

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

IVEY WALTON; RAMONA AUSTIN; JOANN
HARRIS; OFFICE OF THE APPELLATE
DEFENDER; and NEW YORK STATE
DEFENDERS ASSOCIATION, on behalf of
themselves and all others similarly situated,

Petitioners-Plaintiffs,

- against -

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

Respondents-Defendants.

Index No. 04-1048

**MCI'S REPLY
MEMORANDUM
IN SUPPORT OF ITS
MOTION TO DISMISS**

Respondent MCI WORLDCOM Communications, Inc. ("MCI") respectfully submits this reply to two points in petitioners' Memorandum of Law ("Pet. Mem.") opposing the motions to dismiss filed by MCI and the New York State Department of Correctional Services ("DOCS"). With respect to petitioners' other arguments, MCI relies on its initial memorandum and joins in DOCS's reply. For all the reasons stated in MCI's and DOCS's initial and reply memoranda, the Court should dismiss the Petition and Complaint.

I. MCI FULLY COMPLIED WITH THE PSC ORDER BY TARIFFING BOTH THE JURISDICTIONAL AND DOCS COMMISSION PORTIONS OF ITS RATE

Petitioners confirm that the "only" claim against MCI is Count I, which purports to seek enforcement by the Court of the October 30, 2003, Order of the New York State Public Service Commission ("PSC Order"). Pet. Mem. at 26 n.16. MCI is in full compliance with that Order.

Petitioners allege in Count I that MCI is violating the PSC Order because the rate in its tariff includes the DOCS commission. That argument rests on an untenable interpretation of the

PSC Order. Petitioners make the self-contradictory argument that the PSC both (1) ruled that it has no jurisdiction over the DOCS commission and (2) prohibited MCI from collecting, and DOCS from receiving, that commission. As petitioners acknowledge, the PSC could not have been more clear that it lacks jurisdiction over the commission.¹ But the PSC would not, and lawfully could not, prohibit a practice over which it has no jurisdiction.

Petitioners tacitly acknowledge that the PSC Order does not expressly prohibit MCI from collecting the DOCS commission. Pet. Mem. at 22-23 (“Plaintiffs’ first claim for relief, however, cannot rest on the PSC’s failure to recite certain magic words or spell out every consequence of its order.”) (footnote omitted). In fact, petitioners’ argument is flatly inconsistent with the express terms of the PSC Order. The PSC not only permitted but *directed* MCI to file a new tariff that included both the jurisdictional portion and the DOCS commission portion. PSC Order at 24. The PSC explained, “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.*” *Id.* (emphasis added). Petitioners contend that MCI cannot include the DOCS commission portion of its rate in its tariff because “[u]nder the Public Service Law, MCI is prohibited from charging a rate that is not on file with the PSC and has not been determined ‘just and reasonable.’” Pet. Mem. at 23. But if the PSC had agreed

¹ Pet. Opp. at 4 (“The PSC reasoned that because DOCS is not a telephone corporation subject to the Public Service Laws, the agency does not have jurisdiction over either the Department *or the tax charged by it*”) (emphasis added); ; *id.* at 8 (acknowledging PSC’s determination “that it did not have jurisdiction over the DOCS tax”)*id.* at 10 (acknowledging “the PSC determined that it lacked jurisdiction over both the Department *and its tax*”) (emphasis added); *id.* at 16 (“The PSC has determined that because DOCS is not a telephone company, and the DOCS tax is not a telephone rate, it has no jurisdiction over either.”).

with that contention, it would have prohibited MCI from charging the commission portion and from including this portion in its tariff, instead of instructing MCI to do precisely the opposite.²

Equally important, the PSC's order cannot be interpreted to require MCI to provide service at a loss. The PSC's unambiguous and repeated holding that it lacks jurisdiction over DOCS and its commission refutes petitioners' argument that the PSC implicitly "order[ed] DOCS to cease demanding and accepting the tax from MCI." *See* Pet. Mem. at 25. It is inconceivable that the PSC would allow DOCS to continue requiring MCI to pay the commission to DOCS, but simultaneously prohibit MCI from collecting the commission from its customers. If the PSC had intended to order MCI to lose money by prohibiting it from recovering the portion of its costs made up by the commission, the PSC surely would have said so. The PSC Order requires no such thing because § 97(1) of the Public Service Law entitles telephone corporations like MCI to charge rates sufficient to yield reasonable compensation, and as discussed in the next section, commissions are simply one accepted category of costs of providing payphone service.

