To be argued by:
Victor Paladino
20 minutes requested

STATE OF NEW YORK
COURT OF APPEALS

IVEY WALTON, RAMONA AUSTIN, JOANN HARRIS, the OFFICE OF THE APPELLATE DEFENDER, and the NEW YORK STATE DEFENDERS ASSOCIATION,

Petitioners-Appellants,

-against-

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

Respondents-Respondents.

BRIEF FOR RESPONDENT
NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondent DOCS
The Capitol
Albany, New York 12224
Telephone No. (518) 473-4321
Facsimile No. (518) 473-8963
OAG No. 04-002549

BARBARA D. UNDERWOOD
Solicitor General

ANDREA OSER
Deputy Solicitor General

VICTOR PALADINO
Assistant Solicitor General

of Counsel

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PRELIMINARY STATEMENT

In exchange for the right to operate a collect-call-only telephone system on prison property, MCI WordCom Communications ("MCI") agreed to pay the Department of Correctional Services ("DOCS") a commission on inmate collect calls as a cost of doing business. The commission was incorporated in the rates filed with the Public Service Commission ("PSC"). Under the filed rate doctrine, those rates were the only lawful rates the telephone company could charge.

Petitioners are friends or family of inmates in the custody of DOCS. They voluntarily accepted inmate collect calls and did not challenge the PSC's determination authorizing MCI to charge rates that included the DOCS commission. Nevertheless, they claim that the commission constituted an unauthorized tax, effected an unconstitutional taking of their property, and violated their rights to both free speech and equal protection of the law. To support these claims, they assert that, with the DOCS commission, MCI's total rate for inmate collect calls was exorbitant. In fact, an inmate collect call was *less expensive* than an AT&T station-to-station collect call from a payphone. While calling station-to-station collect is generally an expensive way to place a call, petitioners do not here challenge – and DOCS could readily defend – the decision to use a collect-call-only telephone system.

As the Appellate Division, Third Department correctly observed, petitioners' claims for prospective injunctive relief are moot because DOCS ceased collecting its commission as of April 1, 2007. Thus, what remains in this putative class action is petitioners' demand for a DOCS refund of commissions paid since October 30, 2003, estimated to total $60 million. The Appellate Division rejected the State's argument that the filed rate doctrine barred petitioners' constitutional claims, but dismissed the petition on the ground that none of those claims stated a cause of action (R. 8-11).

This Court should affirm the Appellate Division's order for either of two independent reasons. The Appellate Division correctly held that none of the constitutional claims stated a cause of action. Alternatively, the dismissal may be upheld, without reaching the constitutional claims, on the ground that the claims are barred by the filed rate doctrine, despite the Appellate Division's contrary ruling.

QUESTIONS PRESENTED

1. Does the filed rate doctrine bar petitioners' constitutional challenges to the commission payments DOCS received from the telephone company, where the PSC authorized the telephone company to charge a total rate that included the DOCS commission?

2. Whether the commission payments DOCS received from the telephone company for collect calls placed by inmates are properly viewed as rent and access fees, and thus not an unlawful tax, where the telephone company paid the DOCS commission in exchange for the right to provide inmate telephone service, and that commission was included in the total rate filed with the PSC?

3. Whether DOCS can collect a commission on collect calls placed by inmates without effecting an unlawful taking of petitioners' property, given that petitioners are free to refuse to accept the calls?

4. Whether DOCS can collect a commission on collect calls placed by inmates consistent with equal protection requirements?

5. Whether DOCS, consistent with the free speech rights of recipients of inmate collect calls, may contract with a telephone company for inmate collect call services at rates that provide it with the commission at issue?

STATEMENT OF THE CASE

A. DOCS's Inmate Call Home Program and the 1996 contract with MCI

In 1985, DOCS instituted an Inmate Call Home Program so that inmates could place collect calls from coinless telephones to designated family or friends without the intervention of a live operator (R. 270). *See* 7

N.Y.C.R.R. Part 723. For this purpose, DOCS contracted with a long-distance telephone service provider, which installed and maintained the equipment at each correctional facility. During the time period at issue here, the system was operated by MCI pursuant to an exclusive services contract.[1]

The original contract, as extended by renewal options, covered the period April 1, 1996, through March 31, 2001. It resulted from a competitive bidding process in which DOCS requested bids conforming to a Request for Proposal ("RFP") (R. 48, ¶ 30). The RFP specified the rates that a provider would charge and also required the provider, for the privilege of operating the system, to pay DOCS a minimum commission of 47% of the gross monthly revenues generated by all calls accepted (R. 48-49, ¶ 30). The contract ultimately was awarded to MCI, which bid a commission rate of 60% per call (R. 49, ¶ 30).

All of the commissions received by DOCS were appropriated by the Legislature to the "Family Benefit Fund" in DOCS's operating budget (R. 42, ¶ 12; 108, 111). That fund was used exclusively to support programs that directly benefitted inmates and their families, including the family visitation

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[1] The names of MCI and its subsidiaries have changed over the years in connection with a merger and a bankruptcy, but for simplicity's sake, the MCI-related entities are collectively referred to as "MCI." Since July 2007, the inmate telephone service has been provided by Global Tel*Link, a company unrelated to MCI.

program, inmate family parenting programs, the family reunion program, nursery care at women's prisons, domestic violence prevention, AIDS education and medication, infectious disease control, free postage for inmates' legal and privileged mail, motion picture programs, cable television, and "gate money" and clothing given to inmates upon their release (R. 111-12, 172-74). While petitioners claim that some of these services, such as the provision of medical care, were mandatory, nothing mandated any particular level of spending for them. The commissions thus made it possible both to provide optional programs and to enhance mandatory programs.

B. MCI's filing of the tariffs with the Federal Communications Commission and the New York Public Service Commission

State and federal agencies have exclusive jurisdiction to approve telephone rates such as those charged pursuant to DOCS's contract with MCI. Accordingly, upon winning the contract, MCI filed the interstate tariffs with the Federal Communications Commission (the "FCC"), *see* 47 U.S.C. §§ 201-231, and the intrastate tariffs with the PSC (R. 51). *See* Public Service Law § 92. Absent a new filing, telephone companies are prohibited from deviating from rates filed with these agencies. *Id.* at § 92(2)(d). In December 1998, the PSC approved the rates as filed. *See Ordinary Tariff Filing of MCI Telecommunications Corporation to Introduce a General Service Description*

and Rates for MCI's Maximum Security Rate Plan for the New York Department of Corrections, No. 98-C-1765, 1998 N.Y. PUC LEXIS 693 (Dec. 17, 1998).

C. The 2001 Contract

In April 2001, MCI and DOCS executed a second contract. As thereafter renewed and extended, it covered the period April 1, 2001, through March 31, 2007 (R. 247, 286). Because it did not change the rates MCI charged, it required no new filing with the PSC, even though it decreased DOCS's commission from 60% to 57.5% of MCI's gross program revenues (R. 53, 96, 249).

Two years later, in May 2003, DOCS determined that the existing rate structure "was unfair to a majority of families who receive calls from inmates" (R. 95), and accordingly amended its 2001 contract with MCI (R. 236). The new rate structure did not change the 57.5% commission at issue here; rather, it was designed to be revenue neutral to MCI while at the same time decreasing the rate for 83% of inmates' families (R. 95 & n.13). Accordingly, it eliminated the distinction between local and long distance calls, removed the varying rates for time of day and distance, and introduced a single surcharge of $3.00 for all calls and a uniform rate of sixteen cents per minute

without regard to time of day or distance (R. 78, 96). In July 2003, MCI filed proposed tariff revisions with the PSC to amend the rate structure.

D. The PSC's October 2003 order

In response, the PSC issued an order dated October 30, 2003, in which it distinguished between the portion of the proposed rate MCI retained and the portion of the proposed rate MCI paid to DOCS as its commission. It labeled the former the "jurisdictional portion" and found it "just and reasonable" (R. 96). It concluded it lacked jurisdiction to review the portion of the rate attributable to DOCS's commission because DOCS was not providing telephone service and was "not a telephone corporation pursuant to the Public Service Law" (R. 97).

To review the jurisdictional portion of the rate, the PSC considered the rates MCI charged for an analogous service – station-to-station collect calls from pay phones (R. 97). It also looked at the rates AT&T charged for station-to-station collect calls (R. 98, n. 19). The jurisdictional portion of the MCI rate for inmate collect calls was substantially less than either of these rates (R. 97-98), even though it included the cost of unique security features (R. 98).

Indeed, the total MCI rate for inmate collect calls, including the DOCS commission, compared favorably to rates for payphone collect calls outside the prison setting. MCI charged $4.60 for a ten-minute inmate station-to-station

collect call (including the DOCS commission). Outside the prison setting, MCI charged from $2.96 to $4.14 for that call, depending on time of day and distance (R. 97), and AT&T charged $5.25 for the same call (R. 98, n.19). Thus, though the PSC declined to review the reasonableness of DOCS's commission by itself, its analysis tends to show the reasonableness of the total MCI rate, including the DOCS commission.

The PSC's order directed MCI to file new tariffs identifying the bifurcation of the total rate as a jurisdictional rate and a DOCS commission (R. 98). MCI filed a revised tariff accordingly (R. 166). In January 2005, the PSC denied petitions for rehearing of the October 2003 order. *See* 2005 N.Y. PUC LEXIS 20 (January 14, 2005).

E. This proceeding

In February 2004, petitioners commenced this combined declaratory judgment action and article 78 proceeding against DOCS and MCI, but not the PSC. They asserted seven causes of action, including four constitutional claims alleging that the 57.5% commission collected by DOCS constituted an unauthorized tax, effected an unconstitutional taking of their property, and violated their rights to both free speech and equal protection of the law (R. 62-

71).[2] Supreme Court dismissed all claims, and the Appellate Division, Third Department affirmed. *See Walton v. DOCS*, 25 A.D.3d 999 (3d Dep't 2006). Both courts ruled that petitioners' constitutional claims were time-barred.

On appeal, this Court modified, determining in a plurality opinion that petitioners' constitutional claims were timely. *Walton v. DOCS*, 8 N.Y.3d 186, 197 (2007) ("*Walton I*"). Although the PSC had concluded that it lacked jurisdiction over DOCS, this Court held that petitioners' time to sue did not begin to run until the PSC issued its October 2003 order. This was so because, even though the PSC had declined to review the reasonableness of the DOCS commission by itself, the PSC could have determined that MCI's call rate and surcharge "as a whole" was unjust or unreasonable and "ordered them to be lowered," but it did not. *Id.* at 196. Having concluded that petitioners' constitutional claims were timely, the Court remitted the matter to Supreme Court without addressing any other issues, even though the parties had fully briefed DOCS's alternative threshold argument that the filed rate doctrine barred the proceeding and the merits of petitioners' constitutional claims.

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[2] Petitioners also criticized DOCS's decision to use a collect-call-only system, claiming less expensive systems, such as a debit account system, would have satisfied security concerns (R. 41), but they did not challenge the legality of that decision, and instead directed their causes of action only at DOCS's receipt of a commission on the collect calls (R. 62-71).

In January 2007, while the prior appeal was pending in this Court, then-Governor Spitzer directed DOCS to cease collecting commissions on inmate collect calls as of April 1, 2007. Thereafter, the Legislature enacted Correction Law § 623, which, as of April 1, 2008, prohibits DOCS from receiving revenue in excess of its reasonable operating costs for providing telephone service. *See* L. 2007, ch. 240. These acts mooted petitioners' request for prospective injunctive relief, leaving only their demand for refunds.

On remittal, Supreme Court held that petitioners' constitutional claims failed to state a cause of action and dismissed the petition (R. 21-33). The Third Department affirmed, rejecting DOCS's argument that the filed rate doctrine bared petitioners' constitutional claims, but concluding that none of those claims stated a cause of action (R. 8-11). Petitioners appealed as of right to this Court, which retained jurisdiction over the appeal.

