

Decision No. R03-0088

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 02D-451T

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IN THE MATTER OF THE PETITION OF MCI WORLDCOM COMMUNICATIONS, INC.,  
FOR A DECLARATORY ORDER.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
FINDING CERTAIN TELECOMMUNICATIONS  
SERVICES SUBJECT TO THE RULES OF THE  
COMMISSION, DENYING REQUEST FOR TEMPORARY  
WAIVER OF RULE 4 CCR 723-18-5.4, AND GRANTING  
REQUEST REGARDING ADMINISTRATIVE NOTICE**

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Mailed Date: January 23, 2003

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**I. STATEMENT OF THE CASE**

1. On August 27, 2002, MCI WorldCom Communications, Inc. (MCI or Petitioner), filed a Petition for Declaratory Order (Petition) with the Commission.<sup>1</sup> In the Petition MCI asks that the Commission determine that telecommunications services for inmates provisioned by MCI under its contract with the Colorado Department of Corrections (DOC) are neither operator services nor nonoptional operator services and that they are not subject to Commission rules. The Petition has three exhibits, among them the contract and the Affidavit of Mary Lou LaCouture (LaCouture Affidavit), Telecommunications Manager for the DOC. In addition, the Petition contains a request for a temporary waiver of Rule 4 *Code of Colorado Regulations* (CCR) 723-18-5.4 until a final Commission decision is entered in this proceeding.

2. On August 29, 2002, the Commission gave notice of the filing of the Petition. *See* Notice of Petition Filed dated August 29, 2002. The Colorado Office of Consumer Counsel (OCC) and the Staff of the Commission (Staff) filed timely interventions. No other person intervened.

3. On October 4, 2002, the undersigned Administrative Law Judge (ALJ) held a prehearing conference. Both a procedural schedule and a hearing date were established. *See* Decision No. R02-1120-I.

4. On October 25, 2002, MCI, OCC, and Staff (collectively, Parties) filed a Stipulated Motion for Briefing Schedule. In the motion the Parties stated that this matter should be submitted to the Commission on briefs, proposed a briefing schedule, and requested that the hearing and procedural schedule in this matter be vacated. This stipulated motion was granted,

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<sup>1</sup> The Petition also included a request for shortened notice. The Commission granted this request by Minute Entry on August 28, 2002. The Commission shortened the notice and intervention period to ten days.

the hearing date was vacated, and a schedule for the submission of briefs was established. *See* Decision No. R02-1218-I.<sup>2</sup>

5. On November 15, 2002, Petitioner filed its Opening Brief (Petitioner's Opening Brief). On the same date OCC and Staff filed their Joint Opening Brief.

6. On December 11, 2002, Petitioner filed a Response Brief (Petitioner's Response) and a Request for Commission to Take Administrative Notice of Stipulation of Facts from Docket Nos. 93F-667T and 93F-547T (MCI Request). On the same date OCC and Staff filed their Joint Reply Brief (Joint Response).<sup>3</sup>

7. In accordance with § 40-6-109, C.R.S., the undersigned now transmits to the Commission the record in this proceeding along with a written recommended decision.

## **II. DECLARATORY ORDER**

8. This matter comes before the Commission upon MCI's Petition for Declaratory Order. Rule 4 CCR 723-1-60 provides that the Commission may issue a declaratory order to terminate a controversy or to remove uncertainty concerning the applicability of any statutory provision or Commission rule, regulation, or order. That Rule, in turn, incorporates the provisions of, and subjects a petition for declaratory order to the provisions of, Col.R.Civ.P. 57.

9. This case presents a controversy or uncertainty concerning the applicability of the Rules Regulating Operator Services for Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-18, to certain telecommunications services provided by MCI pursuant to its

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<sup>2</sup> At the Parties' request, the ALJ subsequently modified slightly the briefing schedule. *See* Decision No. R02-1366-I.

<sup>3</sup> Although denominated "reply brief," this filing is a response to Petitioner's Opening Brief. For clarity, this Staff and OCC joint filing will be referred to as the Joint Response.

contract with the Department of Corrections. This matter, therefore, is properly before the Commission for a declaratory order.

### **III. DECISION ON THE BRIEFS**

10. The Parties have agreed that there are no disputed material facts<sup>4</sup> and that the case may be decided on briefs. While not designated as motions for summary judgment or decision, the effect of deciding the case on the filed briefs is the same. Thus, the ALJ applies the principles pertinent to summary judgment in determining whether to decide this case on the stipulated facts and the legal briefs.

