IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

C.U.R.E. OF PENNSYLVANIA,	:	
	:	
Petitioner	:	
	:	
v.	:	**NO. 1183 CD 2001**
	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	
	:	
Respondent	:	

MAIN BRIEF OF PETITIONER
CITIZENS UNITED FOR THE REHABILITATION OF ERRANTS (C.U.R.E.)
(DEFINITIVE FORM)

FILED UNDER SEAL BY ORDER OF THE COMMONWEALTH COURT

Petition for Review of the order of the Pennsylvania Public Utility Commission Entered on April 20, 2001, at Docket No. C-00981434

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Date: August 6,2001

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction over the April 20, 2001 Opinion and Order of the Pennsylvania Public Utility Commission ("PUC") in this matter pursuant to 42 Pa. C.S. §5105, which provides for a right of appellate review of governmental determinations, and by 42 Pa. C.S. §763, which provides for such appeals to be heard by the Commonwealth Court.

II. ORDER IN QUESTION

The Order to be reviewed is the Opinion and Order entered April 20, 2001, in the case of Sandra L. Feigley v. AT&T Communications of Pennsylvania, Inc., Docket No. C-00981434.

The pertinent ordering paragraphs of the PUC's order are as following:

1. That the Exceptions of Sandra L. Feigley and intervenor, Citizens United for the Rehabilitation of Errants, are denied.
2. That the Formal Complaint of Sandra L. Feigley, docketed at No. C-00981434, is denied, consistent with the discussion contained in this Opinion and Order.
3. That the June 27, 2000 Recommended Decision of Administrative Law Judge Louis G. Cocheres is adopted, as modified by this Opinion and Order.
4. That this Formal Complaint, at Docket No. C-00981434, shall be marked "closed."

III. STATEMENT OF QUESTIONS INVOLVED

1. Did the Commission err in finding AT&T's rates just and reasonable where AT&T's rates violate the Commonwealth's pro-competitive goals, fail to reflect the true cost of the inmate telephone service, are not comparable to rates in other states, are excessive in light of the poor quality of the system and are discriminatory?

Suggested Answer: **Yes.**

2. Did the Commission err in finding AT&T's rates constitutional by violating the petitioners' First Amendment rights and unnecessarily burdening their ability to communicate with incarcerated individuals?

Suggested Answer: **Yes.**

3. Did the Public Utility Commission err in finding that the commission owed the Commonwealth under AT&T's contract is not an unconstitutional tax?

Suggested Answer: **Yes.**

4. Did the Commission err in finding that AT&T's rates did not violate the 14th Amendment's equal protection clause even though the rates subject recipients of inmate telephone calls to excessive charges not imposed on similarly situated telephone users?

Suggested Answer: **Yes.**

5. Did the Commission err in dismissing Verizon and in failing to join the Commonwealth as indispensable parties?

Suggested answer: **Yes.**

IV. SCOPE AND STANDARD OF REVIEW

A. SCOPE OF REVIEW

This Court's scope of review of an order of the PUC is to determine whether a constitutional violation or error in procedure has occurred, whether the decision is in accordance with law, whether a manifest abuse of discretion has occurred, and whether the necessary findings of fact are supported by substantial evidence. AT&T v. Pennsylvania Public Utility Commission, 737 A.2d 201 (1999); George v. Pennsylvania Public Utility Commssion, 735 A.2d 1282 (2000) (citing 2 Pa. C.S. §704).

B. STANDARD OF REVIEW

In Popowsky v. Pennsylvania Public Utility Commission, 706 A.2d 1197 (1997), the Supreme Court defined the Commonwealth's standard of review of PUC decision as the following:

> The standard of review to be applied by the Commonwealth Court when reviewing the PUC is that the court should not substitute its judgment for that of the PUC when substantial evidence supports the PUC's decision on a matter within the commission's expertise.

The Pennsylvania Supreme, Superior, and Commonwealth Courts have defined "substantial evidence" as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. A mere trace of evidence or a suspicion of the existence of a fact sought to be established is insufficient. Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission, 413 A.2d 1037 (1980).

V. STATEMENT OF THE CASE

A. INTRODUCTION AND SUMMARY

On April 21, 1998, Sandra Feigley filed two complaints with the Pennsylvania Public Utilities Commission to contest the reasonableness and constitutionality of the rates charged by AT&T and Bell Atlantic to recipients of telephone calls from inmates housed by the Pennsylvania Department of Corrections. (See Certified List entry 0001).

Complainant Feigley subpoenaed John Malcom, a Commonwealth employee who manages the Commonwealth's telephone system, to testify regarding the terms of the contract enforcing the telephone rate structure for inmates housed by the Pennsylvania Department of Corrections. (Entry 0049). Malcom testified that the inmate calls are governed by a larger contract between the Commonwealth of Pennsylvania and AT&T. (Entry 0052). The contract covers over 2,000 pay phone stations on Commonwealth property as well as the inmate telephone system. (Tr. 162a, 6/16/99). The contract came into being in 1988, when the Commonwealth designated AT&T as exclusive primary contractor as a result of a competitive bidding process. Subsequently, on February 10, 1999, Verizon replaced AT&T as the primary contractor, though AT&T remains a subcontractor on the contract.

Malcom stated that the overall contract generates $12,766,000 in revenues per year, with the Commonwealth receiving approximately $6 million per year as a commission. (Tr. 163a-164a, 6/16/99). The Commonwealth receives approximately $5 million solely from the inmate telephone system. (Tr. 165a, 6/16/99). Under the current contract, the Commonwealth's commission is 47% of AT&T's gross billed revenues. (Tr. 173a, 6/16/99). The amount of the Commonwealth's commission has multiplied substantially since 1988. In 1988, the Commonwealth's share of the contract was 2% - 4% of the gross billed revenues. (Tr. 175a,

6/16/99). In 1991, the Commonwealth's commission had increased to 23.1% of all gross billed revenues. (Plaintiff's Exhibit-8). Then, the passage of the Telecommunications Act of 1996 allowed the Commonwealth to double its portion of the revenues by introducing competition to the bidding process. (Tr. 172a, 188a, 6/16/99). The various telephone companies competing for the Commonwealth's inmate telephone service contract inserted sizable commissions to the Commonwealth in order to secure the contract.

A typical telephone call from the Pennsylvania Department of Corrections includes a $3.00 prison collect surcharge and a $.30 payphone surcharge regardless of the call's duration. (AT&T Exhibit 5 and Tr. 106a, 6/16/99). A ten minute telephone call costs AT&T $6.196 before taxes. (AT&T Exhibit 5). Such a call includes the $3.00 commission to the Commonwealth, nearly half of the entire cost to AT&T. The remaining costs include $.38 for fraud control, $.06 for LIDB Dip, $.78 in uncollectibles, $.22 for network operations, $.08 for customer services, $.084 for billing, $.24 per call compensation, $.79 for LEC Access, and $.56 for a 10% contribution to overhead. (AT&T Exhibit 5). In contrast, a local telephone company in Huntingdon (Adelphia) charges $.08 per minute. (P324a).

With Commonwealth approval, AT&T raised its rates by 300% during the pendency of these proceedings alone. In April 1998, AT&T charged $3.30 in surcharges and between $.16 and $.31 per minute for inmate telephone calls depending on the time and length of the telephone call. (AT&T Exhibit-6). By the following year, in August 1999, AT&T's charges had risen to a flat rate of $.45. The surcharges remained at $3.30. (AT&T Exhibit-8).

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Traditionally, the Commonwealth's entire commission received under the contract went into the Inmate Welfare Fund.[1] (Plaintiff's Exhibit 6 and 8, Commissioner Lehman Letter 11/6/91; Tr. 187a, 216a-220a, 6/16/99). In 1997, the Department of Corrections capped the commission amount entering the Inmate General Welfare Fund at $3 million (Tr. 186a-187a, 6/16/99). The remaining revenues of approximately $3 million are placed in the Commonwealth's general fund (Tr. 186a-187a, 6/16/99), and not necessarily used to benefit inmates.

Complainant Feigley testified about the rates she pays for calls from her husband, George, who is incarcerated in the Pennsylvania Department of Corrections. (Tr. 102a-103a, 6/16/99). She corroborated AT&T's testimony that upon placing the call, there is a $3.30 charge regardless of the length of the call. (Tr. 106a, 6/16/99).

Dianna Hollis and Robert Franz, president and member, respectively, of Citizens United for the Rehabilitation of Errants (C.U.R.E. of PA.) also testified about the nature and quality of the telephone calls and their bills for calls from family members incarcerated in the Pennsylvania Department of Corrections. (Plaintiff's Exhibits 2 and 3, 6/16/99). Before accepting a call from a correctional facility, recipients of inmate calls hear an automated message informing them of the rates charged. (Tr. 319a-322a, 329a-330a, 332a, 12/21/99). The portion of the message designed to explain the phone charges is often garbled. (Tr. 141a, 6/16/99; Tr. 330a, 12/21/99). Moreover, C.U.R.E. testified that the automated message on inmate telephone charges was incorrect. (Plaintiff's Exhibit 10, Tr. 353a-354a. 12/21/99). In addition, once the call recipient has accepted the call, recorded messages interrupt conversation in four-minute intervals with

[1]The Inmate General Welfare Fund is a fund to benefit inmates housed in the Pennsylvania Department of Corrections, by purchasing leisure time and recreational items including such items as sports equipment, televisions, motion picture rentals and recreational reading materials.

messages announcing the origin of the call and the amount of time remaining. These messages last for three seconds and are included in the amount ultimately charged to the call recipient. The callers cannot continue their conversation over these announcements. (Tr. 331a, 12/21/99). Loud cracking noises also frequently interrupt telephone conversation, and any loud background noise causes the security system to disconnect the call. (Tr. 336a=338a, 12/21/99). Once disconnected, the call recipients incurs another surcharge for accepting another call from the inmate to continue their conversation.

C.U.R.E. also testified as to the importance of continuous contact and support from family members and friends. (Tr. 122a, 6/16/99). Such contact through telephone calls, visits and letters is essential to the successful rehabilitation of an inmate and a primary deterrent to recidivism. (Tr. 122a, 6/16/99). Continual and frequent contact between inmates and their families and friends provides critical emotional and financial support while incarcerated, and assists former inmates in their readjustment into society, once released. (Tr. 122a and Tr. 235a, 6/16/99). In light of the Pennsylvania Department of Corrections policy that places inmates in facilities that are farthest from their homes, telephone contact is especially important to these families where visitation is impractical. (Tr. 122a-123a, 6/16/99).

On August 11, 1999, Angus Love withdrew from the case as Ms. Feigley decided to represent herself. (Entry 0063). C.U.R.E. of PA then filed a Petition to Intervene with Mr. Love as counsel. The petition was granted by the Administrative Law Judge on December 21, 1999. C.U.R.E. is a national organization and pro-family advocacy group that favors the humane treatment of inmates. (Tr. 119a). The composition of C.U.R.E. members resembles the racial composition of inmates housed in the Pennsylvania Department of Corrections, which is 56% African-American and 9.5% Latino as of February 1999. (Plaintiff's Exhibit 9).

B. PROCEDURAL HISTORY

On April 21, 1998, Sandra L. Feigley (Mrs. Feigley) filed two nearly identical complaints with different respondents, AT&T Communications of Pennsylvania, Inc. (Docket No. C-00991434) and Bell Atlantic-Pennsylvania, Inc. (Docket No. C-00991435). AT&T filed its Answer of AT&T Communications of Pennsylvania, Inc. on May 13, 1998, and its Motion Of AT&T Communications of Pennyslvania, Inc., For Judgment On The Pleadings by letter dated June 22, 1998. Bell Atlantic filed its Answer And New Matter of Bell Atlantic-Pennsylvania, Inc. To The Formal Complaints of Sandra L. Feigley on May 13, 1998, and its Motion Of Bell Atlantic-Pennsylvania, Inc. For Judgment On The Pleadings on June 17, 1998. On June 30, 1998, Mrs. Feigley filed a Motion For Consolidation of Docket Nos. C-00991434 and C-00991435.

On July 17, 1998, a prehearing conference took place before Administrative Law Judge, Louis G Cocheres, which Mrs. Feigley attended *pro se* and Bell Atlantic and AT&T were each represented by counsel. On September 16, 1998, by Recommended Decision, the ALJ dismissed the Motion Of AT&T Communications Of Pennsylvania, Inc. For Judgment On The Pleadings, and granted the Motion Of Bell Atlantic-Pennsylvania, Inc. For Judgment On The Pleadings. The ALJ also reversed his decision to consolidate the cases. On February 17, 1998, the Public Utility Commission denied all exceptions and affirmed the recommendations, by Opinion and Order.

