


TO BE ARGUED BY: ANTHONY C. EPSTEIN
(PRO HAC VICE MOTION PENDING)
TIME REQUESTED: 5 MINUTES

**Court of Appeals
State of New York**



IVY WALTON, RAMONA AUSTIN, JOANN HARRIS, OFFICE OF THE
APPELLATE DEFENDER, and NEW YORK STATE DEFENDERS
ASSOCIATION,

Appellants,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES; and MCI WORLDCOM COMMUNICATIONS, INC.,

Respondents.

**ON APPEAL FROM THE APPELLATE DIVISION,
THIRD DEPARTMENT and ALBANY COUNTY COURT,
INDEX # 04-1048**

**RESPONDENTS BRIEF ON BEHALF OF
MCI WORLDCOM COMMUNICATIONS, INC.**

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INTRODUCTION

This brief addresses Count I, which purportedly seeks enforcement of the New York State Public Service Commission's ("PSC") October 30, 2003, Order ("PSC Order"). This is the only claim against Respondent MCI WORLDCOM Communications, Inc. ("MCI"), now doing business as Verizon Business. This claim is entirely without merit. The courts below correctly held that MCI fully complied with the PSC Order. The PSC not only permitted but *directed* MCI to file a tariff with a total rate that includes both the jurisdictional portion and the commission charged by Respondent New York State Department of Correctional Services ("DOCS"). PSC Order at 24 (R. 89). As Appellants admitted in their petition, MCI filed a new tariff consistent with this instruction and therefore did everything the PSC ordered it to do. Although Appellants claim that they are seeking enforcement of an implicit term in the PSC Order, they are in fact belatedly challenging that Order, complaining that the PSC should have required MCI's tariff to exclude – instead of include – the DOCS commission portion. But Appellants chose not to bring a timely Article 78 proceeding against the PSC challenging its Order.

Nor has DOCS violated the PSC Order. Indeed, there is nothing in the Order to enforce with respect to DOCS: the PSC plainly did not require or

prohibit any action by DOCS because the PSC ruled it had no jurisdiction over DOCS or the price DOCS charges MCI for use of prison property.

STATEMENT OF THE CASE

MCI incorporates by reference DOCS' Statement of the Case. The undisputed facts most relevant to Count I are:

- The PSC “directed MCI to file tariff amendments within ten days to reflect the bifurcation of the rate into the two categories, the ‘jurisdictional portion’ and the ‘DOCS commission’ portion.” Petition ¶ 41 (R. 45); *see* PSC Order at 24 (R. 89).
- “On November 7, 2003, MCI filed tariff amendments consistent with the PSC’s Order, setting out the new, bifurcated rate.” Petition ¶ 43 (R. 46); *see* Ex. B to Affirmation of Rachel Meeropol, counsel for Appellants (MCI’s tariff amendments) (R. 432-34).
- Telephone companies routinely pay commissions in exchange for the right to provide telephone service on property owned by third parties – whether the third party is a private party or a federal, state, or local government. *See* PSC Order at 24 n.20 (R. 89).
- The DOCS’ commission of 57.5% is within the ordinary range of commissions paid to prison authorities. *Implementation of the Pay Telephone*

Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 17 FCC Rcd 3248, 3252-53 & n.34 (2002).

- MCI passes on to DOCS the entire commission portion of its retail charges.

Petition ¶¶ 3 & 45 (R. 32 & 46); PSC Order at 21, 22, 23, 24.

- MCI's charges for inmate calls also cover the non-commission costs MCI incurs to provide telephone service, which are higher than the non-commission costs of non-inmate calls because of unique security mechanisms such as a call-monitoring capability. PSC Order at 21 (R. 86); *see* Petition Ex. B (R. 100-01).

ARGUMENT

I. MCI COMPLIED WITH THE PSC ORDER

Appellants complain that MCI violated the PSC Order by including what the PSC called the "DOCS commission" in its total rate. But the PSC ordered MCI to file a tariff with a total rate that includes both the jurisdictional rate and the DOCS commission: "The Commission will direct MCI to file new tariffs that identify the bifurcation of the total rate as a jurisdictional rate and DOCS' commission." PSC Order at 24 (R. 89). Appellants acknowledge that MCI complied with this order: "On November 7, 2003, MCI filed tariff amendments consistent with the PSC's Order, setting out the new, bifurcated rate." Petition ¶ 43 (R. 46); *see* R. 432-34 (MCI's tariff amendments). Because MCI complied with the PSC Order, there is

nothing for any court to enforce with respect to MCI. And because the PSC ruled it had no jurisdiction over DOCS or the commission it charges MCI, PSC Order at 23 (R. 88), the PSC did not order DOCS to do anything, and there is nothing in the Order to enforce with respect to DOCS.

