

## RESEARCH MEMO

To: Interested Parties

From: Stephen Raher, CCJRC Senior Policy Analyst  
(888) 298-8059 or stephen@ccjrc.org

Date: April 6, 2003

Re: Prison Telephone Regulation/SB 303

### Introduction/Background

In 1994, the General Assembly passed HB 94-1189, which defined and deregulated “optional operator services.”<sup>1</sup> “Nonoptional operator services” (which remain regulated) are defined in CRS §40-15-102(19.5) as:

operator services requiring an operator for individualized call processing or specialized or alternative billing, including, without limitation, credit card calls, calls billed to a third number, collect calls, and person-to-person calls, *or operator services to provide telephone service to inmates at penal institutions.* (emphasis added)

The Colorado Public Utilities Commission (PUC) has codified regulations for nonoptional operator services at 4 CCR 723-18.

On August 27, 2002, MCI WorldCom filed a petition with the PUC asking that the commission cease to regulate telephone services provided to inmates in correctional facilities. After consideration of MCI’s petition, the PUC declined the request on January 23, 2003.<sup>2</sup>

Senate Bill 03-303 (Dyer) seeks to statutorily exempt inmate telephone services from PUC regulation. The CCJRC strongly opposes SB 303, based on the economic and regulatory environment in telecommunications. Deregulation of the telecommunications industry has been brought about due to increased competition. The inmate phone market, however, remains a monopoly with no opportunity for competitive market pressures. Thus, SB 303 seeks to deregulate inmate phones without a simultaneous introduction of competition—an action which not only is contrary to economic theory underlying regulation, but has the potential to inflict serious economic harm on inmates and their families.

### Current Regulatory Environment for Inmate Phones

Inmate telephones in Colorado correctional facilities are regulated by the PUC through 4 CCR 723-18 and by the Department of Corrections’ (DOC) Administrative Regulation 850-12. The

---

<sup>1</sup> Colorado General Assembly, *Session Laws 1994*, Chapter 186.

<sup>2</sup> Colorado Public Utilities Commission, Decision No. R03-0088 (Docket No. 02D-451T, mailed January 23, 2003).

PUC currently sets the maximum rate for prison inmate collect call surcharges at \$1.85,<sup>3</sup> while the most recent iteration of DOC AR 850-12 states the surcharge is \$1.25 for local calls, \$1.00 for long distance calls within the same area code, and \$1.25 for inter-area code calls.<sup>4</sup>

Since the current rates charged by MCI to prison inmates are below the PUC's ceiling, it is not clear what the motivation of SB 303 is. Thus, it is useful to examine what regulations are imposed on MCI under current PUC rules. In addition to requiring general certification of providers of nonoptional operator services, 4 CCR 723-18 provides for the following specific regulations in regards to companies and rates:

- ⇒ Providers shall charge "just and reasonable rates" (§5.4)
- ⇒ Providers shall file tariffs with the PUC (§5.4.1)
- ⇒ Operator service rates shall generally not exceed the maximum rates established by the PUC, without a waiver. Waivers may be requested by showing that a company's costs exceed the established maximum rate (§§5.4.3-4)
- ⇒ If a waiver is granted to allow charges that are higher than the established maximum rates, the PUC may require notice of higher rates to be included when a call is placed (§5.4.5)
- ⇒ Customers have the right to withhold payment for unapproved charges (§5.5)
- ⇒ The PUC is required to keep records of customer complaints lodged against providers of nonoptional operator services and is authorized to investigate such complaints (§5.6)

In addition to the above rules which govern operations, the following regulations govern *specific calls* placed using nonoptional operator services:

- ⇒ Providers must audibly identify themselves to the customer at the beginning of the call (§6.1.1)
- ⇒ Customers must be allowed to terminate the call at no charge, before it is connected (§6.1.2)
- ⇒ Customers may request, at no charge, the rates for a call, how charges will be collected, and how to resolve complaints concerning rates (§6.1.3)
- ⇒ Customers shall not be charged for unanswered calls (§6.1.4)
- ⇒ Providers may not charge someone for a call unless that person has provided a positive response, accepting the charges (e.g., "press 1 to accept the call") (§6.4.2)

In short, the current regulations imposed by the PUC on nonoptional operator services (including inmate phone companies) are reasonable and protect consumers in cases where operator services are mandatory—certainly the case with inmate phones, where prisoners and their families are subject to a strict monopoly.

