(Decision No. R96-51)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

CROSBY L. POWELL, CROSBY L. POWELL AND ASSOCIATES, DONZELL ROSENBERG, AND MICHAEL TOWNES AND BETTY LOU TOWNES,	)	
Complainants,	)	DOCKET NO. 93F-547T DOCKET NO. 93F-667T
v.	)	
COLORADO INMATE PHONE SYSTEM, COLORADO DEPARTMENT OF CORRECTIONS AND SPRINT COMMUNICATIONS COMPANY, L.P.,	)	
Respondents.	)	

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE KEN F. KIRKPATRICK GRANTING MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINTS

Mailed Date: January 16, 1996

I. STATEMENT

1. This consolidated proceeding encompasses two complaints. Docket No. 93F-547T ("Powell complaint") was originally filed on September 24, 1993. It was amended November 30, 1993 and again on December 7, 1993. A third amended complaint (which was captioned "Second Amended Complaint" and has been referred to as such throughout most of the parties' filings) was filed July 15, 1994.

Docket No. 93F-667T ("Townes complaint") was originally filed on or about November 17, 1993. It was amended March 14, 1994. By Decision No. R94-553-I, May 6, 1994, the Powell complaint and the Townes complaint were consolidated. By Decision No. R95-7, January 6, 1995, leave to amend the complaints again was granted.

2. A prehearing conference was held on August 3, 1994. The prehearing order established a deadline for certain discovery and for dispositive motions. By subsequent order, the schedule was modified so that dispositive motions were due November 28, 1994, and responses were due December 8, 1994. On November 25, 1994, Sprint Communications Company, L.P. ("Sprint") filed its Motion to Dismiss or Motion for Summary Judgment. On November 28, 1994, the Colorado Department of Corrections ("DOC") and the Colorado Inmate Phone System ("CIPS") filed their Motion to Dismiss Complaint with Prejudice. Complainant Townes filed his response to Sprint's motion on December 1, 1994. Complainants Powell and Rosenberg filed their response to the motions of Sprint and DOC on December 7, 1994.

3. On December 16, 1994, Respondent Colorado Department of Administration ("DOA") filed its Motion for Leave to File Out of Time and Motion to Dismiss. That motion was granted and the untimely Motion to Dismiss considered.

4. During this first round of dispositive motions, it was anticipated by the undersigned that a complete stipulation of facts, agreed to by all parties, would form the foundation for the motions. However, such an agreed-upon stipulation of facts was not filed. Instead, on November 14, 1994, Sprint, DOC, and DOA filed

their Stipulation of Facts ("Stipulation"). On December 7, 1994, Powell and Rosenberg filed their Response to Unilateral Stipulations by Sprint, CIPS, DOC, and DOT. By this latter filing, the Complainants in the Powell Complaint have agreed to a substantial portion of the Stipulation. However, a significant portion of the Stipulation either was not agreed to or was specifically contested.

5. As a result of this first round of dispositive motions, the Administrative Law Judge issued Decision No. R95-7, January 6, 1995. That decision recommended that the DOC's Motion to Dismiss Complaint with Prejudice be granted. It also recommended that the Motion to Dismiss or Motion for Summary Judgment filed by Sprint be denied, and that the Motion to Dismiss filed by the DOA be denied. Sprint timely filed exceptions to the recommended decision. By Decision No. C95-469, May 19, 1995, the Commission denied the exceptions of Sprint as premature. In addition, it reversed Decision No. R95-7 to the extent that it dismissed the DOC. The cases were remanded to the Administrative Law Judge for further proceedings. The thrust of Decision No. C95-469 was that it was not reviewing Sprint's exceptions as to the merits. In addition, the Commission desired additional information concerning whether DOC was reselling basic local exchange, and who owned and operated the software and hardware which provides the service at issue in these complaints. No party filed an application for rehearing, reargument, or reconsideration of Decision No. C95-469.

6. At the suggestion of the Commission, all parties agreed to participate in a settlement conference conducted by an Administrative Law Judge not assigned to this case. A settlement conference

was held on September 11, 1995. As a result of the settlement conference Sprint, the DOC, and the DOA filed a Motion to Schedule Status Conference on October 6, 1995.