Appellants contend that the PSC's "true intent and meaning" is different from its express intent and meaning, and that the PSC Order implicitly prohibits MCI from charging the DOCS commission portion of its total rate because the PSC did not approve the commission. App. Brief at 32. However, the PSC said what it meant, and meant what it said. *If* the PSC had agreed with Appellants that the Public Service Law prohibits MCI from including the DOCS commission in its total rate, the PSC would have exercised its authority under the Public Service Law to require MCI to limit its tariffed rate to only the jurisdictional portion. But instead the PSC instructed MCI to file a tariff that included *both* the DOCS commission *and* the jurisdictional rate. *See* PSC Order at 24 (R. 89). The PSC's true intent that the total rate include both the jurisdictional portion and the DOCS commission is further confirmed by its statement that "[t]he 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." PSC Order at 24 (R.89).

Under Appellants' theory, the PSC permitted MCI to recover a total rate that is less than half the rate that the PSC determined is just and reasonable. For example, the per-minute rate of 16¢ consists of 6.8¢ for the jurisdictional portion and 9.2¢ for the DOCS commission portion. PSC Order at 23 n.18 (R. 88); see MCI's Tariff Amendments (R. 434). The PSC concluded that, *separate and apart from the DOCS commission*, 6.8¢ was just and reasonable in light of MCI's non-commission costs and other factors. PSC Order at 23-24 (R. 88-89). The PSC also concluded that it has no authority to prevent DOCS from charging MCI a commission of 57.5%. Because MCI is contractually bound to pay DOCS a 57.5% commission whether its total rate is 16¢ or 6.8¢, limiting MCI's rate to 6.8¢ would leave MCI with only 2.9¢ (42.5% of 6.8¢) – less than half of the jurisdictional portion of the rate approved by the PSC.¹ The PSC did not put MCI in this impossible situation, able to charge a rate that covered less than half of its costs. It is inconceivable that the PSC would rule that DOCS could continue to require MCI to pay the commission to DOCS, but simultaneously prohibit MCI from recovering the cost of the commission from its customers. No party in the PSC proceeding

¹ Indeed, because the contract with DOCS specifies both the percentage commission and the rate that MCI charges its customers, DOCS might contend that even if the PSC allows MCI to charge a total rate of only 6.8¢, MCI would still be contractually obligated to pay a commission of 9.2¢ based on the 16¢ per-minute rate, leaving MCI even deeper in the red. See PSC Order at 24 (DOCS “has a primary role in establishing the rates that MCI may charge”) (R. 89); R. 221-24 (amending DOCS contract to change retail rate).

advocated this confiscatory result, *see* PSC Order at 4-21 (summarizing comments) (R. 69-86), nor would such a result be constitutionally permissible.

Appellants assert that “[t]he mere fact that MCI filed the bifurcated rate pursuant to the PSC Order does not legitimize the DOCS tax ... because the PSC, by its own admission, lacks jurisdiction over that portion of the MCI billing and the manner by which it came about.” App. Brief at 34. But the PSC plainly has jurisdiction over the rate that MCI charges its customers, and it has the power to order MCI to comply with the Public Service Law. The PSC required bifurcation of rates only to “signif[y] that the Commission does not have jurisdiction over DOCS, a government agency, or the manner in which it enters into contracts with providers.” PSC Order at 24 (R. 89). Indeed, Appellants have it backwards: the PSC’s lack of jurisdiction to prohibit DOCS from charging a commission means that the PSC could not prohibit MCI from setting its total rate to cover that cost, not that the PSC was required to force MCI to provide service at a loss. As discussed in the next section, the Public Service Law entitles telephone corporations like MCI to charge rates sufficient to yield reasonable compensation, and commissions are one accepted category of the costs of providing payphone service.

Although Appellants purport to seek enforcement of the PSC Order, they are really challenging the PSC Order. When the PSC instructed MCI to include in its

tariffed total rate a component that Appellants contend is unlawful, Appellants' remedy was to appeal the PSC Order. If Appellants were correct (and they are not) that the Public Service Law prohibits MCI from charging rates that include elements outside the PSC's jurisdiction, Appellants could and should have timely challenged the PSC Order as inconsistent with the Public Service Law. However, Appellants did not challenge the PSC Order within the four-month statute of limitations applicable to Article 78 proceedings, and instead decided to seek "enforcement" of an Order with which MCI indubitably complied.

II. COMMISSIONS TO PROPERTY OWNERS ARE A STANDARD AND LEGITIMATE COST OF PROVIDING PAYPHONE SERVICE THAT TELEPHONE COMPANIES RECOVER IN THEIR TARIFFED RATES

Although the Court need not reach the issue because Appellants seek only enforcement of the PSC Order and MCI complied fully with that Order, Appellants are wrong that the Public Service Law prohibits telephone companies from setting rates to recover costs resulting from third-party commissions and other charges over which the PSC has no jurisdiction.

The PSC recognized that the DOCS commission is no different from the commissions telephone companies routinely pay to owners of premises where payphones are located: "as a part of placing a payphone on a premise, the premise owner typically receives a commission." PSC Order at 24 n.20 (R. 89). Like

private property owners, state governments commonly charge commissions for payphones located on state property, including prisons as well as state office buildings and state parks. Commissions of 20-63% to prison authorities are customary, and the DOCS 57.5% commission is within that range. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3252-53 & n.34 (2002).

