

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

**MEMORANDUM
OF LAW
IN SUPPORT OF
MOTION TO DISMISS**

I. INTRODUCTION

The practices of respondent New York State Department of Correctional Services (“DOCS”) challenged by petitioners are entirely lawful and consistent with 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”) (Ex. A to Petition). Respondent MCI WORLDCOM Communications, Inc. (“MCI”) violated no law by providing telephone service at New York State prisons on the terms established by DOCS. For the reasons set forth in DOCS’s motion to dismiss and in this memorandum of law, petitioners’ claims against both DOCS and MCI should be dismissed.

The only claim against MCI appears to be Count I, which seeks enforcement of the PSC Order. The other Counts allege that DOCS, but not MCI, violated various constitutional provisions and statutes. *E.g.*, Petition ¶¶ 83, 85, 91, 97, 99, 109, 114, 120. Moreover, petitioners seek damages only from DOCS, not from MCI. *See* Petition ¶ 126. DOCS established the terms

of the contract, and MCI simply collects the commission on behalf of DOCS and passes it on to DOCS. Petition ¶ 30; PSC Order at 21, 22, 24. Petitioners have not stated a claim for relief against MCI.

This case is one more in a long series of state and federal cases complaining about inmate payphone services in numerous prison systems. Although these cases have asserted a wide range of theories, they have all ended with holdings that the rates and conditions of these services are lawful. As in the *Bullard* case in which the Appellate Division affirmed dismissal of a similar case brought in the Court of Claims (Petition ¶¶ 35-36 & Ex. C and D), the result should be the same here.

II. STATEMENT OF THE CASE

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

III. ARGUMENT

MCI addresses only certain arguments made by petitioners, focusing on the sole claim against MCI in Count I. To avoid unnecessary duplication, MCI adopts and incorporates by reference all of the arguments made by DOCS in its motion to dismiss.

A. Lawfulness of Rates

1. Consistency with the PSC Order

In Count I of the Petition, petitioners purport to seek "enforcement of the PSC's Order." Petition at 25. However, petitioners acknowledge that the PSC "held that the Commission does not have jurisdiction over DOCS" and therefore did not review what it called the "DOCS commission" portion of the rate. Petition ¶ 42; *see* PSC Order at 24-25. Accordingly, collection of the commission does not violate the PSC Order. The PSC Order cannot be interpreted to

prohibit DOCS from charging a commission because the PSC would not and could not prohibit a practice over which it held it had no jurisdiction.

The PSC recognizes that “as a part of placing a payphone on a premise, the premise owner typically receives a commission.” PSC Order at 24 n.20. State governments are no exception, and they commonly charge commissions not only for prison payphones but also for payphones located on other types of state property, such as state office buildings and state parks.¹ However, under petitioners’ theory, no property owner – whether governmental or private – could lawfully charge a commission when it allows a telephone company to operate a payphone on its premises. Nothing in the PSC Order, or in Public Service Law, prohibits property owners from requiring payphone service providers to pay a commission. In the case of a private property owner, any such ruling would arguably amount to a taking of private property. The Public Service Law does not establish different rules for payphones that happen to be located in prisons than for payphones that are located outside prisons, whether on private or State property.

Without any citation of authority, the Petition asserts that “MCI, as a telephone corporation under the jurisdiction of the PSC, cannot charge Plaintiffs or class members any rate that is not approved by the Commission.” Petition ¶ 75. But if the Public Service Law prohibited any telephone corporation from charging any rate outside the PSC’s jurisdiction, the PSC would have jurisdiction to prohibit MCI from charging that rate, and the PSC would in fact have prohibited that charge in its October 2003 Order. However, the PSC did not prohibit MCI from charging a rate that included the commission. To the contrary, it instructed MCI to file a

¹ 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) (commissions to prison authorities are customary and usually range from 20-63%).

challenge interstate rates, their claim should be dismissed. The Federal Communications Commission (“FCC”) has primary jurisdiction over the reasonableness of rates for interstate calls. *E.g., Wright v. Corrections Corp. of America*, Civil Action No. 00-293 (D.D.C. Aug. 22, 2001) (copy annexed as Ex. 1 to Affidavit of Kevin M. Colwell). In addition, a purported class action challenging the same practices was filed in 2000 in federal court in Manhattan (Petition ¶ 34 (citing *Byrd v. Goord*)), and motions to dismiss this claim on primary jurisdiction and other grounds are currently pending before the federal court.

4. Constitutional Claims

As explained above, petitioners do not appear to assert any claim against MCI under the State Constitution (or the General Business Law), and they do not allege that MCI was acting under color of state law simply because it entered into a contract with DOCS. Nevertheless, MCI briefly addresses petitioners’ constitutional claims.

Rates for prison payphone calls are constitutional so long as they are not “so exorbitant as to deprive prisoners of phone access altogether.” *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam) (granting motion to dismiss under the same standard as CPLR Rule 3211(a)). Petitioners do not contend that the current rates are prohibitive; to the contrary, they allege that MCI’s rates permit a large volume of inmate calls to family, friends, and lawyers – which is why these calls generated several million dollars in commissions for DOCS. *See* Petition ¶ 10.

It is easy to understand why courts have not interpreted the Constitution to require prisons to ensure that rates are at levels that all inmates and their families, friends, and attorneys consider affordable. Any rate higher than zero will cause inmates not to make some calls, or to

2. Primary Jurisdiction

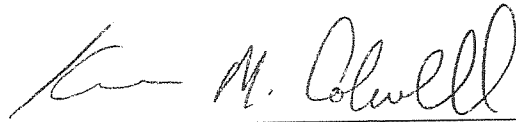
As DOCS demonstrates in its motion to dismiss, to the extent that DOCS's decisions concerning restrictions on inmate calls are subject to review, the primary jurisdiction doctrine requires the Court to dismiss (or at least stay pursuant to CPLR § 7805) the action so that petitioners can seek relief from the PSC or the FCC with respect to DOCS's single-provider, collect-call-only policy. The FCC has long recognized that legitimate security concerns justify the decisions of many prison authorities to restrict inmates to collect calls provided by a single company. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd at 3276; *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, 6156 (1998). The FCC is conducting a proceeding regarding inmate payphone services and recently sought additional public comment on a petition asking the FCC to reconsider its prior rulings.³ The Court should defer to the PSC or the FCC pursuant to the primary jurisdiction doctrine.

IV. 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.

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Notice of Proposed Rulemaking, 69 Fed. Reg. 2697 (Jan. 20, 2004) (attached to DOCS's motion to dismiss). The petition was filed in response to an order in the *Wright* case cited above referring these claims to the FCC under the primary jurisdiction doctrine. *Wright v. Corrections Corp. of America*, CA No. 00-293 (D.D.C. Aug. 22, 2001) (copy annexed as Ex. 1 to Affidavit of Kevin M. Colwell).

Respectfully submitted,



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

Of Counsel:
David Wachen
Associate Litigation Counsel
MCI, Inc.
Washington, D.C. 20036
(202) 736-6547

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

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