11. Rule 56 of the Colorado Rules of Civil Procedure contains the standard for summary judgment: “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” This case meets this standard as no genuine issue exists as to any material fact<sup>5</sup> and the issues to be determined are strictly legal. Thus, deciding this case on the briefs is appropriate.

### **IV. FINDINGS OF FACT**

12. The Parties have agreed that there are no issues of material fact in dispute and that no hearing is required. In essence, then, the Parties have submitted this case for decision on

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<sup>4</sup> The Parties filed no document containing a stipulation of facts. Instead, the Parties agreed that the facts set out in the Petition, the exhibits to the Petition, and the LaCouture Affidavit would constitute the facts upon which the ALJ could issue a decision. The Parties also agreed that OCC or Staff could supplement those facts if certain procedures were followed. *See* Decision No. R02-1218-I; Stipulated Motion for Briefing Schedule. The only supplementation of the record occurred when MCI requested that the Commission take administrative notice of a stipulation entered in a previous docket.

<sup>5</sup> As noted, the Parties agree there are no disputed material facts.

stipulated facts. Accordingly, from the documents filed in this proceeding, the ALJ finds the following as fact.

13. Petitioner MCI is a telecommunications service provider authorized by the Commission to provide local exchange and other telecommunications services in Colorado. MCI is a public utility subject to the jurisdiction of this Commission.

14. On November 1, 2001, MCI (on behalf of itself and its U.S.-based affiliates and their respective successors) entered into a contract with the DOC to provide telephone services for inmates and to provide interLATA long-distance carrier service for the public pay telephones of Colorado General Support Services, Colorado Government Technology Services, Colorado Department of Human Resources, and Colorado Mental Health Institute in Pueblo (the contract). The initial term of the contract is three years, and it may be extended. Exhibit 1 to Petition at 2. The contract contains both the rates to be paid to MCI for calls and the commissions to be paid to the DOC by MCI. *Id.* at 64-66. Only MCI's provisioning of inmate telephone service under the contract is at issue in this proceeding.

15. With certain exceptions not relevant here, an inmate's use of a telephone to make personal calls is a privilege granted by, and regulated by, the DOC. To educate inmates about the parameters of the telephone privilege, about the rates charged for telephone calls, and about how to avail themselves of the telephone privilege, the DOC has issued DOC Administrative Regulation No. 850-12 and provides informational brochures to inmates.

16. To place personal telephone calls, an inmate must use the Colorado Inmate Phone System (CIPS). *See generally* DOC Administrative Regulation No. 850-12 (Telephone Regulations for Offenders), Attachment A to LaCouture Affidavit. At present, MCI provisions

CIPS through the VAC System 100. The VAC System 100 makes possible the CIPS functionalities, the CIPS features, and the CIPS processes described in this Decision.<sup>6</sup> The VAC System 100 replaced the SAFEBLOCK system, an inmate telephone system provided by Sprint Communications Company L.P. under contract with the DOC.<sup>7</sup>

17. CIPS is a controlled calling system, created to DOC specifications, which contains features and functionalities required by the DOC. CIPS has features which allow the DOC to oversee inmate use of the telephone and which make it possible (or easier) for the DOC to administer the telephone use privilege. For example, for calls other than those properly placed to attorneys, CIPS provides call monitoring and call recording functions. CIPS can generate reports and lists that allow inmate accounts to be moved from facility to facility as the inmates are moved. CIPS allows the DOC to have complete control over inmate use of the telephones and, when necessary, to restrict the telephone numbers that an inmate can call and to restrict or to suspend an inmate's access to her telephone account for disciplinary reasons. CIPS allows the DOC to control the duration of inmate telephone calls and to set parameters on an inmate's placing a call. CIPS allows the DOC to establish both standard and customized (by facility) hours of operation for inmate telephones.<sup>8</sup>

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<sup>6</sup> Unless otherwise stated, reference in this Decision to the CIPS is reference to a functionality provided by, or a feature of, the VAC System 100.

<sup>7</sup> Decision No. R96-51, at 5-6, contains a detailed description of SAFEBLOCK. As discussed *infra*, SAFEBLOCK is the inmate telephone system which was the subject of the Colorado Supreme Court decision in *Powell v. Colorado Public Utilities Commission*, 956 P.2d 608 (Colo. 1998).

<sup>8</sup> This is only a sample of CIPS's functions and features. It is not, and is not intended to be, an exhaustive list. The contract's Statement of Work describes the required functionalities. See Exhibit 1 to Petition at 17-63.