7. The status conference was held on November 1, 1995. It was suggested by the Respondents that the Commission allow the filing of summary judgment motions, with supporting affidavits, in order to resolve outstanding jurisdictional issues. The Respondents suggested, and the undersigned agreed, that supporting affidavits would supply the factual basis which was missing from the stipulation previously provided in this proceeding. By Decision No. R95-1112-I, November 8, 1995, the Respondents[1] were authorized to file summary judgment motions, with supporting affidavits, no later than December 1, 1995. The Complainants were authorized to respond to the motions no later than January 2, 1996. Respondents timely filed Motions for Summary Judgment; Complainants timely responded. Based upon the uncontested portions of the Stipulation and the affidavits submitted by the parties, the following facts are found.

A. Findings of Fact

1. On April 14, 1989, Sprint entered into a contract with the State of Colorado ("State") to carry all interLATA toll calls from payphones on State property within the State, excluding facilities for higher education. Payphones at the State correctional institutions were included within the provisions of the agreement. Under this agreement, the inmates were able to utilize the pay-

[1] By Decision No. R95-1111, November 8, 1995, the DOA was dismissed as a Respondent on motion of the Complainants.

phones to make collect calls only, which required the intervention of an operator. After a period of time, Sprint, DOC, and the State agreed to modify the system to address and correct problems that they perceived existed within the system. A primary problem was toll fraud, at times estimated to be 50 percent of the State's total traffic.

2. Sprint and the State reviewed a software application developed by Bell South Communications and Hitachi known as Inmate Outward Dial Control System ("IODCS") which had been used at a federal correctional facility in North Carolina. Sprint contracted with Bell South/Hitachi to purchase PBXs (including maintenance) from Bell South and to purchase a non-exclusive license to use the IODCS software developed by Hitachi in the Colorado correctional institutions, which software would be customized for purposes of the Colorado correctional facility needs.

3. In 1990 and 1991, software was developed to fit the criteria of Sprint and DOC. Specifically, Hitachi developed a system which used a central location to store, move, and manage inmate data within the State while allowing data and report analysis at a local facility level. In addition, the software was required to: (a) manage inmate data, including costing of inmate telephone calls and maintenance of inmate accounts; (b) communicate with each switch for call accounting and inmate information; and (c) provide functions including tasks such as archiving and restoring inmate data. Hitachi developed the software based upon these specifications. This software was termed "SAFEBLOCK".

4. On December 7, 1990, Sprint and the State amended their agreement of April 14, 1989. The amendment includes the following provisions:

> (3) The commission rate payable to the State of Colorado with respect to revenue billed by U S Sprint derived from inmate payphones commencing with the date of installation of the SAFEBLOCK debit system at each location during the term of this Agreement shall be 19 percent. The commission rate can vary in accordance to Attachment A, provided a change of rate is mutually consented to by both the State of Colorado and U S Sprint and is signified by written addendum to this amendment.
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> (4) SAFEBLOCK The State of Colorado agrees to implement at U S Sprint's expense the SAFEBLOCK debit system in its state correctional facilities as the exclusive method of providing interLATA long distance service for inmates. The State of Colorado agrees to administer, at its expense, the SAFEBLOCK debit system, including collection of inmate funds.
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> (5) U S Sprint will charge the State of Colorado a system assessment fee of $1.25 per call plus an amount equal to U S Sprint tariffed interLATA publicFON usage rates. The State of Colorado is responsible for all amounts billed to it under this amendment.

5. Installation of the SAFEBLOCK system began in April 1991 and was completed by December 1991. The SAFEBLOCK system consisted of two primary components: the PBXs and the application processor. A PBX was installed at each correctional facility, and to each PBX were connected phone instruments, printer, modem, and the network lines (T-1 trunks) going to Sprint and U S WEST. U S WEST owned the phone instruments, and Sprint owned the PBXs.

6. The PBXs had been modified to accept the application processor software. The modification allowed the system to: (1) convert the inmate's speed dial selection into a recognized

MPA NXX calling number;[2] (2) implement the DOC's call restriction of 15 minutes; and (3) perform costing of all calls and deduct the actual cost of the call from the appropriate inmate account.

7. The application processor portion of the SAFEBLOCK system performed all inmate account servicing as well as centralization and management of the accounts. The application processor was connected via switched data lines to each PBX. The application processor performed the function as follows: (1) stored the inmate's predetermined and DOC-approved phone listings; (2) allocated to all inmate accounts the proper credits and debits; (3) updated the PBX on a daily and weekly basis; (4) deposited the canteen purchased phone time (money) into the proper account into the PBX where the balance was stored; (5) deducted from the inmate's account balance and the PBX money as calls were completed and collected call information on a nightly basis; and (6) retrieved call record information from the PBX and compiled that information in bulk form. Sprint summarizes the SAFEBLOCK system as follows:[3]

> There were 476 tamper proof telephones located throughout the correctional facilities in Colorado. The inmate, to place an interLATA call, dialed an asterisk and a nine-digit personal identification number. The inmate then dialed a pound sign and the two-digit speed dial number that corresponded to the pre-approved tele-

[2]The DOC limited each inmate to 12 telephone numbers for both interLATA and intraLATA calling. A DOC case manager had to approve the telephone listings, and the DOC had the right to further limit the listings in the event of abuse.

