

To be argued by: Anthony C. Epstein  
Time Requested: 10 minutes

STATE OF NEW YORK : SUPREME COURT  
APPELLATE DIVISION THIRD DEPARTMENT

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

Petitioners-Appellants,

Case No. 98700  
Index No. 04-1048  
(Albany County)

- against -

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

Respondents-Appellees.

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**BRIEF OF RESPONDENT-APPELLEE MCI**

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Dated: October 12, 2004

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## BRIEF OF RESPONDENT-APPELLEE MCI

### I. PRELIMINARY STATEMENT

The Court should affirm the dismissal of all of Petitioners-Appellants' claims. Respondent-Appellee MCI WORLDCOM Communications, Inc. ("MCI") incorporates by reference the arguments in the brief of Respondent-Appellee New York State Department of Correctional Services ("DOCS"). MCI addresses the only claim against MCI – Count I, which purportedly seeks enforcement of the October 30, 2003, Order of the New York State Public Service Commission ("PSC"). *See Order Approving Jurisdictional Portion of Rate* (Oct. 30, 2003) ("PSC Order").

MCI fully complied with the PSC Order. The PSC not only permitted but *directed* MCI to file a tariff that included both the jurisdictional rate and the DOCS commission. PSC Order at 24. MCI filed a new tariff consistent with these instructions and has therefore done everything

the PSC ordered it to do. Although Petitioners claim that they are seeking enforcement of implicit terms in the PSC Order, they are in fact challenging that Order, complaining that the PSC should have required MCI's tariff to exclude, not include, the DOCS commission. That challenge, however, is time-barred.

Nor is there any merit to Petitioners' claim that DOCS failed to comply with the PSC Order. That Order plainly did not require or prohibit any action by DOCS – consistent with the PSC's explicit holding that it had no jurisdiction over DOCS or the price it charges MCI for use of prison property. As the court below found, "MCI timely filed the tariff amendments [the PSC ordered it to file] and the [PSC's] other holdings do not appear to require any action on the part of either respondent." Decision/Order/Judgment, at 7.

## **II. STATEMENT OF THE CASE**

MCI incorporates by reference DOCS's Statement of the Case.

## **III. ARGUMENT**

### **A. MCI Complied with the PSC Order**

In Count 1 of their Petition and in their brief on appeal, Petitioners complain that MCI violated the PSC Order by including what the PSC called the "DOCS commission" in its rate. App. Brief at 2. 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; *see id.* at 27 ("Within ten days of the date of this order, MCI WorldCom Communications, Inc. shall file tariff amendments consistent with this order."). MCI is charging its customers the total rate provided for in the tariff that the PSC ordered MCI to file. MCI has therefore been in full compliance with the PSC Order, and there is nothing for any court

to enforce. Similarly, because the PSC ruled it had no jurisdiction over DOCS or the commission it charges MCI, the PSC did not order DOCS to take, or cease, any action. Thus, there is nothing in the Order to enforce with respect to DOCS.

Petitioners assert that they “seek enforcement of the PSC Order not in terms of what it affirmatively orders, but in terms of what it prohibits Defendants from doing.” App. Brief at 5. But as just explained, the PSC explicitly required MCI to include the DOCS commission in its tariffed total rate. Petitioners complain about “the PSC’s own failure to spell out the logical and necessary consequences of its order,” and contend that the PSC Order implicitly prohibits MCI from including the DOCS commission because the PSC did not approve that commission. App. Brief at 27. However, *if* the PSC had agreed with this contention, it would have exercised its authority to prohibit MCI from charging an unlawful total rate including the DOCS commission, and it would have required MCI to limit its rate to only the jurisdictional portion. But instead, the PSC instructed MCI to file a tariff that included the DOCS commission as well as the jurisdictional rate – which MCI did. *See* PSC Order at 24. And with respect to DOCS, the PSC did not prohibit DOCS from doing anything; after all, the PSC held that it had no jurisdiction over DOCS or the amount it charges for access to government property.