18. To have access to CIPS, an inmate must have a CIPS account and a ten-digit Personal Identification Number (PIN). When using CIPS, an inmate may call only persons listed on her approved Inmate Phone List.<sup>9</sup>

19. To place a telephone call *other than* a call to counsel or an international call,<sup>10</sup> an inmate must use one of two options: the debit option or the collect call option. In either event, because DOC regulations provide that an inmate's possession of cash or coins is possession of contraband, an inmate cannot use coins to place a telephone call. *See, e.g.*, DOC Administrative Regulation No. 300-06 (governing searches and contraband control), Exhibit A to Petitioner's Response, at 6 (contraband includes, *inter alia*, "money or any coin of U.S. or foreign currency or any written instrument of value").

20. In preparation for using the debit option, an inmate must purchase, from funds available in her inmate bank account, "blocks" of telephone time. The inmate makes the purchase at her institution's canteen.<sup>11</sup> The inmate's correctional facility forwards the purchase information to the CIPS administrative office in Canon City. CIPS personnel enter the purchase information into CIPS, which applies the deposits to the inmate's account. When the inmate places a call using the debit option, CIPS deducts the charge for the call from the balance in the inmate's account. CIPS electronically processes the various account and call transactions; the inmate uses no telephone card or similar object to place a call. An inmate may check electronically with CIPS at any time regarding her account balance or the cost of the last debit

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<sup>9</sup> Each person on the list has an assigned speed dial number known to the inmate.

<sup>10</sup> There are specific rules and processes applicable to calls to international calls and calls properly placed to counsel. *See* DOC Administrative Regulation No. 850-12, Attachment A to LaCouture Affidavit. This decision describes in detail only the process used for local calls made to persons other than counsel.

<sup>11</sup> The inmate makes this purchase electronically because, as noted, possession of cash or coins is possession of contraband.

call placed through CIPS. An inmate receives a monthly statement showing the activity in her CIPS account. The DOC has procedures in place for reconciliation of account balances, deposits, and calls.

21. To use the collect call option, an inmate must have an approved phone list. The telephone number *receiving* the call must be on that list and approved to receive collect calls.

22. When an inmate places a telephone call through CIPS, the following occurs. The inmate picks up the handset of a telephone located within her cell house, enters her PIN, and enters the speed dial number she wishes to call. *CIPS then prompts the inmate*: “For a debit call, dial 1; for a collect call, dial 2.”<sup>12</sup> The inmate selects 1 or 2, depending on the type of call she wishes to make. This prompt occurs for every call, including international calls and properly placed calls to counsel.<sup>13</sup>

23. If the inmate selects 1 (indicating a debit call), CIPS confirms that the inmate has sufficient funds in her account to place a call of at least three minutes’<sup>14</sup> duration. If there are sufficient funds, CIPS places the call and *informs the person answering the telephone* as follows: “WorldCom. Except for 90-series attorney call, this call may be monitored or recorded. I have a prepaid call from [prerecording of inmate’s name inserted] at a Colorado State Correctional Facility. *To accept*, dial 5 and wait for connection. *To refuse*, hang up.” (Emphasis provided.)

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<sup>12</sup> The prompts may be in English or Spanish, depending on the inmate’s choice.

<sup>13</sup> The inmate must select the debit option to place an international call. DOC Administrative Regulation No. 850-12, Attachment A to LaCouture Affidavit, at 5. Properly placed calls to counsel also appear to be debit calls.

<sup>14</sup> Three minutes is the minimum; and 20 minutes is the maximum, unless a facility establishes a different maximum. If an inmate does not have sufficient funds in her CIPS account to pay for a three-minute call, CIPS will not place a debit call. *Id.* at 4.



The response of the person receiving the call determines whether the call is completed (*i.e.*, connected).

24. The DOC requested that CIPS have a function that requires a positive response from the person receiving the call before the call is connected. This feature prevents an inmate from being charged for a call answered by a mechanical device (*e.g.*, automated attendant, privacy feature) and not by a person.

25. If the inmate selects 2 (indicating a collect call), CIPS confirms that the number being called is approved to accept collect calls. If it is, CIPS places the call and *informs the person answering the telephone*: “WorldCom has a collect call for you. Except for 90-series attorney calls, this call may be monitored or recorded. You have a collect call from [prerecording of inmate’s name inserted] at a Colorado State Correctional Facility. For customer assistance and collection or complaint procedures, dial 1-800-444-3333. To hear the cost of this call, press 8 now. *If you wish to accept and pay for this call*, dial 5 now. If you wish to block any future collect calls, press or dial 7 for further information. *To refuse this call*, hang up.” (Emphasis supplied.) The response of the person receiving the call determines whether the call is completed (*i.e.*, connected).