MCI, however, is unhappy with the current regulatory environment. On August 28, 2002 (the day after MCI requested that the PUC declare inmate phone services as optional operator services), MCI filed a letter with the PUC, requesting to charge inmate phone service rates higher than the established maximums.<sup>5</sup> The company's August 27 request (to be declared

---

<sup>3</sup> 4 CCR 723-18, Appendix A.

<sup>4</sup> Colorado Department of Corrections, "Administrative Regulation 850-12," Attachment C.

<sup>5</sup> Colorado Public Utilities Commission, Decision No. C02-1017 (Docket No. 02I-487T, mailed September 16, 2002).

optional operator services) has been denied, and no action has been taken on the August 28 rate filing. MCI is apparently trying to make an elaborate end-run around the PUC through SB 303.

### Philosophical Aspects of Utilities Deregulation

The Telecommunications Act of 1996 sought to revolutionize telephone service in the U.S. by gradually deregulating basic phone service in return for a concomitant increase in competition and choice for consumers. The push for competition in local exchange service has been disappointing, however, optimism remains that increased customer choice will develop.<sup>6</sup> As former FCC Commissioner Reed Hundt testified before Congress, the FCC, during his tenure worked...to fulfill the pro-competitive mandate of the 1996 Act. We put in place what I believe were strong and fair policies that, consistent with the FCC's statutory mandate, sought to promote competition in all segments of the telecommunications industry *and deregulate as soon as competition permitted*.<sup>7</sup> (emphasis added)

So long as customer choice is not available (as is the case with inmate telephones), regulation is necessary to protect consumers from abusive practices by monopolies such as MCI. In their petition before the PUC, MCI asked that inmate phone services be declared optional operator services. The administrative law judge, however, noted that the customer (either the inmate or, in the case of collect calls, the person being called) *cannot complete the call* without using the inmate phone service provided by MCI. Thus, MCI's inmate phone services are properly categorized as nonoptional operator services, and should be regulated by the PUC.

History of operator services regulation in Colorado is essential to understanding the current controversy. In 2001, the PUC issued a decision regarding regulation of nonoptional operator services. In justifying its decision, the PUC noted that in 1987, in House Bill 87-1336, the Legislature deregulated optional operator services. The Commission, at that time, interpreted "optional operator services" broadly, and, as a result, virtually all Operator Services were treated as unregulated offerings. A significant portion of the Operator Services industry responded by abusing that freedom from regulatory oversight, in particular, by charging exorbitant rates. The public protested, and the Legislature re-regulated many Operator Services by modifying § 40-15-302(5), C.R.S. In 1996, the Legislature directed the Commission to establish benchmark rates for Operator Services providers. Essentially, then, the legislative history relating to Operator Services primarily indicates a statutory intent to protect consumers against excessive charges, not to promote competition.<sup>8</sup> (citations omitted)

In 1998, the Colorado Supreme Court found in *Powell v. Colorado Public Utilities Commission* (956 P.2d 608) that the PUC had limited ability to regulate inmate phone service. The underlying facts in *Powell* have since changed, specifically with the November 2001 contract that the DOC signed with MCI, superceding the previous contract with Sprint, which was at

---

<sup>6</sup> See e.g., U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights, and Competition, *The Telecom Act Five Years Later: Is It Promoting Competition?* 107<sup>th</sup> Congress, first session, May 2, 2001.

<sup>7</sup> U.S. Senate Committee on the Judiciary, 16.

<sup>8</sup> Colorado Public Utilities Commission, Decision No. C01-223 (Docket No. 00R-285T, mailed March 16, 2001), 8.

issue in *Powell*. Thus, inmate phones have once again come under the regulatory purview of the PUC.

In the current case, the administrative law judge found that the DOC remains free to regulate inmate phone usage in accordance with security considerations inherent in running correctional facilities:

the [PUC]'s jurisdiction over nonoptional operator services, and the prices to be charged for those services...does not hinder or circumscribe in any way the DOC's administration, management, supervision, and control of penal institutions. The DOC remains free to offer, not to offer, to restrict, not to restrict, or to take any other action with respect to inmate access to telephone service. Petitioner, and not the DOC, will feel the impact of the Commission's jurisdiction over the nonoptional operator services provided under the contract. Petitioner, and not the DOC, is the regulated utility which must abide by the Rules. Petitioner, and not the DOC, will be required to justify the rates for the nonoptional operator services it provides under the contract.<sup>9</sup>

Thus, we are left to assume that MCI's request (and, by extension, the underlying motive of SB 303) is based on the desire to either raise rates, strip consumers of protection, or both.

