STATE OF NEW YORK
COUNTY OF ALBANY SUPREME COURT

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

Petitioners, Index No 04-1048

-against-

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

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT DEPARTMENT OF CORRECTIONAL SERVICES' MOTION TO DISMISS THE VERIFIED PETITION AND COMPLAINT

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Preliminary Statement

Petitioners-Plaintiffs (hereinafter "petitioners"), family members of and counsel to New York State correctional inmates, brought this combination Article 78/declaratory judgment proceeding challenging certain commissions paid by respondent-defendant MCI WorldCom Communications, Inc. (hereinafter "MCI") to respondent-defendant New York State Department of Correctional Services (hereinafter "DOCS")[1] with respect to a telephone contract between respondents. The Verified Petition and Complaint (hereinafter "Petition") alleges that the commissions are unlawful and asserts distinct causes of action for enforcement of an order of the Public Service Commission and an accounting, as well as for alleged violations of the power to tax, the guarantees of due process and equal protection, and the rights of free speech and association under the New York State Constitution, and, finally, for violation of the New York General Business Law. Petitioners seek certification of this matter as a class action under New York Civil Practice Law and Rules (hereinafter "CPLR") Article 9 and declaratory, injunctive and monetary relief.

Respondent DOCS now moves pursuant to CPLR sections 3211(a) and 7804(f) for an order dismissing the petition in its entirety. DOCS submits that each of the asserted causes of action fail to state a claim for relief, for a variety of reasons, and are subject to dismissal on that basis. Specifically, the petition should be dismissed because:

1) claims related to the first contract between respondents are moot and inappropriate for declaratory relief;

2) the petition is untimely;

3) the proceeding is barred by the filed rate doctrine;

4) the Public Service Commission and/or Federal Communications Commission have primary jurisdiction of these claims;

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[1] For ease of reference, MCI and DOCS will be referred to collectively as "respondents."

5) the commission is not a tax within the meaning of the New York Constitution and does not violate principles of substantive due process;

6) the commission does not constitute a confiscation of petitioners' property;

7) there is no similarly situated group to petitioners and thus no equal protection claim;

8) the contract and commission are reasonable and have a rational basis;

9) the single-provider system and the respondents' contract are entirely consistent with all requirements for protecting petitioners' speech and association rights;

10) the challenged actions do not implicate General Business Law section 349 and fail to state a claim under that statute in any event; and

11) petitioners are not entitled to equitable relief.

Finally, DOCS submits that class certification is not warranted in this proceeding.

For the reasons set forth below, the petition should be dismissed in its entirety as to DOCS.

Statement of the Case

In order to assist inmates' efforts to communicate with their families and friends, DOCS operates the Inmate Call Home Program. See 7 N.Y.C.R.R. Part 723. Some inmates also use the program as an additional means of contact with their attorneys. As part of the program, DOCS contracts with a long-distance telephone service provider who installs and maintains the system at each of the State's correctional facilities. Currently the contract for these services is held by respondent MCI. Petition, ¶ 5. The current agreement between MCI and DOCS is the second contract between the parties, the first having expired on March 31, 2001, and went into effect on April 1, 2001. Id.[2] As the Appellate Division, Third Department has previously noted in similar litigation: "[t]he contract with WorldCom was the result of a competitive bidding process. Bidders were required to meet extensive security and monitoring requirements, which included the capacity to block, store and record all phone calls." Bullard v. State, 307 A.D.2d 676 (3d Dep't 2003); see also Petition, ¶¶ 11 & 30. The contract provides an exclusive right to MCI to operate station to station collect calls under the program. Petition, ¶¶ 3 & 6.