ARGUMENT

POINT I

THE FILED RATE DOCTRINE BARS PETITIONERS' CONSTITUTIONAL CLAIMS

Although the Appellate Division correctly concluded that petitioners' constitutional claims failed to state a cause of action (*see* Point II *infra*), this Court can affirm without reaching the constitutional questions on the alternative ground that they are barred by the filed rate doctrine. It is an "established principle[] of judicial restraint [that] courts should not address constitutional issues when a decision can be reached on other grounds." *Matter of Syquia v. Board of Education*, 80 N.Y.2d 531, 535 (1992). The Appellate Division's erroneous rejection of the filed rate doctrine does not prevent this Court from affirming the dismissal on that ground. [3]

The filed rate doctrine rests on several "straightforward principles." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). "'The considerations underlying the doctrine . . . are preservation of the agency's

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[3] DOCS could not appeal the Appellate Division's ruling on the filed rate doctrine because DOCS was not aggrieved by the Appellate Division's order dismissing the petition on the merits. *See Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 472-73 (1986) (a party is not aggrieved by an order awarding full relief, even when disagreeing with the court's reasoning). Accordingly, this Court may reach the issue as an alternative ground for affirmance. *Parochial Bus Systems, Inc. v. Board of Education*, 60 N.Y.2d 539, 545 (1983).

primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" *Id.* at 577-78 (*quoting City of Cleveland v. FPC*, 525 F.2d 845, 854 [D.C. Cir. 1975]). The doctrine thus "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate [state] regulatory authority." *Id.* at 577. While this rule is "undeniably strict . . . and may work hardship in some cases," its strict application is necessary to further the legislative goal of preventing unreasonable and discriminatory charges. *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (*quoting Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 [1915]).

Petitioners failed to challenge the PSC's October 2003 determination authorizing MCI to charge rates for inmate collect calls that included the DOCS commission. The filed rate doctrine therefore bars this action for three reasons. First, petitioners suffered no legally cognizable injury because they paid the only rates that MCI was legally authorized to charge. Second, an award of refunds to petitioners would result in "consumer price discrimination," that is, different consumers will have paid different rates for the same service. Finally, since the PSC affirmatively ordered MCI to file the

total rate, which included the DOCS commission, any award of refunds would usurp the PSC's exclusive rate-making authority.

A. Petitioners suffered no legally cognizable injury because they paid the only rate that MCI was legally authorized to charge.

Petitioners paid the only rate that MCI was legally authorized to charge. On this issue, *Bullard v. State of New York*, 307 A.D.2d 676 (3d Dep't 2003), is directly on point. There, the Third Department affirmed the dismissal of a Court of Claims action challenging DOCS's 1996 contract with MCI (the predecessor to the contract at issue here), squarely holding that the action – which raised the same constitutional claims advanced here – was barred by the filed rate doctrine, because "the alleged injury asserted by claimants arose directly from their payment of the filed rate approved by the PSC." *Bullard*, 307 A.D.2d at 678. As the *Bullard* Court explained, claimants' remedy was an article 78 proceeding challenging the PSC's determination authorizing the rates. *Id.* Despite this clear guidance, petitioners did not name the PSC as a party to this proceeding or challenge the PSC's October 2003 order in any way.

Moreover, *Bullard* was correctly decided. It is well settled that "a consumer's claim, however disguised, seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission, is

viewed as an attack upon the rate authorized by the regulatory commission. All such claims are barred by the 'filed rate doctrine.'" *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 568 (2d Dep't 1997), *lv. denied*, 91 N.Y.2d 807 (1998).

Petitioners' alleged injury arose directly from the imposition by MCI of rates duly filed with the FCC and the PSC, *see* 47 U.S.C. § 203(a); Public Service Law § 92(1), and those rates included commissions to the State in accordance with the 2001 contract. Once filed, the tariffs attained the status of binding law and became "the only lawful charge" MCI could impose for inmate collect calls. *See AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998); *see also* Public Service Law § 92(2)(d) (utilities may collect only charges that are filed with the PSC and in effect).

Regardless of how petitioners characterize their claim, they "seek[] relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission." *Porr*, 230 A.D.2d at 568. Such a claim is barred by the filed rate doctrine. Petitioners' purported injury "is illusory . . . because [they have] merely paid the filed tariff rate that [they were] required to pay." *Id.* at 576; *see City of New York v. Aetna Cas. & Sur. Co.*, 264 A.D.2d 304 (1st Dep't 1999) (same).

The Appellate Division sought to distinguish *Bullard* on the ground that when MCI filed revised tariffs in 2003, the PSC declined to review the

reasonableness of DOCS's commission (R. 8). But that fact is irrelevant. Whether or not the PSC separately considered the commission, the PSC in the end directed MCI to file the total rate – including the DOCS commission – in bifurcated form, and thus authorized MCI to charge that total rate (R. 98, 166). As this Court observed in *Walton I*, "[w]hile the PSC concluded that it did not have jurisdiction over DOCS, it could have [rejected] MCI's call rate and surcharge *as a whole* . . . just as, in 1998, it had approved them in their entirety." *Walton I*, 8 N.Y.3d at 196 (emphasis added). As a result, the total rate became the only rate MCI could lawfully charge. Thus, as in other filed rate cases, petitioners' purported injury arises from a rate duty filed with and authorized by the PSC.

New Mexico's highest court has addressed this very issue and reached the same result. In *Valdez v. State of New Mexico*, 132 N.M. 667, 671, 54 P.3d 71, 75 (Sup. Ct. N. Mex. 2002), as in this case, plaintiffs challenged commissions received by the state prison system pursuant to contracts with telephone companies. In rejecting their challenge, the court explained that the basis of the filed rate doctrine is not that the rate is "reasonable or thoroughly researched," but rather that it is "the only legal rate." *Id.* (internal quote omitted). Thus it held that the filed rate doctrine barred a challenge to commission contracts where the regulatory agency had

"exempted inmate telephone services from several of its regulations and [had] authorized the rates at issue." *Id.*

Granting the relief petitioners seek here would nullify the rate on file with the PSC. Petitioners' proper remedy was to challenge the PSC's October 2003 order. As then-Presiding Judge Read stated in dismissing a nearly identical challenge to the 1996 contract, to the extent claimants "seek a refund of alleged overcharges or otherwise challenge the intrastate rates, their sole route to potential redress lies, in the first instance, through the PSC and, if they are dissatisfied with the outcome there, a CPLR article 78 proceeding in Supreme Court." *Smith v. State*, Claim No. 101720, Motion No. M-64458, July 8, 2002 (Read, P.J.) (*see* addendum, A.5).

B. Refunding commissions would result in consumer price discrimination.

Granting the relief petitioners seek would also undermine the objective of the filed rate doctrine to prevent price discrimination among consumers. *See Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998). "[T]he filed-rate doctrine serves the purpose of nondiscrimination by prohibiting a court from entering a judgment that would serve to alter the rate paid by a plaintiff." *Bryan v. BellSouth Communications, Inc.*, 377 F.3d at 429; *Hill v. BellSouth Telcomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004). "Even if such a

challenge does not, in theory, attack the filed rate," the Eleventh Circuit explained in *Hill*, "an award of damages to the customer-plaintiff would, effectively, change the rate paid by the customer to one below the filed rate paid by other customers." *Hill*, 364 F.3d at 1316. A court therefore cannot "permit any claim to go forward that, if successful, would require an award of damages that would have the effect of imposing different rates upon different consumers." *Bryan*, 377 F.3d at 429-30.

Petitioners' lawsuit, if successful, would result in the imposition of different rates upon different consumers. Assuming *arguendo* that petitioners could obtain refunds of commissions paid, such award would effectively reduce the rate paid by petitioners below the rate paid by other friends and families of inmates who are not parties to this suit. Non-party friends and family members not only neglected to protest the commissions when paying their phone bills, but they also neglected to protest their rates by commencing legal challenges of their own. While petitioner denominated this proceeding a class action, they have not moved for class certification, and no class has been certified. It is well settled that "nonprotesting taxpayers may not enhance their tax refund claims through the use of a class action." *See Conklin v. Town of Southhampton*, 141 A.D.2d 596, 597-98 (2d Dep't 1988); *Gandolfi v. City of Yonkers*, 101 A.D.2d 188, 198-99 (2d Dep't), *aff'd*,

62 N.Y.2d 995 (1984). As a result, "the commencement of an action purportedly on behalf of all similarly situated taxpayers does not constitute an appropriate indicium of protest by each proposed member of the class." *Conklin*, 141 A.D.2d at 598-99; *see Neama v. Town of Babylon*, 18 A.D.3d 836, 838 (2d Dep't 2005), *lv. denied*, 6 N.Y.3d 791 (2006). Since non-parties would not be eligible for refunds, an award of commission refunds to petitioners would result in price discrimination among consumers, a result the filed rate doctrine prohibits. *See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922) (Brandeis, J.) ("Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.").

C. Any award of refunds would usurp the PSC's exclusive rate-setting authority.

If permitted to proceed, this lawsuit would also undermine the PSC's exclusive rate-setting authority. The Appellate Division said that this lawsuit would not usurp that authority, because the PSC had determined that it lacked jurisdiction to review the reasonableness of the commission component of the rate (R. 8). But, as noted above, while the PSC did not review separately the reasonableness of the DOCS commission, it nonetheless authorized MCI's call rate and surcharge "as a whole," *Walton I*, 8 N.Y.3d at

196, including the commission, when it expressly directed MCI to file the amended tariff (R. 100-101).

Indeed, in reviewing just that portion of the rate retained by MCI, the PSC considered, among other things, the rates charged by AT&T for non-inmate station-to-station collect calls (R. 98, n.19). That evidence established the reasonableness not only of the retained portion of the rate, but indeed of the total rate. The total cost of a ten-minute inmate collect call (including the commission) was only $4.60 ($3.00 surcharge plus 16 cents per minute), which was significantly *less* than the $5.25 AT&T charged for a ten-minute station-to-station collect call outside the prison context ($2.25 surcharge plus 30 cents per minute). The total DOCS rate was lower than the AT&T rate, even though the DOCS rate "include[d] the costs to MCI of maintaining the unique security features of the service" (R. 98).[4] Though the PSC declined to review the reasonableness of the DOCS commission by itself, its decision is best understood as approving the reasonableness of the total rate. And any award of refunds would undermine the PSC's exclusive authority to set that total rate.

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[4] These additional costs perhaps explain why the total DOCS rate was slightly higher than the MCI rate for a ten-minute station-to-station collect call outside the prison context, which ranged from $2.96 to $4.14 (R. 97).

D. There is no statutory authority for an award of retroactive refunds.

In any event, retroactive refunds are not available as a matter of law. If petitioners had sued the PSC, as they should have, the PSC would have been powerless to order the retroactive refunds petitioners seek in this proceeding. Upon finding that a filed tariff is unjust or unreasonable, the PSC's power under Public Service Law § 97(1) to determine the rates to be charged "is prospective only." *Matter of Burke v. Public Serv. Comm'n*, 47 A.D.2d 91, 95-96 (3d Dep't 1975), *aff'd*, 39 N.Y.2d 766 (1976); *Long Island Lighting Co. v. Public Serv. Comm'n*, 80 A.D.2d 977, 978 (3d Dep't), *lv. denied*, 54 N.Y.2d 601 (1981). The PSC's authority to order refunds is limited to the few instances specified in the statute, none of which include the circumstances presented here. *Matter of Niagara Mohawk Power Corp. v. Public Serv. Comm'n.*, 54 A.D.2d 255, 256-57 (3d Dep't 1976). If the PSC, which has exclusive jurisdiction to set intrastate telephone rates, could not order retroactive refunds, this Court should not do so either.

Federal law is to the same effect. "Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively." *Ark. La. Gas Co. v. Hall*, 453 U.S. at 578. This rule bars the "retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *Id.* Since

DOCS no longer collects commissions and retroactive refunds are simply not available, petitioners' constitutional claims are moot.