#### The Need for Regulation of Inmate Phone Services

Other states have found that exorbitantly high phone rates for prison inmates cause crises in inmate families who are saddled with massive phone bill debt resulting from accepting collect calls from their loved ones in prison. Colorado is to be commended for being one of the few states to offer the option of debit (pre-paid) or collect calling from prison. However, there is no evidence to suggest that Colorado's inmate phone rates are too low for providers to make a reasonable profit. On the contrary, a July 2000 comparison of inmate phone rates in the 50 states found Colorado to have the seventeenth highest rates, with a cost of \$2.20 for a twelve minute local collect call. Other states ranged from 85¢ (Tennessee) to \$4.07 (Illinois), with a national average of \$2.06.<sup>10</sup> Just one year later, however, Colorado had climbed to the seventh highest rate, with a charge of \$2.85 for the same call (other states ranged from 80¢ (South Carolina) to \$5.36 (Illinois), with a national average of \$2.13).<sup>11</sup>

Virginia is the only state which has completed a thorough assessment of inmate calling services. A 1997 report from the Virginia Joint Legislative Audit and Review Commission found that steps should be taken to limit the fiscal impact of the telephone system on recipients of calls from DOC inmates. Individuals receiving collect calls likely have an expectation that rates and charges will be similar to those they receive for collect calls completed outside of the inmate phone system. Linking charges on calls made through the DOC

---

<sup>9</sup> Colorado PUC, Decision No. R03-0088, 18-19.

<sup>10</sup> Attachment to Ex Parte Presentation, FCC Docket No. 96-128, presented by Christopher R. Bjornson of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, PC on behalf of Citizens United for the Rehabilitation of Errants (December 18, 2000).

<sup>11</sup> Attachment to Ex Parte Presentation, FCC Docket 96-128, presented by Robert F. Aldrich of Dickstein, Shapiro, Morin, and Oshinsky, LLP on behalf of the Inmate Calling Service Providers Coalition (June 29, 2001).

inmate phone system to charges the public pays for collect calls could reduce the fiscal impact on call recipients.<sup>12</sup>

Furthermore, the Virginia report considered the importance of telephone access as a tool for inmates maintaining family and community relations and improving inmate morale. The authors concurred with the DOC's practice of using phone access as a privilege, not a right, noting that "the possibility of losing certain telephone privileges due to unacceptable behavior could be used as a factor in maintaining order and discipline among inmates."<sup>13</sup> Additionally, the report mentions the increased importance of reasonable phone access and rates due to increasing numbers of Virginia DOC facilities being located in remote rural areas, which makes personal visits from friends and families in urban areas more difficult<sup>14</sup>—a situation which is certainly true in Colorado as well.

Other states are moving toward, not away from, increased regulatory oversight of and/or competition in inmate phone service providers. In addition to the pro-regulation recommendations in the Virginia report, the Maine Public Utilities Commission has found that, whether or not competition in inmate phones can or should be achieved, "the end result [of prison phone monopolies] appears to confirm the market power that exists: under current market conditions, carriers plainly have sufficient market power to increase operator surcharges and sometimes per-minute rates."<sup>15</sup>

Colorado needs an independent regulator of inmate phone services. While the DOC is no doubt the best situated to develop and implement security-related parameters, the DOC cannot be viewed as an independent body for regulation of fees, since the Department receives a 27% commission of all phone revenues.<sup>16</sup>

### Conclusion

High rates charged by inmate phone service providers primarily impact the families of inmates (people who have committed no crime). Families either accept collect calls or, frequently, send money for their loved ones to purchase time on the DOC's debit calling plan. Therefore, it is crucial to correlate phone charges to actual costs incurred, allowing for a *reasonable* profit for the provider. SB 303 seeks to eliminate all protections for inmates and their families by deregulating rates and eviscerating the required consumer protections now codified by the PUC. Since the benefits of a competitive market in inmate phone services do not appear to be on the horizon, SB 303 is the worst of all possible worlds—an unregulated monopoly whose only watchdog would be the DOC, a party receiving a 27% kickback on billed revenues. SB 303 is bad correctional and telecommunications policy and should be defeated.

---

<sup>12</sup> Virginia General Assembly, Joint Legislative Audit and Review Commission, *Review of the Department of Corrections' Inmate Telephone System*, House Document No. 70 (January 29, 1997), 22.

<sup>13</sup> Virginia General Assembly, 2.

<sup>14</sup> Virginia General Assembly, 19-20.

<sup>15</sup> Maine Public Utilities Commission, Docket No. 96-179 (April 23, 1996), 7-8.

<sup>16</sup> Colorado PUC, Decision No. R03-0088, 10.