The contract, of course, has numerous provisions. Specifically at issue here, however, are those provisions of the contract providing for payment of commissions from MCI to DOCS and the type of service to be provided to DOCS by MCI. The current contract requires MCI to pay a commission of 57.5% of the gross annual revenues from operation of the program to DOCS. Petition, ¶ 6. This commission is subsidized in part by a $3.00 surcharge on each collect call made. Id. at ¶ 7. The commission is then used by DOCS to fund the Family Benefit Fund. Id. at ¶ 12. In

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[2] The contract was amended effective June 1, 2003. Though not made a part of the petition, the contract, including the Request for Proposal, is a matter of public record on file with the New York State Comptroller's Office.

accordance with legislative appropriations regarding DOCS' budget that fund provides money for a wide variety of inmate services as well as services for inmate families and visitors. Specifically, it funds infection control and AIDS training and pharmaceuticals, nursery care, family treatment programs and other services. Act of May 14, 2003, ch. 50, Laws of New York 2003 (act making appropriations for support of government with regard to public protection and general government budget)[3]; Petition, Ex. B. In addition, it provides resources for inmate visitation programs, including furnishings and supplies for visitors and to bus visitors to correctional facilities. Id. Finally, the Family Benefit Fund provides between $300,000 and $600,000 annually for maintenance of the phone home program. Id.

This is not the first challenge of this nature to the DOCS and MCI contract. In 2000, a federal lawsuit was filed challenging various aspects of the program, including the commission received by DOCS from MCI. That case, Byrd v. Goord, No. 00-Civ.-2135, remains pending in federal district court in the Southern District of New York. The Center for Constitutional Rights, counsel for petitioners in this case, also represent the plaintiffs in Byrd. In addition, a claim raising constitutional and statutory challenges to the DOCS commission was brought by a group of inmate families, again represented by The Center for Constitutional Rights, in the New York Court of Claims. The claim was dismissed by the Court of Claims on jurisdictional grounds, related to claimants' failure to file a timely notice of claim and the inappropriateness of pursuing the claim in that court. See Petition, Ex. C. Claimants appealed and the Appellate Division, Third Department affirmed in July 2003. Bullard v. State, 307 A.D.2d 676 (3d Dep't 2003).

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[3] For the Court's convenience, copies of the two pages, of the approximately 500 page budget bill, dealing with the Family Benefit Fund are annexed to the Affirmation of Gerald J. Rock, sworn to May 7, 2004, as Exhibit A.

Argument

This proceeding is brought as a combination Article 78 and declaratory judgment action. Petitioners assert seven distinct causes of action: two equitable in nature (seeking enforcement of an order of the New York Public Service Commission and for an accounting); four constitutional challenges to the DOCS commission; and one claim of alleged statutory violations by the Department. DOCS submits that on the merits each of the seven fail to state a claim for relief and should be dismissed. The basis for dismissal as to each is outlined below. At the outset, however, a number of procedural defects exist in the pleadings which provide independent basis for dismissal of all claims brought against DOCS. Those threshold issues are addressed first, followed by arguments relating to the merits.

POINT I

PETITIONERS ARE NOT ENTITLED TO ANY RELIEF REGARDING ANY CONTRACT BETWEEN MCI & DOCS THAT PREDATES APRIL 1, 2001

While the petition alleges wrongdoing on the part of respondents dating to 1996, it concedes that during the period of time covered by the petition, two separate contracts were in place between MCI and DOCS. The original contract, which took effect on April 1, 1996, was extended through March 31, 2001. Petition, ¶ 33. A new contract, the currently operative one, became effective April 1, 2001. Id. This fact precludes petitioners' claim for relief prior to April 1, 2001 for a number of reasons.

A. All Claims Relating To The Original Contract Are Moot

"It is a fundamental principle of our jurisprudence that [a court's] duty to declare the law only arises out of and is limited to determining actual controversies between litigants." Schulz v. State of N.Y., 200 A.D.2d 936 (3d Dep't), app. dismissed, 83 N.Y.2d 905 (1994) (citations omitted); see also Clear Channel Communications, Inc. v. Rosen, 263 A.D.2d 663, 664 (3d Dep't 1999); Herald Co. v. O'Brien, 149 A.D.2d 781, 782 (3d Dep't 1989). Thus, courts may not pass on academic, hypothetical or moot questions. Mtr. of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713 (1980). This limitation is founded on the separation of powers doctrine. Id. The constraint imposed by barring litigation of moot claims is "paramount," Clear Channel, 263 A.D.2d at 664, inasmuch as it goes to the underlying subject matter jurisdiction of the court. Cerniglia v. Ambach, 145 A.D.2d 893, 894 (3d Dep't 1988), app. denied, 74 N.Y.2d 603 (1989).