By letter dated November 18, 1998, Angus Love, Esq., appeared on behalf of Mrs. Feigley. Mr. Love represented Mrs. Feigley through discovery and the initial hearing. Prior to Mr. Love's opportunity to file a brief, Mrs. Feigley dismissed him as her attorney. Mr. Love withdrew by letter dated August 4, 1999.

Doug and Dianna Hollis on behalf of themselves and the Citizens United for Rehabilitation of Errants (C.U.R.E.) filed a Petition To Intervene by letter dated August 13, 1999. Mr. Love, who formerly represented Mrs. Feigley, was counsel for C.U.R.E. and Mr. And Mrs. Hollis. AT&T responded to the Petition To Intervene by letter dated August 19, 1999, with AT&T Communications of Pennsylvania, Inc.'s Answer In Opposition To Motion To Intervene. Mrs. Feigley filed her Petitioner's Answer To The Petition To Intervene Filed On Behalf Of Dianna Hollis with the Commission on September 7, 1999. The ALJ denied the action to intervene on September 16, 1999.

After closing the record for the hearing on June 16, 1999, and before completing of the briefing process, the parties began to dispute over the cost of an intraLATA collect call from a Pennsylvania correctional facility to Mrs. Feigley. The ALJ reopened the record solely to hear evidence from both parties on what information is automatically provided to recipients of inmate collect calls in Pennsylvania and what charges are actually incurred.

On December 21, 1999, the parties appeared for a final hearing before the ALJ. Mr. Love, appearing on behalf of Mr. and Mrs. Hollis and C.U.R.E., renewed his petition to intervene. While all parties consented to Mr. Love's petition to intervene, AT&T conditioned its consent on an agreement that Mr. and Mrs. Hollis and C.U.R.E. not file a brief. Mr. Love agreed to AT&T's condition, and Mr. and Mrs. Hollis and C.U.R.E. were granted the petition to intervene.

On August 3, 1999, Mrs. Feigley filed her Brief In Support Of Petitioner's Complaint, *pro se*, dated July 27, 1999. On October 18, 1999, AT&T filed its Brief Of AT&T Communications Of Pennsylvania, Inc., in both proprietary and nonproprietary formats. On October 19, 1999, Mrs. Feigley filed Petitioner's Supplementary Brief Addressing Increase in

Tariff, *pro se*, and on October 27, 1999, Mrs. Feigley filed her Petitioner Sandra Feigley's Reply Brief, *pro se*. AT&T then responded to both of the Feigley briefs by letter dated November 11, 1999.

On June 22, 2000, the Administrative Law Judge issued his Recommended Decision denying Mrs. Feigley's complaint. Mrs. Feigley filed Exceptions to the Recommended Decision on July 12, 2000. C.U.R.E. filed Exceptions on July 19, 2000. AT&T issued its Replies to Exceptions on July 27, 2000. The Public Utility Commission issued its Opinion and Order on April 19, 2001 denying Mrs. Feigley's and C.U.R.E.'s Exceptions and adopting the Administrative Law Judge's Recommended Decision, except as modified by the Opinion and Order.

VI. SUMMARY OF THE ARGUMENT

Mrs. Feigley's complaint contests the reasonableness and constitutionality of the rates charged by AT&T to recipients of collect telephone calls from inmates housed by the Pennsylvania Department of Corrections.

AT&T's monopoly over the inmate telephone system violates the pro-competitive goals of the federal Telecommunications Act of 1996 and the Pennsylvania Public Utility Code. Since 1988, the Commonwealth has contracted with a single telecommunications provider (AT&T) for the inmate telephone system.[2] Because 66 Pa. C.S. §2907(b)(1) requires that "all calls made by inmates shall be collect calls only," the families and friends that receive inmate calls have no meaningful choice as to provider and are automatically captive to AT&T's rates. While such a restriction is more reasonably placed upon inmates as an "unfortunate incidence of incarceration"

[2]Prior to February 10, 1999, the Commonwealth contracted with AT&T as exclusive primary contractor for inmate telephone service. After February 10, 1999, Verizon replace AT&T as the primary contractor. Since the contract in question specifies AT&T as the primary contractor, this brief will also refer to AT&T as the primary contractor.

(PUC Opinion & Order, p. 25), it is unreasonable to restrict the choice available to members of the general population.

66 Pa. C.S. §1301 requires that "[e]very rate made, demanded, or received by any public utility...shall be just and reasonable, and in conformity with regulations and orders of the commission." AT&T's rate structure for inmate telephone service is not just and reasonable. AT&T charges a $3.30 surcharge and $.45 per minute rate on intrastate inmate telephone calls, regardless of the time, distance and duration of the telephone calls. This amount contrasts sharply with intrastate direct dialed residential service which dips as low as $.08 per minute. While inmate calls exact higher rates due to critical security features, the tremendous cost differential between the two services is unjustified and unreasonable.

AT&T's rates are not just and reasonable because the rates charged far exceed the true cost of providing telephone service to inmates. During the pendency of this litigation alone, AT&T has raised it rates for recipients of inmate telephone calls by as much as 300%, increasing the per minute charge from between $.16 and $.31 to a flat rate of $.45 per minute. On average, a ten minute inmate call costs AT&T $6.196 before taxes. Included in those costs is a $3.00 commission to the Commonwealth, equaling nearly half of the total cost of the telephone call. Under the contract to the Commonwealth, AT&T returns 47% of its gross billed revenues from the inmate telephone system to the Commonwealth. This commission generates $5 million for the Commonwealth annually. While the Commonwealth distributes $3 million to the Inmate General Welfare Fund,[3] the remaining millions enter the state's general fund. The commission does not subsidize the cost of the inmate telephone system in any way. Thus, AT&T's rates do not reflect the true worth of the inmate telephone service provided.

[3]For a description of the Inmate General Welfare Fund, see Footnote 1.

AT&T's rates are not just and reasonable because AT&T's rates are not comparable to the rates charged in other states. Pennsylvania has one of the highest surcharge rates of the states surveyed. While Pennsylvania charges a $3.30 surcharge per inmate call, other states, such as Alaska, California, Florida, Kentucky, Missouri, New York and Virginia, charge between $1.50 and $3.00 per inmate call. Moreover, many states, such as Alaska, Florida, Kentucky, Missouri, New York and Virginia, also offer lower per minute rates on intrastate collect calls than Pennsylvania's $.45 per minute rate. Other prison systems, such as the Federal Bureau of Prisons, Colorado, Tennessee and Missouri, have instituted alternative telephone systems, such as debit and prepaid phone systems, that significantly lower call costs for inmates and their families and friends. In addition, many state legislatures have adopted or pressed for legislation that would result in lower calls costs. The content of such legislation has ranged from eliminating commissions to requiring contracts to be awarded to provider offering the lowest cost to users. Furthermore, AT&T's rates are not just and reasonable in light of the poor quality of the inmate telephone system. Courts have recognized that the rates charged by a public utility and the quality of service provided to ratepayers are inextricably linked. Prior to accepting a collect call from an inmate, the call recipient hears a message detailing the rates charged. These messages are often garbled and incorrect. Moreover, loud cracking noises frequently interrupt conversation and any loud background noises causes the security system to disconnect the call.

Moreover, AT&T's rates are unconstitutional. AT&T's rates violate the First Amendment rights of families and friends of inmates by unnecessarily burdening their ability to communicate with their incarcerated family members and friends. The appropriate standard of review for the instant case requires that the restriction on inmate correspondence be no greater than necessary to protect the government's legitimate interest in security. AT&T's rates far

exceed those necessary to preserve the Commonwealth's security standards. Other states that face similar security concerns with regard to their inmate telephone systems, including California, New York, Florida, Colorado, Kentucky and Virginia, have offered significantly lower surcharges and rates. Other states, such as Colorado, Missouri and Tennessee, have implemented alternative telephone systems that decrease call costs without sacrificing security standards.

AT&T's rates also violate the Fourteenth Amendment's equal protection clause by subjecting recipients of inmate telephone calls to excessive charges not imposed on similarly situated telephone users. AT&T's rates require strict scrutiny since the rates implicate a suspect class, are discriminatory against African-American and Latino populations in their application and infringe upon the fundamental right of free speech. To survive strict scrutiny, AT&T's rates must be narrowly tailored to the Commonwealth's interest in security and internal order. As mentioned earlier, AT&T's rates far exceed those rates necessary to maintain high security standards.

VII. ARGUMENTS

A. THE PUBLIC UTILITY COMMISSION ERRED IN FINDING AT&T'S RATES JUST AND REASONABLE.

1. AT&T's Rates Are Not Just & Reasonable because the Rates Violate the Pro-Competitive Goals of the Federal Telecommunications Act of 1996 and the Pennsylvania Public Utility Code.

On February 8, 1996, Congress enacted the Telecommunications Act of 1996 (Telecom Act). The Telecom Act's mandate is "to make available, as far as possible, to all the people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The Act seeks to fulfill its mandate through the establishment of a "pro-competitive, de-regulatory national policy framework" that makes advanced telecommunications and information technologies and services available to all Americans "by opening telecommunications markets to competition." In the matter of Billed Party Preference for InterLATA 0+ Calls, Second Report and Order and Order on Reconsideration, CC Docket No. 92-77, Adopted January 29, 1998 (hereinafter BPP Second Report and Order (Slip Op. at §6). With respect to inmate telephone service which is typically offered through a monopoly provider, the FCC has recognized the potential for abuse. In BPP Second Report and Order, the FCC acknowledged the risk for excessive charges on families of inmates, stating that "we do agree with commentators that consumers, in this case the recipients of collect calls from inmates, require additional safeguards to avoid being charged excessive rates from a monopoly provider." (Slip Op. at §60). As a protective measure, the FCC has suggested introducing competition to lower rates, including the use of 800 numbers and pre-paid debit cards, as "such options would exert downward pressure on high interstate rates for 0+ calls from inmate phones, [and] diminish the ability of a prison and its PIC to set supracompetitive rates..." BPP Second Report and Order, (Slip Op. at §57).

In Chapter 30 of the Public Utility Code, 66 Pa. C.S. §3001, the General Assembly of PA has declared a similar pro-competitive policy in accordance with the Telecom Act. According to Chapter 30, it is the Commonwealth's policy to:

> (1) Maintain universal telecommunications service at affordable rates while encouraging the accelerated deployment of a universally available state-of-the-art, interactive, public-switched broadband telecommunications network in rural, suburban and urban areas, including deployment of broadband facilities in or adjacent to the public rights-of-way abutting public schools, including the administrative offices supporting public schools; industrial parks; and health care facilities, as defined by the act of July 19, 1979 (P.L. 130, No. 48), known as the Health Care Facilities Act. (Footnote omitted).
> (2) Ensure that customers pay only reasonable charges for local exchange telecommunications services which shall be available on a nondiscriminatory basis.
> (3) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of providers of telecommunications services.
> (4) Provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth by ensuring that rates, terms and conditions for noncompetitive services, including access services, are reasonable and do not impede the development of competition.
> (5) Ensure the efficient delivery of technological advances and new services throughout this Commonwealth in order to improve the quality of life for all Pennsylvanians.
> (6) Encourage the provision of telecommunications products and services that enhance the quality of life of people with disabilities.
> (7) Promote and encourage the provisions of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth.
> (8) Encourage the competitive supply of any service in any region where there is a market demand.
> (9) Encourage joint ventures between local exchange telecommunications companies and other entities where such joint ventures accelerate, improve or otherwise assist a local exchange telecommunications company in carry out its network modernization implementation plan.
> (1993, July 8, P.L. 456, No. 67 §1, imd. effective)

The contract between the Commonwealth of Pennsylvania and AT&T has enabled AT&T[4] to maintain a monopoly over the Department of Correction's inmate telephone system. AT&T's

[4] In 1988, the Commonwealth designated AT&T as exclusive primary contractor for the Department of Corrections' inmate telecommunications service as a result of a competitive bidding process. Subsequently, on February 10, 1999, Verizon replaced AT&T as the primary contractor, though AT&T remains a subcontractor on the contract. Since the contract in question specifies AT&T as the primary contractor, this brief will also refer to AT&T as the primary contractor.

monopoly violates the pro-competitive goals of the federal Telecom Act as well those of Chapter 30 of the Public Utility Code: to "maintain universal telecommunications service at affordable rates" [66 Pa. C.S. §3001(1)], "provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth by ensuring that rates, terms and conditions for noncompetitive services, including access services, are reasonable and do not impede the development of competition" [66 Pa. C.S. §3001(3)], "promote and encourage the provisions of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth" [66 Pa. C.S. §3001(7)] and "encourage the competitive supply of any service in any region where there is a market demand" [66 Pa. C.S. §3001(8)].