[3] Much of the foregoing statement of facts and all of the following summary are taken from the Sprint Motion for Summary Judgement and supporting documents.

> phone number. The inmate account would be checked by the system to verify the existence of sufficient funds for a 15-minute call. If sufficient funds existed, the PBX would convert the two-digit number to a ten-digit number, and the call proceeded like a direct dial call. The interLATA calls exited the correctional facility and was [sic] carried via a dedicated T-1 through the LEC's central office to the Sprint POP.[4]

8. DOC issued Administrative Regulation No. 850-12 which established the criteria and requirements for the inmates' use of the inmate telephone system. This regulation included the then-effective rates for interLATA calls that the inmates would be charged. Sprint submitted an invoice to the DOC for the total traffic that originated from each of the 11 facilities for the prior month. DOC was contractually liable for payment of the full amount, subject to the 19% commission.[5] DOC used the accounting function in the SAFEBLOCK system to verify the credits and debits and the balance of each inmate's debit account.

9. CIPS is the group of DOC employees that administers the inmate phone system. These employees respond to inmate inquiries and perform other functions related to the phone system.

10. Neither Sprint nor DOC provided either basic local exchange service or intraLATA telecommunications service to inmates while the contract was in effect.

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[4] Sprint's Motion for Summary Judgment, page 7.

[5] The 19% commission was deposited directly into the Canteen and Library fund, a cash funded budget item under § 17-20-127, C.R.S. This fund is used only for the benefit of the inmates of Colorado state correctional facilities.

B. DOC Motion for Summary Judgment

1. DOC's first argument is that CIPS is not a legal entity and must be dismissed. DOC's affidavits indicate that CIPS is simply a group of DOC employees assigned the responsibility of administering the guidelines for CIPS. The fact that this group of employees and their function were assigned a specific name does not turn it into a separate legal entity from the DOC. Complainants concede as much, namely, that CIPS is merely a group of DOC employees administering the inmate phone system. Since CIPS is not a legal entity separate from the DOC, the complaint against them should be dismissed.

2. The DOC's next request is that the complaint against the DOC be dismissed. DOC's argument is twofold. First, DOC states that it is not a public utility subject to this Commission's jurisdiction; second, that the DOC has exclusive jurisdiction over the issues raised by these inmate complaints. As to the first argument, the DOC contends that it is not a telephone corporation under § 40-1-103(1)(a), C.R.S., and that it does not provide telecommunications service under § 40-15-102(29), C.R.S. As found previously in Decision No. R95-7, and as further supplemented by the affidavits filed with the Motions for Summary Judgment, the DOC's role is limited to providing a location for the telephone instruments; collecting money from the inmates for the phone calls and performing related accounting functions; approving the phone numbers to be called; and paying Sprint for the interLATA calls. The

Respondents have admitted as much. As a matter of law, these activities do not make the DOC a telephone corporation as that term is used in § 40-1-103(1)(a), C.R.S. Nor do these activities performed by the DOC constitute telecommunications service subject to regulation under Article 15 of Title 40 of the Colorado Revised Statutes. *See* § 40-15-102(29), C.R.S., defining telecommunications service as "electronic or optical transmission of information between separate points by prearranged means."

3. In reviewing Decision No. R95-7, the Commission indicated its desire for additional information concerning who owns the hardware and software that operates the system.[6] The additional information provided clarifies that the DOC owns neither the hardware nor the software which constitutes the SAFEBLOCK system. This further buttresses the conclusion that the DOC is not acting as a telephone corporation and is not providing telecommunications service.

4. DOC's contention that it has exclusive jurisdiction over the issues raised by these complaints is correct, given the limited nature of the services that DOC provides. DOC provides, as a privilege, a phone system that requires prepayment and preapproval of the phone numbers to be called. It places a time limit on the length of calls, and for the interLATA calls at issue in

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[6] In addition, the Commission queried whether the DOC might be a reseller of local exchange. None of the eight pleadings which constitute the complaints and amended complaints in this proceeding have alleged that any Respondent was acting as a reseller of basic local exchange.

this proceeding, allows the inmates to utilize a certificated interLATA carrier at tariffed rates. Thus the Motion to Dismiss the DOC should be granted.