The expiration of the original contract clearly moots any claims made by petitioners regarding that contract. Courts across the state have recognized that "inasmuch as the subject contract covered [a particular period of time] and has now expired by its terms, the petition should be dismissed as moot." Woods Advertising, Inc. v. Koch, 178 A.D.2d 155, 155-56 (1st Dep't 1991); accord Steele v. Town of Salem Planning Bd., 200 A.D.2d 870, 871 (3d Dep't 1994); Mtr. of Schulz v. Warren Co. Bd. of Supervisors, 179 A.D.2d 118, 121 n. 1 (3d Dep't 1992); In re Tri-State Aggregates Corp. v. Metropolitan Trans. Auth., 108 A.D.2d 645, 646 (1st Dep't 1985); see also Mtr. of AT/COMM, Inc. v. Tufo, 86 N.Y.2d 1, 6 (1995) (challenge to contract term that has not yet expired is not moot).

Accordingly, all claims prior to April 1, 2001 should be dismissed as moot.

B. No Declaratory Judgment Should Be Rendered Regarding the Expired Contract

CPLR 3001 provides for declaratory judgments. The statute provides:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

By its plain and express terms, the statute confers upon the courts discretion with respect to granting a declaratory judgment. Id. ("court may render" & "If the court declines to render such a judgment it shall state its ground.") (emphasis added); see also Lehigh Portland Cement Co. v. New York State Dep't of Envtl. Conservation, 87 N.Y.2d 136, 140 (1995) (declaratory judgment is discretionary). The statute limits that discretion by permitting declaratory judgments only in a "justiciable controversy." See, e.g., Vartanian v. Research Found. of State Univ. of N.Y., 227 A.D.2d 744, 745 (3d Dep't 1996). On this record it is clear that the declaration sought by petitioners as to the original contract is improper, even should the Court find these claims are not moot, and that portion of the petition should be dismissed.

The record, even at this early juncture, confirms that the original contract between MCI and DOCS is no longer in effect. See Petition, ¶ 33. "The courts of New York do not issue advisory opinions for the fundamental reason that in this State the giving of such opinions is not the exercise of the judicial function." Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988) (internal quotation omitted). Determinations which will have no immediate effect or resolve the underlying dispute are advisory. Bachety v. Kinsella, 146 A.D.2d 725 (2d Dep't 1989). Here, any declaration from the Court regarding the propriety of the initial contract would have no effect on the rights of the respective parties, would be purely advisory and should not be issued.

The petition should be dismissed as to all claims for declaratory relief related to the first contract.

POINT II

ALL CLAIMS BUT PETITIONERS' FIRST CAUSE OF ACTION SHOULD BE DISMISSED AS UNTIMELY INASMUCH AS THEY WERE NOT COMMENCED WITHIN FOUR MONTHS OF ACCRUAL

As a threshold matter, the proper procedural context of this case must be examined. Petitioners style this matter as a hybrid Article 78/Declaratory Judgment action challenging the contract and DOCS' receipt of the contract commission from MCI.[4] DOCS submits that this proceeding should be governed by the four month statute of limitations governing Article 78 proceedings and under that standard should be dismissed as untimely.

Actions for declaratory judgment do not have an express statutory limitations period set forth in the CPLR. See Aubin v. State, 282 A.D.2d 919, 921 (3d Dep't), lv. denied, 97 N.Y.2d 606 (2001).[5] Article 78 proceedings, on the other hand, must be commenced within four months of accrual. CPLR § 217(1). "A determination of the Statute of Limitations applicable to a particular declaratory judgment action requires an examination by this court of the substance of that action to identify the relationship out of which the claim arises and the relief sought." Atkins v. Town of

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4 Significantly, however, petitioners have failed to clearly articulate the precise grounds of their Article 78 claim. DOCS addresses petitioners' claims for declaratory judgment in detail below.

5 When not governed by a shorter period, see infra, declaratory judgment actions are controlled by the six year catchall provision of CPLR § 213(1). Litz v. Town Bd. of Guilderland, 197 A.D.2d 825, 828 n.4 (3d Dep't 1993).

