To be argued by:
Victor Paladino

25 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,

AD No. 98700

-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

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PRELIMINARY STATEMENT

Petitioners are recipients of collect calls from inmates in the custody of respondent New York State Department of Correctional Services ("DOCS"). In this combined article 78 proceeding and declaratory judgment action, they challenge DOCS's collect-call-only telephone system provided by respondent MCI WorldCom Communications, Inc. ("MCI") pursuant to an exclusive services contract. They claim that the contractual payment of commissions to DOCS violates an October 2003 order of the Public Service Commission ("PSC"), is unconstitutional, and violates General Business Law § 349.

Petitioners appeal by permission of this Court from the memorandum and order of the Appellate Division, Third Department, that affirmed the judgment of the Supreme Court, Albany County dismissing their petition (Record ["R."] 8-15, 438-442). The Third Department held that petitioners' constitutional and General Business Law § 349 claims were time-barred, and that the only timely claims –- those seeking enforcement of the PSC's October 2003 order and an accounting -- failed to state a cause of action.

Petitioners' constitutional claims, which challenge DOCS's determination to collect commissions and seek incidental monetary relief, are cognizable in an article 78 proceeding and therefore barred by the four-month statute of limitations of C.P.L.R. 217(1). But even if these claims are timely, they run

afoul of the filed rate doctrine, because petitioners' alleged injury arises directly from rates on file with the PSC. Petitioners have failed to challenge the PSC's determinations approving the tariffs or even to name the PSC as a respondent. They are meritless as well. Although the courts below did not reach the merits, the issues were fully briefed, require no additional fact finding, and therefore provide an alternative basis for affirmance.

QUESTIONS PRESENTED

1. Whether the courts below properly held that the statute of limitations bars counts II through VI of the petition, which allege that the commission provisions of the 1996 and 2001 contracts between DOCS and MCI are unconstitutional and violate General Business Law § 349.

2. Whether the filed rate doctrine bars those claims in any event.

3. Whether the petition fails to state a cause of action.

4. Whether, if petitioners' claims are not cognizable in an article 78 proceeding, the request for refunds of the commissions must be dismissed for lack of subject matter jurisdiction as a claim seeking money damages against DOCS, an arm of the State.

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 that permits inmates to place collect calls from coinless telephones, without the intervention of a live operator, to designated family or friends (R. 255). See 7 N.Y.C.R.R. Part 723. To implement the program, DOCS contracts with a long-distance telephone service provider, which installs and maintains the system at each correctional facility. Since April 1, 1996, the system has been provided by MCI pursuant to an exclusive services contract.[1] The original contract covered the period April 1, 1996, through March 31, 1999 (the "1996 contract"). DOCS exercised renewal options that extended the contract through March 31, 2001.

The 1996 contract with MCI resulted from a competitive bidding process in which DOCS requested bids from telephone companies in conformity with a Request for Proposal ("RFP") (R. 41, ¶ 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 (id.).

[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 herein as "MCI."

At the conclusion of the bidding process, the contract was awarded to MCI, which bid a commission rate of 60% per call (R. 42, ¶ 30).

All of the commissions received by DOCS are appropriated by the Legislature to the "Family Benefit Fund" in DOCS's operating budget (R. 35, ¶ 12; 99, 102). That fund is used to support programs that directly benefit inmates and their families, including the family visitation 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. 102-103, 160-162).

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

State and federal agencies are responsible for approving all of the telephone rates 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 et seq., and the intrastate tariffs with the PSC (R. 44). See Public Service Law § 92. Telephone companies are prohibited from deviating from rates

filed with these agencies without filing and receiving approval for new rates. See id. at § 92(2)(d).

In March 1996, MCI filed its tariff with the PSC as a "Special Pricing Arrangement," which did not require PSC approval (R. 44). But in October 1998, MCI re-filed the rates with the PSC as a standard tariff offering, known as a "Maximum Security Plan" (R. 44). By determination dated December 16, 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. 16, 1998) ("PSC December 1998 order"). The PSC explained that "[t]he service provided . . . is more than just the provision of collect call service," and "provides DOCS with a number of security features not traditionally associated with collect calling." 1998 N.Y. PUC LEXIS 693 at *3. Finding that MCI's "[p]rovision of service to [DOCS] should be considered a unique service, with costs that would not be incurred in the provision of standard alternate operator services," the PSC concluded that MCI's proposed rates were reasonable. Id. at *4. Petitioners neither challenged those rates by application to the PSC nor sought article 78 review of the PSC's order.

C. Prior lawsuits challenging the 1996 contract

In September 2000, the Center for Constitutional Rights, the attorneys for the present petitioners, commenced an action in the Court of Claims on behalf of four New York residents who had paid for collect calls from DOCS inmates to challenge the 1996 contract, raising the same claims asserted here. The Court of Claims granted the State summary judgment, and the Appellate Division affirmed. See Bullard v. State of New York, 307 A.D.2d 676 (3d Dep't 2003). Specifically, the Third Department held that (1) the claim was untimely under Court of Claims Act § 10; (2) the continuing violation doctrine was inapplicable; (3) the "filed rate doctrine" barred the claim; and (4) a constitutional tort claim was not available because "claimants had an alternative remedy through a CPLR article 78 proceeding." 307 A.D.2d at 677-78.

Parallel litigation is pending in the United States District Court for the Southern District of New York. In August 2005, the district court (1) dismissed plaintiffs' challenge to the exclusive services contract and the collect-call-only aspect of the system, (2) denied the state defendants' motion to dismiss the plaintiffs' challenge to the 60% commission, and (3) granted MCI's motion to dismiss in its entirety. See Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005).

D. The 2001 Contract

In April 2001, MCI and DOCS executed a second contract for the period April 1, 2001, through March 21, 2006[2] (R. 233, 271). The 2001 contract requires MCI to continue charging its existing rate, but decreases DOCS's commission from 60% to 57.5% of MCI's gross revenues from the program (R. 46, 87, 234). As with the 1996 contract, MCI must charge the rates set forth in the contract regardless of the amount of commissions it agreed to pay (R. 264, 269).

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. 86), and accordingly amended its 2001 contract with MCI (R. 221). 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. 86 & n.13). The amendment was approved by the State Comptroller on July 25, 2003 (R. 222).

On July 18, 2003, MCI filed proposed tariff revisions with the PSC to amend the rate structure for the Maximum Security

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[2]DOCS has exercised its right to extend the 2001 contract from April 1, 2006 to March 31, 2007. In light of proposed legislation that would reduce or eliminate the commissions, the contract has been modified to provide a formula for determining the commission percentage in the event rates are reduced during the contract period. This contract extension was approved by the State Comptroller on April 27, 2006.

Plan. The amended rates 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 flat $0.16 per minute rate without regard to time of day and distance (R. 69, 87).

E. The PSC's October 2003 order

By order dated October 30, 2003, the PSC found that the "jurisdictional portion" of MCI's proposed rate change (i.e., the portion of the rate retained by MCI) was "just and reasonable" (R. 87). However, the PSC concluded that it lacked jurisdiction to review the portion of the rate attributable to DOCS's commission (R. 88). In its view, DOCS was not providing telephone service and was "not a telephone corporation pursuant to the Public Service Law" (R. 88). Rather, MCI was providing telephone service to DOCS pursuant to contract, and the 57.5% commission was not retained by MCI, but received by DOCS as a requirement of the contract (R. 88).