POINT II

IN ANY EVENT, NONE OF THE CONSTITUTIONAL CLAIMS STATES A CAUSE OF ACTION

Even if petitioners' constitutional claims survive the filed rate doctrine, the Appellate Division correctly held that none states a cause of action. The constitutionality of commissions on inmate collect calls has been the subject of extensive litigation in state and federal courts nationwide. Courts have overwhelmingly upheld those commissions, concluding in well-reasoned opinions that they raise no constitutional concerns. A similar conclusion is warranted here.

A. The contractual commission was not an unauthorized tax.

DOCS did not tax recipients of collect calls, but rather collected rent and access fees from MCI for the privilege of operating the prison telephone system. Commissions are a well-recognized business expense in the telephone industry in general and the prison context in particular. The commissions also did not function as a tax because non-payment of a commission would not have subjected the collect call recipient to the State's tax enforcement procedures. In any event, to the extent legislative approval was needed to validate the commissions, it was provided.

1. Commissions are legitimate business expenses of telephone companies that are akin to rent or access fees.

Contrary to petitioners' characterizations, DOCS did not tax petitioners by requiring MCI to include a commission in its rates. The commission reflected a legitimate business expense incurred by MCI for the valuable privilege of accessing the prisons and providing telephone service. As the PSC observed in its October 2003 order, DOCS's commission was no different from commissions paid by pay-phone telephone companies to premises owners in exchange for the right to install, operate and maintain payphones on their property (R. 98, n.20). As premises owners, governmental entities routinely receive substantial payphone commissions based not on governmental costs, but on what the market will bear. *See Matter of the Rules and Regulations of the Public Service Commission 16 NYCRR, Chapter VI*, 1989 N.Y. PUC LEXIS 45 at *60-*62 (Aug. 16, 1989) (in 1987, New York City received $78 million in payphone commissions from a telephone company).

Federal law is to the same effect. According to the FCC, "[c]ommission payments have traditionally been considered a cost of bringing payphone service to the public." *Matter of AT&T's Private Payphone Commn. Plan*, 3 F.C.C. Rcd. 5834, 5836 (1988). The FCC's "regulations reflect that payphone commissions have been traditionally treated as a business expense

paid to compensate for the rental and maintenance of the space occupied by the payphone and for access to the telephone user." *Id.* In other words, they are "business expenses paid to gain a point of service to the individual user." *Id.*; *see also International Telecharge, Inc. v. AT&T Co.*, 8 F.C.C. Rcd. 7304, 7306 (1993) (commission payments, which are "a standard practice in the operator services industry," are a "legitimate business expense"); *Matter of National Tel. Servs., Inc.*, 8 F.C.C. Rcd. 654, 655 (1993) (same).

Likewise, the FCC has recognized commissions as legitimate business expenses in the prison context. The DOCS commission fell well within the range charged by other prison systems nationwide, which "usually range between 20% and 63%, with most states charging more than 45%." *See Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 F.C.C. Rcd. 3248, 2002 F.C.C. LEXIS 889 at *13, n.34 (2002). The FCC, which has primary jurisdiction to regulate interstate telephone tariffs, has declined to prohibit or impose caps on commissions collected by prisons.

In addressing this issue in *Valdez*, the Supreme Court of New Mexico held that the prison system did not impose an illegal tax by collecting prison telephone commissions. Filed rates that include commissions, the court held, were not taxes, but rather "a price at which and for which the public utility

service or product is sold." 54 P.3d at 77 (internal quotation omitted). Moreover, the commissions could not be viewed as a tax because plaintiffs had "voluntarily accepted collect call services," and the payment for voluntary services could not be considered a mandatory tax. *Id.*

Petitioners concede that commissions to premises owners are a legitimate business expense when they represent fair market value, but argue that DOCS's commission should be treated differently because it bore no relation to the *cost to DOCS* of providing MCI with the market it sought (Br. at 19). As a matter of basic economics, fair market value is not limited to, or even a function of, the seller's costs. Fair market value is simply the price a buyer (here, MCI) is willing to pay a seller (DOCS) for a good or service on the open market and in an arms-length transaction. *See* Black's Law Dictionary (8th ed.), at 1587. As the PSC explained, the DOCS commission was a "material term" of a "competitively bid" contract (R. 98), an indicator that it reflected fair market value. To the extent industry practice is relevant, the DOCS commission fell within the range of rates customarily charged by other prisons nationwide.

Commissions from payphones and inmate collect calls are just one example of payments by private businesses to the government for the privilege of doing business on, or leasing, state property. For instance,

McDonald's and other private businesses rent space from the Office of General Services ("OGS") in the Empire State Plaza, concession vendors pay commissions for the right to do business at New York State Thruway rest areas or in state parks, and telephone companies pay commissions to governmental premise owners from payphone proceeds. *See, e.g.,* Public Buildings Law § 3(13) (lease of space in public buildings to private entities); Public Lands Law §§ 3(2)-(4) (lease of state lands); Public Authorities Law § 354(10) (lease of space in thruway rest areas); Parks, Recreation and Historic Preservation Law §§ 3.09(2-a) through (2-g) (authorizing concession license agreements and the leasing of various state parks and historic sites). OGS, as landlord, collects millions of dollars annually from private entities. The rents OGS typically charge private tenants are based not on the State's maintenance costs, but rather on fair market value.

All of these private tenants in turn factor these rental costs into the prices they charge for their goods and services, so that they can recover those costs from consumers. The fact that rental or commission payments are passed on to consumers does not transform them into taxes simply because the consumers may have limited product choice, and thus will pay a higher price. Petitioners have attempted to distinguish these analogous rental situations on the ground that they allegedly had *no* choice but to accept the

collect calls (Br. at 22), but they are mistaken in this regard. Petitioners could have chosen to accept fewer calls, or even no calls, and to rely instead on writing letters or visiting inmates in person. This choice, while perhaps difficult, was still a choice.

In the court below, petitioners also attempted to distinguish these analogous rental situations on the ground that state agencies have general legislative authority to lease space or enter into concession agreements. But DOCS similarly has statutory authority to enter into contracts relating to the operation of state prisons, *see* Correction Law § 112(1), and petitioners conceded below that DOCS had the power to impose *some level* of commission, payable by MCI as a valid business expense (Petitioners' Supreme Court memorandum of law, p. 27, n. 18, addendum, A.32). To the extent DOCS needed any other authorization to collect the commissions, DOCS obtained it both in the PSC's October 2003 order authorizing MCI to charge the bifurcated tariff, and in the Legislature's annual appropriation to DOCS of the commission proceeds (*see* Point II(A)(4), *infra*).

Petitioners also argue for the first time (Br. at 23) that the commissions constituted "franchise" fees, which require more specific legislative authority. They failed to preserved this argument by raising it in their papers below or at any earlier stage of this litigation. In any event, since the 2001 contract

did not grant MCI any interest in real property, it did not award MCI a franchise; it merely gave MCI a license. *See New York Telephone Co. v. Town of North Hemstead*, 41 N.Y.2d 691, 699-700 (1977); *Matter of Algonquin Gas Transmission Co. v. Moore*, 2 Misc. 2d 997, 998 (Sup. Ct. Alb. Co. 1956), *aff'd*, 6 A.D.2d 333 (3d Dep't 1958); 60 N.Y. Jur.2d, Franchises, §§ 1-2; 49 N.Y. Jur. 2d, Easements § 195 (defining a license).

2. Petitioners were not liable to the State for the non-payment of the commissions.

Petitioners were never legally liable to the State for the DOCS commission as they would have been had the commission been a tax. If the commissions were a tax, then any failure to pay that tax by failing to pay it would trigger the State's tax enforcement procedures. *See, e.g.*, Tax Law §§ 1133(b), (c) (buyers of items are liable to the State for unpaid sales or use taxes). Petitioners were not subject to any such enforcement. MCI was contractually obligated to pay commissions to DOCS on all completed collect calls regardless of whether it collected payment from recipients (R. 279), but collect call recipients were *never* liable to the State for the non-payment of any portion the telephone rates. Their only liability was to MCI pursuant to their service contracts. Thus, the commissions did not function as taxes imposed on recipients of collect calls.

A Michigan appellate court found this factor crucial in *Sprik v. Regents of the University of Michigan*, 43 Mich. App. 178, 204 N.W.2d 62 (1972), *aff'd*, 390 Mich. 84, 210 N.W.2d 332 (1973). There, students at a state university challenged a rent increase on student housing, the proceeds of which were paid to the local school district. In rejecting the claim that the rent increase was an unlawful tax, the court reasoned that the "governmental unit which will ultimately receive the money, the Ann Arbor School District, cannot enforce payment." 204 N.W.2d at 66. The students' only liability was to the university, as landlord, under the terms of their leases. *Id.*

3. The tax/fee dichotomy does not apply here.

Petitioners argue that the DOCS commission had to be either a tax or a fee, and that it was a tax because it exceeded DOCS's cost of administering the inmate telephone program (Br. at 12-14). But "it is simply not the law that all payments to the state must be regarded as either taxes or regulatory fees." *Henderson v. Stadler*, 434 F.3d 352, 355 (5th Cir. 2005) (eight-judge dissent from denial of rehearing en banc). For instance, lease payments by private parties to a state for the rental of state lands are neither taxes within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341, nor fees; they are payments pursuant to a contract in exchange for the use of the land. *See Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500 n.13

(5th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002). Likewise, some courts have held that a state's sale of specialty license plates to motorists creates contractual debts, not taxes. *See American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 374 (6th Cir.), *cert. denied*, 126 S. Ct. 2972 (2006). *But see Henderson v. Stalder*, 407 F.3d 351, 358-59 (5th Cir. 2005) (concluding that additional charges for specialty plates were taxes). Like the lease payments at issue in *Lipscomb*, the commissions MCI paid to DOCS were neither taxes nor fees imposed on petitioners, but rather were contractual payments by the telephone company in exchange for a valuable business opportunity – the right to operate the prison telephone system.

Even if the tax/fee distinction applied here, the commission payments would be indistinguishable from the access fees paid by rental car companies, taxi cabs and limousine companies for the privilege of doing business at government-owned airports. Such fees are typically imposed as a percentage of an enterprise's gross sales, and they generate revenues greatly in excess of the government's administrative costs of granting an maintaining access to the airport. Nevertheless, courts throughout the country have uniformly held that such payments are not unauthorized taxes, but rather access fees paid in return for a valuable business opportunity. *See, e.g., A&E Parking v. Detroit Metro. Wayne County Airport Auth.*, 271 Mich. App. 641, 723 N.W.2d 223,

226-28 (2006); *Ace Rent-A-Car, Inc. v. Indianapolis Airport Auth.*, 612 N.E.2d 1104, 1107-08 (Ind. Ct. App. 1993); *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*, 600 So. 2d 1159, 1160 (Fla. App. 1992). These enterprises, like MCI, pass the cost of the access fees onto their consumers, but since the fees are not taxes on the business, they are also not taxes on the consumers.

Petitioners argue that in the context of airport access fees, airport customers had other options such as public transportation, which serves as a check on the access fee airport authorities can impose (Br. at 25). But petitioners also had other options. They could have limited their telephone usage and communicated with inmates in letters and visits. Thus, it was in DOCS's interest to keep the rates within a reasonable range. Prohibitive rates would have diminished usage, and in turn, lowered MCI's gross revenues and its payments to DOCS. And as this Court observed in *Walton I*, the PSC could have disallowed the total rate as unreasonable, even without examining the reasonableness of the commissions by themselves. 8 N.Y.3d at 196.

Finally, petitioners rely (Br. at 15-16) on *Gross v. Ocean*, 92 N.J. 539, 457 A.2d 836 (1983), *revg on dissent*, 184 N.J. Super. 144, 445 A.2d 435 (1982), but that reliance is misplaced. In *Gross*, the New Jersey Supreme Court held that a town's competitive bidding procedure, under which towing

companies bid for the privilege of towing illegally parked cars, was an illegal tax. The Court reasoned that any government contract that generated revenue "beyond what is required to meet necessarily related administrative expenses" was a tax. 184 N.J. Super. at 157. This view, if adopted by this Court, would improvidently call into question the myriad contracts pursuant to which OGS and other governmental entities in this State lease government property to private entities, since mere general authority is insufficient for a state agency to collect a tax. *See Yonkers Racing Corp. v. State of New York*, 131 A.D.2d 565, 566 (2d Dep't 1987).