26. Once the call is connected and irrespective of the option used, at random intervals, but no more than twice per call, a recording plays. The recording says: “This call is from a Colorado Correctional Facility.” Thus, even if a call is transferred to someone other than the person who accepted the call, the individual on the telephone is made aware that the call is from an inmate.

27. All prompts and messages provided by CIPS during the course of connecting a call, whether to the inmate or to the person receiving the call, are recordings, computer-voice interactions, or synthesized voices. No live operators are involved in placing or connecting calls through CIPS.

28. Under the contract, MCI provides the software and the equipment necessary to provision CIPS.<sup>15</sup> This includes, for example, workstations, servers, digital conversation equipment, backboards, routers, universal power sources, and all modems and equipment required for networking. MCI maintains and services the equipment. The DOC administers CIPS and provides, for example, data entry, handling of inmate grievances, and paperwork distribution (including the monthly account balances).

29. Qwest Corporation, or one of its affiliates, owns the telephone instruments available to the inmates. The telephone instruments used by the inmates to place CIPS calls are coinless telephones. Qwest Corporation also owns the switches that route the inmate calls to the appropriate destinations.

30. Under the terms of the contract, the DOC receives a 27 percent commission on all billed revenues, regardless of whether the revenues are derived from collect calls or from inmate debit account calls. The DOC deposits these commissions directly into the Canteen, Vending Machine and Library Trust Fund (Trust Fund). *See* § 17-20-127, C.R.S. By statute, the Trust Fund must cover the expenses of the operation of canteens and vending machines. Section 17-20-127(2), C.R.S., states that any profits (*i.e.*, monies in excess of expenses) must be used solely “to purchase educational and recreational supplies and equipment and to supplement direct

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<sup>15</sup> The equipment may be owned by MCI or by one of its subcontractors.

inmate needs.” DOC Administrative Regulation No. 200-11 provides that profits (*i.e.*, monies in excess of expenses) from CIPS are part of the Trust Fund. Exhibit 4 to Petition.

## V. LEGAL ISSUES PRESENTED

31. Whether the telecommunications services provided by MCI under the contract are “operator services,” as defined in § 40-15-102(20), C.R.S.

32. If the telecommunications services provided by MCI under the contract are operator services, whether they are “nonoptional operator services,” as defined in § 40-15-201(19.5), C.R.S., and in 4 CCR 723-18-3.1.3.

33. Whether the Rules Regulating Operator Services for Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-18, apply to the telecommunications services provided by MCI under the contract.

## VI. DISCUSSION

34. For the reasons discussed below, the inmate telecommunications services (inmate services) provided by MCI pursuant to its contract with the DOC are operator services; are nonoptional operator services; and are subject to the Rules Regulating Operator Services for Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-18 (the Rules).

35. MCI’s primary argument is that the inmate service provided under the contract is the same in all relevant particulars as SAFEBLOCK, the inmate service analyzed in the Powell case.<sup>16</sup> In that case SAFEBLOCK was found not to be an operator service. As a result,

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<sup>16</sup> Dockets No. 93F-547T and No. 93F-667T; *Powell v. Colorado Public Utilities Commission*, 615 P.2d 608 (Colo. 1998) (*Powell*). Reference to the Powell case (without italics) includes both the Commission proceeding and the Colorado Supreme Court decision on judicial review.

according to MCI, CIPS is neither an operator service nor a nonoptional operator service; and the Rules do not apply to the inmate service provided under the contract. Intervenor distinguishes the Powell case on its facts, asserts that CIPS is different from SAFEBLOCK in one critical respect, and argues that the Rules apply to the inmate service provided under the contract. MCI offers other, secondary arguments in support of its petition. Intervenor offers arguments in opposition.

36. The first question presented is whether the inmate services provided by MCI are operator services. MCI argues that they are not. In support of that proposition, MCI asserts that, as was the case with SAFEBLOCK, CIPS does not require the use of an operator (either live or recordings) to place a call. OCC and Staff disagree, arguing that an inmate cannot place a CIPS call without the use of recordings or computer interaction. The ALJ agrees with OCC and Staff.