The PSC directed MCI to file new tariffs identifying the bifurcation of the total rate as a jurisdictional rate and DOCS's commission (R. 89). This new tariff, the PSC explained, would serve to indicate that the PSC had reviewed and approved the jurisdictional portion of the rate, and would notify end-users about DOCS's commission (R. 89).

The PSC further explained that bifurcating the rate reflected its determination that it lacked jurisdiction over DOCS, "a governmental agency, or the manner in which it enters into contracts with providers" (R. 89). The contract between DOCS and MCI, the PSC reasoned, was competitively bid and contained privately negotiated terms and conditions, a material term of which was the commission payable to DOCS by MCI (R. 89).

In accordance with the PSC's October 2003 order, MCI filed a revised tariff reflecting the jurisdictional and nonjurisdictional portions of the rate (R. 154). In January 2005, the PSC denied petitions for rehearing of the October 2003 order, reaffirming that it lacked jurisdiction over the DOCS commission and that the jurisdictional portion of the rate was just and reasonable. See 2005 N.Y. PUC LEXIS 20 (January 14, 2005) ("January 2005 PSC order").

F. This proceeding

On February 26, 2004, petitioners commenced this proceeding in Supreme Court, Albany County, naming as respondents DOCS and MCI, but not the PSC (R. 27). While labeled a class action (R. 31, 53-55), the case was never certified as such under C.P.L.R. 902. In seven separate causes of action, the petition challenges DOCS's imposition of the commission, claiming that DOCS has imposed an unauthorized tax, denied them their state constitutional rights to due process, freedom of speech and

association and equal protection, and violated General Business Law § 349 (R. 55-64). Before answering, DOCS and MCI moved to dismiss the petition as time-barred and for failure to state a cause of action (R. 156, 196-197).

DECISIONS OF THE COURTS BELOW

Supreme Court (Ceresia, J.) granted respondents' motions to dismiss (R. 24). The Appellate Division unanimously affirmed, holding that petitioners' constitutional claims were cognizable in an article 78 proceeding and time-barred, and that the timely claims, which seek enforcement of the PSC's October 2003 order and an accounting, failed to state a cause of action. The General Business Law § 349 claim, the court held, was time-barred and, in any event, failed to state a cause of action (R. 441).

TIME-LINE SUMMARY OF THE RELEVANT EVENTS

March 30, 1996	To implement the 1996 contract, MCI files tariff with PSC as a special pricing arrangement (R. 44)
April 1, 1996	1996 contract, which includes 60% commission provision, becomes effective (R. 42)
April 1996	Petitioner Walton first pays for collect calls (R. 38)
1997	Petitioner Austin first pays for collect calls (R. 38)
Oct. 29, 1998	MCI files tariff with PSC, which re-introduces its rate plan as a maximum security rate plan (R. 44)
Nov. 1998	Petitioner N.Y.S. Defenders Association first pays for collect calls (R. 39)

Dec. 16, 1998	PSC approves the rates as a maximum security plan. 1998 N.Y. PUC LEXIS 693
Nov. 1999	Harris first pays for collect calls (R. 38)
April 1, 2001	2001 contract, which lowers commission to 57.5% commission but continues the same rate, becomes effective (R. 46, 87, 233-34, 271)
May 2003	2001 contract amended to change the rates so that they do not vary based on time of day and distance; no change in commissions (R. 86, 221)
July 18, 2003	MCI files proposed tariff revisions with PSC to amend rate structure (R. 68)
July 25, 2003	State Comptroller approves 2003 contract amendment (R. 222)
Oct. 30, 2003	PSC finds that jurisdictional portion of rate is just and reasonable and that it lacks jurisdiction to review commission portion of rate, and directs MCI to file new tariffs identifying bifurcated rate (R. 87-89)
Nov. 7, 2003	MCI files tariff amendments consistent with the PSC’s order (R. 154)
Feb. 26, 2004	This proceeding commenced (R. 27)

ARGUMENT

POINT I

ALL BUT TWO OF PETITIONERS' CLAIMS ARE TIME-BARRED

As the courts below correctly concluded, all but two of petitioners' claims are time-barred. The constitutional claims are untimely because they are reviewable in an article 78 proceeding, accrued well beyond the four-month statute of limitations applicable to such proceedings, and are not governed by the continuing violation doctrine. Petitioners' General Business Law § 349 claim, though subject to a three-year statute of limitations, is untimely because this proceeding was commenced more than three years after petitioners were first injured by DOCS's allegedly deceptive acts or practices. The only timely claims are those seeking enforcement of the PSC's October 2003 order and an accounting, but they fail to state a cause of action.

A. Petitioners' constitutional claims are reviewable in an article 78 proceeding and thus subject to the four-month statute of limitations.

As the Appellate Division correctly and unanimously held, petitioners' constitutional claims (counts II through V of the petition) are subject to the four-month limitations period of C.P.L.R. 217(1). Although declaratory judgment actions are subject to a six-year statute of limitations, see C.P.L.R.

§ 213(1), if the underlying dispute could be resolved through an action or proceeding for which a specific, shorter limitations period governs, then the shorter period must be used. See New York City Health & Hosp. Corp. v. McBarnette, 84 N.Y.2d 194, 200-01 (1994). To make that determination, the Court must examine "the substance of [the] action to identify the relationship out of which the claim arises and the relief sought." Solnick v. Whalen, 49 N.Y.2d 224, 229 (1980). If the claim is asserted against a public body or officer and could have been brought in an article 78 proceeding, then the four-month limitation period of C.P.L.R. § 217(1) applies regardless of the form in which the proceeding is brought. See McBarnette, 84 N.Y.2d at 201. The time to bring suit "cannot be extended through the simple expedient of denominating the action one for declaratory relief." Id.

Regardless of how petitioners now seek to couch their constitutional claims, those claims attack provisions of the 1996 and 2001 contracts requiring MCI to pay commissions to DOCS. These provisions simply implement an administrative determination by DOCS, set forth in a Request For Proposal ("RFP"), to provide a collect-call-only system and to require any telephone corporation submitting a bid to agree to pay DOCS commissions (R. 35, 238, 265).

That is a classic administrative determination reviewable in an article 78 proceeding. It is no different from the project labor agreements adopted by the public authorities, the legality of which was reviewed in an article 78 proceeding in Matter of New York State Chapter, Inc., Associated General Contractors of America v. New York State Thruway Authority, 88 N.Y.2d 56, 73 (1996). Accord Matter of Citizens for an Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 409 (1991) (challenge to the Governor's execution of a contract providing for the purchase of the Shoreham nuclear plant); Matter of United Health Services, Inc. v. Cuomo, 180 A.D.2d 172 (3d Dep't 1992) (reviewing legality of an agreement between New York and Pennsylvania concerning regional health planning activities); Matter of New York State Conference of Blue Cross and Blue Shield Plans v. Cooper, 173 A.D.2d 60, 63-64 (3d Dep't 1991) (challenge on separation of powers grounds to Insurance Superintendent's approval of agreement was governed by the four-month statute of limitations); Matter of Konski Engineers, P.C. v. Levitt, 69 A.D.2d 940, 941 (3d Dep't 1979) (Comptroller's refusal to approve a contract is reviewable in an article 78 proceeding).