The contrary opinion of the appellate division majority in *Gross* is more cogent and should be followed here. "The township did not 'tax' any towing company for the advantage of being called by the township police department to perform towing services for the township; it simply granted the privilege to the highest bidder." 184 N.J. Super. at 150-51. Nothing in the law required "a municipality to limit itself to public bidding that will assure the lowest cost to a motorist whose vehicle is towed, so long as the regulated charges are fair and reasonable, or are comparable to prevailing charges established by market forces." *Id.* at 153. "To the extent that the tower may profit from the ultimate sale of abandoned vehicles," the appellate division majority reasoned, there was "no reason why the tower should not pay for the

opportunity of being placed in that position." *Id.* at 155. This reasoning applies equally here. Since the total rate charged for inmate collect calls was reasonable and comparable to charges for non-inmate collect calls, DOCS could share in MCI's gross proceeds without levying a tax.

4. Any required legislative approval was obtained here.

Because the DOCS commission was not a tax, DOCS was not required to obtain specific legislative authority to collect it contractually from MCI. But to the extent more general legislative approval was required, it was provided.

First, the DOCS commission was a component of the total rate authorized by the PSC, "the alter ego of the Legislature." *Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn.*, 135 A.D.2d 4, 7 (3d Dep't 1987), *appeal dismissed*, 72 N.Y.2d 840 (1988); *see Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn.*, 117 A.D.2d 156, 160 (3d Dep't 1986) (same). The PSC directed MCI to file a total tariff, including the separately identified DOCS commission (R. 98), thus making that tariff the only rate MCI could have legally charged. *See* Public Service Law § 92(2)(d).

It is for this reason that the court in *Arsberry v. State of Illinois*, 244 F.3d 558, 565 (7th Cir.), *cert. denied*, 534 U.S. 1062 (2001), refused to view prison telephone commissions as an unauthorized tax. In *Arsberry*,

while the court rejected the applicability of the filed rate doctrine, it nonetheless held that prison telephone commissions are simply part of the approved rate, and that "a claim of discriminatory tariffed telephone rates is precisely the kind of claim that is within the primary jurisdiction of the telephone regulators." *Id.*

Second, the Legislature itself approved the DOCS commission by annually appropriating it to DOCS's Family Benefit Fund. Between 1996 and 2007, DOCS deposited in the State's general fund between $15 and $24 million per year in commission revenues. DOCS's budget proposals expressly disclosed to the Legislature that these revenues were generated by the Inmate Phone Home Program, which DOCS uses "to pay for various inmate programs . . . which directly benefit the inmate population." *See, e.g.,* DOCS 2006-2007 All Funds Budget Request, at 22 (*see* addendum, A.30). Additionally, the DOCS Commissioner testified before legislative committees about these contracts and the use of the commission revenues. *See Matter of 2001-2002 Joint Budget Hearing on Public Protection, Feb. 5, 2001*, at 95-100; *Joint Hearing of the Senate Finance Committee and Assembly Ways and Means Committee on Public Protection, Feb. 24, 2003*, at 116-18, 158-61; *Matter of 2006-2007 Joint Budget Hearing on Public Protection, Feb. 14, 2006*, at 131-36 (*see* addendum, A.7-A.28).

Thus, the Legislature knew that DOCS collected a commission, it knew how much DOCS collected each year, and it knew DOCS used the commission to pay not only for the telephone system itself, but also for various inmate programs as well. Fully aware of these facts and despite vigorous debate on bills proposing to do away with the commissions,[5] the Legislature each year from 1996 through March 31, 2007, appropriated the commission revenues to DOCS for expenditure on Family Benefit Fund programs. *See, e.g.*, L. 2003, ch. 50, pp. 26-27 (reproduced at R. 172-174). That is all the approval the law requires. If the Legislature regarded the DOCS commission as an unauthorized tax, or improper in any way, it would not have legitimized it by expressly authorizing DOCS to spend the proceeds on inmate programs.

5. Petitioners' failure to pay the commissions under protest precludes their claim for refunds to all putative class members.

Petitioners demand refunds of all commissions paid by themselves and all similarly situated proposed class members (R. 72). But the Appellate Division correctly held that, even if the commissions were an illegal tax, petitioners' sweeping demand for refunds would fail to state a claim.

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[5] *See, e.g.*, A4181 (2005 N.Y. Bill Tracking A.B. 4188); A7231-A; A7231-B; A7231-C; A7231-D (2005 N.Y. Bill Tracking 7231); S5299-A; S5299-B; S5299-C; S5299-D (2005 N.Y. Bill Tracking 5299).

An essential element of a claim for the refund of an allegedly illegal tax is that the taxpayer paid the tax involuntarily – that is, under protest or duress. *See Video Aid Corp. v. Town of Wallkill*, 85 N.Y.2d 663, 666-67 (1995); *City of Rochester v. Chiarella*, 58 N.Y.2d 316, 323, *cert. denied*, 464 U.S. 828 (1983). Petitioners cannot show that they paid under duress. They do not deny that, as required by the 2001 contract, the telephone operator informed them that they had a collect call from a DOCS inmate, and afforded them the opportunity to decline the call (R. 292, § 3.10[d]). While petitioners claim they had no choice but to accept the calls, as they had no other means to communicate with their incarcerated friends and family (Br. at 27-28), this was simply not so. Petitioners had other means to communicate with inmates, including letter writing and in-person visits. Their preference for communicating by telephone was not duress as a matter of law.

Petitioners argue alternatively (Br. at 26-27) that the filing of this lawsuit on February 25, 2004 was an adequate protest as of that date. *See People ex rel. Wessell, Nickel & Gross v. Craig*, 236 N.Y. 100, 105 (1923). But even if that filing constituted a protest on behalf of the named petitioners, it could not serve as a protest on behalf of unnamed, proposed class members. *Conklin*, 141 A.D.2d at 598-99; *Neama v. Town of Babylon*, 18 A.D.3d at 838.

B. The contractual commission provision did not effect a taking of petitioners' property without just compensation.

Nor is there any merit to petitioners' claim that the commissions paid by MCI to DOCS effected a taking of their property without just compensation in violation of article VII, § 1(a) of the New York State Constitution. No taking occurred because the "prospective recipient of a collect call [was] in complete control over whether . . . to accept the call and thereby relinquish her money to pay for it." *McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003). Thus, "[t]here is no taking of which to speak, such as where the government confiscates property or forecloses its commercial use by fiat or legislation." *Id.* If the State had the authority to collect the commission in the first place, it is absurd to assert that the State should then have turned around and gave the money back as "just compensation."

C. Petitioners have not stated an equal protection claim.

Petitioners' equal protection claim also fails. The Equal Protection Clause of the State Constitution, like its federal counterpart, "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Cent., Inc.*, 473 U.S. 432, 439 (1985). As a corollary, the Equal Protection Clause does not prohibit dissimilar treatment of persons who are not similarly situated. *See Bower Assoc. v. Town of*

Pleasant Valley, 2 N.Y.3d 617, 631 (2004). Where, as here, the governmental action does not infringe on a fundamental right or involve a suspect classification, the difference in treatment need only satisfy rational basis scrutiny to comport with equal protection. *Port Jefferson Health Care Facility v. Wing*, 94 N.Y.2d 284, 289 (1999).

Petitioners brought this case complaining that because the commissions they paid were imposed only on inmate collect calls, they paid higher rates than were paid by other telephone service customers when accepting collect calls from non-inmates. But petitioners are not similarly situated to telephone service customers who receive collect calls from places other than a prison facility, which presents unique security concerns.

The overwhelming weight of authority has rejected similar claims by inmates, their friends and families, concluding that recipients of inmate collect calls are not similarly situated to recipients of non-inmate collect calls. *See Daleure v. Commonwealth of Kentucky*, 119 F. Supp. 2d 683, 691 (W.D. Ky. 2000), *appeal dismissed*, 269 F.3d 540 (6th Cir. 2001); *Glimore v. County of Douglas*, 406 F.3d 935 (8th Cir. 2005); *Turk v. Plummer*, 1994 U.S. Dist. LEXIS 12745, *4 (N.D. Cal. 1994).

Moreover, even if the two groups were similarly situated, the claim of unequal treatment would fail, because an inmate collect call made under the

MCI-DOCS system was actually *less expensive* than a collect call made by a non-inmate using AT&T, and it was comparable in price to a collect call made by a non-inmate using MCI. As mentioned, MCI charged just $4.60 for a ten-minute collect call from a DOCS inmate, significantly less than the $5.25 AT&T charged for a ten-minute station-to-station collect call outside the prison context (R. 98, n.19), and comparable to MCI's own charges for many non-inmate collect calls. While the charge to inmates under the MCI system was greater than the charge for standard residential land-line service, that comparison is not relevant. Residential customers at the relevant time paid about $30 per month just for the privilege of having a phone, even before one call was made (R. 108). If inmates were required to pay $30 per month for phone service, such charges would total $24 million annually; yet inmates did not pay anything for access to telephone service (R. 108). Petitioners' assertion that they paid exorbitant rates is therefore unsubstantiated.

In concluding otherwise, the court in *Byrd v. Goord*, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005), ignored the critical distinction between recipients of inmate collect calls and recipients of other collect calls. The *Byrd* court reasoned that "the state defendants have offered no rational basis to justify placing the burden of [the] additional commission solely on the friends and families of inmates, and those individuals providing counseling

and professional services, thereby charging them more per call than similarly situated collect call recipients." 2005 U.S. Dist. LEXIS 18544 at *32.

But the *Byrd* court overlooked that the friends and family members of inmates who receive collect calls, unlike recipients of non-inmate collect calls, received a direct and special benefit from both the Inmate Call Home Program and the host of programs funded by the Family Benefit Fund. Likewise, individuals providing counseling and professional services enjoyed the benefits of the Inmate Call Home Program, without which they would be required to communicate with their inmate clients by writing letters or in-person visits. These special benefits provided a rational basis for any differential treatment.

D. Petitioners' free speech rights are not violated.

The Appellate Division was also correct in concluding that DOCS did not impair petitioners' free speech rights under Article I, section 8, of the New York Constitution by contracting with MCI for collect call services at rates that provided it with a commission. Petitioners correctly do not suggest that New York's free speech guarantee affords more protection than its federal counterpart in the context at issue here, namely the ability of inmates to communicate with friends and family and to maintain familial relationships. *See Courtroom Television Network, LLC v. State of New York*, 5 N.Y.3d 222,

231 (2005) (noting that the Court has interpreted state guarantee more broadly than its federal counterpart "in certain circumstances"); *see also People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557-59 (1986) (recognizing that state guarantee is interpreted more broadly in cases implicating freedom of expression in books, movies and/or the arts).

The United States Supreme Court has held that inmates have only a qualified right to communicate with the outside world, and that prison officials need only provide them with a reasonable opportunity to do so. *See Overton v. Bazzetta*, 539 U.S. 126, 135 (2003). Accordingly, most courts to have addressed the issue have held that prison officials need not provide inmates with telephone service at all – or with any particular means of communication for that matter – let alone telephone service at a particular rate. *See Arsberry*, 244 F.3d at 565; *United States v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000); *Valdez v. Rosenthal*, 302 F.3d 1039, 1048 (9th Cir. 2002). As these courts have explained, inmates have no more right to use the telephone than they do to e-mail or text-message their friends and families.

