ct. of Claims No. 103138, May 1, 2002) (Collins, J.) (*Emphasis added*)
<http://www.pulp.tc/BullardvNYS.pdf>

¹³ *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, Paras. 10 and 28 (Issued Feb. 21, 2002) (*footnotes omitted*) (*emphasis added*)
<http://www.pulp.tc/FCCInmatePhoneOrder02-39.pdf>

¹⁴ *Id.*, at para. 12 (*emphasis added*).

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The FCC urged states to review more closely the rates for calls from inmates, and particularly singled out the commission element:

*"[A]ny solution to the problem of high rates for inmates must embrace the states. States are encouraged to examine the issue of the significant commissions paid by ICS providers to confinement facilities and the downward pressure that these commissions have on ICS providers' net compensation and, more important, the upward pressure they impose on inmate calling rates."*¹⁵

As indicated in the FCC decision, the commissions paid to confinement institutions ranged from 20% to 60%. New York's commissions, according to the July 31, 2003 DOCS press release, are 57%.¹⁶

PULP submits that the PSC must be the ultimate arbiter of the reasonableness of telephone rates for calls made within the state. Rate setting is a quasi-legislative function delegated by the legislature to the Commission, a bipartisan body charged with taking into account a fuller range of concerns than an executive agency such as DOCS that is charged with implementation of other statutes. For example, the Commission has the ability to develop an evidentiary record in accordance with its hearing procedures that provide full opportunity for input from interested parties, can weigh evidence of the effect of rates and charges on consumers and utility revenues, and can create the record needed to determine whether identical rates for local and long distance service are appropriate in these circumstances. The Commission should develop a record regarding the extraordinarily large number of incompleting calls, which may be evidence that basic telecommunications policies are being frustrated. According to a DOCS Press Release, "[a]ttempted calls that are not completed add in excess of 2 million phone uses per month."¹⁷ The record needs to be developed to determine the extent to which high charges may be diminishing completion of calls and frustrating PSC policies favoring reasonably priced communication services and affordability. There should also be an opportunity for intervening customers to present customer service issues related to the tariff, including examination of the MCI tariffs and customer service practices to determine if MCI billing and collection practices are reasonable and in accord with Commission regulations and policies such as those regarding partial payments, termination and blocking of services.

¹⁵ *Id.*, at para. 29 (*emphasis added*).

¹⁶ See *"Inmate pay phone access fosters family ties, enhances security for all,"* DOCS Press Release, July 31, 2003, <http://www.docs.state.ny.us/PressRel/phoneinfo.pdf>

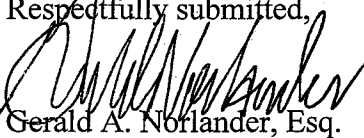
¹⁷ *Id.*, at p. 1.

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Also, there needs to be a full briefing of any contention that the PSC lacks jurisdiction or power to examine reasonableness of any cost element of the rate, including the element related to commissions required by DOCS. Under the New York Public Service Law, the Commission has full power to review telephone rates set by contracts, and review of contracts is specifically addressed in Sections 91, 92, 94 and 97, without any exclusion of contracts with the state that affect telephone service. Clearly the Court of Claims and the Appellate Division in their decisions in the *Bullard* case assumed that the Commission possesses jurisdiction to review and determine reasonableness of the rates under its standards, for this was a reason why they refused to grant judicial review of the commission element of cost. Any party contending the Commission lacks full power to look at the rates including the cost elements related to commissions should be required to brief this issue to an administrative law judge and to the Commission in the course of further proceedings, with full opportunities for all parties to respond.

In conclusion, PULP requests the Commission to deny MCI's request for approval of the rates and the underlying contract upon which they may be based, and asks that further proceedings be held to determine expeditiously whether the rates are just and reasonable. Given the complexity of the issues and the need to proceed in a deliberate fashion, PULP suggests that the Commission establish interim rates pending the investigation, subject to later refund to consumers, and that MCI be directed promptly to file rate case quality data in support of all cost elements of the requested rates, including commissions, and that an administrative law judge be assigned to schedule further proceedings and a hearing.

Respectfully submitted,



Gerald A. Norlander, Esq.
Executive Director

Attachments:

- Exhibit A - Proposed MCI Tariff
- Exhibit B - 1998 PSC Order Approving MCI Rates

Exhibit A