Thus, petitioners' constitutional claims are all reviewable under C.P.L.R. § 7803(3), which permits judicial review of whether a determination of a public body is "affected by an error of law or was arbitrary and capricious." The claims are not

outside the scope of article 78 review simply because the challenged DOCS determination is quasi-legislative. McBarnette establishes that, unlike true legislative acts, quasi-legislative acts of administrative bodies are cognizable in an article 78 proceeding "to the extent that the challenge fits within the language and accompanying gloss of CPLR 7801 and 7803(3)." 84 N.Y.2d at 204. Where, as here, a litigant challenges a quasi-legislative act by an administrative agency "on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803[3]), a proceeding in the form prescribed by article 78 can be maintained and, as a corollary matter, the four-month Statute of Limitations that ordinarily governs such proceedings is applicable." Id.

Not only do petitioners' constitutional claims fit within C.P.L.R. 7803(3), but the relief they seek can be obtained in Supreme Court only through an article 78 proceeding. Petitioners demand a judgment enjoining "DOCS from enforcing that part of its contract with MCI which requires MCI to collect the portion of the telephone charges attributable to the State's commission or 57.5% of the charge," and directing DOCS to "refund all commissions" received from MCI from April 1, 1996, to the present (R. 28). The demand for commission refunds is properly construed as a request for incidental damages under C.P.L.R. 7806, since

the award of damages would be preceded by a judicial finding that DOCS's determination to collect a commission is affected by error of law or is arbitrary and capricious. See Gross v. Perales, 72 N.Y.2d 231, 236 (1988).

Petitioners' brief offers no explanation of how Supreme Court would have jurisdiction to direct DOCS to refund all commissions received from MCI pursuant to the contracts since April 1996, other than as an award of incidental damages under C.P.L.R. 7806. If, as petitioners urge, their constitutional claims may be reviewed only in a declaratory judgment action, then Supreme Court would lack subject matter jurisdiction to award money damages against DOCS, an arm of the State. See Point IV, infra, pp. 55-58. Thus, an article 78 proceeding is the only vehicle by which petitioners may obtain the relief they seek in Supreme Court. See Ozanam Hall Nursing Home, Inc. v. State of New York, 241 A.D.2d 670, 671 (3d Dep't 1997); Health Services Medical Corp. of Central N.Y., Inc. v. Chassin, 175 Misc. 2d 621, 630 (Sup. Ct. Onondaga Co. 1998), aff'd on opn. below, 259 A.D.2d 1053 (4th Dep't 1999).

This crucial difference in the nature of the relief sought distinguishes this case from Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 815 (2003), upon which petitioners heavily rely (Brief, p. 21). In Saratoga, this Court concluded that an article 78 proceeding was not available to

determine whether the Governor had the authority to enter into an Indian gaming compact without legislative approval, "because article 78 [did] not provide plaintiffs a way of obtaining the relief they [sought]," that is, "a declaration as to the unconstitutionality of the 1993 compact and an injunction against the use of state funds to implement it." 100 N.Y.2d at 815. The closest remedy available under article 78, this Court held, was a writ of prohibition, which would not lie against executive officials. Id. Here, in contrast, mandamus to review (C.P.L.R. 7803[3]), coupled with an award of incidental damages (C.P.L.R. 7806), could have afforded petitioners the relief they seek. Although they style their request as one to enjoin the commission provisions of the contracts, in reality their request is simply one to annul DOCS's administrative determination to collect commissions.

That petitioners now characterize their constitutional claims as challenging the very authority of DOCS to collect commissions from MCI does not change the result. Even if a claim of ultra vires agency action were outside the scope of article 78, petitioners' allegations do not state such a claim. In Supreme Court, petitioners conceded that DOCS had the authority to impose some level of commission. What petitioners challenge instead is the amount of the commission, arguing it was too large, and thus unrelated to the cost of running the collect-

call-only telephone system. Specifically, they acknowledged that "DOCS must finance the telephone system somehow," and they did "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" (Petitioner's memorandum of law, p. 27, n. 18, see DOCS's addendum, A.88). According to petitioners, then, the commission is a tax because it offsets not only the cost of running the telephone system, but also other inmate programs and services (Brief, pp. 36-38), and it denies them free speech, equal protection and due process because it bears no relationship to related regulatory costs (Brief, p. 48). These claims, even if accepted, would not establish that DOCS lacks authority to collect any commission from MCI, but would at most suggest that DOCS set the commissions too high. Thus, they are classic allegations of arbitrary and capricious agency action affected by error of law, reviewable in an article 78 proceeding. See N.Y. State Ass'n of Crim. Def. Lawyers v. Kaye, 96 N.Y.2d 512, 519-20 (2001) (article 78 review of whether fee schedule for capital defense lawyers was too low and arbitrary and capricious).

B. Petitioners' challenge to the commission provisions of the 1996 and 2001 contracts accrued when those contracts took effect, or, alternatively, in December 1998, when the PSC first approved the rates containing the subject commissions.

Petitioners' constitutional claims accrued well after the expiration of the four-month limitations period applicable to article 78 proceedings. An article 78 proceeding must be commenced "within four months after the determination to be reviewed becomes final and binding upon the petitioner." C.P.L.R. § 217(1). In order for an agency determination to be final and binding, "the agency must have arrived at a definite position on the issue inflicting actual injury, and the injury may not be significantly ameliorated either by further administrative action or steps taken by the complaining party." Matter of Comptroller of the City of New York v. Mayor of the City of New York, 7 N.Y.3d 256, 262 (2006).

Where, as here, the challenged determination is a quasi-legislative action of an administrative agency -- which has an impact far beyond the immediate parties at the administrative stage -- the proper accrual date for statute of limitations purposes is the effective date of the determination, not when each potential petitioner receives actual notice of the determination or its application to them. For example, in Matter of Owners Committee on Electric Rates, Inc. v. Public Service Commission, 76 N.Y.2d 779, 780 (1990), rev'g on dissenting op.

below, 150 A.D.2d 45, 53 (3d Dep't 1989) (Levine, J., dissenting), this Court held that the limitations period for challenging a PSC determination ran from its effective date, not from when each individual petitioner received actual notice. Accord Matter of Federation of Mental Health Centers, Inc. v. DeBuono, 275 A.D.2d 557, 560 (3d Dep't 2000); New York State Rehabilitation Assoc. v. Office of Mental Retardation and Development Disabilities, 237 A.D.2d 718, 721 (3d Dep't 1997). As explained by Justice Levine in his dissenting opinion adopted by this Court in Owners Committee, where a quasi-legislative determination is in issue, keying the commencement of the statute of limitations to the receipt of actual notice by individual petitioners would "effectively destroy the statutory policy behind the short limitations period that governmental operations should not be held hostage to stale claims." 150 A.D.2d at 53.

DOCS's determinations to use a collect-call-only system and to require a minimum commission are quasi-legislative, for they affect the entire segment of the general public that accepts collect calls from inmates. Thus, they became final and binding when the 1996 and 2001 contracts became effective, on April 1, 1996, and April 1, 2001, respectively. This proceeding, commenced on February 26, 2004, is therefore untimely. Furthermore, it is untimely even if the limitations period is measured from August 1, 2001, the date the State Comptroller

approved the 2001 contract (R. 240), or from July 25, 2003, when he approved the 2003 amendment to the 2001 contract (R. 222).

Indeed, the petition is untimely with respect to these claims even if they accrued when each individual petitioner was first aggrieved by the contracts. According to the petition, MCI has billed petitioner Walton for collect calls from DOCS inmates since April 1, 1996; petitioner Austin "for the last seven years"; petitioner Harris from November 1999 (for calls from her incarcerated cousin) and from November 2001 (for calls from an incarcerated friend); and the New York State Defenders Association since November 1998 (R. 38-39). While the petition does not specify when the Office of the Appellate Defender was first billed by MCI for collect calls from inmates, surely that office received such bills more than four months before the commencement of this proceeding (R. 39), and petitioners have never argued otherwise. Each petitioner therefore was first made aware of the fees charged for collect inmate phone calls many years before the commencement of this proceeding.