Rotterdam, 266 A.D.2d 631, 632 (3d Dep't 1999) (internal citations and quotations omitted); see also New York City Health & Hosp. Corp. v. McBarnette, 84 N.Y.2d 194, 200-01 (1994); Trager v. Town of Clifton Park, 303 A.D.2d 875, 876 (3d Dep't 2003) (citing cases). "It is the responsibility of the court in the first instance to determine the true nature of a case in order to discover whether the six-year Statute of Limitations for declaratory judgment actions or the much shorter four-month Statute of Limitations for CPLR article 78 proceedings applies." Llana v. Town of Pittstown, 234 A.D.2d 881, 882 (3d Dep't 1996). These rules have their origin in the Court of Appeals decision in Solnick v. Whalen, 49 N.Y.2d 224 (1980). Solnick adopted the "next nearest context" rule, through which courts protect ". . .the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations." Solnick, 49 N.Y.2d at 231.

"Where the parties' claims could have been litigated in an action or proceeding which has a specific limitations period, 'then that period limits the time for commencement of the declaratory judgment action'." Wechsler v. State, 284 A.D.2d 707, 708 (3d Dep't 2001) (quoting Solnick, 49 N.Y.2d at 230). When claims captioned to seek declaratory relief could, in fact, have been brought in a proceeding pursuant to Article 78, the shorter four month limitations period must apply. Bitondo v. State, 182 A.D.2d 948, 949-50 (3d Dep't 1992); SJL Realty Corp. v. City of Poughkeepsie, 133 A.D.2d 682, 683 (2d Dep't 1987) (citing Press v. County of Monroe, 50 N.Y.2d 695 (1980)). Clearly, petitioners' challenge to DOCS' administrative actions could have been brought in an Article 78 proceeding and should, therefore, be governed by the limitations period in section 217. While "[a]n article 78 proceeding cannot be used to challenge the constitutionality of a general legislative act, . . . the fact that an attack on another kind of governmental act is mounted

in constitutional terms does not render review pursuant to CPLR article 78 unavailable." SLJ Realty Corp., 133 A.D.2d at 683. Here petitioners do not challenge the constitutionality of a statute, but the actions of DOCS as an administrative agency to enter into contracts and appropriate moneys. Such a claim, clearly was subject to review under Article 78, as the Court of Claims and Appellate Division found in the Bullard case. See Bullard, 307 A.D.2d at 678 ("claimants had an alternative remedy through a CPLR article 78 proceeding"); Petition, Ex. C.

As a matter of policy, as well, these challenges should be considered under the Article 78 limitations period. As the Court of Appeals observed in Schulz v. State, litigation to challenge governmental actions

> possibly causing traumatic disturbance to settled matters of public finances and governance, should be undertaken reasonably promptly. To relax this procedural safeguard could disproportionately incur or threaten a greater harm to the public weal than the alleged . . . transgression itself.

81 N.Y.2d 336, 348-49 (1993). Matters, such as those presented here, should be addressed as expeditious as possible especially since petitioners seek to disturb a contractual financial arrangement that has been in place, in one form or other, for nine fiscal years and which they contend could entitle them to upwards of 130 million dollars in damages. See Petition, ¶ 44. To permit them to now proceed with this claim is simply inconsistent with New York law in this area.

Properly construed under the Article 78 limitations period, almost all of petitioners' claims must be dismissed as untimely.[6] Proceedings under Article 78 are subject to a strict four month statute of limitations. CPLR § 217(1); see also Brignoni v. Abrahamson, 278 A.D.2d 565, 567 (3d

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[6] Petitioners' first claim actually seeks enforcement of the PSC Order of October 30, 2003. Petition, ¶¶ 75-76. That claim was timely commenced in this proceeding, but for the reasons set forth in Point VI infra fails to state a claim for relief.

Dep't 2000); Cardwell v. Travis, 277 A.D.2d 571, 572 (3d Dep't 2000); Doolittle v. County of Broome, 276 A.D.2d 863, 865 (3d Dep't 2000). An Article 78 claim accrues at the time the administrative determination complained of became final and binding against the petitioner. Brignoni, 278 A.D.2d at 567; Hunt Bros. Contractors v. Glennon, 214 A.D.2d 817, 819 (3d Dep't 1995). This occurs when "it has an impact upon a petitioner or when it becomes clear that a petitioner has been aggrieved." Mtr. of Halpin v. Perales, 203 A.D.2d 675, 677 (3d Dep't 1994). Under these standards, petitioners' claims are untimely.