37. Section 40-15-102(20), C.R.S., defines operator services, in relevant part, as: “services ... provided by ... the *use of recordings or computer-voice interaction* to enable customers to receive individualized and select telephone call processing or specialized or alternative billing functions. ‘Operator services’ includes nonoptional operator services[.]” (Emphasis supplied.)

38. Based on the facts in this case, CIPS meets the statutory definition. First, one must determine who the customer is in this case. “Customer” is not defined in the statute. There is a definition of “customer” found in 4 CCR 723-18-6.4: “the customer is the person who will be billed for the call.” Although the Rules limit its use to specific circumstances, this definition indicates the Commission’s thinking on the meaning of customer. In addition, this definition is consistent with the commonly-understood meaning of the word. Thus, the ALJ determines that a customer, in the context of § 40-15-102(20), C.R.S., and this proceeding, is the person who will

be billed for the call. In a debit call, that person is the inmate; in a collect call, that person is the person receiving and agreeing to pay for the call.

39. Second, the party paying for the call (*i.e.*, the customer) cannot receive service (*i.e.*, a connected call) without the use of recordings or computer-voice interaction. An inmate cannot initiate a call at all unless she uses the recording or computer-voice interaction to indicate the type of call (*i.e.*, debit or collect) she wishes to place.<sup>17</sup> For a collect call, CIPS will not connect the call unless the person receiving the call agrees to accept, and to pay for, the call.<sup>18</sup> This is done using recordings or computer-voice interaction. In addition, CIPS will not connect either a debit call or a collect call from an inmate (*i.e.*, provide service) unless the person receiving the call accepts the call. This, too, is done by the use of computer-voice interaction or recordings.<sup>19</sup>

40. Third, the customer must use recordings or computer-voice interaction in order to connect a call and to authorize the manner of payment for a call, whether debiting the inmate's account or agreeing to pay the charges for a collect call. Thus, through the use of CIPS's recordings or computer-voice interaction, the customer "receives individualized and select telephone call processing." Section 40-15-201(20), C.R.S.

41. Fourth, as noted by OCC and Staff, the history of the deregulation and subsequent reregulation of nonoptional operator services, described at length in Decision No. C01-223,

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<sup>17</sup> If the call is a debit call, CIPS subtracts the cost of the call from the inmate's account, thus making the inmate the customer.

<sup>18</sup> In this case the person receiving the call is the customer.

<sup>19</sup> The existence of these intercepts renders CIPS *not* analogous to a sent paid call and is a complete answer to MCI's argument that CIPS, like SAFEBLOCK, is analogous to a sent paid call. Judge Kirkpatrick considered SAFEBLOCK to be analogous to a sent paid call because there was no interaction, "no live or simulated voice intercept whatsoever." Decision No. R96-51 at ¶ I.C.10.

entered in Docket No. 00R-285T, proves the General Assembly's intention that the Commission regulate the rates and charges for inmate telephone service. *See* Decision No. C01-223 at 8-10.

42. Fifth and finally, the DOC appears to consider collect calls to be operator-assisted calls. DOC Administrative Regulation No. 850-12, at 5, states: "Collect calls will be charged at the current rate for *operator assisted calls*." (Emphasis supplied.) While not controlling, this is instructive and informative.

43. MCI argues earnestly that the CIPS, in all relevant respects, is precisely like the SAFEBLOCK system analyzed by this Commission and the Colorado Supreme Court in the Powell case. Because the Commission found that SAFEBLOCK was not an operator service, MCI asserts that CIPS is not an operator service. OCC and Staff argue just as strenuously that CIPS is different from SAFEBLOCK in one critical respect: CIPS requires the use of computer-voice interaction or recordings, and SAFEBLOCK did not. OCC and Staff are correct.

44. The Commission entered Decisions No. R96-51 (mailed January 16, 1996) and No. C96-457 (mailed April 30, 1994) in *Powell et al. v. Colorado Inmate Phone System et al.*, Dockets No. 93F-547T and No. 93F-667T. In those decisions the Commission found that SAFEBLOCK did not come within the definition of operator services because "the SAFEBLOCK system as implemented in Colorado does not use live operators or recordings or computer voice interaction. *There was no live or simulated voice intercept whatsoever.* There was a pre-programmed speed dial number and a prepaid account. The inmate call proceeds like a direct dial call with no interaction." Decision No. R96-51 at ¶ I.C.10 (emphasis supplied); *see also* Decision No. C96-457 at ¶ II.C.2 ("SAFEBLOCK does not utilize any operator services ... and is simply a sophisticated PBX. In order to be an operator service, SAFEBLOCK would have to require the use of live operators, recordings, or computer voice interaction."). The Colorado

Supreme Court affirmed the Commission in *Powell v. Colorado Public Utilities Commission*, 956 P.2d 608 (Colo. 1998) (*Powell*). In reaching its decision, the supreme court stated that “[i]t is undisputed that the Safeblock system did not utilize operators, live or recorded, in its operation.” *Id.* at 615 (footnote omitted).