Finally, the constitutional claims are untimely even if the accrual date is viewed as the date the PSC approved the rates reflecting the payment of DOCS's commission. The PSC first approved those rates on December 17, 1998, when it approved MCI's Maximum Security Plan as a unique service. See PSC December 1998 order, 1998 N.Y. PUC LEXIS 693.

C. The PSC's October 2003 order did not start a new accrual date.

While petitioners maintain that their constitutional claims did not accrue until October 30, 2003, when the PSC effectively approved the modified rate structure (Brief, p. 27), this argument fails to withstand scrutiny. DOCS's determination to collect commissions was final and binding long before the 2003 PSC proceedings even began. By then, the 1996 contract had expired and the 2001 contract had been in effect for over two years, with DOCS collecting commissions during all that time.

The 2003 PSC proceedings could not have triggered a new accrual date for two reasons. First, petitioners do not challenge the only change approved by the PSC in October 2003. Specifically, the PSC's October 2003 order only reviewed and approved a change in the rate structure of MCI's Maximum Security Rate Plan so that the rates no longer varied for local and long distance calling (R. 69, 87). Petitioners, however, have sought neither to annul the PSC's October 2003 order nor to challenge the revised rate structure approved therein. Indeed, they have not even named the PSC as a respondent in this proceeding, and instead purport to seek enforcement of that 2003 order. Rather, all of petitioners' claims are directed at the DOCS commission requirement embodied in the 1996 and 2001 contracts, the reasonableness and legality of which the PSC declined to address in October 2003 for lack of jurisdiction. Thus, the fact that

the PSC issued a new order at that time cannot be found to have triggered a new accrual date for statute of limitations purposes.

Second, the 2003 PSC proceedings did not provide a vehicle to challenge the DOCS commission, as the PSC itself found. To render the challenged action non-final, there must have been available to the complaining party administrative action or steps that could prevent or ameliorate the injury inflicted. See Matter of Comptroller of the City of New York, 7 N.Y.3d at 262; Matter of Best Payphones, Inc. v. Department of Info. Tech. and Telecom., 5 N.Y.3d 30, 34 (2005). A litigant's pursuit of remedies outside the statutory or regulatory scheme does not toll the limitations period or render non-final an agency determination that inflicts concrete injury. See Beth Israel Medical Center v. Department of Health, 18 A.D.3d 367 (1st Dep't 2005) (filing of administrative appeal did not toll the statute of limitations because it raised issues not reviewable in such an appeal), lv. denied, 6 N.Y.3d 704 (2006); Lyden Nursing Home v. DeBuono, 287 A.D.2d 490 (2d Dep't 2001) (same), lv. denied, 98 N.Y.2d 602 (2002).

By October 2003, no administrative remedy remained available to challenge the commission provisions of the 1996 and 2001 contracts, which had been in effect for many years before the 2003 PSC proceedings. In light of the PSC's determination that it lacked jurisdiction over the DOCS commission, the 2003 PSC

proceedings did not provide an "available" administrative remedy by which petitioners could have ameliorated or prevented the injury of which they complain -- payment of rates that include the DOCS commission. Moreover, the PSC's finding that it lacked jurisdiction must be accepted as correct for purposes of this litigation, because petitioners have failed to challenge that ruling or even to name the PSC as a respondent here.

While petitioners may have believed that the PSC had jurisdiction to disapprove or lower the commission, their mistaken belief about the PSC's authority cannot render DOCS's final determination any less final. For that matter, petitioners' belief was not objectively reasonable. The PSC's January 2005 order denying rehearing addressed and refuted the assertion that it had jurisdiction over the DOCS commission. See 2005 N.Y. PUC LEXIS 20 at *15-*22; see also Powell v. Colorado Public Utilities Commission, 956 P.2d 608 (Col. 1998) (Colorado Public Utilities Commission lacked jurisdiction to review prison commissions).

Finally, even assuming that the PSC's October 2003 order started a new accrual date, petitioners' claims would still be time-barred in large part. Any challenge to the rates charged pursuant to the 1996 and 2001 contracts in effect before the October 2003 rate change, as well as any claims for refund of

commission payments received by DOCS before the PSC's October 2003 order, would still all be untimely.

D. The continuing violation doctrine does not apply here.

Perhaps recognizing the weakness of their position, petitioners' brief begins with the argument that their claims are nonetheless timely under the continuing violation doctrine. Both courts below properly rejected that argument, however. While petitioners "characterize the damages sustained after every completed telephone call as continuing unlawful acts, . . . they are more appropriately viewed as the continuing effects of the [1996 and 2001] contract[s]." Bullard, 307 A.D.2d at 678. Notably, Judge Read rejected the same continuing violation theory in Smith v. State of New York (Ct. Claims July 8, 2002, Claim No. 101720) (see DOCS's addendum, A.4), another case challenging DOCS's inmate telephone system, for the same reasons expressed by the court below.

These decisions properly recognize the strong public policy concerns weighing against applying the continuing violation doctrine here. As a general matter, in determining whether to view a litigant's claim as asserting a completed wrong with ongoing effects, or as ongoing wrongs that create separate causes of action, this Court balances the competing "policy considerations at the heart of our statute of limitations jurisprudence." See Covington v. Walker, 3 N.Y.3d 287, 293

(2004), cert. denied, 545 U.S. 1131 (2005). Balanced against the injured person's stake in having a reasonable opportunity to assert a claim are, among other things, the interests of repose, preventing surprise and prejudice to the defendant through the revival of stale claims, judicial economy, and averting possible fraud. See Bianco v. American Telephone and Telegraph Co., 90 N.Y.2d 757, 773-74 (1997).

Suits against the government, especially those demanding substantial monetary relief, implicate the "strong public policy" that "the operation of government agencies should not be unnecessarily clouded by potential litigation." Matter of Best Payphones, Inc., 5 N.Y.3d at 34. This Court has been mindful of "the prejudice to the State and local governments that occurs when challenges to State financing plans are delayed." Schulz v. State of New York, 81 N.Y.2d 336, 349 (1993). Application here of the continuing violation doctrine, with its "potential for endless triggering of the statute of limitations," Firth v. State of New York, 98 N.Y.2d 365, 370 (2002), would frustrate the policy concerns underlying the short statute of limitations for suits against public bodies like DOCS. It would be difficult to overstate the disruptive effect on DOCS and the State of a judgment annulling commission provisions in effect for over ten years, for it could require DOCS to refund all commissions

collected since 1996, a sum petitioners at one time estimated to exceed $150 million dollars (R. 32).

Importantly, one of the primary justifications for the continuing violations doctrine –- affording the injured person "a reasonable opportunity to assert a claim," Covington, 3 N.Y.3d at 293 -- is not implicated here. Petitioners admit that they have been receiving bills for inmate collect calls for at least five and as many as ten years (R. 38-39), and thus they had an ample opportunity to bring suit within the limitations period. Literally thousands of individuals could have challenged the DOCS commission before the statute of limitations expired.