The language of the Telecommunications Act of 1996 and Chapter 30 of the Public Utility Code unequivocally encourages competition in telecommunications markets and the deregulation of telecommunications services to ensure that telephone rates are reasonable for consumers. Unfortunately, the introduction of competition into the Commonwealth inmate telecommunications service industry has produced unreasonably high rates for consumers. The Commonwealth contracts with a single telecommunications provider to service the inmate telephone system. To secure the Commonwealth contract, the competing bidders include sizable commissions to the Commonwealth in their proposals. The Commonwealth subsequently awards the contract to the highest bidder (here, AT&T) and in turn, generates a substantial profit from the contract. Currently, the Commonwealth receives a 47% commission on all gross billed revenues from the inmate telephone system which totals approximately $5 million.[5] To avoid a

[5]The AT&T and Commonwealth contract in question covers the inmate telephone system, along with approximately 2,000 public pay phone stations on Commonwealth property. The entire contract generates $12,766,000 in revenues with the Commonwealth receiving approximately $6 million per year. Of that amount, $5 million per year is derived solely from the inmate telephone system.

financial loss, AT&T's rates necessarily reflect the commission owed to the Commonwealth, and the ratepayers shoulder the burden of the commission by paying excessive rates. Thus, the introduction of competition, as endorsed by the Telecom Act and Chapter 30, has severely frustrated the primary pro-competitive goal of reasonable rates.

Because AT&T is the sole provider of inmate telecommunications service for the Department of Corrections, inmates who wish to maintain contact with their families and friends are automatically subject to the terms of the contract between the Commonwealth and AT&T and AT&T's excessive rates. The Administrative Law Judge reasoned that the "constraints from competitive alternatives are an unfortunate incidence of incarceration." (PUC Opinion & Order, p. 25). However, the burden of the lack of choice does not fall upon the inmates, but more significantly, on the recipients of inmate telephone calls. Because 66 Pa. C.S. § 2907(b)(1) requires that "all calls made by inmates shall be collect calls only," the families and friends that accept telephone calls from inmates are also automatically subject to the terms of the Commonwealth and AT&T contract and AT&T's rates. It is not at all reasonable to restrict the range of choice available to members of the general population and burden the families and friends of inmates with telephone costs reflecting the "unfortunate incidence of incarceration."

2. <u>AT&T's Rates Are Not Just & Reasonable because AT&T's Rates are Excessive</u>.

AT&T's rates are excessive in violation of section 1301 of the Public Utility Code, 66 Pa. C.S. §1301, which requires that "[e]very rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, **shall be just and reasonable,** and in conformity with regulations and orders of the commission" (emphasis added). Because 66 Pa. C.S. §2907(b)(1) requires that "all calls made by inmate shall be collect calls only," Administrative Law Judge contrasted AT&T's rates for inmate collect calls with AT&T's rates for collect calls from a

public payphone phone. He found AT&T's rates on inmate calls to be just and reasonable because the cost differential was $.90. The cost differential was justifiable because of the additional costs incurred by AT&T for security, recording and monitoring equipment, and the commission owed the Commonwealth.

a. The Commission's Comparison of Inmate Collect Call Rates and Collect Calls Rates from Public Payphones Is Not a Reasonable Basis for Comparison.

We take issue with the Administrative Law Judge's comparison of inmate collect calls with collect calls from a public payphone. Such a comparison is inappropriate since individuals electing to use a public payphone for collect calls and inmates using facility telephones are not similarly situated. A person making a collect call from a public payphone has a wide variety of options to reduce the cost of the call. An individual at a payphone is not subject to a monopoly provider and has the option of selecting his or her preferred carrier to reduce the cost of the call. A person can also charge the call to an alternative number, such as a home or work number, thereby fully absolving the recipient of the call costs. More generally, public payphones provide consumers with a multitude of other call options, such as coin calls, calling card options, etc. In contrast, inmates have none of these options to reduce the cost of such calls. Inmate calls are captive to the high rates charged by the presubscribed carrier that holds the inmate telephone service contract.

Moreover, by comparing inmate collect calls with collect calls from a public payphone, the ALJ elected to compare the rates of the competitive payphone industry with the rates of the noncompetitive inmate telephone system. In this context, such a comparison is inappropriate. While introducing competition to a market typically drives down rates and benefits consumers, this is not necessarily true for collect call rates from public payphones. Instead, collect call rates from public payphones are inflated due to the unique situation of the caller and the infrequency of

such calls. With the wealth of options available to payphone users, such as coin calls, calling cards and prepaid phone cards, the collect caller at a public payphone typically places such a call in more urgent or emergency situations, as last resort. Because of the immediacy of the caller's situation, the carrier can demand high rates that the caller accepts. Consequently, the call's recipient also more readily accepts the excessive rates of such calls precisely because the calls are urgent and more rare. Thus, collect calls from public payphones and their higher rates are not an appropriate measure of the reasonableness of inmate telephone calls.

Instead, inmate telephone service is more appropriately compared to direct dialed residential telephone service. Both services serve the same primary purpose of maintaining frequent and continual contact with families and friends. Both services have much higher user frequencies than collect calls from public payphones. A comparison of intrastate long distance service rates for direct dialed calls and intrastate rates for inmate collect calls reveals the excessiveness of the rates charged by AT&T for inmate calls. The rates for directed dialed intrastate long distance service dip as low as $.08 per minute for the general population of Pennsylvania. This contrasts sharply with the $3.30 surcharge and the $.45 per minute rate charged to recipients of inmate telephone calls under AT&T's and the Commonwealth's current contract. While it is clear the inmate telephone system will demand higher rates than residential service rates due to the increased security features, the tremendous differential between the two services is unjustifiable and unreasonable.

3. AT&T's Rates Are Not Just and Reasonable Because the Rates Do Not Reflect the True Cost of the Telephone Service Provided.

According to the U.S. Supreme Court in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, at 602 (1944), inquiries into the reasonableness of rates involves a balancing

of investor interests and consumer interests. In accordance with Hope, in Pennsylvania Public Utility Commission v. Pennsylvania Gas and Water Co., 424 A.2d 1213 (1980), the Pennsylvania Supreme Court stated that the requirement of "just and reasonable" rates set forth in 66 Pa. C.S. §1301, requires an "appropriate balance between prices charged to utility customers and returns on capital to utility investors consonant with constitutional protections applicable to both." 424 A.2d 1219. The balance seeks to protect consumers from exploitative rates charged by utility companies while upholding the financial integrity of the utility.

AT&T's rates are not just and reasonable because the rates charged far exceed the true cost of providing telephone service to inmates. In Duquesne Light Company v. Barasch, the Supreme Court held that "the public is entitled to demand ... that no more be exacted from it for the use of [utility property] than the services rendered by it are reasonably worth." 488 U.S. 299, at 308 (1989) (citing Smyth v. Ames, 169 U.S. 547 (1898). Following suit, the Commonwealth Court of Pennsylvania, in National Utilities, Inc. v. Pennsylvania Public Utility Commission, construed Barasch as indicating that "rate increases requested by the public utility have to have some relationship to the service it provides to the public." 709 A.2d 972, at 977 (1998). Furthermore, Chapter 30 of the Public Utility Code substantiates the assertion that rates should reflect the cost of the provided service. Chapter 30 requires that "rates for noncompetitive telecommunications services not subsidize the competitive ventures of providers of telecommunications services." 66 Pa. C.S. §3001(3). Literally, this provision prevents public utilities from hiking noncompetitive rates to artificially depress their competitive rates. Underlying this provision is also the contention that noncompetitive rates should reflect the cost of the provided service.

AT&T's costs of providing inmates with telephone service are excessive due to recent rate increases and the annual commission paid to the Commonwealth. During the pendency of this litigation alone, AT&T has raised the rates for recipients of inmate telephone calls by as much as 300%, increasing the per minute charge from between $.16 and $.31 to a flat rate of $.45 per minute. The Pennsylvania Public Utility Commission approved each of these rate increases. On average, a ten-minute telephone call from an inmate housed by the Department of Corrections to a Pennsylvania address costs AT&T $6.196 before taxes. Included in those costs is a $3.00 return to the Commonwealth that equals nearly half of the total cost of the telephone call. The Commonwealth's current return on the contract is 47% of AT&T 's gross billed revenues. The amount of the Commonwealth's commission has increased substantially since the creation of the contract in 1988, when the Commonwealth's share was merely 2% - 4% of all gross billed revenues. While it is true that property owners of payphone locations typically receive a commission, the commission received by the Commonwealth is excessive and extortionate. The commission alone from inmate telephone calls generates $5 million for the Commonwealth annually. The commission does not subsidize the cost of the inmate telephone system in any way. By eliminating or reducing the commission, AT&T's costs for the inmate telephone system would decrease substantially. Consequently, costs to recipients of inmate telephone calls would decrease and conform to reasonableness standards. Thus, AT&T's rates do not reflect the true worth of the inmate telephone service provided.

In response to the contention that AT&T rates are not just and reasonable, AT&T alleged that its rates on inmate telephone calls are just and reasonable because AT&T is not guaranteed a profitable return on its contract with the Commonwealth. The ALJ also interpreted this information as further evidence that AT&T's rates are just and reasonable. However, according

to Hope, the balancing of investor and consumer interests does not "insure that the business shall produce net revenues." [quoting Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, at 590 (1942)]." 320 U.S. at 603. No authority exists that consumer interests must yield to the interests of investors to ensure the utility's financial integrity. Thus, a utility's rates may be unreasonable, even if the rates do not yield a return.

4. AT&T's Rates Are Not Just and Reasonable Because the Rates Are Not Comparable to Those in Other States.

The rates for comparable services in other states and jurisdictions are relevant factors in assessing the reasonableness of a rate. In the Hope decision, the Supreme Court emphasized that reasonable rates yield returns that "should be commensurate with returns...in other enterprises with corresponding risks." 320 U.S. 603. Moreover, for a Commonwealth Public Utility Commission approval of a rate change for a noncompetitive service, the Pennsylvania Code requires that the Commission consider whether: 1) the proposed change is designed to make the rates, terms or conditions for the service conform to the comparable rates, or conditions for the same service that have become lawfully effective in the interstate jurisdiction; and, 2) the proposed change is designed to make the rates, terms or conditions that have become lawfully effective in several other states. 52 Pa. Code §63.105(d)(1) - (2).

A comparison of AT&T's rates under the Commonwealth contract and the rates of inmate telephone service providers under contract with other states reveals that AT&T's current rates are excessive and unreasonable. Pennsylvania has one of the highest surcharge rates of the states surveyed.[6] In Kentucky, the surcharge on inmate collects calls is $1.50 per call. Moreover, other

[6] **Inmate Collect Call Quotes:** Alaska: $1.55 - $2.50 surcharge & $.39 - $.060/min.; California: $3.00 surcharge & $.50/min.; Florida: $1.75 surcharge & $.21 - $.26/min.; Federal Bureau of Prisons: $2.45 surcharge & $.40/min.; Kentucky: $1.50 surcharge; Missouri: $3.00 surcharge & $.30/min.; New York: $3.00 surcharge & $.33/min.; **Pennsylvania: $3.30 surcharge & $.45/min.**; Virginia: $1.55 - $2.25 surcharge & $.048 - .40/min.

states, such as Alaska, Florida, and Virginia charge between $1.55 and $2.50 for surcharges. While Missouri and New York charge $3.00 as a surcharge, those states offer significantly lower per minute rates of $.30 and $.33 per minute, respectively. The Federal Bureau of Prisons collect call system offers rates of $.40 per minute with a $2.45 surcharge.