45. In the case now before the Commission, however, there are two required recorded or voice simulated intercepts which occur before the inmate call is connected. The first occurs when the inmate enters her PIN number and the speed dial number to be called. The second occurs when the person receiving the call is informed of the call, is given the opportunity to accept or to refuse the call, and (if it is a collect call) is informed that she will pay for the call if it is accepted. The existence of these required intercepts is the critical -- and controlling -- fact which differentiates CIPS from SAFEBLOCK and which brings CIPS within the definition of operator services.

46. Having determined that CIPS comes within the definition of operator services, the second question to be addressed is whether CIPS provides nonoptional operator services. There are both a statutory definition and a rule definition of nonoptional operator services. CIPS meets both definitions.

47. As pertinent here, § 40-15-102(19.5), C.R.S., defines nonoptional operator services as “operator services to provide telephone service to inmates at penal institutions.” Based on the facts stated *supra* and as shown by the discussion *supra* concerning operator services, CIPS meets the statutory definition of nonoptional operator services.

48. By rule the Commission has defined nonoptional operator services. *See generally* Rule 4 CCR 723-18-3.1. Rule 4 CCR 723-18-3.1.3 contains the portion of the nonoptional

operator services definition relevant here: “[c]alls made by *inmates* at penal institutions or other correctional facilities [a] *who are not permitted* to use coins when placing calls at coin operated or coinless telephones **or** [b] *who are required* to use an operator’s services to complete a call because of the rules or regulations of said institutions or facilities.” (Emphasis supplied.)

49. MCI argues that CIPS does not meet the rule definition because inmates are permitted to use coinless telephones and the DOC does not require inmates to place collect calls. Thus, according to MCI, the two prongs of the definition are not met; and CIPS does not come within the definition of nonoptional operator services. OCC and Staff disagree, pointing out that only one prong of the definition needs to be met and that, in any event, CIPS meets both prongs of the definition. OCC and Staff are correct.

50. By the rule’s plain language, a service (such as CIPS) meets the rule definition of nonoptional operator services if it meets *either* prong of the definition. Thus, MCI is incorrect to the extent it urges an interpretation that requires CIPS to meet both prongs of the definition.

51. The first prong of the definition is met if inmates are not permitted to use coins when placing calls. As discussed *supra*, the DOC does not permit inmates to use coins to place calls; inmates have access only to coinless telephone instruments; and CIPS was specifically designed to operate without the use of coins. CIPS meets the first prong of, and comes within, the rule definition of nonoptional operator services.

52. The second prong of the rule definition is met if the rules or regulations of the penal institutions or correctional facilities require an inmate to use an operator’s services to complete a call.



53. The ALJ finds that the term “an operator’s services” in the rule definition of nonoptional operator services includes the use of recordings, computer-voice interaction, and synthesized voices and does not require the use of a live operator. This interpretation makes the language of Rule 4 CCR 723-18-3.1.3 consistent with § 40-15-102(20), C.R.S., and Rule 4 CCR 723-18-3.2.<sup>20</sup> In addition, based on review of the Commission decisions which introduced the term “nonoptional operator services” into the Rules, the ALJ discerns no indication that the Commission intended to narrow or to restrict the statutory definition of operator services when regulating nonoptional operator services provided to inmates.

54. As discussed in detail *supra*, the DOC requires inmates to use CIPS to place calls; and CIPS requires the use of operator services to complete inmate telephone calls. CIPS meets the second prong of the rule definition and, thus, comes within the definition of nonoptional operator services.

55. In addition, finding that CIPS provides nonoptional operator services achieves the purpose underlying regulation of those services. As the Supreme Court stated in *Powell*, “[g]enerally, operator assisted calls cost more than direct dial calls. Thus, it makes sense to regulate the cost of this service where it is nonoptional to a customer.” *Powell*, 956 P.2d at 615. That is precisely the situation here: CIPS makes use of an operator service nonoptional for inmates and persons receiving inmate calls. The charge for the CIPS calls is higher than the charge for a direct dial call. In such circumstances, Commission regulation of the CIPS-provided telecommunications services makes sense and is warranted.