There can be no question that the contract which has allegedly aggrieved petitioners did so more than four months prior to commencement of this action. The contract's effective date itself could well be viewed as the appropriate accrual of petitioner's claims. The petition can certainly be read to raise facial challenges to the contract which would make the effective date the date of accrual. The petition makes plain, however, when each petitioner was aggrieved by the contract and these specific dates highlight the untimeliness of the petition. Petitioner Walton alleges that she has been billed for calls since 1996. Petition, ¶ 18. Petitioner Austin has been so billed for seven years, id. at ¶ 19, and petitioner Harris for two separate periods of time the latest of which beginning in November 2001. Id. at ¶ 20. Likewise, the State Defenders Association alleges that it has been billed for calls since November 1998. Id. at ¶ 62. While no specific allegation is made in the petition regarding the exact time frame for calls made by the Office of the Appellate Defender it can be reasonably inferred from the petition that it too has been "aggrieved" by the DOCS contract for longer than four months. See, e.g., Petition, ¶ 60. Each petitioner, therefore, was aware long prior to commencing this proceeding of the fees charged for collect inmate phone calls. To the extent there were actually aggrieved by this pricing, their causes of action accrued then. This proceeding,

commenced in February 2004, was clearly commenced outside the four month limitations period and should be dismissed as untimely.

POINT III

PETITIONERS' CLAIMS ARE BARRED BY THE FILED RATE DOCTRINE

First formulated in Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922), the filed rate doctrine "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).[7]

The doctrine is supported by two basic policy principles, "first, that legislative bodies design agencies for the specific purpose of setting uniform rates," and "[t]he agencies' experience and investigative capacity make them well-equipped to discern from an entity's submissions what costs are reasonable and in turn what rates are reasonable in light of those costs." Wegoland, 27 F.3d at 19 & 21. Second, "courts are not institutionally well suited to engage in retroactive rate setting" and

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[7] Originally designed to bar suits against utility providers, courts considering similar challenges to collect call-only/single provider inmate telephone systems have readily applied the doctrine to bar claims against governmental entities as well. See Miranda v. Michigan, 168 F. Supp. 2d 685, 692-693 (E.D. Mich. 2001); Daleure v. Commonwealth of Kentucky, 119 F. Supp. 2d 683, 689 (W.D. Ky. 2000) ("The recipients of inmate calls could have avoided any injustice by protesting the telephone rates at the time they were filed"), appeal dismissed, 269 F.3d 540 (6th Cir. 2001).

> any 'harm' allegedly suffered by the plaintiff[s] 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 plaintiff[s] 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). Moreover, the doctrine applies with equal force to petitioners' claims regarding the propriety of the single provider/collect call only system required by DOCS and made an express component of its contract with MCI. Kross Dependable Sanitation, Inc. v. AT&T Corp., 268 A.D.2d 874, 875 (3d Dep't 2000).

Petitioners will presumably argue that having determined that the DOCS commission is a "non-jurisdictional rate," the Public Service Commission (hereinafter "PSC") has extinguished applicability of the filed rate doctrine. This argument is without merit. In sum, petitioners paid the filed rates and now seek some portion of that payment back as damages. However, "only by determining what would be a reasonable rate absent [DOCS' allegedly unlawful choice of its system] could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids." Wegoland, 27 F.3d at 21; see Porr, 230 A.D.2d at 573-574 ("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") (internal quotation omitted). As Judge Read explained in Smith v. State, "in order to award the damages sought in this claim -- the difference between what claimants paid MCI for inmate initiated 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." Smith, slip op. at 4; see also Guglielmo v. WorldCom, Inc., 148 N.H. 309, 808 A.2d 65 (2002) (filed rate doctrine barred claim by recipients of inmate collect calls that they paid excessive rates and were prevented from using other phone service options).