Only a small minority of courts have suggested that inmates have a qualified right to some telephone access. *See Byrd v. Goord*, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005); *see also Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (adopting view in *dictum* only). *But see Valdez v.*

Rosenthal, 302 F.3d at 1048 (repudiating *dictum* in *Johnson*). Under this minority view, inmates can state a First Amendment claim by alleging that the telephone rates are so exorbitant as to deny them telephone access altogether. *See Byrd v. Goord*, 2005 U.S. Dist. LEXIS 18544 at *25 (*quoting McGuire v. Ameritech Servs, Inc.*, 253 F. Supp. 988, 1002 [S.D. Ohio 2003]); *Johnson*, 207 F.3d at 656.

This case presents no occasion, however, to resolve this conflict because even under the minority view, petitioners' detailed allegations, accepted as true, preclude their claim. Petitioners' complaint establishes that, notwithstanding the allegedly high commission rates, petitioners continued to communicate with their incarcerated relatives and friends by telephone as well as by other means throughout the time period at issue. Petitioner Walton alleged that she visited her son and nephew once a month, and that, while she and her son "are not able to speak on the phone as much as they would like" (R. 55, ¶ 53), she accepted a total of seven collect calls from her son and nephew in a given month (R. 56). Walton's allegations do not address what efforts she made to correspond with her son and nephew, but petitioners have never suggested that prison officials interfered with her ability to correspond in any way. Petitioner Austin alleged that the high cost of the collect calls prevented her from speaking by phone with her husband "as

much as they both need" (R. 57), but she admitted that she and her incarcerated husband "write letters to each other frequently, and she visits him when she can" (R. 56, ¶ 56). While petitioner Harris alleged that she "cannot afford to speak to her cousin and friend even twice a month" and, because she is in graduate school, does not have the time or resources to visit them (R. 57), she never suggested she could not correspond regularly with her cousin and friend.

Thus petitioners' allegations fail to establish either that the DOCS commission was so exorbitant that it prevented petitioners from communicating *at all* with their friends and relatives in prison, or even that it curtailed telephone access altogether. If anything, the allegations highlight the alternative means of communication available to them, including face-to-face visitation at the prison, *see* 7 N.Y.C.R.R. Part 200, and communication through written correspondence. *Id.* at Part 720. Together, these programs provided and continue to provide ample opportunity for inmates to communicate with the outside world, which is all the Constitution requires. In *Overton v. Bazzetta*, in upholding certain prison visitation regulations, the U.S. Supreme Court rejected the claim that "letter-writing is inadequate for illiterate inmates" and that "phone calls are [too] brief and expensive," stating that "[a]lternatives to visitation need not be ideal, [but] need only be

available." 539 U.S. at 135. Nothing in the Constitution mandates that the State ensure that inmates and their relatives are able to communicate "as much as they would like" (R. 55, ¶ 53) by telephone or any particular means. *See McGuire v. Ameritech Servs, Inc.*, 253 F. Supp. 2d at 1002, n.11.

Any telephone rate greater than zero can potentially restrict an individual's ability to make calls to some extent. Petitioners do not suggest what telephone rate would be constitutionally permissible, or how many calls per month an inmate's relative should be able to afford to make. But since inmates and their families have no constitutional right to telephone service, they have no constitutional right to telephone service at low cost. *See Carter v. O'Sullivan*, 924 F. Supp. 903, 911 (C.D. Ill. 1996) (rejecting plaintiffs' argument that calls are overpriced because "nothing precludes the prisoners and their outside contacts from writing to each other to save money"). Petitioners' free speech claim is therefore without merit.

Finally, even if the commission at issue here implicated the free speech and family association rights of prisoners, as petitioners claim, it was permissible because it was rationally related to legitimate governmental and penological interests. *See Turner v. Safley*, 482 U.S. 78, 89 (1987); *Matter of Lucas v. Scully*, 71 N.Y.2d 399, 405 (1988). As the FCC aptly observed, prison officials "must balance the laudable goal of making calling services available

to inmates at reasonable rates, so that they may contact their families and attorneys, with necessary security measures and costs related to those measures." 17 F.C.C. Rcd. 3248 at **72. While single provider arrangements and the prison's exclusive control over access to inmate calling may lead to higher rates, "higher commissions may give confinement facilities a greater incentive to provide access to telephone services [and] [c]ommission proceeds may be dedicated to a fund for inmate services." *Id.* at **73.

That is exactly what occurred here. Far from denying access to telephone service, the commissions facilitated access. During the period at issue, DOCS's telephone program handled over 500,000 completed calls a month, or 6 million calls per year (R. 108). And the commission revenues gave DOCS a strong incentive to assure inmates access to the telephone system despite the security and other administrative challenges it implicated by enabling DOCS to fund not only the Inmate Call Home Program, but also a variety of programs that directly benefitted inmates and their families. These programs, some of which are optional, undeniably served legitimate penological goals. Without the commissions as the funding source, many of these programs might not have existed.

CONCLUSION

The Appellate Division's order should be affirmed.

Dated: Albany, New York
July 28, 2009

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondent DOCS

By: Victor Paladino
VICTOR PALADINO
Assistant Solicitor General

Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 473-4321

BARBARA D. UNDERWOOD
Solicitor General

ANDREA OSER
Deputy Solicitor General

VICTOR PALADINO
Assistant Solicitor General

of Counsel

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ADDENDUM

SMITH v. THE STATE OF NEW YORK, #2002-001-036, Claim No. 101720, Motion No. M-64458

Synopsis

Case Information

UID:	2002-001-036
Claimant(s):	RUTH D. SMITH and CONSTANCE L. COAD ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED[1]
Claimant short name:	SMITH
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	The claim names "New York State" as well as "the New York State Department of Correctional Services, Glenn S. Goord, individually and in his official capacity as Commissioner of the New York State Department of Correctional Services, Office of the Comptroller of the State of New York, H. Carl McCall, individually and in his official capacity as New York State Comptroller, G. Ronald Courington, individually and in his official capacity as Director, Management Information Services, New York State Department of Correctional Services, William Ginsburgh, individually and in his official capacity as Principal Auditor of State Expenditures, Office of the Comptroller of the State of New York." The Court of Claims does not have jurisdiction to hear claims against individuals (*see*, *Smith v State of New York*, 72 AD2d 937), a point made by defendant State of New York in this motion to dismiss. In this instance, the Court *sua sponte* has amended the caption to reflect the only proper defendant here, the State of New York (*see*, Court of Claims Act § 9).
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	101720
Motion number(s):	M-64458
Cross-motion number(s):	
Judge:	SUSAN PHILLIPS READ

A D D E N D U M

A2

Claimant's attorney:	William T. Martin & Associates By: William T. Martin, Esq., Of Counsel
Defendant's attorney:	Hon. Eliot Spitzer, NYS Attorney General By: Kathleen M. Resnick, Esq., Assistant Attorney General, Of Counsel
Third-party defendant's attorney:	
Signature date:	July 8, 2002
City:	Albany
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

The following papers were read and considered on defendant's motion to dismiss the claim pursuant to CPLR 3211 (a) (2), (7) and (8): Notice of Motion, dated and filed December 14, 2001; Affirmation in Support of Kathleen M. Resnick, Esq., AAG, dated and filed December 14, 2001, with annexed Exhibits 1-5; Affirmation in Opposition of William T. Martin, Esq., dated March 12, 2002 and filed March 13, 2002, with annexed Exhibits A-B; Claim, dated December 1999 and filed January 4, 2000; and Verified Answer, undated and filed February 8, 2000. Claimants Ruth D. Smith and Constance L. Coad ("claimants") filed this claim as a class action against, among others (*see*, n 1, *supra*), defendant State of New York ("defendant" or "the State") on January 4, 2000 to challenge the call-home program operated by the New York State Department of Correctional Services ("DOCS") (*see*, 7 NYCRR 723 *et seq.*). The State now moves to dismiss the claim on various jurisdictional and substantive grounds.

I. Background

The call-home program, first instituted at Sing Sing Correctional Facility in 1985, allows inmates to place collect calls from coinless telephones without the intervention of a live operator to designated family or friends outside prison facilities (*id.*; *see also*, Affirmation in Support of Kathleen M. Resnick, Esq., AAG, dated and filed December 14, 2001 ["Resnick Aff."], Exh. 1, Part 1.3). Numerous restrictions apply; for example, the number of accessible telephone numbers is limited to 15 per inmate (7 NYCRR 723.2); inmates are prohibited from placing calls to those who notify the facility that they do not wish to receive them and to specified categories of individuals or for forbidden purposes (*see generally*, 7 NYCRR 723.3 [d], [e]); and the calls are subject to electronic monitoring (7 NYCRR 723.3 [c]).

The current telephone-service provider ("provider") for the call-home program, MCI Telecommunications Corporation ("MCI"), was chosen by DOCS as the winning bidder from among seven providers who responded to a Request for Proposal ("RFP") for the exclusive right to operate the program throughout the State's prison system (Resnick Aff., ¶ 6; Exh. 1 [RFP dated October 30, 1995]). The RFP required each bidder to demonstrate extensive security-related capabilities such as the ability to block certain numbers, to record and store phone conversations and to monitor and report the names and addresses of those accepting

inmate initiated collect calls (*id.*, Exh. 1, Part 3).

The RFP further required each bidder to commit to pay DOCS a minimum commission of 47% of the gross monthly revenues generated by all calls accepted from prison facilities (*id.*, ¶ 5, Exh. 1, Part 2.4 [d]; claim, dated December 1999 and filed January 4, 2000 ["claim"], ¶ TENTH). The size of the commission rate offered, including administrative rates, counted for 50% of each bidder's evaluation (Resnick Aff., Exh. 1, Parts 3.3, 4.2 [a]). MCI committed to a commission rate of 60% (claim, ¶ TENTH).

The RFP, however, also prescribed the rates to be charged recipients of inmate initiated collect calls, freezing both the interstate and intrastate rates at their respective 1994 levels (Resnick Aff., ¶ 12; Exh. 1, Part 2.12, Attachment G).[2] Pursuant to Federal and State law, MCI subsequently filed the interstate rates, or tariffs, with the Federal Communications Commission ("FCC") (*see*, 47 USC § 201 *et seq.*) and the intrastate rates, or tariffs, with the Public Service Commission ("PSC") (*see*, Public Service Law § 92) (*id.*, Exhs. 2-3).[3]

Claimants object to the contractual requirement for a provider to pay DOCS a commission for the exclusive right to operate the call-home program at prison facilities, which they contend has caused the State to "request phone commissions at an artificially high level" to the detriment of those who accept inmate initiated collect calls (claim, ¶ TENTH). The claim also alleges that DOCS has improperly used the commissions to finance its budget rather than the Family Benefit Fund,[4] "assessing what is in effect a 'special tax' on the families of inmates . . . in violation of their due process and equal protection rights under the New York State and United States Constitutions" (*id.*, ¶ NINTH). The claim also vaguely alludes to the call-home program and the corresponding use of the commission revenues derived from it as a "price fixing scheme" (*id.*, ¶ ELEVENTH), which amounts to a conversion, misdirection or misappropriation of funds (*id.*, ¶ TENTH).

Claimants seek $250,000,000 in damages "for the overcharges above and beyond fair market value, from 1985 up to and including 1999" and "the restoration of the full amount of all monies determined to be misappropriated or derived from the exorbitant price fixing above and beyond the fair market value" (*id.*, WHEREFORE clause). They also seek equitable and declaratory relief (*id.*, ¶¶ 1-7).