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<sup>20</sup> Rule 4 CCR 723-3.2 states that the term nonoptional operator services includes “provision of those [*i.e.*, nonoptional operator] services through the use of synthesized voices rather than through a live operator.”

56. Having determined that CIPS is nonoptional operator services, it is necessary to consider whether the Rules apply to CIPS. MCI raises several arguments in support of its contention that the Rules do not apply to CIPS. The ALJ finds none to be persuasive.

57. Citing the Powell case, MCI asserts that only the DOC has jurisdiction over the procedures and charges for CIPS. OCC and Staff assert that the Commission has jurisdiction over nonoptional operator services provided by MCI under the contract and over the charges for those services. OCC and Staff are correct.

58. MCI reads too much into the Powell case. The case does not support MCI's assertion that, for telecommunications services over which this Commission has jurisdiction, the Commission is prohibited from exercising that jurisdiction because the services are provided to inmates. Indeed, the language of § 40-15-102(19.5), C.R.S. (quoted above), is to the contrary and specifically states that the Commission has jurisdiction over nonoptional operator services, even nonoptional operator services used to provide inmate telephone service.

59. In addition, the Commission's jurisdiction over nonoptional operator services, and the prices to be charged for those services, provided by MCI under the contract does not hinder or circumscribe in any way the DOC's administration, management, supervision, and control of penal institutions.<sup>21</sup> 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.<sup>22</sup> 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

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<sup>21</sup> Unquestionably, this authority resides in the DOC. *Powell*, 956 P.2d at 613-14.

<sup>22</sup> The DOC must act within the Constitutional bounds of inmate access to counsel and to the courts.

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>23</sup>

60. MCI also argues that CIPS is exempt from Commission regulation because it is a debit card as defined in Rule 4 CCR 723-18-2.6. *See* Rule 4 CCR 723-18-4.1.5 (debit cards are optional operator services) and § 40-15-401(1)(j), C.R.S. (optional operator services are exempt from regulation). Staff and OCC disagree, stating that CIPS does not involve the use of a card and, thus, is not a debit card. The ALJ finds that CIPS is not a debit card. First, as discussed above, CIPS is a nonoptional operator service. By definition, then, it cannot be an optional operator service. Second, Rule 4 CCR 723-18-2.6 states “[a]s the customer makes calls using this [debit] *card*, ... charges are deducted from the value of the account ... until the value of the *card* is exhausted.” (Emphasis supplied.) This language, not to mention the very name “debit *card*,” makes it clear that there must be a physical object -- a card -- for there to be a debit card within the meaning of Rule 4 CCR 723-18-2.6. In this case, however, CIPS electronically handles all transactions and all calls. The inmate never possesses a card as part of the CIPS.<sup>24</sup> CIPS is not exempt from regulation as a debit card.

61. MCI further argues that, because it is customer premises equipment, CIPS is deregulated by federal law and is exempt from Commission regulation. MCI relies heavily on the Powell case as support for this argument. Staff and OCC dispute Petitioner’s conclusion,

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<sup>23</sup> In this regard, OCC and Staff argue that the contract contains charges that the Commission does not permit. MCI disputes this assertion. The determination of which, if any, charges are appropriate and the determination of the justness and reasonableness of charges under the contract are or should be issues in Docket No. 02I-487T. They are not issues in this docket. Therefore, the ALJ expresses no opinion on these questions.

<sup>24</sup> The DOC prohibits inmate possession of “any written instrument of value.” DOC Administrative Regulation No. 300-06, Exhibit A to Petitioner’s Response, at 6. This restriction appears to include debit cards. *See also* page 4 of Attachment 5 to the Stipulation of Facts from Docket Nos. 93F-667T and 93F-547T, Exhibit A to Request for Administrative Notice (DOC specification that CIPS cannot require the use of coins or a card).

asserting that it is the nature of the telecommunications service provided that determines the regulatory status of the service. Staff and OCC are correct.

62. Petitioner's reliance on the Powell case, and on the similarities between CIPS and SAFEBLOCK, is misplaced. *After* determining that SAFEBLOCK was neither operator services nor nonoptional operator services, Judge Kirkpatrick found SAFEBLOCK to be "nothing more than a very sophisticated PBX, which has long been exempt as customer premises equipment[.]" Decision No. R96-51 at ¶ I.C.11.<sup>25</sup> Unlike SAFEBLOCK, however, CIPS comes within the definition of nonoptional operator services and is more than a PBX. The attributes that distinguish CIPS from SAFEBLOCK render moot MCI's arguments based on the Powell case's discussion of SAFEBLOCK as customer premises equipment.