The Federal Communication Commission ("FCC") recognizes that "[c]ommission payments have traditionally been considered a cost of bringing payphone service to the public" and the FCC's "regulations reflect that payphone commissions have been traditionally treated as a business expense paid to compensate for the rental and maintenance of the space occupied by the payphone and for access to the telephone user." *AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834, 5836 (1988), *recon. and review denied*, 7 FCC Rcd 7135 (1992); *see National Telephone Services, Inc.*, 8 FCC Rcd 654, 655 (1993) (recognizing that commissions "are a legitimate business expense").²

² Appellants concede that DOCS uses a portion of the commissions paid by MCI "for the maintenance and operation of the prison telephone system," Petition ¶ 28 (R. 41); *see* Exhibit B to Petition (describing DOCS' administrative costs) (R. 94 & 102), and Appellants do not dispute that DOCS has a right to collect commission that recovers its out-of-pocket costs. Therefore, Appellants' claim is not that DOCS cannot charge a commission, but rather that its commission is too high. The Court should decline Appellants' invitation to regulate both the level of the commission charged by DOCS and the reasonableness of the rate charged by MCI.

Accordingly, the Public Service Law does not prohibit telephone companies from recovering through their rates costs imposed by property owners – private or public – that permit telephone companies to place pay telephones on their property. Appellants do not contend that it is unlawful for telephone companies to set rates at levels sufficient to cover their costs, or that commissions paid to owners of premises where payphones are located are not a legitimate cost that telephone companies may lawfully cover in their filed rates. Otherwise, a telephone company could *never* recover the cost of commissions when any property owner – whether governmental or private – allows the telephone company to operate a payphone on its property.

Section 97(1) of the Public Service Law entitles telephone corporations like MCI to charge rates sufficient to yield “reasonable compensation,” and reasonable compensation must cover MCI’s business expenses. Because the cost of commissions is an actual cost incurred by MCI to provide service – and a cost outside the PSC’s jurisdiction to reduce – the PSC correctly authorized MCI to set its tariffed rate to cover that cost. That is no different from approving a rate that covers other costs outside the PSC’s jurisdiction. For example, the PSC has no jurisdiction over the price that equipment manufacturers charge MCI for payphones, but under Appellants’ theory, MCI would be precluded from setting the jurisdictional portion of its rate to cover the cost of payphones because PSC lacks

jurisdiction over their manufacturers. If telephone companies cannot set inmate rates that cover all of their costs, including commission and equipment costs, they will not provide telephone service at prisons – which would deny inmates phone service altogether.

Finally, MCI responds to three related contentions by Appellant. First, Appellants characterize the DOCS commission as a “rate.” App. Brief at 31. But the commission is a cost that MCI recovers in its rate. Appellants confuse what telephone companies charge their customers – the rates over which the PSC has jurisdiction – and what third parties charge telephone companies for goods, services, or access to property – costs over which the PSC lacks jurisdiction.

Second, Appellants contend that the DOCS commission portion of MCI’s rate “is not truly part of MCI’s ‘filed rate.’” App. Brief at 34. But the PSC ordered MCI to include the DOCS commission in its tariffed total rate, albeit as a separately identified component. PSC Order at 24 (R. 89). Contrary to Appellants’ contention (App. Brief at 32-33), MCI is therefore in full compliance with Section 92(2)(d) of the Public Service Law because the only charge it collects in connection with telephone service is “the charge applicable as specified in its schedule on file and in effect.”

Third, Appellants characterize the DOCS commission portion of the rate as “a surcharge that increases the rate a customer pays over the tariffed rate.” App.

Brief at 33. But the DOCS commission is included in the tariffed rate, and customers pay only the total tariffed rate that the PSC authorized MCI to charge. The two cases cited by Appellants in support of their contrary contention involve whether property owners (there, hotels) could impose on customers their own surcharge for telephone service over and above the telephone company's tariffed rate. See App. Brief at 33 (citing *People ex rel. Public Service Commission v. New York Telephone Co.*, 262 A.D. 440 (3rd Dept. 1941), *aff'd* 287 N.Y. 803 (1942), and *United States v. AT&T*, 57 F. Supp. 451 (S.D.N.Y. 1944), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945)). Here, however, customers pay only MCI's tariffed rate, and DOCS does not impose any surcharge directly on customers, instead collecting only a standard commission from MCI. In both of these cases cited by Appellants, the courts concluded that the hotels were providing telephone service, but here the PSC determined that DOCS does not provide telephone service. See PSC Order at 23 (R. 88). Nothing in these two cases suggests that property owners cannot collect commissions or that telephone companies cannot set their tariffed rate to cover these commissions. To the contrary, although the PSC does not permit hotels to charge guests directly for telephone service provided by telephone companies, the PSC has held that hotels can require telephone companies "to pay rental for the use of the hotel premises."

Connolly v. Burleson, P.U.R. 1920C 243, 247 (1920) (cited by Appellants in the trial court). That is all DOCS has done.

CONCLUSION

The Court should affirm the judgment below.

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Albany, New York

Respectfully Submitted,



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