II. The State's Motion to Dismiss and Claimants' Response

On this motion, the State urges dismissal of the claim or dismissal of particular causes of action or parties on various grounds: that claimants did not timely serve a notice of intention or a claim upon the Attorney-General (Resnick Aff., ¶¶ 18-19); that the Court does not possess jurisdiction to grant the declaratory and/or injunctive relief sought or to award attorneys' fees (*id.*, ¶¶ 20-22); that the Court lacks jurisdiction to the extent that the claim alleges Federal constitutional claims (*id.*, ¶ 23); that the Court lacks jurisdiction over the named elected or appointed officials and State employees (*id.*, ¶ 24) (*see*, n 1, *supra*); that the Court lacks jurisdiction because claimants' relief lies by way of a CPLR article 78 proceeding (*id.*, ¶¶ 25-26); that the installation and operation of an inmate communications system and the appropriation of funds related to it are purely governmental functions involving discretionary decision making for which the State is immune from tort liability (*id.*, ¶ 29-30); that claimants have not stated a viable State constitutional claim (*id.*, ¶¶ 35-40); and that the claim fails to state a cause of action because, among other things, it is barred by the filed-rate doctrine (*id.*, ¶¶ 41-42). The State also argues that claimants have no standing to bring this claim as a class action because they have not been granted class status pursuant to article 9 of the CPLR and have not even alleged that they are actual recipients of inmate initiated collect calls (i.e., parties injured by the allegedly artificially inflated rates) (*id.*, ¶¶ 31-34).

Claimants slough off defendant's statute-of-limitations defense as "ludicrous" because "the conduct complained of . . . is ongoing and . . . the harm visited upon the friends and families will not be abated without Court intervention because [the State's] profit motive is to [sic] great" (Affirmation in Opposition of William T. Martin, Esq., dated March 12 and filed March 13, 2002, with annexed Exhibits A-B ["Martin Aff."], ¶ 7).[5] Although repeated readings of the claim have failed to disclose anything hinting at breach of contract, in opposition to defendant's motion claimants principally rely on the novel theory that they are

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third-party beneficiaries of the exclusive provider contract between DOCS and MCI and therefore have standing to sue for breach of contract, by which they seem to mean the RFP/contractual requirement for a commission (*id.*, ¶¶ 3-6, 9-14, 16-18).[6]

III. Discussion

A. The claim's untimeliness

For the reasons explained in detail by the Honorable Francis T. Collins in a recently decided motion concerning a similar claim (*see, Bullard v State of New York*, Ct Cl, unreported decision filed May 1, 2002, Collins J., Claim No. 103138, Motion Nos. M-64624, M-64630), this claim is untimely. Briefly, claimants identify an accrual date as March 1985 and then attempt to circumvent their claim's obvious untimeliness when measured from this date (or from April 1, 1996, the effective date of the contract between MCI and the State) by invoking the "continuing violation doctrine"; however, as Judge Collins pointed out, this doctrine presupposes continuing unlawful acts rather than, as is alleged here, the continuing effects of earlier unlawful conduct; namely, the State's entry into a supposedly unconstitutional and otherwise unlawful contract (*Selkirk v State of New York*, 249 AD2d 818; *see also, Alston v State of New York*, 97 NY2d 159). The State, however, only interposed the defense of untimeliness for wrongdoing alleged from 1985 until September 3, 1999, or 90 days preceding service of a notice of intention on the Attorney-General (Verified Answer, undated and filed February 8, 2000, ¶ Eleventh), and so this ground does not dispose of the entire claim, which arguably seeks damages from March 1985 through the end of 1999.[7] Accordingly, the Court proceeds to consider as necessary the other grounds for dismissal proffered by the State.

B. The Court of Claims' jurisdiction

The jurisdiction of the Court of Claims is generally limited to awarding money damages in claims against the State and other entities specified by statute for appropriation of real or personal property, tort or breach of contract (*see*, Court of Claims Act §§ 9, 10, 11). More particularly for purposes of this motion, this Court does not possess jurisdiction to review determinations of the State's administrative agencies (*see, Harvard Fin. Servs. v State of New York*, 266 AD2d 685; *Bertoldi v State of New York*, 164 Misc 2d 581, 587, *affd* 275 AD2d 227, *lv denied* 96 NY2d 706; *Lublin v State of New York*, 135 Misc 2d 419, *affd* 135 AD2d 1155, *lv denied* 71 NY2d 802). If the award of a money judgment would require the Court of Claims to review an administrative agency's determination, "then the primary relief sought is not money damages" (*Ouziel v State of New York*, 174 Misc 2d 900, 905) and the proper remedy lies in Supreme Court by way of a CPLR article 78 proceeding with any incidental monetary relief available there (*see, Matter of Gross v Perales*, 72 NY2d 231).

Further, the filed-rate doctrine forbids courts generally from modifying a public utility's or common carrier's filed tariffs. In New York State, telephone companies are required to file the intrastate rates to be charged their customers with the PSC (Public Service Law § 92), and the companies cannot charge more than is "just and reasonable" (Public Service Law § 91 [1]). Once filed and approved by the PSC, the filed rate "'takes on the force and effect of law and governs every aspect of the utility's rates and practices'" (*Lauer v New York Tel. Co.*, 231 AD2d 126, 129, quoting *Lee v Consolidated Edison Co. of N.Y.*, 98 Misc 2d 304, 305-306).

Accordingly, the PSC has been held to have "'exclusive original jurisdiction over public utility rates'" (*Porr v NYNEX Corp.*, 230 AD2d 564, 570, *lv denied* 91 NY2d 807) and any challenge to the reasonableness of rates approved by the PSC must be initially submitted to that agency "which has been vested by the legislature with the authority to regulate and review such matters" (*Brownsville Baptist Church v Consolidated Edison Co. of N.Y.*, 272 AD2d 358, 359; *see, Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156; *see also, United States v Western Pac. R.R. Co.*, 352 US 59, 64). Consumer claims for injuries allegedly caused by a payment of a rate on file with the PSC are viewed as attacks upon the rate itself and consequently fall within the ambit of the filed-rate doctrine (*see, Porr v NYNEX Corp.*, *supra*, at 568; *see also, Miranda v Michigan*, 168 F Supp 2d 685 [customers precluded by filed-rate and primary-jurisdiction doctrines from recovering damages for alleged overcharges for inmate initiated collect calls]; *Daleure v*

Commonwealth of Kentucky, 119 F Supp 2d 683, *appeal dismissed* 269 F3d 540 [same]; *but see, Arsberry v State of Illinois*, 244 F3d 558 [district court erred in dismissing challenge to exclusive provider contracts for inmate initiated collect calls on filed-rate and primary-jurisdiction grounds because plaintiffs sought to annul practice whereby each prison grants one telephone company exclusive right to provide service to inmates in exchange for 50% of revenues generated by service, not to invalidate tariffs; however, dismissal of federal claims was affirmed on merits and district court was therefore directed to relinquish jurisdiction over state claims]).[6] Judicial relief from the filed rate, if any, may only be obtained by way of a CPLR article 78 proceeding challenging the agency's rate determination (*see, City of New York v Aetna Cas. & Sur. Co.*, 264 AD2d 304; *Minihane v Weissman*, 226 AD2d 152; *see also, Discon v NYNEX Corp.*, 2000 WL 33312196 [Sup Ct, New York]).

Although the matter is hardly free from doubt, claimants here seem to object principally to the RFP's requirement for a commission, or at least to the requirement for a minimum 47% commission, rather than to the particular rates for intrastate calls prescribed in the RFP and contract and subsequently filed and approved by the PSC. But however the claim is parsed, this Court does not have subject matter jurisdiction of it.

To the extent that claimants challenge DOCS' determination to require a commission or to award the contract to MCI for a 60% commission or to the Comptroller's approval of the contract, they must seek relief in Supreme Court by way of a CPLR article 78 proceeding, perhaps combined with a request for declaratory relief. To the extent that they seek a refund of alleged overcharges or otherwise challenge the intrastate rates, their sole route to potential redress lies, in the first instance, through the PSC and, if they are dissatisfied with the outcome there, a CPLR article 78 proceeding in Supreme Court.

IV. Conclusion

Whether the Court of Claims has subject matter jurisdiction to entertain a particular claim depends upon "the actual issues presented," not on how a claimant characterizes the action in a claim or motion papers (*Sidoti v State of New York*, 115 AD2d 202, 203). Here, claimants have alleged causes of action seeking damages for constitutional tort, misappropriation, conversion, price fixing and, more recently, for breach of contract under some third-party beneficiary theory. But claimants are, in fact, asking this Court to review determinations made by administrative agencies, which it cannot do. Moreover, in order to award the damages sought in this claim--the difference between what claimants paid MCI for inmate initiated collect calls and "fair market value"--the Court would necessarily have to review the reasonableness of the tariffs filed and approved by the PSC, which the filed-rate doctrine precludes (*see, Porr v NYNEX* Corp., *supra*, at 573-574, quoting *Marcus v AT & T Corp.*, 938 F Supp 1158, 1170 ["'As long as the carrier has charged and the plaintiff has paid the filed rate, what bars a claim is not the harm alleged, but the impact of the remedy sought. Any remedy that requires a refund of a portion of the filed rate . . . is barred"']; *see also, Bullard v State of New York, supra*).

Based on the foregoing, the Court grants defendant's motion and dismisses the claim for want of subject matter jurisdiction. In light of this disposition, the Court need not and does not consider defendant's remaining arguments.

July 8, 2002
Albany, New York

HON. SUSAN PHILLIPS READ
Judge of the Court of Claims

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1.The claim names "New York State" as well as "the New York State Department of Correctional Services, Glenn S. Goord, individually and in his official capacity as Commissioner of the New York State Department of Correctional Services, Office of the Comptroller of the State of New York, H. Carl McCall, individually and in his official capacity as New York State Comptroller, G. Ronald Courington, individually and in his official capacity as Director, Management Information Services, New York State Department of Correctional Services, William Ginsburgh, individually and in his official capacity as Principal Auditor of State Expenditures, Office of the Comptroller of the State of New York." The Court of Claims does not have jurisdiction to hear claims against individuals (*see, Smith v State of New York*, 72 AD2d 937), a point made by defendant State of New York in this motion to dismiss. In this instance, the Court *sua sponte* has amended the caption to reflect the only proper defendant here, the State of New York (*see*, Court of Claims Act § 9).

2.The RFP projected that approximately 85% of the calls placed in the call-home program would be intrastate calls, while the remaining 15% would be interstate calls (Resnick Aff., Exh.1, Part 1.7).

3.The CFR defines "tariff" as the "[s]chedules of rates and regulations filed by common carriers" (47 CFR 61.3 [ii]). The PSC defines the term as "[a] document that lists the rates, terms and conditions of a local distribution company's services that are subject to review and approval by the [PSC]" (http://www.dps.state.ny.us/enegloss.htm).

4.The Family Benefit Fund supports certain services provided by DOCS; for example, free buses for family visits, nursery care at women's facilities and various counseling services (Resnick Aff., ¶ 5). The RFP indicates that commissions from the original call-home program at Sing Sing Correctional Facility were deposited into a specially created account, the Family Benefit Fund (*id.*, Exh. 1, Part 1.3). Defendant states that commissions are now appropriated by the Legislature for the Family Benefit Fund (*id.*, ¶ 5).

5.For ease of reference, the Court has added paragraph numbers to this affidavit.

6.As noted earlier, the RFP prescribed the rates to be charged by the provider to the customer for intrastate and interstate calls; the bidders competed as to the percentage of the gross monthly revenue generated by these calls to be paid to DOCS as a commission (Resnick Aff., ¶ 12).

7.The Court recognizes that the claim is a bit inconsistent on the matter of dates, at one point suggesting that the "scheme of conduct, practice and procedure" attacked took place from March 1985 through March 1, 1999 (claim, ¶ SEVENTH). The claim also, however, talks in terms of a "*continuous* course and pattern of conduct (emphasis added)" commencing in 1985 (*id.*, ¶ EIGHTH); and the claim's WHEREFORE clause seeks damages for conduct allegedly occurring during the entirety of calendar year 1999. As a result, the Court interprets the claim as seeking damages for wrongdoing allegedly taking place after September 3, 1999, the latest date for which the State interposed the defense of untimeliness.