63. For these reasons, CIPS is operator services; is nonoptional operator services; and is subject to the Rules.

64. MCI requests a temporary waiver of Rule 4 CCR 723-18-5.4 until the Commission enters a final decision in this docket. Rule 4 CCR 723-18-5.4 requires the filing of tariffs containing rates, terms, and conditions. The Rule also sets out the procedures to be followed to determine whether the rates charged for nonoptional operator services are just and reasonable. The MCI request for a temporary waiver will be denied. First, MCI appears to have abandoned the request. There is no mention of, and no support offered for, the request in any filing made by MCI. The exact parameters of the requested waiver are unclear, and MCI has

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<sup>25</sup> The Commission and the supreme court undertook similar analyses; they discussed SAFEBLOCK as customer premises equipment only after determining that SAFEBLOCK was not operator services. Decision No. C96-457 at ¶ II.C.2 (definition of operator services does not pertain to SAFEBLOCK; "SAFEBLOCK is, therefore, exempt as software which is part of a customer's premise equipment."); *Powell*, 956 P.2d at 616-17 (to same effect).

done nothing to provide the needed clarity. Second, the pendency of Docket No. 02A-487T, *Re: The Investigation of the Colorado Operator Service Contract Rates Filed by MCI WORLDCOM Communications, Inc., Pursuant to Rule 4 CCR 723-18-5.4.4*, renders moot some, if not all, of the request. That docket will examine the operator services rates contained in the contract with the DOC. Thus, any issue concerning filing such a proceeding is moot. Third, this docket addresses MCI's Petition for Declaratory Order. The focus of the docket is narrow and would be broadened unnecessarily and considerably by consideration of the request for temporary waiver of Rule 4 CCR 723-18-5.4, even assuming one could ascertain the exact scope of the request (which, as discussed above, is made difficult by MCI's failure to provide information about, or support for, the request).

65. The MCI Request for Commission to Take Administrative Notice of Stipulation of Facts from Docket Nos. 93F-667T and 93F-547T is unopposed, states good cause, and will be granted. Administrative notice will be taken of a portion of the Stipulation of Facts filed in Dockets No. 93F-667T and No. 93F-547T on November 14, 1994. More specifically, administrative notice will be taken of unnumbered page 4 of Attachment 5 to that Stipulation of Facts, attached to the MCI Request for Administrative Notice as Exhibit A.

## **VII. CONCLUSIONS**

66. The telecommunications services provided to inmates pursuant to the contract between MCI and the DOC are operator services, as defined in § 40-15-102(20), C.R.S.

67. The telecommunications services provided to inmates pursuant to the contract between MCI and the DOC are nonoptional operator services, as defined in § 40-15-102(19.5), C.R.S., and Rule 4 CCR 723-18-3.1.3.

68. The Rules Regulating Operator Services for Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-18, apply to the telecommunications services provided by MCI under the contract.

69. The MCI request for temporary waiver of Rule 4 CCR 723-18-5.4 should be denied.

70. The MCI Request for Commission to Take Administrative Notice of unnumbered page 4 of Attachment 5 to the Stipulation of Facts from Docket Nos. 93F-667T and 93F-547T should be granted.

## **VIII. ORDER**

### **A. The Commission Orders That:**

1. The telecommunications services provided to inmates pursuant to the contract, dated November 1, 2001, between MCI WorldCom Communications, Inc., and the Colorado Department of Corrections are nonoptional operator services. The Rules Regulating Operator Services for Telecommunications Service Providers and Telephone Utilities, 4 *Code of Colorado Regulations* 723-18, apply to the telecommunications services provided by MCI WorldCom Communications, Inc., under its contract, dated November 1, 2001, with the Colorado Department of Corrections.

2. The Request for Temporary Waiver of Rule 4 *Code of Colorado Regulations* 723-18-5.4 filed by MCI WorldCom Communications, Inc., is denied.

3. The Request for Commission to Take Administrative Notice of Stipulation of Facts from Docket Nos. 93F-667T and 93F-547T filed by MCI WorldCom Communications, Inc., is granted. Administrative notice is taken of unnumbered page 4 of Attachment 5 to the

Stipulation of Facts filed in Dockets No. 93F-667T and No. 03F-547T, which page is reproduced and attached as Exhibit A to the Request for Commission to Take Administrative Notice of Stipulation of Facts from Docket Nos. 93F-667T and 93F-547T.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

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