Moreover, other states have instituted alternative telephone systems in their correctional facilities, such as debit or pre-paid telephone systems, to reduce the cost of inmate calls. Such systems allow inmates to place direct dialed calls. The call charges are drawn directly from inmate debit accounts or prepaid phone cards, which absolves families and friends of all call costs. Debit and pre-paid telephone systems also offer significantly lower rates.[7] For example, Colorado's debit system charges inmates a $1.25 surcharge per call with a $.29 - $.32 per minute rate. The Federal Bureau of Prisons (BOP) has eliminated its surcharge for debit calls and charges $.04 - $.15 per minute (in contrast to the $2.45 surcharge and $.40 per minute rate on collect calls). Significantly, 92% of inmate calls from the BOP are through the debit system. Debit and prepaid phone systems can lower costs in part by eliminating the telephone company's risk of uncollectibles. Under the contract in dispute, AT&T charges a 13% fee per ten-minute call for uncollectibles.

In addition, many state legislatures have adopted or pressed for legislation that would result in lower call costs for recipients of inmate telephone calls.[8] The content of such legislation

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[7] **Inmate Debit Systems:** Colorado: $1.25 surcharge & $.29 - $.32/min.; Federal Bureau of Prisons: No surcharge & $.04 - $.15/min.; Missouri: $.13/min.

[8] **Introduced Legislation & Status:** California: Bill requiring contracts to be awarded to telephone company providing lowest reasonable costs to user passed through legislature, vetoed by Davis; DC: Passed *Prisoner Equitable Phone Charges Act of 2000:* requires that inmate collect calls not exceed public payphone collect calls; Florida: Legislature established rate caps; Louisiana: 1999 Act requires that inmate calls not exceed operator assisted collect calls & rate caps; Massachusetts: Pending legislation requires that inmate phone service be comparable to residential telephone service, contracts must be awarded to telephone company offering lowest cost to user and eliminates commission; Michigan: Two bills died in committee allowing for debit system and requiring that toll/operator service provider cannot exceed state average rate; New Mexico: Legislation passed requiring correctional facilities to contract with telephone company offering lowest cost of service and eliminating commission; North Carolina: Pending legislation requires debit system for minimum security inmates; Ohio: Pending (?) legislation requires creation of inmate debit telephone system. South Carolina: Joint resolution established

has ranged from establishing rate caps to eliminating commissions, from requiring that contracts be awarded to the telephone service provider with the lowest cost to users to establishing alternative inmate telephone service systems, such as debit and prepaid telephone systems. For example, the New Mexico legislature recently passed bills requiring the Department of Corrections to contract with a telecommunications service that "provides the lowest cost of service to inmates or any person who pays for inmate telecommunications service," and that the contract "shall not include a commission."[9]

Moreover, in Kentucky, the Public Utility Commission recently reduced the rates on inmate collect calls in an administrative proceeding. The Kentucky Public Utility Commission found the surcharges placed on inmate collect calls to be "unjust and unreasonable and [that] this must be changed..." In the Matter of: Establishment of an Operator Surcharge Rate for Collect Telephone Calls from Confinement Facilities, Adm. Case No. 378. Like Pennsylvania, the Kentucky Department of Corrections contracts with telecommunications carriers to service its inmate telephone system. Originally, the surcharges to recipients of inmate telephone calls were $3.00 per call. The Kentucky PUC found that "recipients of inmate collect calls face (1) a lack of choice of carriers, (2) a lack of calling options, (3) limited call duration, and (4) a likelihood of frequent and repeated calls." (Opinion, p. 2). Subsequently, the Administrative Law Judge ordered the surcharge reduced to $1.50 per call.

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committee to study reasonableness of charges; Vermont: Pending legislation requires contracts to be awarded to telephone company charging lowest reasonable costs, creates debit system & eliminates commission; Virginia: Legislation required study of reasonableness of rates resulting in recommendations of capping or eliminating commissions, lengthening time limits, limiting surcharges and establishing debit system or prepaid systems. Pending legislation would eliminate commission.

[9] SB102

In essence, the Commonwealth boasts one of the highest surcharge rates, one of the highest per minute rates, and demands a substantial commission from the inmate telephone system. Because the Commonwealth has been unwilling to employ any of a variety of available remedies for reducing the costs to recipients of inmate collect calls, AT&T's rates under contract to the Commonwealth are excessive, unjust and unreasonable.

5. AT&T's Rates Are Excessive in Light of the Poor Quality of the Inmate Telephone System

Courts have long recognized that the rates charged by a public utility and the quality of service provided to ratepayers are inextricably linked. Pennsylvania law has made clear that the PUC has the discretion to withhold, limit or condition rate approvals on the quality of service provided by the utility. In National Utilities, Inc. v. Pennsylvania PUC, the Commonwealth Court affirmed a PUC decision denying a water utility a rate increase due to the poor quality and quantity of water supplied to its consumers. 709 A.2d 972 (1998). Citing the United States Court of Appeals in D.C. Transit System, Inc. v. Washington Metropolitan Transit Commission, 466 F.2d 394 (1972), the court held that the "caliber of a utility's service is not a neutral factor in determining its allowable rate of return." 709 A.2d 978. The court declared that the obligations of the utility and the consumer are interrelated and reciprocal, with the utility's responsibility being to "furnish safe, adequate and proper service," while the consumer is obliged to pay this service's reasonable worth. 709 A.2d 979.

Despite the poor quality of the inmate telephone system, AT&T has raised the per minute rates charged to recipients of inmate telephone calls by as much as 300%, from $.16 - $.31 per minute to a flat rate of $.45 per minute during the pendency of this litigation. The PUC approved

each of these rate increases. Prior to accepting an inmate collect call, the recipient hears a recording of the rates charged for the call. The portion of the message designed to explain the phone charges is often garbled. Also, the rates heard by the call recipient are often incorrect. In addition, all calls between inmates and the general population are interrupted every four minutes with messages announcing the origin of the call and the amount of remaining time. During these announcements, the parties cannot continue their conversation. Recipients of inmate telephone calls also complain about loud cracking noises that frequently interrupt the telephone conversation, and that any loud background noise causes the security system to disconnect the call. Once disconnected, the call recipient incurs another surcharge fee if he or she accepts another call from the inmate to continue their conversation. Thus, in light of the poor quality of the inmate telephone system, AT&T's rates are excessive.

6. AT&T's Rates are Not Just and Reasonable Because They Are Discriminatory.

Ms. Feigley alleges unlawful discrimination in AT&T's rate structure, arguing that recipients of inmate telephone calls are charged excessive rates in comparison to other consumers that are subject to AT&T rates. AT&T's discriminatory rates violate 66 Pa. C.S. §3004(d)(2) ("assures that rates for noncompetitive phone services are just, reasonable and not unduly discriminatory") as well as Section 1304 of the Public Utility Code, 66 Pa. C.S. §1304, which provides in pertinent part:

> No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

It is true that Pennsylvania courts have established that mere differences in utility rates between classes of customers does not establish unreasonable discrimination. Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, 409 A.2d 446 (1979). Different rates may be charged to customers that are receiving a different type, grade or class of service. Carpenter v. Pennsylvania Public Utility Commission, 15 A.2d 473 (1940). However, rates for one class of service cannot be unreasonably prejudicial and disadvantageous to another class of service, with advantage to one class resulting in injury to another. Such an injury can arise from collecting a more reasonable rate from one class in order to make up for inadequate rates charged to another. Carpenter v. Pennsylvania Public Utility Commission, 15 A.2d 473, at 474 (1940).

The rates charged to recipients of inmate telephone calls are excessive and unreasonably prejudicial in comparison to the rates charged to the general population. Intrastate long distance service rates for direct dialed calls are as low as $.08 per minute for the general population of Pennsylvania. This contrasts sharply with the $3.30 surcharge and the $.45 per minute rate charged to recipients of inmate telephone calls under the current contract between AT&T and the Commonwealth. Moreover, the rates charged to recipients of inmate telephone calls are unreasonably disadvantageous to that class, while disproportionately benefitting the taxpayers of Pennsylvania. The commission received by the Commonwealth for 47% of AT&T's gross billed revenues supports the Commonwealth's general fund and the Department of Corrections' Inmate General Welfare Fund (IGWF).[10] Of the $5 million received annually by the Commonwealth from revenues derived from inmate collect calls, only $3 million enters the IGWF. The remaining millions fund state programs and initiatives otherwise financed by Commonwealth taxpayers.

[10] The Inmate General Welfare Fund is a fund to benefit inmates, by purchasing leisure time and recreational items including such items as sports equipment, televisions, motion picture rentals and recreational reading materials.

Thus, through AT&T's excessive rates and the Commonwealth's commission, recipients of inmate telephone calls are disproportionately shouldering the burden of state expenses, to the benefit of the rest of the Commonwealth taxpayers.

B. THE COMMISSION ERRED IN FINDING AT&T'S RATES CONSTITUTIONAL

1. AT&T's Rates Violate the First Amendment Rights of Families and Friends of Inmates By Unnecessarily Burdening Their Ability to Communicate with Their Incarcerated Family Members and Friends.

The U.S. Supreme Court has recognized that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, at 84 (1987). Federal courts have emphasized that convicted inmates retain their First Amendment rights to communicate with family and friends. Morgan v. LaVallee, 526 F.2d 221, at 225 (1975). While it is true that an inmate's First Amendment right does not extend to unlimited access to a telephone, Benzel v. Grammer, 869 F.2d 1105, at 1108 (1989), federal courts have found "no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone, and. . . such use is protected by the First Amendment." Johnson v. Galli, 596 F. Supp. 135, at 138 (1984). See also Inmates of Allegheny County Jail v. Wecht, 565 F. Supp. 1278 (1983), Washington v. Reno, 35 F.3d 1093 (1997). An inmate's right to telephone access is restricted only by "rational limitations in the face of legitimate security interests of the penal institution." Strandberg v. City of Helena, 791 F.2d 744, at 747 (1986).

Federal courts have also held that prison walls do not "bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" Turner v. Safley, 482 U.S. 78, at 94-99 (1987). See Procunier v. Martinez, 416 U.S. 396 (1974), Thornburgh v. Abbott, 490 U.S. 401, at 407 (1989). In Martinez, the Supreme Court invalidated a prison regulation permitting censorship of outgoing prison mail on grounds of preserving the First

Amendment rights of the non-prisoner correspondent. The Martinez court stated that "whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech." 416 U.S. at 408. The court's holding revolved around the fact that the challenged regulation caused a "consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners." 416 U.S. at 409 (emphasis added).

In Martinez, the Court adopted a standard of review that requires that 1) the regulation furthers an important or substantial government interest, such as security, order, or rehabilitation; and, 2) the limitations on the right are no greater than necessary or essential to the protection of the government interest. Thus, a restriction on inmate correspondence is invalid under the First Amendment if its scope is unnecessarily broad. Later, in Thornburgh v. Abbott, 490 U.S. 401 (1989), the Court restricted the holding in Martinez to regulations concerning outgoing personal correspondence, regulations that are not of central importance to maintaining prison order and security. Challenged prison regulations that involve heightened administrative and security concerns face a more deferential standard delineated in Turner v. Safley that requires that the prison regulation only be "reasonably related to legitimate penological interests." 482 U.S. at 89.

The Martinez standard is the appropriate standard of review in the present context. While it is true that all correspondence between inmates and the general population involve some security concerns, closely monitored and recorded outgoing inmate telephone calls to a restricted telephone list of family member, friends and attorneys do not raise the same level of concern that unregulated incoming prison mail raises. Unregulated incoming prison mail can contain contraband and can easily excite prison behavior. On the contrary, inmate telephone calls with families and friends serve an important rehabilitative purpose and regulations on such calls deserve

a more restrictive standard of review. Continual and frequent contact between inmates and their families and friends increases the likelihood that inmates have emotional and financial support and assistance while incarcerated. Once released, such support helps former inmates in their readjustment into society, allowing them to become productive citizens.

AT&T's rates do satisfy the first prong of the Martinez standard. AT&T's rates do further an important government interest by covering important security features, such as recording and monitoring equipment for inmate telephone calls. However, AT&T's rates do not satisfy the second prong of the Martinez standard because the rates place a far greater burden on recipients' First Amendment rights than is necessary to protect any legitimate administrative and security concerns. Moreover, the DOC's system does not allow for more affordable, alternative methods of telephone communication that would satisfy security concerns and lessen the burden on plaintiffs' First Amendment rights.

