

STATE OF NEW YORK
SUPREME COURT

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,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

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

Respondents-Defendants.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 1048-04 Index No. 01-04-ST4340

Appearances:

Center for Constitutional Rights
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioners-Plaintiffs (hereinafter "Petitioners") bring this self-styled declaratory judgment/Article 78 proceeding for a judgment: (1) declaring that certain policies of the New York State Department of Correctional Services (hereinafter "DOCS") are illegal and violate petitioners' constitutional rights; (2) enforcing the Public Service Commission's (hereinafter "PSC") October 30, 2003 Order and permanently enjoining DOCS and Respondent MCI Worldcom Communications Inc., (hereinafter "MCI") from imposing charges above the rate filed with the PSC; (3) permanently enjoining DOCS and MCI from enforcing certain portion of their contracts; (4) directing DOCS and MCI to provide an accounting; (5) directing DOCS and MCI to make certain refunds to petitioners and class members; and (6) awarding costs and disbursements of the proceedings. Respondents oppose the relief requested and move to dismiss on the merits and on procedural grounds.

Petitioners¹ are recipients of collect telephone calls from inmates at correctional

¹ Specifically they are various family members of inmates housed in New York's correctional facilities. Additional petitioners are the Office of the Appellate Defender, a non-profit appellate defense office serving and indigent client population and the New York State Defenders Association a not-for-profit corporation which assists New York's criminal defense community.

facilities in the State of New York. The correctional facilities are maintained by DOCS. MCI entered into contracts with DOCS on April 1, 1996 and August 1, 2001. Pursuant to the contracts, DOCS operates a program that permits inmates to make collect calls to designated friends, family and defense counsel from coinless telephones within the particular correctional facility. Each contract was the result of a competitive bidding process. Prospective telephone service providers were required to meet detailed security and monitoring requirements. The requirements included the ability to block, store and record all calls. DOCS collected 47% of the gross monthly revenue generated by these calls under the 1996 contract. The 2001 contract raised this percentage to 57.5%.

MCI filed its intrastate telephone rates with the PSC.² The rates were approved in December 16, 1998 and then again in November 2003 after MCI revised its rates. The PSC made clear in their 2003 order that DOCS was not a telephone corporation pursuant to the Public Service Law. They therefore determined that they had no jurisdiction over DOCS or the 57.5 % commission payable to DOCS. PSC determined that the “jurisdictional portion” (that portion of the rate retained by MCI) of the revised rate was just and reasonable.

Several court challenges have been pursued seeking relief similar to petitioners’ current requests. A challenge was brought in the Court of Claims alleging, *inter alia*, various infringements of constitutional rights and violations of the General Business Law. The Court of Claims dismissed the action on procedural grounds but advised claimants that they may be entitled to Article 78 relief. The Third Department affirmed the dismissal and noted that the action was also barred by the filed rate doctrine (Bullard v State of New York, 307 AD2d 676). A similar federal action is currently pending in the Southern District of New York.

² Interstate telephone rates are governed by the Federal Communications Commission and are not at issue in this proceeding.

The Causes of Action

Petitioners' first cause of action alleges that DOCS and MCI have impermissibly collected commissions in excess of the jurisdictional rate approved by PSC. They title the action – Enforcement of the PSC'S Order. The second cause of action alleges that DOCS' actions constitute a violation of the power to tax. The third cause of action alleges that DOCS' actions constitute a violation of petitioners' and proposed class members' due process rights. The fourth cause of action alleges that DOCS' actions constitute a violation of petitioners' and proposed class members' rights to equal protection. The fifth cause of action alleges that DOCS' actions constitute a violation of petitioners' and proposed class members' rights to free speech and association. The sixth cause of action alleges that DOCS' actions violate General Business Law § 349. Finally, the seventh cause of action alleges that petitioners' and proposed class members are entitled to an accounting based on DOCS' actions.

Statute of Limitations Issues

Respondents contend that all but the first of petitioners claims are time-barred by the four month statute of limitations period applicable to Article 78 proceedings. Petitioners contend that the six-year catch-all statute of limitations applies to this mixed Article 78 and declaratory judgment action. They stress that the six year period applies because they “seek relief in this case that would be unavailable to them in an Article 78 proceeding”.

The Court must determine the true nature of the case and the relief requested to discover which limitations period applies (*see, Llana v Town of Pittstown*, 234 AD2d 881, 882). If the Court determines that the matters at issue can be resolved in the context of an Article 78 proceeding then the four month Statute of Limitations period will govern (*see generally, Solnick v Whalen*, 49 NY2d 224, 229-230).

Respondents assert that the instant proceeding challenges the actions of an administrative agency to enter into contracts and to appropriate funds and is thereby

subject to Article 78 review. They further contend that the Third Department has held that similar challenges on inmate telephone calls were subject to review under Article 78 (*see, Bullard v State of New York, supra* at 678). Respondents also stress that policy reasons necessitate an application of the four month limitations period in this action due to its potentially serious implications on matters of public finance.