C. Sprint's Motion for Summary Judgment

1. Sprint makes a number of arguments in support of its Motion to Dismiss the Complaints. First, it contends that since its contract was with the State, that the State is Sprint's customer and not the inmates. It states that it was a private contractor providing services by contract and not to the public and therefore it is not a public utility. However, the Commission has recently rejected this sort of analysis when analyzing non-optional operator services. *See* Decision No. C95-1085, IN THE MATTER OF THE INVESTIGATION INTO RATES AND CHARGES OF NON-OPTIONAL OPERATOR SERVICES OF TELTRUST COMMUNICATIONS SERVICES, INC. ("Teltrust"), October 26, 1995. That decision made clear that simply looking at who the contracting parties were was not determinative of the question of whether or not the services that were provided were subject to the Commission's jurisdiction.[7]

2. Sprint's next contention is that the complaint should be dismissed for lack of jurisdiction since Sprint is not operating

[7] As the Findings of Fact make clear, however, the situation in this proceeding is markedly different than the typical arrangement between independent payphone providers, non-optional operator service providers, interexchange carriers, and local exchange carriers. In addition, as discussed *infra*, it is the conclusion of the Administrative Law Judge that in the facts of this particular case there are no operator services being provided to the inmates.

for the purpose of supplying the public under its contract with the State. Sprint's somewhat circuitous argument is that since the DOC has authority to limit the telephone privilege to the inmates, and that the inmates have no right to demand telephone service, that Sprint is not a public utility. Sprint's argument proves too much: under this theory even Sprint's interLATA rates[8] are beyond the jurisdiction of this Commission. Such is not the case.

3. Sprint next argues that the SAFEBLOCK services provided are exempt as a new product and service under § 40-15-401(1)(e), C.R.S. That provision exempts from regulation, as a so-called "Part 4 service",

> New products and services other than those necessary to provide basic local exchange service, or those which fundamentally change the manner in which basic local exchange service functions, such as caller identification or last call return service.

"New Products and Services" in turn are defined in § 40-15-102(19), C.R.S as:

> . . . Any new product or service introduced separately or in combination with other products and services after January 1, 1988, which is not functionally required to provide basic local exchange service and any new product or service which is introduced after January 1, 1988, which is not a repackaged current product or service or a direct replacement for a regulated product or service. Repackaging any product or service deregulated under Part 4 of this article with any service regulated under Part 2 or 3 of this article shall not be considered a new product or service.

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[8] The interLATA rates assessed by Sprint have not been challenged in this proceeding.

4. Sprint contends that the SAFEBLOCK system was not a product or service that existed prior to January 1, 1988. However, the Complainants' Response to Motion For Summary Judgment and supporting affidavit raise a factual question of whether or not SAFEBLOCK is a repackaged product. Therefore the Motion for Summary Judgment cannot be granted under this theory.

5. Sprint next contends that the SAFEBLOCK system is exempt as a Part 4 informational service. *See* § 40-15-401(1)(i), C.R.S. Informational services are defined in § 40-15-102(10), C.R.S., as:

> . . . Non-standard services provided to customers by means of personnel and facilities which include personalized intercept, synthesized voice messages, specialized bill services, and personalized number services.

6. Sprint notes that there is little interpretative history concerning this exception. However, a review of Decision No. C89-290 indicates that personalized intercept includes services such as a customized referral message on a disconnected number. This is not the sort of intercept provided by the SAFEBLOCK system. Specialized bill services include things such as code billing of toll calls, using carrier-provided code numbers. Personalized number service includes such things as a customer-requested specific telephone number. *See* Decision No. C89-290, Appendix G. None of these services are the types of services provided in the SAFEBLOCK system and thus it is not an informational service exempt from regulation.

7. Finally, Sprint contends that the SAFEBLOCK system did not provide non-optional operator services as described in § 40-15-102(19.5), C.R.S. The Administrative Law Judge agrees with this contention and for this reason recommends that the Motion for Summary Judgment filed by Sprint be granted.

8. Non-optional operator services are currently defined in § 40-15-102(19.5), C.R.S., as:

> Operator services requiring an operator for individualized call processing or specialized billing including, without limitation, credit card calls, calls billed to third numbers, collect calls, and person-to-person calls, or operator services to provide telephone services to inmates at penal institutions.