While there may well be other potential litigants who, on this reasoning, will have to wait for a new contract to take effect in order to challenge the commission, there is no injustice in requiring them to do so. The same was true in Owner's Committee, 76 N.Y.2d 779, where this Court's holding that the statute of limitations ran from the effective date of the PSC's determination would bar suits by new rate payors who moved to the State after the limitations period had expired. This is simply the practical consequence of enforcing a statute of limitations, which gives repose to the defendant.

The authorities cited by petitioners, including Matter of Cahill v. Public Serv. Comm'n, 113 A.D.2d 603 (3d Dep't), aff'd, 69 N.Y.2d 265 (1986), cert. denied, 484 U.S. 829 (1987), do not

dictate a contrary result. The petitioner in Cahill, who sought to challenge as unconstitutional a PSC policy first adopted in 1970, brought suit within four months of the PSC's June 1984 rate order that specifically reaffirmed that policy. Cahill, 69 N.Y.2d at 268-69. Because the proceeding timely challenged a specific application of a previously adopted policy, the Appellate Division's statement in Cahill that petitioner sought to address a continuing violation is dictum. This Court, in affirming the Appellate Division's order, concluded that the issue of timeliness was not properly before it on appeal. 69 N.Y.2d at 274.

Even if the continuing violation doctrine applies here, it is not without limits. As petitioners acknowledge (Brief, pp. 11, 13), claims occurring outside the limitations period would be time-barred. Thus, any claims for refunds of commissions paid more than four months before the commencement of this proceeding should be foreclosed.

E. Petitioners' General Business Law § 349 claim is also time-barred.

Though petitioners' claim under General Business Law § 349 is most easily disposed of on the merits, see infra at 53-55, it too is untimely even though it is subject to a three-year statute of limitations. See Gaidon v. Guardian Life Insurance Company of America, 96 N.Y.2d 201, 210 (2001). "[A]ccrual of a section 349(h) private right of action first occurs when [petitioners

have] been injured by a deceptive act or practice violating section 349." Id. Petitioners allege that DOCS violated section 349 by (1) failing to disclose to the public that it was receiving a commission of up to 60% of the revenue generated from collect calls for the period of April 1, 1996, through October 30, 2003, (2) representing falsely that the single provider/collect-call-only system was necessary to meet security needs, and (3) "profiting" from the commissions (R. 62-63 ¶ 115). With regard to DOCS's alleged failure to disclose the receipt of the commission and its profits therefrom, petitioners were first injured when they began paying telephone bills that reflected the commissions. As discussed, that occurred sometime between April 1, 1996 and the end of 1999, depending on the individual petitioner (R. 48-52). The date of discovery rule is not available to extend the limitations period of a section 349 claim. See Wender v. Gilberg Agency, 276 A.D.2d 311, 312 (1st Dep't 2000). Likewise, the alleged misrepresentation of the security needs of the single provider/collect-call-only system first injured petitioners in April 1996, when the system was first implemented. Because this proceeding was commenced on February 26, 2004, more than three years after both the implementation of the telephone system and the date petitioners began paying for collect calls, the General Business Law § 349 claim is time-barred.

POINT II

THE FILED RATE DOCTRINE BARS PETITIONERS' CLAIMS

These time-barred claims also run afoul of the "filed rate doctrine." Although the Third Department did not reach that issue here, it did in Bullard, where it correctly found it dispositive. There, the court affirmed the dismissal of the Court of Claims action challenging the 1996 contract, squarely holding that the action -- which raised claims identical to those 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. Indeed, the Bullard court explained that the available remedy for the claimants in that case was an article 78 proceeding challenging the PSC's determination approving the rates. Id. (citing Matter of Cahill v. Public Serv. Comm'n, supra). Despite this clear guidance, petitioners declined either to seek annulment of the PSC's December 1998 or October 2003 orders approving the rates charged pursuant to the 1996 and 2001 contracts or even to name the PSC as a party in this proceeding.

Moreover, the Bullard court's conclusion was correct. The filed rate doctrine, often invoked with the overlapping doctrine of primary jurisdiction, "holds that any 'filed rate'-- that is, one approved by the governing regulatory agency -- is per se reasonable and unassailable in judicial proceedings brought by

ratepayers." Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (1994). Thus,

> [i]t has repeatedly been held 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 approved 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 arises 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 include commissions to the State in accordance with the 1996 and 2001 contracts. Once filed, the tariffs attained the status of binding law and became the legal rate that the service provider was entitled -- indeed, legally mandated -- to charge. See Marcus v. AT&T Corp., 138 F.3d 46, 56 (2d Cir. 1998) ("federal tariffs are the law") (internal quotation omitted); 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 attempt to disguise their claim, they clearly "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, a claim that is thus barred by the filed rate doctrine. As the Porr Court explained,

> any 'harm' allegedly suffered by the [petitioners] is illusory . . . , because [they have] merely paid the filed tariff rate that [they were] required to pay. [A]ny subscriber who pays the filed rate has suffered no legally cognizable injury . . . . In the absence of injury, the [claimants] cannot sue for damages, nor may [they] seek equitable redress, because there is nothing to redress.

230 A.D.2d at 576 (internal quotations omitted); see also City of New York v. Aetna Cas. & Sur. Co., 264 A.D.2d 304 (1st Dep't 1999) (same).

The fact that the PSC's October 2003 order did not review the reasonableness of the commissions themselves does not make the filed rate doctrine any less applicable. First, the PSC's December 1998 order did approve the total rate filed by MCI, including the commissions. See 1998 PUC LEXIS 693. Thus, at the very least, any challenge to rates charged before the PSC's October 2003 determination must be dismissed. More importantly, however, application of the filed rate doctrine does not depend on whether the PSC's October 2003 order reviewed the commission component of the rates. What matters is that the PSC specifically authorized MCI to charge the bifurcated rate, and that rate includes the commission (R. 89, 154). Consequently, petitioners' alleged injury arises from a rate duly 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, 54 P.3d 71, 75 (Sup. Ct. N. Mex. 2002), as in this

case, the plaintiffs challenged the 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.

Critically, granting the relief petitioners seek would require the Court to nullify the rate on file with and approved by the PSC. Petitioners' proper remedy thus was to challenge the PSC's October 2003 order, not to seek its "enforcement." As then-Presiding Judge Read stated in dismissing a nearly identical challenge to DOCS's inmate telephone system, to the extent that 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, 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 DOCS's addendum, A. 5). Any request for refunds must be decided in the first instance by the PSC. See Matter of KLCR Land Corporation v. Public Service

Commission, 20 A.D.3d 849, 851 (3d Dep't 2005); Independent Payphone Association of New York v. Public Service Commission, 5 A.D.3d 960, 963-64 (3d Dep't), lv. denied, 3 N.Y.3d 607 (2004).

POINT III

THE PETITION FAILS TO STATE A CAUSE OF ACTION

In any event, Supreme Court's judgment can be affirmed on the alternative ground, raised below, that the petition fails to state a cause of action. The petition purports to state seven distinct causes of action, styled counts I through VII. With respect to the first, which seeks "enforcement" of the PSC's October 2003 order, to avoid needless repetition, DOCS adopts the arguments set forth in MCI's brief.

A. The contractual commission is not an unauthorized tax and does not violate petitioners' substantive due process rights.

As demonstrated below, the commissions are not taxes imposed on recipients of collect calls, but rather are rent and access fees paid by MCI to DOCS for the right to operate the prison telephone system. But to the extent that legislative authorization for the commissions was required, DOCS has obtained it.