While conceding that inmate telephone service with its heightened security features is typically more expensive than residential telephone service provided to the general population, the rates charged by AT&T are excessive, even in light of these increased costs. While all state correctional departments face similar security concerns with regard to their inmate telephone systems, numerous states including California, New York, Florida, Colorado, Kentucky and Virginia have contracted with telephone companies that offer significantly lower surcharges and rates.[11] Moreover, a significant number of state correctional departments, such as Colorado, Missouri and Tennessee, and the Federal Bureau of Prisons have instituted alternative telephone systems, such as debit or pre-paid telephone systems that significantly decrease call costs. All of

[11] California: $3.00 surcharge & $.50/min.; New York: $3.00 surcharge & $.33/min.; Florida: $1.75 surcharge & $.21 - $.26/min.; Colorado: $1.25 surcharge & $.29 - $.32/min.; Kentucky: $1.50 surcharge & Virginia: $1.55 - $2.25 surcharge & $.048 - $.40/min.

these alternative systems contain the security features deemed necessary by the Commonwealth Department of Corrections, including monitoring, regulating and reporting functions. Thus, AT&T's telephone rates are excessive and not essential to satisfy the Commonwealth's security and safety concerns. The rates unnecessarily restrict the ability of families and friends to communicate and maintain relations with inmates and as such, violate their First Amendment rights.

Even if this court were to find the more deferential standard adopted in Turner more appropriate in this context, AT&T's telephone rates charged would not withstand a First Amendment challenge. In Turner, the Supreme Court held that a prison regulation infringing upon a constitutional right is valid if "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. The factors for determining reasonableness include: 1) a valid, rational connection between the prison regulation and the legitimate government interest justifying the regulation; 2) the existence of alternative means of exercising the abridged right; 3) the impact of an accommodation of the abridged right on prison resources; 4) the absence of alternatives for exercising the right at de minimis cost to penological interests. Turner, 482 U.S. at 89-91.

AT&T and the Commonwealth will set forth various government interests to justify the excessive telephone rates and the contract in question. The defendants will undoubtedly maintain that 1) security and administrative concerns mandate that inmate telephone service contain features, such as specialized control, monitoring, and recording devices, that ultimately raise the cost of the service; and that 2) the 47% commission to the Commonwealth that raises inmate call costs actually affords the average taxpayer and Commonwealth relief from the burdensome cost of incarceration.

There is no valid, rational connection between the excessive rates charged to recipients of inmate telephone calls and the Commonwealth's security concerns because the current rates far exceed those rates necessary to cover such security devices. As identified earlier in this brief, numerous states that face similar security and safety concerns, including California, New York, Florida, Colorado and Virginia have contracted with telephone companies that offer significantly lower surcharges and rates. (See Footnote 9). Moreover, state correctional departments can institute alternative systems, such as debit or pre-paid telephone systems, which contain the same security standards and substantially decrease call costs. Thus, because AT&T's rates extend well beyond those required to satisfy the Commonwealth's security interests, there is not a valid, rational connection between the rates and the legitimate government interest.

Moreover, there is no valid, rational connection between AT&T's excessive rates and the relief afforded taxpayers and the Commonwealth from the cost of incarceration. The Commonwealth's 47% commission from AT&T's gross billed revenues derived from inmate collect calls generates approximately $5 million per year. The Commonwealth distributes $3 million to the Department of Corrections' Inmate General Welfare Fund (IGWF). The remaining millions remains in the Commonwealth's coffers.

As distributed, the Commonwealth's commission does not provide taxpayers or the Commonwealth necessary relief from the cost of incarceration. The IGWF does not and has never received any taxpayer dollars or public money. The fund draws its revenue from a variety of sources, including prison telephone service, profits from the prison commissary, visiting room vending machines, fees from the Prison Medical Services Programs, etc... Because the taxpaying population and the Commonwealth do not contribute to the IGWF, AT&T's rates do not provide

any relief to those entities for the cost of incarceration. Moreover, because the IGWF obtains its funding from such a wide variety of sources, even if the Commonwealth reduced its commission, the reduction would not substantially jeopardize the fund. Other states have either capped or eliminated the kickbacks received from telephone companies while maintaining their inmate welfare funds. For example, New Mexico recently passed legislation eliminating the commission received from its inmate telephone service provider.[12] Moreover, the state legislatures of Massachusetts, Vermont and Virginia have proposed similar legislation that would eliminate or cap the commissions received.[13]

Furthermore, the $3 million delivered to the Commonwealth's general coffers does not provide Commonwealth taxpayers relief that is rationally connected to the cost of incarceration. The surplus flows into the state's general fund for use for any budget items, not necessarily incarceration.[14] The surplus does not necessarily supplant taxpayer incarceration costs. Thus, because the commission does not replace taxpayer incarceration costs, AT&T's rates are not rationally connected to the burdensome cost of incarceration.

As the second factor, the Turner reasonableness test also considers whether alternative means for exercising the abridged right remain open to prisoner inmates. While alternative methods of communication between inmates and their families and friends do indeed exist, such as visitation and mail correspondence, telephones enable families and friends to maintain more regular, uninterrupted communication than visits or mail correspondence. Inmates are only allowed one visit per week. Moreover, in light of the Department of Corrections policy to place

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[12] HB 133 & SB 103.

[13] Massachusetts: HB 2598; Vermont: HB 246; Virginia: HB 2213.

[14] As of 2000, the Commonwealth has a 1.2 billion surplus in its Rainy Day Fund. (cite).

inmates in facilities located farthest from their homes, telephone contact is particular important. If an inmate's family and friends do not live near the inmate's facility, visitation can be expensive and impractical. Moreover, mail correspondence is not always an option for inmates. According to a 1996 article in Investor's Business Daily, 60% of the nationwide prison population is illiterate.

The third factor in the Turner reasonableness assessment is to the extent to which accommodating the abridged right would impact prison resources, prison staff and the other inmates. Decreasing AT&T's rates would not substantially impact prison resources. Only half of the $6 million commission received by the Commonwealth is guaranteed to subsidize the Commonwealth's penal institutions by entering the IGWF. As mentioned earlier, the IGWF retains its funding from a wide variety of sources, not relying exclusively on revenues generated through the inmate telephone system. Moreover, other states have endorsed eliminating or capping their commissions to reduce the rates charged to recipients of inmate telephone calls while maintaining their inmate general welfare funds.

The fourth factor is the extent to which obvious, easy alternatives exist to accommodate the abridged right, demonstrating that the regulation is an exaggerated response to prison concerns. If an inmate can point to an alternative that fully accommodates the prisoner's right at de minimis cost to the institution's interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard. Turner, 482 U.S. at 91. The Commonwealth can reduce its commission percentage, which would translate into a reduction in inmate call costs. Moreover, the Commonwealth can institute alternative telephone systems, such

as debit and pre-paid telephone systems, which would decrease the cost of calls for recipients and maintain the necessary security standards.

2. The Commission Owed to the Commonwealth under AT&T's Contract for Inmate Telephone Service Is an Unconstitutional Tax:

Under the contract between AT&T and the Commonwealth, AT&T delivers a 47% commission to the Commonwealth for all gross billed revenues derived from the contract. The commission amounts to a $6 million return for the Commonwealth, with the value of the contract totaling $12,766,000 per year. Of the $6 million commission, $5 million is derived solely from revenues from the inmate telephone system. While the Department of Corrections designates $3 million of the commission for the Inmate General Welfare Fund, the remaining portion of the commission contributes to the Commonwealth general fund. Through the bid process, the Commonwealth typically awards the inmate telephone service contract to the bidder offering the highest commission. Since of course, telephone rates reflect the commission percentage, ratepayers bear the burden of the commission to the Commonwealth.

The Commonwealth's commission constitutes an unconstitutional and confiscatory tax and violates the due process clauses of the Fifth and Fourteenth Amendments. The commission forces AT&T to charge rates beyond just and reasonable standards to compensate for the 47% commission received by the Pennsylvania Department of Corrections. The Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation. The Fourteenth Amendment pertains to the states providing that no State shall deprive any person of life, liberty, or property without due process of law. Under the due process

clauses of the Fifth and Fourteenth Amendments, a utility is entitled to rates, not per se excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services. Denver Union Stock Yard Co. v. United States, 304 U.S. 470, at 475 (1938).

In Public Advocate v. Philadelphia Gas Commission, 674 A.2d 1056 (1996), the Pennsylvania Supreme Court considered whether a fixed annual payment of $18,000 by the Philadelphia Gas Works (PGW) to the City of Philadelphia was constitutional and could be included in PGW's rate increase or whether the payment was an unconstitutional tax. The Supreme Court held that the payment was not confiscatory, because Philadelphia owned the gas company and was therefore entitled to a rate of return on its assets, and because the payment fell within the broad zone of reasonableness since the payment was merely a 9% rate of return.

In contrast, in the present case, the commission received by the Pennsylvania Department of Corrections is an unconstitutional tax. While the Commonwealth, as property owner of the payphone locations, is entitled to a percentage of AT&T's gross billed revenues from inmate collect calls, the commission received by the Commonwealth is excessive and extortionate, comprising 47% of all gross billed revenues and amounting to $6 million annually. This rate of return to the Commonwealth far exceeds the broad zone of reasonableness. Thus, the commission constitutes an unconstitutional tax and is confiscatory.

3. AT&T's Rates Violate the Equal Protection Clause By Subjecting Recipients of Inmate Telephone Calls to Excessive Charges Not Imposed on Similarly Situated Telephone Users.

AT&T's rate structure violates the equal protection clause of the Fourteenth Amendment which provides that no State shall "deny to any person within its jurisdiction the equal protection

of the laws." U.S. Const. Amend. XIV, § 1. The equal protection clause protects a party from state action that selects the part for discriminatory treatment by subjecting the party to regulations not imposed on others in the same class. To prove state action, a private party's conduct must be so closely connected to the state's conduct that it may be treated as conduct of the state itself. Jackson v. Metropolitan Edison Co., 419 U.S. 345, at 351 (1974). According to the Pennsylvania Commonwealth Court, the issue is whether the private party's action is attributable to the state and "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." Groman v. Township of Manalapan, 47 F.3d 628, at 638 (1995) (quoting NCAA v. Tarkanian, 488 U.S. 179, at 192 (1988)).

In the instant case, AT&T's rates clearly fall within the purview of state action. Under contract to the Commonwealth, AT&T installs and maintains the system according to the Department of Corrections' guidelines, regulations and restrictions. For rate approval, AT&T must file a tariff with the Public Utility Commission. Any change to those rates requires further PUC approval. In return, AT&T pays the Commonwealth a 47% - 50% commission of all gross billed revenues from inmate telephone calls. The Commonwealth clearly provides the mantle of authority for AT&T's rate structure.

AT&T's rate structure violates the equal protection clause by subjecting recipients of inmate telephone calls to excessive charges not imposed on similarly situated telephone users. The equal protection clause ensure that government treats all similarly situated persons identically. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, at 439 (1985). Courts evaluate equal protection challenges under three levels of scrutiny depending on the nature of the classification and the interest that the classification implicates: 1) for classifications that implicate

a "suspect" class or fundamental right, the court employs a strict scrutiny standard that demands a "compelling" governmental purpose; 2) for classifications that implicate a "sensitive" classification, the court employs heightened scrutiny that demands an "important" governmental purpose; and, 3) all other classifications require a rational basis for the classification. Smith v. City of Philadelphia, 516 A.2d 306, at 311 (1986).

The present challenge to AT&T's rates demands strict scrutiny because AT&T's rates implicate a "suspect" class and are discriminatory against African-Americans in their application. While it is true that strict scrutiny requires a finding of purposeful discrimination, the Supreme Court has recognized that classifications, though racially neutral, are unconstitutional if racially discriminatory in their administration and application. Yick Wo v. Hopkins, 118 U.S. 356, at 373 (1886). As stated in Yick Wo, "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. 374. The Commonwealth's inmate population is 56% African-American and 9.5% Latino as of February 1999. (Plaintiff's Exhibit 9). Presumptively, inmates' families have similar racial compositions. Thus, though AT&T's rates apply to all recipients of inmate telephone calls regardless of race, because the families and friends of inmates are disproportionately African-American and Latino and the Commonwealth condones the excessive rates applied exclusively these populations, AT&T's rates are racially discriminatory.