Accordingly, petitioners claims should be dismissed as barred by the filed rate doctrine.[9]

POINT IV

THE DOCTRINE OF PRIMARY JURISDICTION PRECLUDES THIS COURT FROM CONSIDERING THE MERITS OF THE PETITION

Even were the Court to conclude that the petition is not subject to dismissal for the reasons outlined above, it should nonetheless decline to entertain the merits on the ground that petitioners' challenge to the single-provider system required under the DOCS-MCI contract can and should be considered in the first instance by the Public Service Commission or Federal Communications Commission which have primary jurisdiction over such claims.[10]

> The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.

Albany-Binghamton Express, Inc. v. Borden, Inc., 192 A.D.2d 887, 888 (3d Dep't 1993) (quoting Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 156 (1988)); Rochester Gas & Elec. Corp. v. Greece Park Realty Corp., 195 A.D.2d 956 (4th Dep't 1993) (citing cases). The doctrine is rooted in the notion that agencies, like the Public Service Commission and the Federal

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9 At the very least, the doctrine precludes litigation of claims or damages prior to the PSC's October 30, 2003 decision regarding the rates at issue here.

10 The PSC has jurisdiction over intrastate calls, while the Federal Communications Commission has jurisdiction over interstate calls.

Communications Commission, are specifically created to address facts and problems that arise in an area of particularized expertise and that courts should be sure to permit those agencies to pass judgment first on matters within their special competence. Brownsville Baptist Church v. Consolidated Edison Co. of N.Y., Inc., 272 A.D.2d 358, 359 (2d Dep't 2000); Lamparter v. Long Island Lighting Co., 90 A.D.2d 496 (2d Dep't 1982). Therefore, while the doctrine is not implicated when technical questions are not presented, when as here the petition raises intricate questions of a uniquely technical nature, the Public Service Commission must in the first instance pass on the merits of the claims. Rochester Gas & Elec. Corp., 196 A.D.2d at 957. There can be no question that petitioners' pleading raises such technical questions. While the PSC may have found that it lacked jurisdiction over the DOCS commission[11] the precise elements behind the operation of the DOCS Call Home Program challenged by petitioners have not been addressed by the PSC.

Throughout the petition, petitioners' raise issues regarding the appropriateness and propriety of the single-provider, collect call only system. See, e.g., Petition, ¶¶ 8-9, 64, 80, 92, 108, 115, & 119. The PSC decision already rendered in this matter did not pass on these questions. Significantly, many of these questions involve intricate questions of prison security which petitioners have, in an entirely conclusory manner, argued would be unaffected by alternate phone systems. By their very nature, these questions of fact are specific to the correctional context. Resolution of the facts surrounding these unsupported assertions falls precisely within the purview of the PSC, at least initially. Lamparter, 90 A.D.2d 496 ("where questions of fact exist, the controversy should be referred to the Public Service Commission"). Moreover, the Federal Communications Commission is actively considering an application to prohibit the type of exclusive collect call only system

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[11] A finding DOCS does not concede was correct.

operated by DOCS. See 69 Fed. Reg. 2697 (2004).[12] This fact strongly militates against court intervention at this juncture.

Because "[t]he reasonableness of a utility's rates, rules or practices is properly submitted first to the agency which has been vested by the legislature with the authority to regulate and review such matters," petitioners constitutional and statutory claims must be dismissed "as they amount to little more than collateral attacks of the Public Service Commission's rate determinations." Brownsville Baptist Church, 272 A.D.2d at 359.

POINT V

CLASS ACTION CERTIFICATION IS NOT WARRANTED IN THIS CASE

Petitioners' application for class certification under Article 9 of the CPLR should be denied as unnecessary. New York courts have long recognized that "where governmental operations are involved, and where subsequent petitioners will be adequately protected under the principles of stare decisis . . .class action relief is not necessary." Jones v. Berman, 37 N.Y.2d 42, 57 (1975); accord Mahoney v. Pataki, 98 N.Y.2d 45, 55 (2002); Alvarino v. Wing, 261 A.D.2d 255, 256 (1st Dep't 1999); Terry v. Town of Huntington, 101 A.D.2d 833 (2d Dep't 1984); see also Eastern New York Youth Soccer Ass'n v. New York State Public High Sch. Athletic Ass'n, Inc., 108 A.D.2d 39, 40 (3d Dep't 1985), aff'd, 67 N.Y.2d 665 (1986). The effect of this rule, as the Appellate Division, Second Department has pointed out, is to preclude petitioners from demonstrating that a class action is the superior method for fair and efficient litigation, as required by CPLR 901(a)(5), against a