Petitioners argue that Article 78 review is unavailable because they challenge a “continuing” policy of DOCS. They also note that Bullard is inapplicable because it was decided before PSC had determined that it lacked jurisdiction over DOCS and that portion of the rate which DOCS collected as its commission. Alternatively they contend that the only other limitations period which could possibly apply would be the six year period under CPLR § 213(2) for money had and received. Finally, they argue that since respondents’ wrongful conduct is continuous in nature, the accrual period extends until the wrongful conduct ends.

The Court notes that in their notice of petition, petitioners styled this action as one seeking a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules. The notice goes on to state that petitioners seek, *inter alia*, an order pursuant to Article 78. The notice demands a response from petitioners under CPLR § 7804. Finally, the jurisdiction and venue section of the petition indicates that this Court has jurisdiction pursuant to CPLR § 7804(b).

The Court finds that the Article 78 four month statute of limitations applies to all of petitioners’ causes of action. The bulk of petitioners’ claims emanate from two contracts entered into by DOCS and MCI, which were effective on April 1, 1996 and April 1, 2001 respectively (*see generally, Bullard, supra* at 677; holding that a similar set of challenges stemmed from DOCS April 1, 1996 agreement with MCI/Worldcom). The claims challenge the actions of DOCS, an administrative agency, in entering into the contracts at issue. It is axiomatic that judicial review of administrative actions is generally achieved through Article 78 proceedings (*see, Abiele Contr. v NYC Constr., 91*

N2Y2d 1, 8). The Court sees nothing unique about the claims herein which would take them outside normal Article 78 review. As claims 2-7 were not brought within four months of April 1, 2001, they are untimely as a matter of law.

The Court also must reject petitioners' theory of the continuing violation doctrine.. This would allow petitioners' to proceed on the theory that the statute of limitations period accrues until the wrongful conduct ends. On nearly identical facts the Third Department rejected this argument in Bullard (*supra*). There, as is the case here, any damages sustained were the continuing effects of the 1996 and 2001 contracts rather than any continuing wrongful conduct as alleged by petitioners.

Based on the foregoing petitioners' causes of action numbered 2-7 are hereby dismissed as untimely.

Cause of Action # 1 - Enforcement of the PSC'S Order

Petitioners claim that the commission collected by MCI and retained by DOCS was not approved by the PSC. Therefore, they contend that it is not a valid telephone rate under the Public Service Law. Specifically they note that MCI cannot charge the rate because they are a telephone corporation under the jurisdiction of PSC. As such, MCI is not allowed a rate which has not been approved by the PSC. Petitioners also argue that DOCS is not a telephone corporation and therefore may not charge any telephone rate at all. Based on the title of the cause of action they purportedly seek enforcement of the PSC'S Order.

As the Court finds nothing to enforce in the PSC'S order this cause of action must be dismissed. The relevant order from the PSC contains the following decretal paragraphs:

The Commission orders:

1. Pursuant to Public Service Law §97(1), the jurisdictional portion of the proposed rate change contained in the MCI WorldCom Communications, Inc. PSC No. 5 tariff is just and reasonable.

2. Within ten days of the date of this order, MCI WorldCom Communications, Inc. shall file tariff amendments consistent with this order. The tariff amendments shall take effect on ten days' notice.
3. For good cause shown, the requirement of newspaper publication of the tariff amendments is waived.
4. This proceeding is continued.

Petitioners' have not provided the Court with any evidence that respondents' have failed to comply with any portion of the order. Counsel for respondents has indicated that MCI timely filed the tariff amendments and the other holdings do not appear to require any action on the part of either respondent. The Court finds no provision of the PSC's order which needs to be enforced. As such, petitioners' first cause of action must also be dismissed.

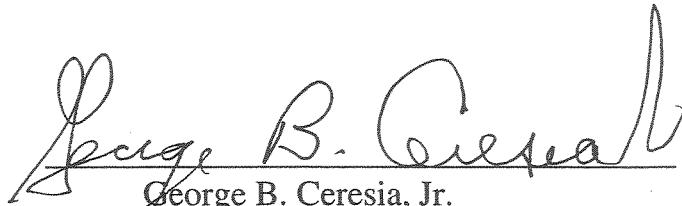
Based on the foregoing the relief requested in the petition is denied and the petition is hereby dismissed.

SO ORDERED and ADJUDGED!

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for respondent DOCS who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: Troy, New York
October 8, 2004


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Petition dated February 25, 2004;

Verified Petition dated February 25, 2004, with annexed exhibits;

Notice of Motion to Dismiss by respondent DOCS returnable June 25, 2004;

Affirmation of Gerald J. Rock, dated May 7, 2004, with annexed exhibits;

Notice of Motion to Dismiss by respondent MCI dated May 7, 2004;

Affidavit of Kevin Colwell, sworn to on May 7, 2004; with annexed exhibits;

Affirmation of Rachel Meeropol, dated June 17, 2004; with annexed exhibits.