To survive the strict scrutiny standard, AT&T's rate must be justified by a compelling state interest and must be narrowly tailored to the state interest at stake. Denoncourt v. State

Ethics Commission, 470 A.2d 945, at 949 (1983). While the Supreme Court has recognized an institution's interest in internal order and security as legitimate, Bell v. Wolfish, 441 U.S. 520 (1979), AT&T's rates are not narrowly tailored to the Department of Corrections' interest of security and internal order. AT&T's current rates far exceed the rates necessary to maintain high security standards. States, such as California, New York, Florida, Colorado and Virginia, have contracted with telephone service providers that offer significantly lower surcharges and rates, while upholding security standards. (See Footnote 3). Moreover, alternative systems, such as debit and pre-paid telephone systems, allow for a substantial decrease in call costs without sacrificing the systems' security interests. Because AT&T's rates greatly surpass those rates necessary to cover such security devices and are not narrowly tailored to the state interest at stake, AT&T's rates do not survive strict scrutiny.

The instant case also demands strict scrutiny because AT&T's rate infringe upon the free speech guarantee of the recipients of inmate telephone calls, protected by the First Amendment. Because freedom of speech is a fundamental right, an equal protection challenge to that fundamental right requires strict scrutiny. J.S. v. Bethlehem Area School District, 757 A.2d 412 (2000). Again, while institutional security and internal order are compelling government interests and call for legitimate restrictions on the ability of family members and friends to communicate with inmates, AT&T's rates place excessive restrictions on that ability. As identified earlier in this brief, the Commonwealth has a multitude of options for lowering surcharges and the rates charged without jeopardizing the security of the system. The Commonwealth can also institute alternative systems of communication, allowing families and friends to maintain more consistent and frequent telephone contact with inmates. Thus, AT&T's rates are not narrowly tailored to

the Commonwealth's interest in security and unnecessarily violate the call recipients' fundamental right of freedom of speech.

In the alternative, even under a more deferential standard of scrutiny, AT&T's rates do not survive an equal protection challenge because AT&T's rate structure is not rationally related to a legitimate state interest. In McGowan v. Maryland, the Supreme Court held that unless a classification is inherently suspect, a "classification's validity is tested by assessing whether the classification has some reasonable basis." 366 U.S. 420, at 425-26 (1961). There is no reasonable basis justifying AT&T's excessive rates charged exclusively to recipients of inmate telephone calls.

The Administrative Law Judge justified AT&T's rates by comparing the rates charged to recipients of inmate telephone calls and recipients of public payphone collect calls. Finding a $.90 differential between the two groups of call recipients, the Administrative Law Judge defended the rate differential due to the additional cost of the monitoring and recording equipment used for security purposes. As indicated previously we take issue with the comparison of inmate collect calls with public payphone collect calls because inmates and public payphone users are not similarly situated with regard to the purpose of the telephone calls, the frequency of the telephone calls and the situation of the caller. Instead, inmate telephone service is more appropriately contrasted with direct dialed residential telephone service because both services serve more analogous purposes, have more similar user frequencies and are placed by callers in more comparable situations.[15] With intrastate long distance residential rates dipping as low as $.08 per minute, the contrast reveals the excessiveness of the inmate telephone rates. As indicated

[15]See Brief Section (A)(2)(a).

previously, AT&T's excessive rates are not rationally related to the government interest in security, since the rates far exceed institutional security needs. Thus, such a vast rate differential denies equal protection to similarly situated telephone users without being rationally related to a legitimate government purpose.

C. THE COMMISSION IMPROPERLY DISMISSED VERIZON AND FAILED TO JOIN THE COMMONWEALTH AS INDISPENSABLE PARTIES TO THE PROCEEDING.

The Commission improperly dismissed Verizon and failed to join the Commonwealth as indispensable parties to the proceeding. On September 16, 1998, by Recommended Decision, the Administrative Law Judge granted Verizon's (formerly Bell Atlantic-Pennsylvania, Inc.) motion for judgment on the pleadings and dismissed Verizon as a party to the proceeding. In the Opinion and Order adopted April 19, 2001, the PUC disagreed with the Recommended Decision, stating that "Verizon's participation in the hearings would have been appropriate" in order to "fashion an overall perspective of the issues relating to collect call charges for inmate service." Notwithstanding the procedural error, the PUC affirmed the Administrative Law Judge's decision on the basis that Ms. Feigley "incurred no harm as a result of the lack of participation of Verizon." With respect to the Commonwealth's participation in the proceeding, during the public hearing on June 16, 1999, Mr. Love orally moved to join the Commonwealth as an indispensable party pursuant to 52 Pa. Code § 5.103. The Administrative Law Judge denied Mr. Love's motion.

The Pennsylvania Public Utility Commission has held that an indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without

impairing or infringing upon those rights. Harry Bernard v. ALLTEL Pennsylvania, Inc., 1997 Pa. PUC LEXIS 82. With regard to Verizon's improper dismissal as an indispensable party, under the contract in question, AT&T was the exclusive primary contractor with the Commonwealth for inmate telephone service until February 10, 1999. On February 10, 1999, Verizon replaced AT&T as exclusive general contractor, though AT&T remains a subcontractor on the contract. As exclusive general contractor to the contract in dispute, Verizon has an undisputable right and interest related to petitioner's claim that the current rates charged to recipients of inmate telephone calls are unreasonable and unconstitutional. Verizon's continued absence would greatly impair its ability to preserve the current rate structure. Moreover, Verizon's participation is essential to the merits of the claim since Verizon, as prime contractor, contributes necessary information and insight. Lastly, a disposition against AT&T would deprive Verizon of its due process rights by vastly altering the corporation's approved rate structure and collectibles without providing Verizon an opportunity to challenge the disposition.

Furthermore, the Commission improperly denied Mr. Love's motion to join the Commonwealth as an indispensable party. The ALJ stated that while the case in hand "does concern the business relationship between AT&T and the Commonwealth," the ALJ was unconvinced that the issue regarding the reasonableness of the rates requires the participation of the Commonwealth or its agencies as parties. (cite) However, the essence of the dispute involves the reasonableness of AT&T's rates and the terms and conditions of the inmate telephone system as delineated by the contract between AT&T and the Commonwealth. AT&T's rates are subject to the approval of a Commonwealth agency, the PUC, with respect to their reasonableness. In addition, a disposition in Ms. Feigley's favor would result in a substantial financial loss for the

Commonwealth, since the Commonwealth receives a 47% commission from AT&T under the contract, totaling $6 million annually. The Commonwealth has an undisputed right to protect its interest in the contract and is thus, an indispensable party.

VIII. CONCLUSION

For the reasons stated above, the Court should remand AT&T's rates for inmate telephone calls set by the Pennsylvania Public Utility Commission, with instructions that such rates must conform to just and reasonable standards.

Respectfully submitted,

Angus Love, ID #22932
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LAW PROJECT
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Philadelphia, PA 19107
(215) 925-2966

Dated: August 6, 2001

APPENDIX

OPINION AND ORDER ENTERED APRIL 20, 2001, IN THE CASE OF SANDRA L. FEIGLEY V. AT&T COMMUNICATIONS OF PENNSYLVANIA, INC., DOCKET NO. C-00981434

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held April 19, 2001

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
Nora Mead Brownell
Aaron Wilson, Jr.
Terrance J. Fitzpatrick

Sandra L. Feigley

v. C-00981434

AT&T Communications of
Pennsylvania, Inc.

CONTAINS PROPRIETARY MATERIAL

OPINION AND ORDER

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BY THE COMMISSION:

Before the Commission for consideration are the Exceptions filed by Sandra L. Feigley (Complainant) on July 12, 2000, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Louis G. Cocheres issued on June 27, 2000. Replies to Exceptions were received from AT&T Communications of Pennsylvania, Inc. (AT&T or Respondent) on July 27, 2000. We further note that Citizens United for the Rehabilitation of Errants (CURE),[1] an intervenor in these proceedings, filed Exceptions on or about July 19, 2000.

Background

On April 21, 1998, Complainant filed two (2) substantially similar Formal Complaints with the Commission. The first Formal Complaint, docketed at No. C-00981434, named AT&T as the Respondent. (R.D., p. 1). The second Formal Complaint, docketed at No. C-00981435, named Verizon Pennsylvania, f/k/a Bell Atlantic-Pennsylvania, Inc. (Verizon PA) as the second Respondent. (R.D., p. 2).[2] Presiding ALJ Cocheres has set forth the operative paragraph contained in both Formal Complaints as follows:

> I [Complainant] receive collect telephone calls from a prison. The companies grossly overcharge for the service in order to pay an unauthorized tax of 35% and 50% respectively to the Commonwealth. No legislation authorizes the Commonwealth to tax my speech in this way.

(Complaints, ¶3).

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[1] As will be more fully explained, below, CURE is an organization of family members, friends, and persons who are interested in maintaining a humane criminal justice system. The national headquarters for CURE is San Antonio, Texas. (*See* Finding of Fact Nos. 17-18, *infra).*

[2] The docket numbers in the text of the Recommended Decision should reflect the year 1998 rather than 1999.

By Letter dated November 18, 1998, Angus Love, Esquire entered an appearance for the Complainant.[3] Presiding ALJ Cocheres noted that:

> Throughout the discovery process and the hearings held on April 16 and June 16, 1999, Mr. Love represented Mrs. Feigley. Thereafter, and prior to Mr. Love's opportunity to file a brief in this case, Mrs. Feigley dismissed Mr. Love as her attorney. In accordance with his client's wishes, he withdrew by letter dated August 4, 1999. *See* Interim Order No. 4, dated September 16, 1999, at 6-8.

(R.D., pp. 2-3).

By letter dated August 13, 1999, Doug[4] and Dianna Hollis filed a Letter-Petition to Intervene. The Hollis' sought intervention, individually, and in a representational capacity, for an organization titled Citizens United for Rehabilitation of Errants (the afore-mentioned CURE). CURE and Doug and Dianna Hollis were represented by the same attorney, who formerly represented Complainant. (*See* R.D., p. 3). AT&T responded in opposition to the Petition to Intervene. Also, the Complainant filed an Answer to said Petition. By Interim Order No. 4, dated September 16, 1999, ALJ Cocheres denied the Petition to Intervene. (*Id).*

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[3] The Complainant disputed the legal representation of Counsel. *e.g.*, Complainant's Reply Brief, p. 1. Counsel was, at the time this Complaint was prosecuted, the Executive Director of the Pennsylvania Institutional Law Project, Philadelphia, Pennsylvania. The Complainant points out that Counsel had been contacted to represent her incarcerated husband, George Feigley. She also comments that the Pennsylvania Institutional Law Project, which employs Counsel, limits his representation to prisoners. Of course, the Complainant is not a prisoner. (Complainant R.B., p. 1; also Interim Order No. 4).

[4] Mr. Douglas Hollis, who is married to Dianna Hollis, was, at the time of the Recommended Decision, incarcerated at the state correctional institution at Frackville, Pennsylvania. (*See* Finding of Fact No. 14). Also, Mrs. Hollis was, at the time of the hearing, a member of the Pennsylvania Prison Society and Chairperson of Pennsylvania CURE. (Tr., p. 68).

We also note that Mr. Guzzi, Esquire, appeared on behalf of the Commonwealth of Pennsylvania Department of Corrections.[6]

Briefs were prepared by the Complainant and AT&T. On August 3, 1999, the Complainant filed her Brief In Support of Petitioner's Complaint, *pro se*. The Brief was dated July 27, 1999. On October 18, 1999, (in accordance with specific instructions from ALJ Cocheres to delay filing until the Petition to Intervene was decided) AT&T filed its Brief in both proprietary and non-proprietary format. On October 19, 1999, the Complainant served her Supplementary Brief Addressing Increase In Tariff, *pro se*. On October 27, 1999, the Complainant served Petitioner Sandra Feigley's Reply Brief, *pro se*. By Letter dated November 11, 1999, AT&T responded to both of the most recent Briefs filed by the Complainant.

The Recommended Decision was issued on June 27, 2000. Presiding ALJ Cocheres recommended that the Formal Complaint of Mrs. Feigley be denied, consistent with his discussion. (R.D., p. 64). As noted, Exceptions were filed by the Complainant on July 12, 2000. Exceptions were filed by CURE on July 19, 2000. Replies to Exceptions were received from AT&T on July 27, 2000.

Discussion

A. Introduction

The instant formal Complaint presents certain matters of first impression for this Commission. The Complainant's Formal Complaint lodges an attack against the constitutionality and reasonableness of the rates and conditions of service provided by

[6] The Commonwealth Department of Corrections was not made a party to the proceedings. (Tr., p. 48). Counsel, whose presence was acknowledged, did not formally record an entry of appearance. (Tr., p. 58; 178-182; 185).

and (3) the transport charge ($.27).[8] The rates charged by AT&T are contained in Commission-approved tariffs which require AT&T to charge uniform rates for all inmate service calls. (AT&T MB, p. 5).