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[12] A copy of this request for comments on the proposed rulemaking is annexed to the Rock Affirmation as Exhibit B.

governmental agency. Oak Beach v. Town of Babylon, 100 A.D.2d 930 (2d Dep't 1984); Aumick v. Bane, 161 Misc. 2d 271, 281 (Monroe Co. Sup. Ct. 1994). This rule applies whether the matter is brought pursuant to Article 78 or in a plenary action. Ferguson v. Barrios-Paoli, 279 A.D.2d 396, 398 (1st Dep't 2001). Here, a ruling for these petitioners that the commission is unlawful would necessarily require DOCS to change its policy and practices related to all recipients of inmate collect calls, i.e. all members of the purported class. Potential class members would, therefore, be adequately protected absent class certification. In addition, claims under General Business Law section 349 are not particularly amenable to class action litigation. See Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1999).

As such, there simply is no need for class certification in this case and petitioners' application in that regard should be denied.

POINT VI

PETITIONERS' CLAIM SEEKING ENFORCEMENT OF THE ORDER OF THE PUBLIC SERVICE COMMISSION LACKS MERIT

Petitioners' first claim for relief seeks enforcement of the Public Service Commission's Order of October 2003. See Petition, Count I. The precise basis of this claim as it relates to DOCS, however, is unclear. The Public Service Commission did not "order" DOCS to take any action. In fact, the Order found only: that the "jurisdictional rate" of MCI's rate tariff was reasonable, that MCI should file a new tariff with the Commission and waived the requirement for publication of the tariff amendment. Petition, Ex. A, p. 27. There is no question that MCI refiled as required. See Petition, ¶ 43 & Ex. F. Nothing in that order compelled DOCS to take any action and as such, no order in this

case directing DOCS to do anything as it relates to the Commission's order would be proper. In addition, while the petition seeks, in this cause of action, an order restraining DOCS from "imposing any charges and collecting any fees for inmate telephone calls," Petition, ¶ 76, it is clear from the petition that these functions are solely the province of MCI under the contract, id. at ¶ 4, and DOCS simply is not involved in this process. In that regard, nothing in the PSC Order required either MCI or DOCS to stop collecting the commission and so it is entirely unclear how petitioners believe this Court can "enforce" the Order by directing DOCS to take action that the PSC itself did not require. The argument becomes even more absurd when one recognizes that by declaring it lacked jurisdiction over DOCS' commission, the PSC itself recognized that it could not enforce any action as to DOCS.

Accordingly, the petition fails to state a cause of action as to DOCS regarding the PSC's prior order and this cause of action should be dismissed.

POINT VII

THE CONTRACTUAL COMMISSION IS NEITHER A TAX WITHIN THE MEANING OF THE NEW YORK STATE CONSTITUTION, NOR AN AFFRONT TO PRINCIPLES OF SUBSTANTIVE DUE PROCESS

Petitioners' first substantive claim alleges that the commission is in fact a tax not lawfully adopted as prescribed in the New York State Constitution. Petition, ¶¶ 80-83. They also allege that the commission violates principles of substantive due process. Neither claim is a basis for relief.

A. The Contractual Commission is not a Tax within the Meaning of the State Constitution

"Taxes are imposed for the purpose of defraying the costs of government services generally." Albany Area Builders Ass'n, 141 A.D.2d 293, 298 (3d Dep't 1988); see also New York Tel. Co. v. City of Amsterdam, 200 A.D.2d 315, 318 (3d Dep't 1994). Here, the commissions received by DOCS are specifically appropriated to the Family Benefit Fund within DOCS' budget and, as such, do not go into the general fund of the state to pay for programs throughout the state. In that regard the commission is much more akin to a fee "imposed to defray or help defray the cost of particular services." Mtr. of Joslin v. Regan, 63 A.D.2d 466, 470 (4th Dep't 1978) (emphasis added). As the record clearly reflects, a portion of the commissions received by DOCS are expended, pursuant to legislative appropriation, from the Family Benefit Fund to pay for maintenance of the Call Home Program. Act of May 14, 2003, ch. 50, Laws of New York 2003 (act making appropriations for support of government with regard to public protection and general government budget). Clearly, therefore, those moneys are most properly construed as a fee which does help defray costs of the service. Nor may petitioners, who throughout the rest of their petition extol the importance of telephone contact with their family, credibly argue that they do not receive benefits from this fee. This understanding of telephone commissions, that they are not a "tax", is consistent with an extensive body of regulatory authority from the Federal Communications Commission recognizing the utility and propriety of such commissions. See, e.g., International Telecharge, Inc. v. AT& T Co., 8 F.C.C.R. 7304, 12 (1993); In re Nat'l Telephone Servs., 8 F.C.C.R. 654, 9 (1993); In re AT&T's Private Payphone Commission Plan, 3 F.C.C.R. 5834, 20 (1988).