8.The Court's research has disclosed no PSC cases regarding inmate initiated collect call rates in New York State. In Kentucky, the recipients of inmate initiated collect calls petitioned the Kentucky Public Service Commission for review of the rates and services, and the Commission found some of the rates to be unjust and unreasonable and so lowered them (*see, Matter of Establishment of an Operator Surcharge Rate for Collect Telephone Calls from Confinement Facilities, Administrative Case No. 378, Kentucky Public Service Commission*, 1999 Ky. PUC Lexis 71; *see also, Daleure v Kentucky*, 119 F Supp 2d, *supra* at 685, n 8). The Court notes that in Kentucky the exclusive provider contracts were competitively bid and awarded to the provider bidding the highest commission per call (*id.*, at 686) whereas in New York State, DOCS, in fact, specified the rates in the RFP and contract (Resnick Aff., ¶ 13, Exh. 1, Part 2.12, Attachment G).

NEW YORK STATE SENATE

FINANCE COMMITTEE

-and-

NEW YORK STATE ASSEMBLY

WAYS AND MEANS COMMITTEE

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In the Matter of :

2001-2002 Joint Budget Hearing on Public Protection :

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Hearing Room #B
Legislative Office Building
Albany, New York

February 5, 2001
10:05 a.m.

B e f o r e:

SENATOR RONALD B. STAFFORD

Chair, Senate Finance Committee

ASSEMBLYMAN HERMAN D. FARRELL, JR.

Chair, Assembly Ways and Means Committee

that's applied.

ASSEMBLYMAN AUBREY: -- isn't it? Is that the practice?

DIRECTOR LAPP: It is the practice. I can say though that through -- if you have a higher rate of attrition that you haven't anticipated, those may be, you know, not being achieved at any given time. That's true in any kind of case management.

ASSEMBLYMAN AUBREY: This upcoming fiscal year where we are going to see a decrease in the prison population, I presume that there will be an increase in parolees.

DIRECTOR LAPP: Not necessarily. The drop is both in terms of some of the early release programs, but also drops in arrests and indictments statewide, which are down dramatically.

ASSEMBLYMAN AUBREY: Lastly, we've had over the past year a lot of discussion about the prison phone system and its reimbursement process.

And I know the Department went to bid on that system just not so long ago.

I wonder, one, where that revenue is now shown in the Department's budget and Correction's budget, and whether there was a change in any of the policies associated with it.

We've heard from many of the families who are trying to stay in touch with their family members who are incarcerated that this cost is exorbitant for them to stay in contact.

Did the Department look at that at all? I'm sure that you've heard some of the same complaints. And was it a factor at all in the rebidding of the phone system?

COMMISSIONER GOORD: I guess you and I have talked about this several times.

It appears in our budget in our Family Benefit Fund. There was no adjustment in the way it was rebid. It's just based on the economics of what we use to spend the money on; as I guess I stated previously, on AIDS medication and other programs, family visiting programs. I think basically it comes out to be about $20 million.

And I guess as we said

previously, certainly we didn't adjust it because we needed the vehicle to develop those revenues to pay for those services.

ASSEMBLYMAN AUBREY: We couldn't have found -- you didn't seek additional revenues, for instance, for AIDS medicine? We have no other source for medicine for AIDS in the prison system other than through money that parents pay to call their children?

COMMISSIONER GOORD: Well, I think, as I said previously, certainly I spend about fifty -- or the taxpayers spend about $54 million, about $50 million roughly for pharmaceuticals now. I don't know what my total budget is for health services, but it just wasn't there without cutting other services.

ASSEMBLYMAN AUBREY: I mean -- obviously not necessarily to come out of Corrections. But I'm saying in all of the health initiatives, the health funding, Medicaid, Medicare, that was the only place that we could find?

That seems rather unique to me, to be in a position for a particular disease, not

just -- you know, all medical care comes out of this fund, but a particular disease, the only way we fund it is through that mechanism. It seems odd to say the best.

COMMISSIONER GOORD: There is a history to it that I really can't -- I'm not in a position to explain.

I assumed that some of the history was legislative history where the Legislature sat down and we said we had this revenue stream and it was established where we would send it.

Because as far as that policy of where the money goes and so forth, that's nothing that I have changed. All we've continued to do is - and I don't disagree with you - is create that revenue stream, and that's where the money goes.

I don't really know the history of it.

ASSEMBLYMAN AUBREY: Well, maybe one of my colleagues who have been here a long time could explain that to me because I don't see it in the law necessarily. It seems to be by practice as opposed to necessarily in any

statute.

One would ask that we look at that. That seems to me one extraordinary amount of money to bear on families in some cases who try to stay in contact.

And I know that you particularly agree that part of the rehabilitation of the individuals who are incarcerated has to do with their contact with their families. And if that contact is positive and strong, chances are we will not once again be faced with having them come back in the system.

And then to put a price on that for the families particularly those who are farthest away -- we know that most of the prisoners come from New York City. Though we have graduated facilities, the farthest up can be up in Canada. And we have gone up to those. And that's a long trip.

A lot of families can't make that trip. The children can't see them.

So telephones - letters could be used - but telephone is a medium for which they could stay in touch.

To add another burden to that seems to be rather putting a hurdle for the families for something that we are all going to benefit from, that is, their successful rehabilitation.

So I certainly would think that if we can find additional sources, particularly for health care costs, that that might be helpful in reducing the amount of money we have to have driven from this source.

Thank you.

SENATOR STAFFORD: Thank you.

Senator Nozzolio.

SENATOR NOZZOLIO: Thank you, Mr. Chairman.

Good afternoon, Director Lapp, Superintendent McMahon, Chairman Travis, Commissioner Goord.

You and all the leaders of Governor Pataki's public protection team are to be congratulated. We have seen in these four years significant reductions in all aspects of violent crime. You alluded to it in your testimony, Director Lapp, but I think it needs to

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ORIGINAL

JOINT HEARING
OF THE
SENATE FINANCE COMMITTEE
AND THE
ASSEMBLY WAYS AND MEANS COMMITTEE

ON
PUBLIC PROTECTION

HELD IN
HEARING ROOM B
LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK

FEBRUARY 24, 2003
10:00 A.M.

Assembly Official Reporter
Agency 4, 13th Floor
Albany, New York
518-455-3969

what's going on in the courts and parole release rates and return parolees and we make our best guesstimate on how we do.

Now, you know, in a population of 67,000 last year even though the number is probably 14- or 1500 off, when you look at a population of 67,000 that was only 3 percent off. That's not too bad.

So, we very steadily over the last three years have taken the population down and will continue to take it down. The fiscal impact has been probably well over $100 million in the last two years on savings to the people of New York.

SENATOR BROWN: Okay. Commissioner Goord, this year, the Executive proposal includes funding in the amount of $205 million for capital projects. Can you provide us with a list of the projects and what facilities are earmarked for these funds?

COMMISSIONER GOORD: Absolutely, I could get that out to you. I don't have it with me today.

SENATOR BROWN: Another question I'd like to ask is related to the Department receiving commissions on coinless, collect-only telephones. This money is deposited into a special account known as the Family Benefit Fund. Is that money projected

to be used in that same way in this budget year?

COMMISSIONER GOORD: Absolutely.

SENATOR BROWN: Now, does the Department have a new contract with the service provider?

COMMISSIONER GOORD: The contract is with MCI and the contract is, at least, a year old now.

SENATOR BROWN: It's a year old?

COMMISSIONER GOORD: Yes.

CHAIRMAN FARRELL: Only MCI? I'm sorry, only one?

COMMISSIONER GOORD: Yes.

SENATOR BROWN: And what does the Department collect through that contract?

COMMISSIONER GOORD: I know I have that. I could get you that number and I could also get you a break down of where that money is spent.

SENATOR BROWN: Now, it's still in the millions of dollars, though, would you say?

COMMISSIONER GOORD: Yes, I know I have that here, I just can't --

$22 million.

SENATOR BROWN: $22 million?

Thank you, Commissioner Goord.

COMMISSIONER GOORD: Yes.

SENATOR BROWN: My next question is for Superintendent McMahon. Superintendent, I would like to thank you for the assistance that the State Police has provided in the City of Buffalo with respect to helping the Buffalo Police Department with drug arrests.

Also in Buffalo, we have a situation where there is a high number of unsolved homicides. Would that be an area where, if requested, you could also provide the police department with some assistance?

SUPERINTENDENT MC MAHON: Senator, I appreciate your comments on our efforts in Buffalo. We do have in each troop a violent crime investigative team, and they do work with local departments on cold cases.

Now, a year ago this past May when there was 19 murders in the one month in the City of Buffalo and we sent the Community Stabilization Team and uniformed troopers, we also sent

that.

CHAIRMAN FARRELL: To close, Commissioner Goord, just to go back for a quick minute on the collections on the telephone companies. I'm looking here and my history has it was an inmate call program in '85 at Sing-Sing and then it went up from there. And now, I had gotten, as a matter of fact, I think a couple of years ago I spoke to you because I had some complaints at the fact that it has been overcharging the prisoners. And you have not gone to additional groups, allowing like Ma Bell, not that I'm pushing for that, allowing Ma Bell or any of the other companies in which would tend to keep the price down; or are you caught in a conflict of interest because now all of a sudden this has become a non-taxed tax because I see you spent $24 million on AIDS services and treatment for infectious diseases and family visit programs. A, it's a question, do you have a problem? And have you checked to see that we're not charging an inordinate amount of money in the day of the 5 cents long distance call? Are we not charging an obscene amount of money for these prisoners to make these calls?

COMMISSIONER GOORD: I don't think so. I mean, I'd be more than glad, like I did several years ago when we

talked about it, tell you what the rates are. I mean, the rates are not going to be consistent with what you and I pay or could pay because of the special requirements that the prison system requires for inmates to have access.

CHAIRMAN FARRELL: I'm sorry, repeat that.

COMMISSIONER GOORD: I need special equipment to monitor every phone call. In the prison system it's not like at my house or your house. We monitor phone calls. I've been asked several times how I monitor what's going in my prison population and other things like that.

CHAIRMAN FARRELL: The way I monitor my daughter, you have an extension in the house.

COMMISSIONER GOORD: I know, but you don't have 67,000 daughters, I hope.

CHAIRMAN FARRELL: I'm going to leave that one alone.

COMMISSIONER GOORD: I apologize.

But, that's the answer to the question as far as being able to -- I can't just contract with local vendors to do this. It requires someone with a sophistication to acquire equipment and other needs

that we have to control it. We only allow inmates "x" amount -- they don't have unlimited phone numbers. They're allowed, I think, it's just eight or nine phone numbers. So, there's a lot of requirements, that security that overrides the prison needs adds to the cost.

But, I'd be more than glad to show you what the costs are.

CHAIRMAN FARRELL: But, you're covering those costs or are the telephone companies? Because there's no local phone company.

COMMISSIONER GOORD: No, those are all covered -- those costs are all part of the contract.

CHAIRMAN FARRELL: And they are responsible? In other words, you do the listening in and you do the wires in the prisons?

COMMISSIONER GOORD: No, they wire the prisons.

CHAIRMAN FARRELL: And they give you the connections and allow you to --

COMMISSIONER GOORD: Absolutely.

CHAIRMAN FARRELL: One of the questions, how

much does the MCI -- you make $24 million on this. How much does MCI make on it?

COMMISSIONER GOORD: I don't know that. I'll get back to you. I can get you that number.

CHAIRMAN FARRELL: I'd like to see general cost. Can you give me from Dannemora and, you know, say, if you can give me some call numbers -- not numbers, but distances like from Brooklyn and what's the one all the way up in the north, if you can get me those numbers, what it costs per minute it would be helpful.

COMMISSIONER GOORD: That's fine. I can get you all that.

CHAIRMAN FARRELL: All right. Thank you very much.

Gentlemen, thank you very much.

DIRECTOR PARKER: Thank you.

CHAIRMAN JOHNSON: Thank you. Great job.

CHAIRMAN FARRELL: Next will be the Honorable Leo Milonas, former New York chief administrative judge, and President of the New York City Bar Association. He was

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NEW YORK STATE SENATE

FINANCE COMMITTEE

-and-

NEW YORK STATE ASSEMBLY

WAYS AND MEANS COMMITTEE

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In the Matter of :

2006-2007 Joint Budget Hearing on Public Protection :

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Hearing Room #B
Legislative Office Building
Albany, New York

February 14, 2006
9:40 a.m.