9. However, Sprint points out that non-optional operator services were first identified in the statutes as subject to PUC jurisdiction effective May 4, 1994. Prior to that, only operator services generally were defined. Under § 40-15-102(20), C.R.S., operator services were defined as "optional services provided by operators to customers which offer individualized and select call processing." Operator services were subsequently amended by the Legislature so that the current definition in § 40-15-102(20), C.R.S., is as follows:

> "Operator services" means services provided either by live operators or 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 non-optional operator services, optional operator services, and operator services necessary for the provision of basic local exchange service.

The 1994 amendment also included the new definition of non-optional operator services quoted above.

10. Sprint is correct that non-optional operator services are a subset of the greater universe of operator services. Specifically, operator services are services "provided by operators" (under the pre-1994 version) or services that are provided "either by live operators or by the use of recordings or computer voice interaction" (under the 1994 amendments). Sprint correctly notes that 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. It is analogous to a paid sent call over which this Commission exercises no jurisdiction. Thus Sprint did not provide operator services under either version of the statutory definition.[9]

11. The SAFEBLOCK system in this proceeding is really nothing more than a very sophisticated PBX, which has long been exempt as customer premises equipment ("CPE"). The fact that the CPE was provided by an interLATA carrier does not change the nature of the

[9]Complainants note that the Commission's rules governing Operator Services for Telecommunications Service Providers and Telephone Utilities, 4 *Code of Colorado Regulations* 723-18, in Rule 3.1.3, did contain a broad definition of nonoptional operator services which was in effect during the events complained of in this proceeding. However, the statement of Basis, Purpose, and Statutory Authority which prefaces those rules makes it clear that only operator services are subject to the rules--specifically, nonoptional operator services. As discussed in the main text, these are a subset of operator services. If there are no operator services, there can be no nonoptional operator services.

CPE. Also, the fact that the CPE was paid for on a per call basis rather than a flat fee or some other basis does not change its basic nature. Sprint has essentially provided two services to the inmates. It provides interLATA MTS service at tariffed rates. The Complainants have not challenged those rates. It has also provided sophisticated CPE on a contractual basis to the DOC, for which it charges $1.25 per call. This provision of CPE is not operator services and not a service regulated by this Commission.

D. Attorney's Fees

1. By Decision No. R95-1266-I, December 15, 1995 Complainants Crosby L. Powell, Crosby L. Powell & Associates, and Donzell Rosenberg were awarded $262.50 in attorney's fees relating to certain discovery motions. On December 29, 1995 those Complainants filed their Motion For Modification Of Interim Decision. The Motion states that attorney's fees were denied for the Second Motion To Compel primarily on the grounds that the information should have been obtained informally, and the Decision stated that there was no allegation that an informal route had been attempted. The Motion For Modification correctly notes that the Second Motion to Compel did contain a reference to an attempted informal resolution which was unsuccessful. Therefore the Complainants should be awarded additional attorney's fees in the amount of $150. In all other respects the Motion For Modification is denied.

2. DOC in its Motion For Summary Judgment requests attorney's fees pursuant to § 13-17-102, C.R.S., on the grounds that the filing of these complaints was substantially frivolous, substantially groundless, or substantially vexatious. The record does not support any such finding and the request for attorney's fees by DOC should be denied.

E. Conclusions

1. CIPS is not a legal entity separate from the DOC, and therefore it should be dismissed as a party.

2. The DOC's Motion for Summary Judgment should be granted since it did not act as a telephone corporation and did not provide telecommunications services which are subject to the jurisdiction of this Commission.

3. Sprint's Motion to Dismiss should be granted because it is did not provide operator services which are subject to the jurisdiction of this Commission.

4. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

II. ORDER

The Commission Orders That:

1. The Motion for Summary Judgment filed December 1, 1995 by the Colorado Department of Corrections is granted. Docket No. 93F-547T and Docket No. 93F-667T, being complaints against the Colorado

Department of Corrections and the Colorado Inmate Phone System, are dismissed. The request for attorney's fees is denied.

2. The Motion for Summary Judgment filed December 1, 1995 by Sprint Communications Company L.P. is granted. Docket No. 93F-547T and Docket No. 93F-667T, being complaints against Sprint Communications Company, L.P., are dismissed.

3. Sprint Communications Company, L.P., shall remit to Crosby L. Powell, Crosby L. Powell & Associates, and Donzell Rosenberg, in care of their attorney, the additional sum of $150 for attorney's fees as discussed above, within 10 days of the effective date of this Order.

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.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

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