Petitioners do not accept MCI's challenge to identify a single federal or state court or agency that prohibits a telephone company from setting rates at a level sufficient to cover the company's actual costs, including commissions to payphone premise owners. *See* MCI Mem. at 4. Nor do petitioners respond to MCI's argument that the Public Service Law gives DOCS the same right to collect a commission as private property owners that make space available to

² Although petitioners purport to seek enforcement of the PSC Order, their real disagreement in Count I appears to be with the PSC, not with MCI or DOCS. When the PSC instructed MCI to include in its tariff a charge that petitioners contend is unlawful, petitioners' remedy was to file a timely appeal of the Order. The time for petitioners to appeal the October 2003 Order under the four-month statute of limitations applicable to Article 78 proceedings has long since expired.

payphone service providers. *See* MCI Mem. at 3. Nor do petitioners dispute the FCC's finding that negotiated contracts between prisons and telephone companies – contracts that typically provide for commissions to prison authorities comparable to the commission at issue here – provide fair compensation within the meaning of federal law. *See* MCI Mem. at 4 (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, 3251, 3252-53 & n.34 (2002)).

For these reasons, MCI respectfully submits that it has fully complied with the PSC's unambiguous Order by continuing to charge the non-jurisdictional portion of the rate that the PSC directed MCI to include in its tariff.³

II. THE DOCS COMMISSION IS A STANDARD AND LEGITIMATE BUSINESS EXPENSE

In the context of their argument that the commission is a tax, petitioners contend that “the DOCS tax is not a ‘commission’ under applicable law.” Pet. Mem. at 30.⁴ The short answer to this contention is that the PSC disagreed, as it repeatedly characterized the DOCS commission as a commission. *See, e.g.*, PSC Order at 24 n.20 (finding that “as a part of placing a payphone on a premise, the premise owner typically receives a commission.”).

³ If the Court has any question about the meaning of the PSC Order, it should direct petitioners to get clarification from the PSC. Indeed, petitioners have a complete remedy with the PSC, which has ample authority to clarify and enforce its own order, as well as the alleged prohibition in the Public Service Law against MCI charging the non-jurisdictional DOCS commission portion of its rates.

⁴ Petitioners go so far as to suggest that “[e]ven if this Court were to decide that the PSC erred in ruling that it lacked jurisdiction over the DOCS tax, the PSC could not have found the DOCS tax just and reasonable, as it is not a valid commission” Pet. Mem. at 25 n.15. Neither petitioners nor respondents have asked the Court to determine that the PSC “erred.”

Moreover, none of the cases cited by petitioners supports their argument. To the contrary, the 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). “Thus, the [Federal Communication] Commission’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.” *Id.* This holding that premise owners are entitled to compensation for use of “the space occupied by the payphone and for access to the telephone user” also contradicts petitioners’ restrictive claim that the *only* costs for which DOCS can be compensated are its actual out-of-pocket costs related to the inmate telephone system. *See* Pet. Mem. at 26, 54, 64. Petitioners do not claim that DOCS’s 57.5% commission is out of line with the commissions charged by payphone premise owners, both public and private, and petitioners do not acknowledge, much less dispute, the FCC’s finding cited by MCI that commissions to prison authorities usually range from 20-63%. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd at 3252-53 & n.34.