B e f o r e:

SENATOR OWEN JOHNSON

Chair
Senate Finance Committee

ASSEMBLYMAN HERMAN D. FARRELL, JR.

Chair, Assembly Ways and Means Committee

We've recently -- we met with the union several times since the hearings and we worked out recently sort of a different way of collecting them.

We are going to use the lock box method as opposed to the parolee giving money directly to the parole officer. So we have worked something else out.

ASSEMBLYMAN AUBREY: Is that a policy that you can share with us?

CHAIRMAN ROBERT DENNISON: Yes, we will.

ASSEMBLYMAN AUBREY: We would like -- I'd like to see that.

We have had some discussion around the inmate phone call system. I know that we are about to see a new contract or renewal of the contract. We have a change of vendor. We go from MCI to Verizon.

And I wonder if there is an opportunity for the Administration to look at the fees that are being charged to the families to stay in communication.

As well as most recently I

gather that the vendor, MCI or Verizon or whoever they are right now, are now requiring that families pay upfront, that they maintain a $100 deposit for families who are calling inmates who are locked up in our system.

The discussion I've had suggested that that was only if there were families who were in arrears. But other information that we gathered told us it was a general policy that MCI is engaged in right now. So they're blocking people from receiving telephone calls from people who are incarcerated.

Given our interest in re-entry, which I certainly support - I'm happy to see that a number of agencies are part of it - I think most of the professionals in corrections, they seem to recognize that re-entry is enhanced with an opportunity to keep family connections established, this being a primary one.

So I wondered whether or not, one, we've looked at this contract in a way in which we might reduce its revenue to the State, which I know is subject to litigation, as well as whether or not the new policy is something that

had to be approved by us or was this totally under the province of MCI?

COMM. GLENN GOORD: There's a lot of questions there.

But I share your commitment and our commitment to inmate re-entry and that family ties and maintaining family ties is an important factor.

But as far as the survey, we've looked at the legislation that is pending in front of you and in front of the Senate, and certainly my recommendations are that would be given to the Governor after those bills have passed.

As far as administratively looking at ways to reduce the fees, we haven't done that at this time. And that would be probably part of the reason - one of the things I would say to the Governor I say to you today - I'm concerned about not being able to provide certain services until I was assured that whatever revenues we've gotten from the fees would be gotten either through the Executive or through the Legislature, because a lot of those

fees are -- most of the money on those fees go for, as you know, for enhanced medical care, for family reunion programs, for inmate programs, for other things.

So we're open for discussion on that, on how we could adjust the fees.

ASSEMBLYMAN AUBREY: We noticed --

COMM. GLENN GOORD: Go ahead.

ASSEMBLYMAN AUBREY: We noticed that the percentage of dollars being used specifically for AIDS medicine from the family benefit fund was reduced and moved over to a more general obligation I believe.

And so I thought that was a sign that potentially the Administration was determining that this was a -- that utilizing this source of money may not have necessarily been appropriate over the long term.

And, of course, the Administration is -- as well as maybe even with more ability to ensure that the replacement of those funds is done out of -- you've got a $2 billion budget.

COMM. GLENN GOORD: Right.

But I agree with you. I think the fact that -- it was clear to us that the use of that fund for AIDS medication when it's the State's obligation, the Administration's responsibility to provide the AIDS medication, is a sign that we had to find other ways and other areas that we would -- and we've used that money for enhancement of other things.

You know, I'm not here -- and I know you wouldn't debate with me -- I think we're the only state in the country that pays for families to go to visit facilities and pay for those services, one of the few -- and that's a service that we pay for that.

And every year -- and, as you know, since 1991 this is not a program that this Administration implemented. This is a program that has been in effect, that I've been questioned on certainly for my last ten or eleven years, that it's very clear, certainly hopefully we lay out to you clearly every year where the monies go to and for what.

And that's my dilemma because

I'm supportive not only of -- supportive of where that money goes and where it's spent.

ASSEMBLYMAN AUBREY: And I recognize that the Administration didn't author it, but it just proves that bad ideas come from a lot of different places.

COMM. GLENN GOORD: I agree.

ASSEMBLYMAN AUBREY: So we will move -- we'll try and move it. I hope that the legislation will move, though I don't see my counterpart in the Senate here, he has that bill and I have that bill, and we hope to have that moved this year.

And then, lastly, for me, I noticed the report on the number of programs offered and the number of individuals who are in programs. And, of course, in our latest discussion on civil confinement, we've had a bit of discussion that we put forward about improving and enhancing the amount of sex offender treatment that is given to individuals while they're incarcerated.

It is my understanding that right now that treatment is afforded to

STATE OF NEW YORK

AGENCY Correctional Services FUND TYPE General

CATEGORY State Operations & Aid to Localities FUND General

ALL FUNDS BUDGET REQUEST

FISCAL YEAR 2006-2007

- ☐ Senate Finance Committee
- ☐ Assembly Ways and Means Committee
- ☐ Division of the Budget

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FAMILY BENEFIT FUND:

The Department of Correctional Services operates an Inmate Phone Home Program in which inmates are given access to telephones so they have the opportunity to make collect phone calls to their families, thus maintaining essential ties with their family and community.

This program, in turn, generates commissions from telephone companies which the Department uses to pay for various inmate programs. Most notably, these funds are used to pay for programs which directly benefit the inmate population such as the Nursery Program, Family Reunion furnishings, the Domestic Violence program, the Family Busing Program, Visitor Center Contracts, and AIDS medications.

Available revenues from this program are expected to support a total appropriation of $16.2 million in 2006-2007.

INITIATIVE	2006-2006 ADJUSTED APPROPRIATION	BFL	2006-2007 DOCS REQUEST	BFL	CHANGE
INFECTION CONTROL					
Clinical Staff	$1,422,225	23	$1,484,754	23	$62,529
Infection Control NPS	$125,000		$125,000		
Tests and Vaccines	$1,820,000		$1,820,000		$0
AIDS PHARMACEUTICALS	$5,647,258		$5,247,752		($399,506)
CONT. QUALITY IMPROV. PROGRAM					
CQI Staff	$85,056	1	$87,533	1	$2,467
CQI Supplies	$10,000		$10,000		$0
AIDS TRAINING					
AIDS Institute - PS	$860,849		$860,849		$0
AIDS Institute - NPS	$32,095		$32,095		
MEDICAL STAFF TRAINING					
Doctors/Nurses Training	$20,000		$20,000		$0
Teleconferencing	$50,000		$50,000		$0
Medical Textbooks	$5,000		$10,000		$5,000
MEDICAL PAROLE UNIT					
Processing of Med Parole Applications	$77,395	2	$80,129	2	$2,734
TOTAL MEDICAL SERVICES	$9,954,848	26	$9,628,072	26	($326,776)
NURSERY CARE					
Nursery Staff--Bedford Hills	$287,817	5	$287,735	5	($82)
Baby Supplies--Bedford Hills	$30,000		$45,000		$15,000
Nursery Staff--Taconic	$882,328	11	$831,633	11	($50,695)
Pediatric Care Contract--Taconic & Bedford	$117,945		$117,945		$0
Baby Supplies--Taconic	$30,000		$45,000		$15,000
FAMILY SERVICES					
Family Services Positions	$279,236	6	$285,895	6	$6,659
Family Services Furnishings	$135,000		$100,000		($35,000)
Family Reunion Supplies	$0		$50,000		$50,000
FAMILY BUSING					
Family Busing	$1,106,841		$1,324,910		$218,069
VISITING CENTERS					
Visitors Center Contracts	$519,100		$519,100		$0
INMATE TREATMENT					
St. Christopher-Otillie	$128,000		$128,000		$0
Builders for Family & Youth-Bedford&Taconic	$420,135		$420,135		$0
Hour Children Contract-Bedford & Taconic	$153,735		$153,735		$0
Family Violence Positions	$163,253	3	$179,712	3	$16,459
Eastern Domestic Violence Program	$554,637	12	$531,632	12	($23,005)
INMATE SERVICES					
Swank Motion Pictures	$149,103		$153,514		$4,411
Cable Television	$234,000		$266,000		$32,000
PHONE HOME ADMINISTRATION					
Maintenance of Communication Lines - PS	$177,627	2	$185,962	2	$8,335
Maintenance of Communication Lines - NPS	$50,000		$50,000		
Maintenance of Communication Equipment	$100,000		$100,000		$0
AIDS EDUCATION					
Enhanced AIDS Education	$131,395	3	$141,000	3	$9,605
RELEASE CLOTHING					
Release Clothing Costs	$600,000		$625,000		$25,000
Cash to Outgoing Inmates	$90,000		$100,000		$10,000
WORK RELEASE/DAY REPORTING					
Temporary Release Advance Account	$75,000		$100,000		$25,000
TOTAL PROGRAM SERVICES	$6,195,152	42	$6,521,920	42	$326,776
GRAND TOTAL	$16,150,000	68	$16,150,000	68	$0

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

IVEY WALTON; RAMONA AUSTIN; JOANN HARRIS; the OFFICE OF THE APPELLATE DEFENDER; and the NEW YORK STATE DEFENDERS ASSOCIATION, Petitioners-Plaintiffs,	:	Index No. 04-1048
	:	**ORAL ARGUMENT REQUESTED**
- against -	:	
THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; and MCI WORLDCOM COMMUNICATIONS, INC., Respondents-Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS DEPARTMENT OF CORRECTIONAL SERVICES' AND MCI WORLDCOM COMMUNICATIONS' MOTIONS TO DISMISS THE VERIFIED PETITION AND COMPLAINT

Rachel Meeropol
Barbara J. Olshansky
Craig S. Acorn
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6432

June 17, 2004

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Defendants point out that "a portion of the commissions received by DOCS are expended...for maintenance of the Call Home Program," DOCS Br. at 20, but they fail to inform this Court that that portion is approximately 1.5 percent of the revenue DOCS receives.[17] Id. The tiny portion of the DOCS tax used to finance the actual cost of the prison telephone system simply cannot justify the huge surcharge.[18]

Fees must also be paid by those to whom the service benefit accrues. Fees are by definition "a visitation of the costs of special services upon *the one who derives a benefit from them*." Jewish Reconstructionist Synagogue, 352 N.E.2d at 117 (emphasis added). While the Family Benefit Fund does in (very small) part benefit those who wish to receive collect calls from prisoners, the vast majority of the money taken from prisoners' advocates and families through the DOCS tax is used to benefit programs unrelated to telephone service. Complaint, Ex. B. Defendants argue that these separate services, such as prison medical care, also benefit prisoners' families because the call recipients probably want their loved ones to receive proper treatment. DOCS Br. at 21-22. While this is of course true, a family member's desire for the loved one to be treated humanely *cannot* justify charging that family for services the state is obligated by law to fund and which are already paid for by Plaintiffs and others through their taxes.

Along with benefiting the actual rate-payers, fees must be also used to finance the *same* services to which they are attached, not merely services which may indirectly benefit some of the same people that pay the fee. See, e.g., Jewish Reconstructionist Synagogue, 352 N.E.2d at 119

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[17] Under the MCI / DOCS contract, all maintenance on the telephone equipment and wiring will be provided by MCI at no cost to DOCS. Meeropol Aff., Ex. A at 31.

[18] Plaintiffs understand that DOCS must finance the telephone system somehow, and Plaintiffs do not oppose including a proportional commission (amounting to around $300,000 a year) payable to DOCS as a valid business expense to be included in MCI's filed rate.

CERTIFICATION PURSUANT TO RULE 2105

I, Victor Paladino, an Assistant Solicitor General in the Department of Law of the State of New York, do hereby certify, pursuant to Rule 2105, that the foregoing papers which constitute the addendum, have been compared by me with the originals and found to be true and complete copies of said originals.

Dated: Albany, New York
July 28, 2009

ANDREW M. CUOMO
Attorney General

By: Victor Paladino
VICTOR PALADINO
Assistant Solicitor General