In reviewing the claims of Mrs. Feigley, we observe that this Commission is an independent administrative agency of the Commonwealth. As such, we may only exercise enumerated statutory powers or such powers that are necessarily implied from our enabling statute. (66 Pa. C.S. §§101-3315; *Western Pa. Water Co. v. Pa.PUC*, 471 Pa. 347, 370 A.2d 337 (1977); N*ational Fuel Gas Distribution Corp. v. Pa.PUC*, 464 A.2d 546 (Pa. Cmwlth. Ct. 1983)). Pursuant to the Commission's enabling statute, the Commission has been vested by the General Assembly with exclusive original jurisdiction over the reasonableness, adequacy, and sufficiency of public utility rates and service, including telephone rates and services. (*See Behrend v. Bell Teleph. Co. of Pa.*, 431 Pa. 63, 243 A.2d 346 (1968)).

B. ALJ Decision

ALJ Cocheres made one-hundred seventy (170) Findings of Fact and reached twenty-seven (27) Conclusions of Law.[9] We, hereby, adopt the ALJ's Findings of Fact unless expressly or by necessary implication they are modified or rejected by this Opinion and Order.

A summary of non-proprietary facts, excerpted from pages 32-37 of the Recommended Decision, is provided, below:

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[8] The transport charge was increased to $.45 per minute, effective August 6, 1999. (*See* AT&T MB, p. 3, n. 8).

[9] Finding of Fact Nos. 166–170 contain proprietary information.

hearing), the recipient also has the option to hear the maximum interstate charges applicable to collect calls from prisons.[4] At this point, the call recipient can refuse the call by hanging up and will incur no charges. If the recipient wishes to continue, he/she must push a designated button to accept the charges.

After the call is accepted, the connection is completed, and conversation can begin. Periodically, the call will be interrupted (a few seconds) to inform the parties of the time remaining before call termination. During these announcements the parties cannot continue their conversation. The audio portion of the call can also be interrupted by loud cracking noises. Finally, loud background noises in the vicinity of the recipient can cause the security system to disconnect the call. If the call is disconnected, the inmate and the call recipient must repeat the process to transmit another collect call. The recipient must then pay another service charge and a per call compensation charge to be reconnected in addition to the usual per minute costs.

[4] The option to hear a recorded message which provides the maximum interstate charges applicable to collect calls from prisons is a requirement imposed by the Federal Communications Commission (FCC). 47 C.F.R. §64.710. Further, at the December 21 hearing, AT&T explained that its subcontractor had failed to specify in the message that the charges only applied to interstate calls.

(R.D., pp. 32-34) (Emphasis original).

ALJ Cocheres concluded that the Complainant had the burden of proof to show that the rates charged by AT&T were "unreasonably high." (*See* R.D., p. 37; 66 Pa. C.S. §315(a)). On consideration of the record, the presiding ALJ concluded that the Complainant failed to meet her burden of proof that the rates at issue were too high or that there was something improper relative to some component of the rate which made the total rate unjust or unreasonable. (66 Pa. C.S. §1301). The main thrust of the

98 S. Ct. 401, 54 L. Ed. 2d 281 (1977); reh'g. denied, 434 U.S. 1025, 98 S. Ct. 754, 54 L. Ed. 2d 774, (1978).

5. United States Constitution guarantees to its citizens the right of freedom of speech. U.S. Const. Amend. I.

6. By this Commission's regulation an interexchange carrier's intrastate rate for noncompetitive service is reasonable if it is equal to or less than the comparable rates for the same service in interstate jurisdiction. 52 Pa. Code §63.105(d).

7. The AT&T intrastate, inmate, collect, toll call rate meets the regulatory standard.

* * *

9. In *National Association For the Advancement Of Colored People, Inc. v. Pennsylvania Public Utility Commission*, 5 Pa. Commonwealth Ct. 312, 290 A.2d 704 (1972), the Court ruled that this Commission had no power to regulate utility employment practices in the context of a general rate case. The Court continued that the authority to investigate allegations of the discriminatory employment practices is vested the Pennsylvania Human Relations Commission.

10. *In Philadelphia Electric Company v. Pennsylvania Human Relations Commission*, 5 Pa. Commonwealth Ct. 329, 290 A.2d 699 (1972), the Court ruled that the Human Relations Commission did not have the authority to investigate allegations of discrimination by a utility in the provision of home economics department services, the requiring of security deposits and the termination of service for failure to pay bills. The Court continued that the jurisdiction to review allegations of racial discrimination on these subjects was vested in the Public Utility Commission. The Court reasoned that these subjects were within this Commission's exclusive jurisdiction over rates and services.

interstate, collect, toll call. BPP Second Report And Order. 47 C.F.R. §64.710.

25. Mrs. Feigley has not prevailed on any portion of her claim.

26. Mrs. Feigley failed to prove that AT&T did anything which violated the Public Utility Code, Commission regulation, Commission order or the Constitutions of Pennsylvania or the United States.

(R.D., pp. 59-63).

C. Exceptions

1. Complainant

The Complainant presented six (6) arguments in support of her Formal Complaint, all of which were rejected by ALJ Cocheres. The Complainant's arguments and related sub-arguments shall be addressed and disposed of concomitantly. Any argument or consideration not expressly considered shall be deemed denied. (*University of Pennsylvania v. Pa. P.U.C.*, 485 A.2d 1217, 1222 (Pa.Cmwlth. 1984)).

The Complainant's Exceptions, summarized, are as follows: Complainant Exceptions 1-3 raise alleged procedural irregularities. The Complainant objects to the dismissal of Verizon from this proceeding and repeats her position that Mr. Angus Love, Esquire, did not represent her during the proceedings. (Complainant Exc., pp. 1-2).

Exception No. 4 of the Complainant represents the substantive details of her disagreement with the recommendation of ALJ Cocheres. These contentions are noted below:

that First Amendment freedom of speech rights are implicated through this Complaint, and that the charges for collect call recipients from inmates amount to an improper tax imposed by a government agency. Finally, the Complainant objects, in omnibus fashion, to ALJ Cocheres' Conclusions of Law and to his general understanding of her contentions in this case. She emphasizes that the societal goals for controlling inmate behavior should not, essentially, be imposed on "other citizens." (Complainant Exc., p. 7).

2. CURE

CURE's Exceptions, in addition to expounding on the positions of the Complainant, assert that the Complainant met her burden of showing that the rates from the contract at issue are not just and reasonable, pursuant to the standards of the Public Utility Code, and the Commission's Regulations at 52 Pa. Code §63.105. (*See* CURE Exc., pp. 3-9). CURE additionally presents several policy arguments the import of which are that "a monopolistic enterprise is in need of regulation" by this Commission consistent with our legislative mandate. (CURE Exc., p. 11).

CURE, in detail, attempts to draw all pertinent provisions of Chapter 30, the Commission's Regulations, and the federal Telecommunications Act of 1996, 47 U.S.C. §151, *et seq.* (TA-96), to bear on the resulting rates. Essentially, CURE notes that "[t]he ALJ fails to note that AT&T raised rates four (4) times during the pendency of this action (see AT&T Exhibits 6-9), the last two (2) increases occurring after the AT&T testimony regarding the profitability of the Contract. . . . The increases reflect as much as a 300% increase in rates during the pendency of this litigation." (CURE Exc., p. 15).

> those tariffs are on the record of this proceeding. AT&T Exh. 1-4.

(R.D., p. 39) (Note omitted).

We note that the Complainant filed an Exception to the ALJ's dismissal of her claim that there were irregularities in the bidding of the contract. In her Exceptions, the Complainant argues, in pertinent part that:

> . . . Where the Commonwealth acts as the agent of the taxpayer, Mrs. Feigley, and enters into a contract, Mrs. Feigley is legally entitled to have the Commonwealth act in her best interest, not to conduct itself as a party with a competing financial interest.

(Complainant Exc., p. 4).

In its Replies to Exceptions, AT&T reiterates its position that the Commission lacks jurisdiction to consider the Complainant's contention. AT&T holds that we lack jurisdiction on two (2) bases, one of which is pertinent to those issues which relate to the Commonwealth/AT&T contract's impact on rates. (R.Exc., pp. 12-13).

AT&T, citing *Schnieder v. Pa. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984), *petition for allowance of appeal denied* (1984), states that "the Commission lacks jurisdiction to hear questions of federal and constitutional law which go beyond application of its enabling statute nor to decide the constitutionality of its own enabling statute." (R.Exc., p. 12; n. 34 citing *Schnieder, City of Phila. v. Kenny*, 369 A.2d 1343 (Pa. Cmwlth. 1977) and *Borough of Green Tree v. Bd. of Prop. Assessments*, 459 Pa. 268, 328 A.2d 819 (1974)). Also, AT&T argues that since the Complainant's constitutional challenges are directed at the Commonwealth's actions, any review of these issues would involve this Commission's review of the constitutionality of actions taken by the

In *Elkin v. Bell Telephone Co. of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980), the Supreme Court favored a bifurcated procedure where complex matters within an agency's area of expertise are resolved by the agency. (*See also Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977)). Those matters not requiring the application of the agency's specialized knowledge or expertise are resolved by the courts. *See DeFrancesco v. Western Pa. Water Co.*, 499 Pa. 374, 378, 453 A.2d 596 (1982). Where resolution of a party's claim depends upon no rule or regulation predicated on the peculiar expertise of the Commission, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the Commission, then the court should not refer the matter to the Commission. *See, MAPSA v. PECO Energy Company*, Docket No. P-00981615, *et al.* (Order entered May 19, 1999) – Commission referral of matters to the Pennsylvania Office of Attorney General due to the primacy of First Amendment issues and deceptive advertising claims.

Therefore, as an administrative agency of the Commonwealth, this Commission cannot provide a means of redress to Mrs. Feigley regarding the merits of her legal claims that there were improprieties in the Commonwealth bidding procedures. Neither would it be appropriate for this Agency to consider the Complainant's suggestions that there were competing and conflicting financial objectives on the part of the Commonwealth DOC which led to the selection of the successful bidder.[10]

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[10] The Complainant strongly suggests that she is, as a collect telephone call recipient, within the class of persons on whose behalf the DOC should act in its solicitation of bids. The Commonwealth contract involved here provides approximately $3 million per year to the DOC which is used for the Inmates General Welfare Fund. This fund is, in turn, used to provide services to inmates, such as recreation, entertainment, etc. (*See* Findings of Fact Nos. 92-96). Consequently, the negotiated contract bid price provides benefits to taxpayers and prisoners by ameliorating the tax burden of incarceration. (Finding of Fact No. 96; Tr., p. 165).

> conditions for the same service that have become lawfully effective in the interstate jurisdiction". 52 Pa. Code §63.105(d)(1). In this litigation, the Administrative Law Judge (ALJ) utilized long distance collect calls as a basis for comparison. (P.35 of Opinion). These rates are based on competitive services that give individuals a choice in service, *i.e.*, collect calls, personal cell phones, credit card calls, public pay phone charges, debit cards or 1-800 and 1-900 services. The testimony indicates that the Complainant and witnesses frequently utilize the service at issue (Findings of Fact Nos. 10, 20, 39), yet they cannot exercise the many less expensive options listed above. The least expensive option of choosing one's own long distance service is not considered by the ALJ. Intervenor C.U.R.E. refers to Plaintiff's Exhibits 1-3, 12, for long-distance rates available to Ms. Feigley and witnesses if competitive services were permitted. These rates charge as little as $.06 cents per minute as opposed to the $.45 cents per minute rate charged under the current contract.[2]
>
> [2] See telephone bills of Feigley, Franz and Hollis, Plaintiff's Exhibits 1-3.

(CURE Exc., pp. 7-8).

AT&T, in its Replies, does not directly respond to this contention of CURE.[11] However, AT&T notes that higher rates for collect calls are justified and not discriminatory in light of the fact that AT&T incurs categories of costs in providing inmate services calls that it does not incur in providing direct dial service. These costs include, *inter alia*, operator costs, dial around compensation costs, higher uncollectibles, and fraud control. (*See* Reply Exceptions, p. 11). Additionally, AT&T asserts that any

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[11] This contention of CURE is, as noted, implied from its Exceptions. We note that AT&T variously complains that the Exceptions of the Complainant and CURE are "erratic" and "incomprehensible." We recognize that neither CURE, nor the Complainant may be conversant with the details of practice before the Public Utility Commission and have endeavored to draw all reasonable inferences from well-pleaded contentions. (Tr., p. 233).