Petitioners also assert that “[a]s a business expense, the ‘commission’ must be included in the tariffed rate, such that it does not alter in any way the rate paid by the telephone user.” Pet. Mem. at 31. But nothing in any of the three FCC decisions cited by petitioners supports petitioners’ meritless claim that business expenses cannot affect the tariffed rate. Because higher expenses justify higher rates, recovery of commissions necessarily and properly “changes the tariffed rate paid by the customer.” *See* Pet. Mem. at 31. In a case petitioners cite, the FCC confirms that commissions paid for delivery of collect calls “are a legitimate business expense.”

National Telephone Services, Inc., 8 FCC Rcd 654, 655 (1993). Petitioners are correct that a telephone company cannot make payments to *callers* that effectively reduce the tariffed rate, because that would be an unlawful rebate. *Id.* at 656; *AT&T's Private Payphone Commission Plan*, 3 FCC Rcd at 5836; *International Telecharge, Inc. v. AT&T*, 8 FCC Rcd 7304, 7306 (1993) (miscited by petitioners as 8 FCC Rcd 7403). But the commission at issue here is a payment to the premise owner, not to the people who make or receive telephone calls, and the recipients of collect calls from inmates in New York State prisons pay the full tariffed rate – a rate that covers legitimate business expenses, including commissions and other unregulated costs (such as the cost of the payphones themselves).⁵

Finally, it is worth noting that despite their contrary protestations, petitioners are seeking relief that would enmesh the Court in rate regulation. *See* Pet. Mem. at 16. Petitioners “do not oppose” a commission proportional to DOCS’s costs. *Id.* at 27 n.18.⁶ This makes clear that the real issue is not whether DOCS can charge a commission, but whether the commission that DOCS charges is based on its costs. Setting rates in relation to costs is exactly what regulatory

⁵ The other cases cited by petitioners are equally inapposite. For example, in *United States v. AT&T*, 57 F. Supp. 451, 454-56 (S.D.N.Y. 1944), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945) (per curiam), the court determined that hotels were providing telephone service and enjoined AT&T from providing service to any hotel that resold the service at a rate above the tariffed rate. Here, the PSC determined that DOCS does not provide telephone service. Similarly, in *Connolly v. Burlison*, P.U.R. 1920C 243, 247 (1920) (Ex. 1 to Pet. App. of Unreported Decisions), the PSC determined that hotels could not charge customers directly for telephone service provided by telephone companies, but could require telephone companies “to pay rental for the use of the hotel premises.” Here, DOCS does not charge customers for telephone service and simply collects a standard commission for use of its premises.

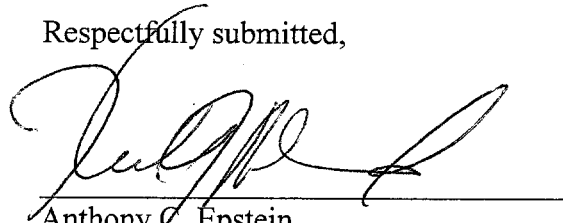
⁶ As DOCS explains in its reply memorandum, the dollar figure that petitioners use for DOCS’s costs excludes major categories of cost that may legitimately be recovered through a commission.

commissions like the PSC are supposed to do. To the extent that the legislature thought that telephone rates should be regulated, it assigned that responsibility to the PSC, not to the courts.

III. CONCLUSION

The Court should grant DOCS's and MCI's motions, dismiss the petition with prejudice, and grant such other and further relief as it deems just and proper.

Respectfully submitted,



Anthony C. Epstein
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8065
(202) 261-7507 (fax)

Of Counsel:
David S. Wachen
Associate Litigation Counsel
MCI, Inc.
1133 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 736-6547
(202) 736-6072 (fax)

Keith J. Roland
Kevin M. Colwell
ROLAND, FOGEL, KOBLENZ &
PETROCCIONE, LLP
One Columbia Place
Albany, NY 12207
(518) 434-8112
(518) 434-3232 (fax)

Dated: June 24, 2004

Counsel for MCI WORLDCOM
Communications, Inc.

To: Rachel Meeropol
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Gerald J. Rock
Assistant Attorney General
The Capitol
Albany, NY 12224-0341