Although Petitioners 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 Petitioners contend is unlawful and violates the Public Service Law, Petitioners’ remedy was to appeal the PSC Order. However, Petitioners did not challenge the October, 2003, PSC Order within the four-month statute of limitations applicable to Article 78 Proceedings. If Petitioners were correct that the Public Service Law prohibits MCI from charging rates that include elements outside the PSC’s jurisdiction, Petitioners should have timely challenged the

PSC Order as inconsistent with the Public Service Law on the ground that it authorized MCI to include the DOCS commission in the tariffed total rate.

**B. The DOCS Commission Is a Standard and Legitimate Cost of Providing Payphone Telephone Service**

In the context of their argument that the commission is a tax, Petitioners assert that the commission paid to DOCS is not “a valid telephone service ‘commission.’” App. Brief at 33.

The short answer is that the PSC disagreed, and Petitioners did not appeal that conclusion. The PSC recognized that the DOCS commission is no different from the (equally unregulated) commissions paid to other owners of premises where payphones are located, stating that “as a part of placing a payphone on a premise, the premise owner typically receives a commission.” PSC Order at 24 n.20. 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).

In a case cited by Petitioners, the Federal Communications Commission (“FCC”) stated that “[c]ommission payments have traditionally been considered a cost of bringing payphone service to the public.” *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 paid in connection with collect calls “are a legitimate business expense.”). 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 costs. Petitioners acknowledge that

commissions are a “valid” cost if they “are specifically based on expenses incurred by telephone companies to gain access to property in order to be able to provide services there.” App. Brief at 33. In fact, the DOCS commission portion is specifically based on the “expenses incurred by [MCI] to gain access to [New York State prisons] in order to be able to provide services there.”

Petitioners also contend that to be “valid,” a commission must be included in the tariffed rate. App. Brief at 28. But as the PSC ordered, the DOCS commission is included in MCI’s tariffed total rate. PSC Order at 24. The PSC held that it was just and reasonable for MCI to include that price in its tariffed total rate. The PSC recognized that it had no jurisdiction to determine whether DOCS’ price was reasonable – just as it does not determine whether the commission charged by private property owners is reasonable, or whether the price that equipment manufacturers charge for payphones is reasonable. But because the cost of commissions is an actual cost reasonably incurred by MCI to provide payphone service on government or private property, the PSC authorized MCI to include that cost in its tariff – just as MCI includes commission costs in tariffs for calls from payphones on private property.

Petitioners contend that “the law is clear that ‘commissions’ which increase the rate a customer pays *over the tariffed rate* are invalid.” App. Brief at 33 (emphasis added) (citing two state and federal cases decided in the 1940s). Here, however, the DOCS commission is included in the tariffed rate, and customers pay only the total tariffed rate that the PSC authorized MCI to charge. Moreover, the cases cited by Petitioners in support of this contention involved whether property owners (there, hotels) could charge for telephone service. Here, the PSC determined that DOCS does *not* provide telephone service, and instead only collects from the telephone company a standard commission for use of its property. *See* PSC Order at 23. MCI, not DOCS, collects the charges from customers – pursuant to the MCI tariff that (as the PSC ordered)

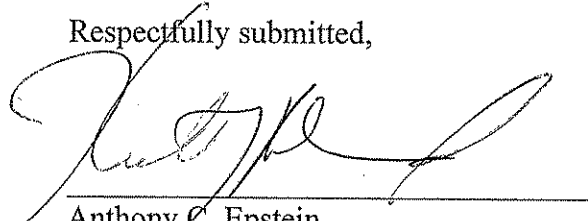


includes the DOCS commission portion of the total rate. Nothing in these cases suggests that property owners cannot collect commissions or that these commissions cannot be reflected in the tariffed rate. The right of telephone companies to set rates that cover all costs, including commission costs, necessarily means that MCI can charge a higher tariffed rate because DOCS (like other property owners) charges MCI for access to its property in order for MCI to provide telephone service there.

#### IV. CONCLUSION

The Court should affirm the judgment below dismissing the petition.

Respectfully submitted,



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