In light of the foregoing, this Commission is without primary jurisdiction to address that aspect of the instant Formal Complaint challenging the reasonableness of inmate access to telephone facilities. This is a question closely related to the process by which the Commonwealth has selected Verizon as contractor and AT&T (as sub-contractor) to provide telecommunications services. Reasonable access to the telephone system by inmates is a matter within the discretion of prison administrators, and the DOC, subject to court review. (37 Pa. Code §93.7). The fact that Chapter 30 and the Telecommunications Act of 1996 (TA-96) implement a new regulatory regime of competition and competitive choice among services and service providers, but that the Commonwealth contract appears to foreclose such choices, does not, in our view, present a question within the area of competence of this Commission.

We note that the *FCC Billed Party Preference Order*, *supra*, released January 29, 1998, after the effective date of TA-96, discussed without criticism the prevailing practice of correctional institutions throughout the United States to provide inmate telephone services through a competitively bid sole source.[13] Also, while the Federal Communications Commission (FCC) has expressed concern over comments regarding the reasonableness of costs, it did not express disapproval of the limitation of choice on the called party. If such a question were to be placed squarely before this Agency, we would

[13] Our review of the record in this matter and our review of the decisions in other jurisdictions that have considered the issue, indicates that only the state of Florida appears to provide some degree of choice for the recipient of a collect call initiated from an inmate. (*See FCC Billed Party Preference Order*). Also, CURE, in its Exceptions, and citing the *FCC Billed Party Preference Order*, asserts that the system installed by the Federal Bureau of Prisons provides for choice in providers via the Telephone Operator Consumer Services Improvement Act of 1990. (CURE Exc., p. 10). *See* also Tr., p. 139, citing Wisconsin as another jurisdiction which may offer some alternative billing arrangement.

Contract for Payphone and Inmate Services (RFP Number 97-15-2580-011) (Exh. P-5), states the following:[16]

> Bell Atlantic, the project manager, and all subcontractors will ensure that all services proposed during the term of the Contract will comply with all federal and state laws, rules and regulations including but not limited to rate making, branding, provision of consumer information, access to local, intraLATA and InterLATA carriers, accommodations for individuals with disabilities and any applicable construction, electrical and safety codes.
>
> All parties must also agree to comply with, and hold the Commonwealth of Pennsylvania harmless from, any subsequent rulings or findings of fact by the Federal Communications Commission (FCC) or the Pennsylvania Public Utilities Commission (PUC) regarding compliance with the requirements of an aggregator. The term aggregator, as used in this paragraph, is defined in the Telephone Operator Consumer Service Improvement Act of 1990.

Finally, limiting inmate initiated calls to only collect calls is prescribed by the Public Utility Code, 66 Pa. C.S. §2907(b)(1). Therefore, while the General Assembly has not indicated a preference for the potential billing alternatives for a call recipient, it has unequivocally mandated use of the collect only system for the inmates. *See also In the Matter of Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators*, 11 FCC Rcd 4532 (March 5, 1996), Para. 29 – "In view of the "exceptional" circumstances presented by the correctional environment, . . . we are not

[16] We note that the February 10, 1999 contract between the Commonwealth and Bell Atlantic-Pennsylvania, Inc., admitted into the record as Exhibit P-5 was erroneously marked proprietary. (*See* Finding of Fact No. 74). Said document is not a proprietary document. (*Id.*; Tr. 143).

> difference between an intrastate, interLATA collect call from a public payphone and the same collect call from an inmate in a correctional institution was $.90. In other words, even though AT&T incurred additional capital investment costs for security, recording and monitoring equipment in the prison setting, the resulting cost differential made the inmate call $.90 more expensive (including the commission paid to the Commonwealth). The proprietary cost information which was set forth in the "Undisputed Facts" and which was further explained by AT&T's witness and which was adopted in the findings of fact above justified the initial higher per call costs. In addition, I stress that, when the record closed, it was $.45 less expensive for the inmate collect call than the public payphone collect call. Thus, while the prices of all of the calls went up, the inmate calls went up the least. Under these circumstances, I do not find the rates unreasonable or violative of any section of the Public Utility Code.
>
> * * *
>
> I accept the contracts as valid. They were adopted in legitimate arms length transactions with authorized agents of the Commonwealth. The negotiated prices and the bid prices support benefits to both the taxpayers and the prisoners. The resulting price differences in comparison to the same calls from public payphones ($.90 higher for intrastate, inmate calls at the start of the case and $.45 lower for intrastate, inmate calls at the end of the case) fall within a zone of reasonableness. In addition, the resultant rates consistently fall within or below the regulatory benchmark (*i.e.* equal to or below the interstate rates for similar calls). . . .

(R.D., pp. 44-45) (Note omitted).

In her Exceptions, the Complainant asserts that the communication at issue is speech protected by the First Amendment to the United States Constitution and by the Pennsylvania Constitution. (Complainant Exc., p. 4). In addition to her First Amendment claims in this area, the Complainant additionally asserts that the rates result in an improper "tax" imposed by the executive branch, rather than the legislative branch of the General Assembly. (*Id*). In connection with this improper taxation argument, the

unjust and unreasonable, we conclude that their incurrence by the call recipient does not impact her constitutional rights.

4. Equal Protection and Protected Class

ALJ Cocheres considered this claim at pages 45-53 of the Recommended Decision. In conclusion, he rejected the position of the Complainant, reasoning as follows:

> As I indicated above, the record demonstrated at the beginning of the case that intrastate, inmate, collect, toll calls were more expensive than similar public payphone, collect calls. I also rejected the idea of using direct dialed toll calls as a valid benchmark for inmate collect calls. Instead, I used the cost of public payphone collect toll calls as a comparison point to inmate collect calls. At this point, I am compelled to observe that the record showed at the end of the case that the cost of public payphone collect toll calls were more expensive than an inmate collect toll calls. After evaluating the closing case evidence, I have concluded that those rates did not demonstrate a *prima facie* case of disparate treatment of a protected class. Thus, Mrs. Feigley had not carried her burden of demonstrating a *prima facie* case during the length of the proceedings.
>
> In conclusion, my review illustrated 1) that Mrs. Feigley and her witnesses were not representative of the protected classes, 2) that the Commission has jurisdiction over the disparate treatment claim, 3) that, assuming Mrs. Feigley was permitted to represent the protected classes, she did not establish a *prima facie* case for any part of the proceeding, 4) that Mrs. Feigley failed to establish a valid basis for comparison of existing inmate rates to other less costly rates, and 5) that the societal goal of controlling inmate behavior justified the limited access to the telephone system and the additional costs of security measures. Accordingly, I have concluded that on balance the societal concerns over security and its costs justified the price differential in the rates without regard

argues that it has standing to prosecute the racially disparate treatment claim. CURE refers to its Exhibit 9 and the transcript, pages 182-184. Here, CURE established that two-thirds of the inmate population are racial minorities. Thus, CURE contends that the "burden of high-cost telephone calls falls disproportionately on minority family members and friends." *Id.*

On consideration of the positions of the Complainant and CURE, we find that no equal protection violation has been established. It is the position of the Complainant and CURE that they represent a class of persons, friends and family members of incarcerated persons, against whom higher telephone rates are imposed. However, the rates are equally applied to a class of persons, all recipients of telephone calls from incarcerated persons in the Commonwealth, irrespective of an improper and suspect classification. That the majority of such incarcerated persons are disproportionately a racial minority does not create a suspect class that this Commission may recognize for equal protection purposes. (*See Abdul-Akbar v. McKelvie*, __ F.3d __ (3rd Cir. 2001), No. 98-7307, filed January 29, 2001, *citing Pryor v. Brennan,* 914 F.2d 921, 923 (7th Cir. 1990) for the proposition that prisoners do not constitute a suspect class.

Additionally, we are convinced, based on this record, that the relevant charges are within a zone of reasonableness and not in violation of Commission Regulation.

5. Illegal Monopoly

The inmate provided telephone system is, among the majority of jurisdictions, a monopoly service. (*See FCC BPP Order*). We note that the *FCC BPP Order* was rendered after the promulgation of TA-96. Thus, we do not acknowledge that the pro-competitive goals of TA-96 have, in some way, altered the legitimate security interests of the state in maintaining control over inmate access to the telephone facilities.

7. AT&T's Profits

AT&T's costs were detailed in Exhibit No. 5 (Proprietary). On review of the individual cost elements presented in this record, we agree with ALJ Cocheres that the average cost of a **[BEGIN PROPRIETARY]** ten minute telephone call is $6.19, while the average revenue related to a call of the same duration is $6.00. **[END PROPRIETARY]**. While CURE and the Complainant have attacked the logic of AT&T's provision of service pursuant to the Commonwealth contract at a loss, the information shows that the profitability of the contract for AT&T is not guaranteed.

The reasonableness of the underlying charges for calls was extensively discussed in this proceeding. Mr. Malcom testified that the difference in the surcharge imposed by AT&T for an inmate initiated call ($3.00) and a call initiated from a public payphone ($2.10) was $.90.[19] The difference has been adequately explained in this record as attributable to the higher costs for specialized control, monitoring, and recording equipment needed for the provision inmate telephone service. (*See* Tr., pp. 133-134). As expected, the surcharge is a flat rate imposed regardless of the duration of the call.[20]

8. Dismissal of Verizon as a Party Respondent

At transcript pages 42-43, Mr. Angus Love, Esquire, orally moved the presiding ALJ to reconsider his ruling which granted Verizon's motion in the nature of a motion for summary judgment and resulted in its dismissal from this proceeding. Mr. Love averred, *inter alia*, a material change occurred related to a new contract

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[19] We take administrative notice that the current tariffed rate for an intraLATA or interLATA call is now $3.45 per call (*See* AT&T Tariff No. 9, Third Revised Sheet 38A and 39A, effective August 6, 1999).

[20] As observed by ALJ Cocheres, in the instance where a call is prematurely terminated for whatever reason and the process begins anew, another surcharge is imposed.

Changes in circumstances whereby Verizon became the general contractor and AT&T was the subcontractor for services to the Commonwealth could be material to fashioning an overall perspective of the issues relating to collect call charges for inmate service. As subcontractor, AT&T would not be directly in privity with the Commonwealth, but would be responsible to Verizon for performance. We additionally note that the calls complained of were a mixture of calls wherein Verizon and AT&T were, alternately, the prime contractors.

Notwithstanding the foregoing, in light of the fact that the Complainant has not met her burden of proof to sustain any claim regarding the impropriety of any rate charged pursuant to the authority of the Public Utility Code, she has incurred no harm as a result of the lack of participation of Verizon. Given the extensive pleadings and discovery in this proceeding, ALJ Cocheres properly balanced principles of administrative efficiency and did not delay the matter pending the joinder of Verizon as a participant in this matter. In retrospect, the Complainant and CURE could have sought interlocutory review of the question pursuant to the Commission's Rules of Practice and Procedure. That they did not seek such review has no substantive bearing on the resolution of this case.

Conclusion

Based on our review of the record, we conclude that the ALJ's Recommended Decision is supported by substantial and competent evidence. We shall adopt the Recommended Decision of Administrative Law Judge Louis G. Cocheres, as modified by this Opinion and Order. The Formal Complaint of Sandra L. Feigley is denied.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2001 two copies of Petitioner's Appeal Brief and Reproduced Record in the above-captioned matter were served via U. S. Mail, first class, postage paid on the following:

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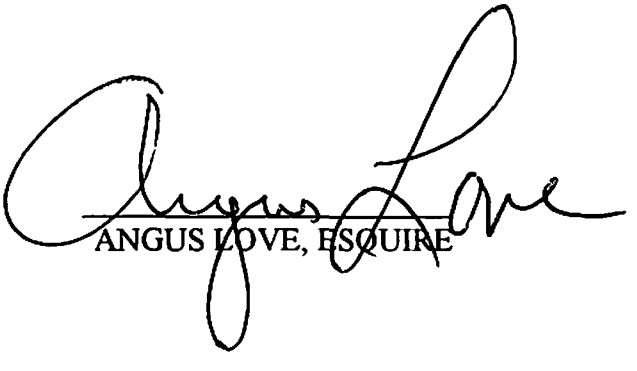

ANGUS LOVE, ESQUIRE