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

Contrary to petitioners' characterizations, the commissions are not a "tax." Rather, they are a legitimate business expense

incurred by telephone companies for the privilege of accessing the prisons and providing telephone service. As the PSC observed in its October 2003 order, the DOCS commission is no different from the commissions paid by pay-phone telephone companies to premises owners (R. 89 n. 20). While payphones are now largely deregulated, see Public Service Law § 90(3), before such deregulation, the PSC recognized that it had no authority to limit the commissions charged by governmental premises owners, which are a matter of contractual agreement with the payphone companies, or to bar them from entering into exclusive service arrangements. 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).

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," i.e., "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 a legitimate business expense in the prison context. The DOCS commission is 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.

Thus, under pertinent regulatory law, the commission payments are an expense incurred by MCI for access to the prisons and the privilege of installing, maintaining and operating the telephone system. They are essentially access fees or rent paid by the telephone company. That MCI passes these expenses on to recipients of collect calls does not transform them into taxes. If, for example, MCI rented office space from a government entity, and factored its rental costs into the calculation of the tariffs, the monthly rental payments thus passed on to MCI's customers would not constitute taxes on those customers. Neither

the PSC nor the FCC reviews whether premises owners charge too much rent; rent is simply a matter of contractual negotiation between the parties.

Further distinguishing the commissions from taxes is the absence of any legal liability of petitioners to pay the commissions to the State. If the commissions were taxes on petitioners, then recipients of collect calls who failed to pay their telephone bills to MCI would be liable to the State for the unpaid commissions and subject to 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 taxes). Here, while MCI must pay commissions to DOCS on all completed collect calls regardless of whether it receives payment for them (R. 264), the collect call recipients are not liable to the State for non-payment of the commission component of the telephone rates. Their only liability is to MCI pursuant to their service contracts. Thus, the commissions are not taxes imposed on recipients of collect calls.

Notably, in Valdez, the Supreme Court of New Mexico addressed this issue and held that, in collecting prison telephone commissions, the prison was not imposing an illegal tax. 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). It also noted that the commissions could not be viewed as a tax because plaintiffs had "voluntarily accepted collect call services" and thus the payment for such voluntary services could not be considered a mandatory tax. Id.

2. Any required legislative approval was obtained here.

Because commissions are not taxes, DOCS was not required to obtain specific legislative authority to collect them contractually from MCI. But to the extent that legislative approval was required, it was provided here.

First, the telephone rates paid by petitioners incorporate the commissions payable to DOCS pursuant to the 1996 and 2001 contracts, and these rates were approved by the PSC, which is "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 tariff identifying the DOCS commission as part of the approved rate (R. 89), thus making those rates the only ones that MCI was legally authorized to charge. See Public Service Law § 92(2)(d).

Because rates containing commissions have been approved by the very body created by the Legislature to exercise exclusive jurisdiction over such matters, the commissions are not an unauthorized tax. See Arsberry v. State of Illinois, 244 F.3d

558, 565 (7th Cir.), cert. denied, 534 U.S. 1062 (2001). In Arsberry, the Court rejected the claim that prison telephone commissions constitute an illegal tax, holding that they are instead 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 has approved the commissions by annually appropriating them to DOCS's Family Benefit Fund. Each year since 1996, DOCS has deposited in the State's general fund between $15 and $24 million in commission revenues. DOCS's budget proposals have 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 DOCS's addendum, A.66). Additionally, the DOCS Commissioner has testified before legislative committees about the contracts and 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. 16, 2006, at 131-36 (see DOCS's addendum, A.7-A.28).

The State Comptroller has also issued reports to the Legislature about the commissions. In July 2003, the State Comptroller issued an audit report regarding DOCS's administration of the 1996 contract. He found that all of the commission revenue (totaling $109 million) was deposited, as required, in a designated state account (R. 99).[3]

The commissions have also been the subject of considerable legislative debate. During the life of the contracts, the Legislature has considered numerous bills proposing to eliminate or modify both the commissions and the collect-call-only system. In 2005 and 2006, for instance, the Legislature considered, but failed to pass, several bills relating to telephone rates for calls from correctional facilities. See, e.g., A4181 (2005 NY Bill Tracking A.B. 4188); A7231-A; A7231-B; A7231-C; A7231-D (2005 NY Bill Tracking 7231); S5299-A; S5299-B; S5299-C; S5299-D (2005 NY Bill Tracking 5299) (see DOCS's addendum, A.29-A.62).[4]

Thus, the Legislature knows that DOCS collects commissions, it knows how much DOCS collects each year, and it knows DOCS uses the commissions to pay not only for the telephone system itself, but for various inmate programs as well. Moreover, fully aware of these facts and despite vigorous debate on bills proposing to

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[3]A copy of this report is found in DOCS's addendum, A.69-86.

[4]The most recent version of these bills (A7231-D; S5299-D) passed the Assembly in June 2006 and has been referred to the Senate Committee on Rules.

do away with the commissions, the Legislature has each year since 1996 appropriated the commissions to DOCS for expenditure on Family Benefit Fund programs. See, e.g., L. 2003, ch. 50, pp. 26-27 (reproduced at R. 160-161). That is all the approval the law requires. If the Legislature regarded the commissions as an unauthorized tax, or improper in any way, it would not have legitimized them by expressly authorizing DOCS to spend the proceeds on inmate programs.

The commissions are lawful even if they are viewed not as a tax but as an indirect governmental charge on recipients of collect calls. On point is Benson v. State of Maryland, 389 Md. 615, 640, 887 A.2d 525, 539 (2005). There, Maryland's highest court held that a statute authorizing the use of telephone commissions to finance the Inmate Welfare Fund was sufficient legislative consent -- even though the Legislature had not set or specifically approved the amount of the commission payments. Such general authorization, the court held, did not violate the separation of powers "because there exists a legislative check on Executive agency-established fee schedule. The Legislature is aware of the fee schedule and may, if it chooses, change it at any time." 389 Md. at 646; 887 A.2d at 543.

3. Petitioners' failure to pay the commissions under protest precludes their claim for refunds.

Even if the commissions are a tax, petitioners' demand for refunds fails to state a claim. An essential element of a claim for the refund of an 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). The petitioners do not allege that they paid any of their telephone bills under protest. Accordingly, any claim for the refund of commissions paid before the commencement of this proceeding must be dismissed. See Community Health Plan v. Burckard, 3 A.D.3d 724, 725 (3d Dep't 2004).

B. Petitioners' free speech rights are not violated.

DOCS has not impaired petitioners' free speech rights under article I, § 8, of the New York Constitution by contracting with MCI for collect call services at rates that provide it with a commission. Indeed, DOCS's telephone system simply does not implicate petitioners' free speech rights at all.

New York's free speech provision generally is interpreted no more broadly that its federal counterpart. See Courtroom Television Network LLC v. State of New York, 5 N.Y.3d 222, 231 (2005); cf. O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 530-32 (1988) (Kaye, J., concurring) (noting breadth of State's

protections for freedom of the press). Nothing in DOCS's telephone system abridges those rights, because nothing in the State's free speech provision guarantees inmates or their families the right to communicate by telephone, let alone by the least expensive means possible.

In Arsberry v. State of Illinois, 244 F.3d at 564, the Seventh Circuit rejected a similar First Amendment claim by inmates and their families. Judge Posner explained that it "is true that communications the content of which is protected by the First Amendment are often made over the phone, but no one before these plaintiffs supposed the telephone excise tax an infringement of free speech." Likewise, in Chapdelaine v. Keller, 1998 U.S. Dist. LEXIS 23017 at *28 (S.D.N.Y. 1998), the court held that while "the current system charges more than it would cost to call collect or dial direct, a higher pricing scheme does not violate the constitution [and] the court cannot fathom how higher telephone charges can amount to a constitutional claim." Even in a case in which a prison regulation restricted an inmate's right of access to newspapers, and thus implicated the First Amendment, "'the loss of 'cost advantages does not fundamentally implicate free speech values.'" Matter of Montgomery v. Coughlin, 194 A.D.2d 264, 267 (3d Dep't 1993) (quoting Bell v. Wolfish, 441 U.S. 520, 552 (1979)), appeal dismissed, 83 N.Y.2d 905 (1994).

To be sure, inmates have a qualified right to communicate with the outside world, and so the State must provide reasonable opportunities for them to do so. See Overton v. Bazzetta, 539 U.S. 126, 135 (2003); Morgan v. La Vallee, 526 F.2d 221, 225 (2d Cir. 1975). But the New York Constitution does not require the State to 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). Inmates have no more right to telephone service than they do to e-mail or text-message their friends and families.

While the Ninth Circuit disagrees with this position, even that court takes the view that inmates have no right to "any specific rate" for telephone calls, and can state a First Amendment claim only by alleging that the telephone rates are so exorbitant as to deny them telephone access altogether. See Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000). Similarly, the court in Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005), held that the plaintiffs' challenge to the 60% commission DOCS received under the 1996 contract stated a First Amendment claim, because plaintiffs could prevail by demonstrating "'that the costs are so exorbitant that they are unable to communicate.'" Id. at *26 (quoting McGuire v. Ameritech Servs, Inc., 253 F. Supp. 988, 1002 (S.D. Ohio 2003)).

But Johnson and Byrd, which are not binding on this Court in interpreting the parallel provision of the State Constitution, see Brown v. State, 9 A.D.3d 23, 28 (3d Dep't 2004), are nonetheless flawed and should not be followed. They rest on the false assumption that inmates have a constitutional right to telephone service, as opposed merely to the more general right to communicate with the outside world. See Arsberry, 244 F.3d at 565; United States v. Footman, 215 F.3d at 155.

Even accepting the reasoning of Johnson and Byrd, the detailed allegations of the petition here, accepted as true, preclude petitioners from establishing that they are "unable to communicate" with their incarcerated relatives and friends or have been denied telephone access altogether. Petitioner Walton alleges that she visits 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. 48), she accepted a total of seven collect calls from her son and nephew in a given month (R. 49). Walton does not allege what efforts she makes to correspond with her son and nephew. While petitioner Austin alleges that the high cost of the collect calls prevents her from speaking by phone with her husband "as much as they both need" (R. 50), she readily admits that she and her incarcerated husband "write letters to each other frequently, and she visits him when she can" (R. 49). While petitioner Harris alleges 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. 50), she is silent as to her efforts to write to her cousin and friend.

These allegations simply do not establish that the DOCS commission prevents the petitioners from communicating at all with their friends and relatives in prison. To the contrary, they highlight the alternative means of communication that DOCS makes 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 provide an ample opportunity for inmates to communicate with the outside world, which is all the Constitution requires. See Overton v. Bazzetta, 539 U.S. at 135 (in upholding visitation regulations, the 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"). 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. 49) 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 will restrict an individual's ability to make calls. Petitioners do not even suggest what telephone rate is constitutionally permissible, or how many calls per month an inmate's relative should be able to afford to make. Simply put, there is no constitutional right to low cost telephone service for inmates and their families. 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").

While the petition alleges that the commissions impermissibly burden the legal work of the Office of the Appellate Defender and the New York State Defenders' Association (R. 51-52), petitioners have abandoned any such claim by failing to raise it in their brief. But these allegations do not state a free speech claim in any event. The petition alleges that because these organizations have "a very limited budget," the commission portion of the rate "limits the work" that these organizations can perform (R. 51-52). But all budgets are limited, and any telephone rate greater than zero will limit the ability of a legal service to provide legal services. Although the Appellate Defender alleges that "administrative errors" by MCI have sometimes caused it to block calls for varying lengths

of time (R. 51), such administrative errors have nothing to do with the size of the commission.

While not mentioned by petitioners, DOCS provides inmates broad access to their attorneys, through both visitation rights and the privileged correspondence program. DOCS provides inmates a weekly free postage allowance equivalent to five domestic first class one-ounce letters to cover postage for outgoing privileged correspondence. 7 N.Y.C.R.R. § 721.3(a)(3)(ii). Thus, inmates are afforded a reasonable opportunity to communicate with their attorneys.

Finally, even if the commission requirement implicates free speech rights, the requirement is 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 has occurred here. Far from denying access to telephone service, the commissions have done just the opposite. DOCS's telephone program handles over 500,000 completed calls a month, or 6 million calls per year (R. 99). And commission revenues give DOCS a strong incentive to provide inmates with telephone service by enabling DOCS to fund not only the Inmate Call Home Program, but also a variety of programs that directly benefit inmates and their families. These programs, some of which are optional, undeniably serve legitimate penological goals. Without the commissions as the funding source, it is doubtful that many of these programs could exist.

C. The contractual commission provision does 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 effect a taking of their property without just compensation in violation of article VII § 1(a) of the New York State Constitution. No taking occurs because the "prospective recipient of a collect call is in complete control over whether she chooses 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 has the authority to collect the commission in the first place, it is absurd to assert that the State must then turn around and give the money back as "just compensation."

D. Petitioners have not stated an equal protection claim.

Petitioners' equal protection claim –- that because the commissions are imposed only on inmate collect calls, they pay higher rates for collect calls from inmates than other telephone service customers who are the recipients of non-inmate calls -- fails at the threshold. 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). The Equal Protection Clause, however, does not prohibit dissimilar treatment of persons who are not similarly situated. Matter of Jarrett, 230 A.D.2d 513, 525 (4th Dep't 1997); see Matter of McDermott v. Forsythe, 188 A.D.2d 173, 177 (3d Dep't 1993). 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, who have brought this case because they accept collect calls from inmates, are not similarly situated to recipients of non-inmate calls. The calls at issue here are initiated by inmates from the confines of a correctional facility, and thus "the recipients are necessarily constrained by whatever security measures are appropriate to place on the inmates themselves," and "[i]f security precautions affect the telephone services that are available to inmates, this will inevitably impact the inmate call recipients." Daleure v. Commonwealth of Kentucky, 119 F. Supp. 2d 683, 691 (W.D. Ky. 2000), appeal dismissed, 269 F.3d 540 (6th Cir. 2001). Indeed, in approving the rates, the PSC noted this obvious difference, explaining that MCI's "[p]rovision of service to [DOCS] should be considered a unique service, with costs that would not be incurred in the provision of standard alternate operator services." See 1998 N.Y. PUC LEXIS 693 at *4. "Because the recipients of inmate calls are not similarly situated with the recipients of non-inmate calls, Plaintiffs would have to allege that they were discriminated against as compared to other recipients of inmate calls to state a supportable claim. They have not done so." Daleure, 119 F. Supp. 2d at 691; see also Glimore v. County of Douglas, 406 F.3d 935 (8th Cir. 2005) (rejecting claim that 45% commission paid to county by telephone

company was a tax or levy imposed on friends and relatives in violation of the equal protection clause); Turk v. Plummer, 1994 U.S. Dist. LEXIS 12745, *4 (N.D. Cal. 1994) (inmate failed to state equal protection claim that collect call-only system treated him differently from non-inmates). Accordingly, this claim also fails.

In concluding otherwise, the court in Byrd v. Goord failed to grasp 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 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 inmates' friends and family members who receive collect calls, unlike recipients of non-inmate collect calls, receive 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 enjoy 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 provide a rational basis for any differential treatment.

E. Petitioners do not state a claim against DOCS under General Business Law § 349.

Petitioners also do not state a claim under General Business Law § 349 against DOCS, a state agency performing governmental functions in administering the Inmate Call Home Program. This statute declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," id. at § 349(a), and confers on injured persons a private right of action to "enjoin such unlawful act or practice" or obtain damages. Id. at § 349(h).

"In order to make out a valid section 349 claim, a plaintiff must allege both a deceptive act or practice directed at consumers and that such act or practice resulted in actual injury to a plaintiff." Blue Cross and Blue Shield of New Jersey, Inc. v. Phillip Morris USA Incorp., 3 N.Y.3d 200, 205-06 (2004). Section 349 simply does not apply to actions of a state agency like DOCS performing governmental functions. In Kinkopf v. Triborough Bridge and Tunnel Authority, 6 Misc. 3d 73 (App. Term 2d Dep't 2004), the court dismissed an action under General Business Law § 349 against a public authority to recover alleged overcharges to an E-Z pass account. The public authority, in collecting the tolls for use of its facilities, was engaging in a "governmental function" that "was not a consumer oriented

transaction and therefore not subject to section 349 of the General Business Law." Id.

A similar conclusion is warranted here. As the PSC found in its October 2003 order, DOCS is not engaged in the business of providing telephone service (R. 88). Rather, it is performing a government function in operating its Inmate Call Home Program and collecting the commission to offset the cost of that program and other programs for the benefit of inmates and their families. Indeed, the acts that petitioners allege to be deceptive or misleading acts are quintessentially governmental in nature. Specifically, petitioners allege that DOCS violated section 349 by "failing to disclose the DOCS tax, making false representations regarding purported penological justifications for the tax, and profiting from the illegal tax" (Brief, p. 53). Even if the commissions are an unauthorized tax (a point we do not concede), their collection is indisputably a governmental activity.

In any event, petitioners could not obtain damages from DOCS, a state agency, for an alleged violation of General Business Law § 349, because any such claim is barred by sovereign immunity. This is so because there is absolutely no evidence in the statute or legislative history that the Legislature, in providing a private damages remedy, intended to waive the State's immunity from suit for damages in Supreme Court, let alone

evidence clearly manifesting such intent. Legislative enactments in derogation of the common law, "especially those creating liability where none previously existed, . . . are deemed to abrogate the common law only to the extent required by the clear import of the statutory language." Blue Cross and Blue Shield, 3 N.Y.3d at 206 (internal quote omitted). Waivers of the State's sovereign immunity are "strictly construed" and waivers of immunity by inference are disfavored. Bello v. Roswell Park Inst., 5 N.Y.3d 170, 173 (2005).

F. Petitioners are not entitled to an accounting.

Finally, petitioners are not entitled to the equitable remedy of an accounting because no fiduciary relationship exists between them, as recipients of collect calls from inmates, and DOCS. See Weisman v. Awnair, 3 N.Y.2d 444, 450 (1957); Hydro Investors, Inc. v. Trafalgar Power, 6 A.D.3d 882, 886 (3d Dep't 2004); Bettan v. Geico General Ins. Co., 296 A.D.2d 469 (2d Dep't), lv. denied, 99 N.Y.2d 552 (2002).

POINT IV

IF THESE CLAIMS MAY BE MAINTAINED ONLY IN A DECLARATORY JUDGMENT ACTION, PETITIONERS' REFUND CLAIMS MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

If the Court concludes that petitioners' constitutional claims are not cognizable in an article 78 proceeding, but may be brought only in a declaratory judgment action, then their claims

for refunds of the commissions must be dismissed for lack of subject matter jurisdiction. In that event, the action would be one for money damages against DOCS, an arm of the State, and can be brought only in the Court of Claims. The only relief Supreme Court could award would be a declaratory judgment.

Critically, petitioners nowhere explain how Supreme Court could direct DOCS, a state agency, to refund millions of dollars in commissions, except as an award of incidental damages pursuant to C.P.L.R. 7806. In the Appellate Division, petitioners argued that the essential nature of their claims was a plenary action against DOCS for money had and received, which is subject to a six-year statute of limitations (See Petitioners' Appellate Division Brief, p. 19). But petitioners have now backed away from this assertion, inasmuch as Supreme Court lacks jurisdiction over an action for money had and received against DOCS, an arm of the State.

Although an action for money had and received is available to recover payment of an illegal tax, see Niagra Mohawk Power Corp. v. City School District of the City of Troy, 59 N.Y.2d 262, 267 (1983), such a claim against the State will lie only in the Court of Claims. See Parsa v. State of New York, 64 N.Y.2d 143, 148-49 (1984); Guaranty Trust Co. of New York v. State of New York, 299 N.Y. 295, 300-01 (1949). This is so because an action for money had and received is a contractual claim implied in law.

See Matter of First National City Bank v. City of New York Finance Administration, 36 N.Y.2d 87, 93 (1975). The Legislature has waived the State's sovereign immunity for breach of contract, but has conditioned that waiver by requiring that such claims be brought in the Court of Claims. See Court of Claims Act § 9(2); Alston v. State of New York, 97 N.Y.2d 159, 161-63 (2001); Main Evaluations, Inc. v. State of New York, 296 A.D.2d 852 (4th Dep't 2002). The Court of Claims would have jurisdiction only after a court of competent jurisdiction had found illegal the subject law, regulation or administrative action. See Ouziel v. State, 174 Misc. 2d 900, 906 (Ct. Claims 1997).

Thus, a finding that petitioners' claims are not reviewable in an article 78 proceeding would mean that the only relief available to them here is a declaratory judgment. While the Legislature has authorized the Supreme Court to award damages in an article 78 proceeding against a public body or officer if they are incidental to the primary relief sought, see C.P.L.R. 7806; Gross v. Perales, 72 N.Y.2d 231, 236 (1988), there is no such express grant of authority, or waiver of sovereign immunity from damages, in declaratory actions brought against the State.

The contrary authority is distinguishable. In Weissman v. Evans, 56 N.Y.2d 458, 462 (1982), a judge pay parity case, this Court awarded retroactive monetary relief against the State as "ancillary relief" to the declaratory judgment. However, in

Weissman, the State failed to raise the issues of sovereign immunity or subject matter jurisdiction in its brief (see Appellants' Brief in Weissman, table of contents, included in DOCS's addendum, A.92-A.95), and this Court did not address them. Because these jurisdictional issues were neither briefed nor decided, Weissman does not stand for the proposition that Supreme Court may award damages against the State in a declaratory judgment action. Since its decision in Weissman, this Court has reaffirmed the rule that claims primarily seeking damages from the State, state agencies, or state officials in their official capacities, including claims against the State for money had and received, see Parsa v. State of New York, 64 N.Y.2d at 148-49, must be brought in the Court of Claims, see Morell v. Balasubramanian,
70 N.Y.2d 297, 300 (1987); Cass v. State of New York, 58 N.Y.2d 460, 462 (1983).

CONCLUSION

The Appellate Division's order should be affirmed.

Dated: Albany, New York
November 8, 2006

Respectfully submitted,

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