B. The Commissions Do Not Violate Substantive Due Process

Petitioners also assert that the commission violates substantive due process, apparently because they derive no benefit from them. See Petition, ¶ 85. This claim misstates the record and lacks merit.

As just noted, a portion of the commissions has, in fact, been used to maintain the phone program, id. at Ex. B, and thus petitioners have derived a benefit from collection of the commissions. Apart from this fact, however, the law governing a substantive due process claim makes plain that petitioners cannot maintain this theory on these facts.

> In essence, the doctrine of substantive due process prevents the deprivation of life, liberty or property for arbitrary reasons. The challenged [action] is not arbitrary if there is a reasonable connection between it and the promotion of health, comfort, safety, and welfare of society.

Mallinckrodt Med. Inc. v. Assessor of the Town of Argyle, 292 A.D.2d 721, 723 (3d Dep't 2002) (citing Health Ins. Ass'n of Am. v. Harnett, 44 N.Y.2d 302 (1978)); see also New York State Crime Victims Bd. v. Majid, 193 Misc. 2d 710, 714 (Alb. Co. Sup. Ct. 2002) (Malone, J). Here, petitioners cannot demonstrate that collection and use of the commissions for inmate programs was arbitrary. The inmate programs funded serve a valid and important penological function, which petitioners do not dispute. More than serving the penological role of DOCS, as a correctional agency, though, these programs serve the same important goals advocated throughout the petition. While petitioners refer to the high cost of travel inherent in actually visiting their loved ones or clients, they say nothing of the busing program provided for DOCS, enabling individuals to travel to state correctional facilities free of charge, that is made possible by funds allocated from the Family Benefit Fund. Funding programs such as medical training, inmate visitation program, and the Inmate Call

Home Program are undeniably important to DOCS' mission and equally important to petitioners who claim to have the best interests of incarcerated individuals in mind. Substantive due process is judged by whether the government action "is reasonable in relation to its subject and adopted in the interest of the community." Treyball v. Clark, 65 N.Y.2d 589, 590 (1985). This is especially true when the state action at issue is economic in nature. Sobel v. Higgins, 151 Misc. 2d 876, 881-82 (N.Y. Co. Sup. Ct. 1991). To suggest that the commissions do not bear a reasonable relationship to important community interests fostered by these visitation and assistance programs simply does not withstand scrutiny.

Accordingly, petitioners' taxation[13] and substantive due process claims should be dismissed.

POINT VII

THE COMMISSION IS NOT AN UNLAWFUL TAKING OF PROPERTY

Count III of the pleading asserts that the state's operation of the single-provider system "constitutes a confiscation of Plaintiffs' property" in violation of Article I, § 6 of New York's Constitution. Petition, ¶ 92. The only basis for making this allegation appears to be DOCS' refusal to permit less costly alternatives for inmate calls.[14] This claim is no basis for declaratory relief.

Black letter law prohibits the government from taking an individual's property without due process. What actually constitutes a confiscation for purposes of a constitutional claim, however,

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13 The claim that the commissions violate the prohibition on double taxation, Petition, ¶ 87, must be denied since the commissions are not taxes within the meaning of the New York Constitution.

14 Petitioners' repeated incantation alleging DOCS has violated petitioners' rights through its "acts and omissions" is so impermissibly vague as to be beyond response.

is not entirely clear. Here, any claim of confiscation made by petitioners does not extend to the actual loss of physical property or some total deprivation and thus is unlike the zoning laws or eminent domain proceedings so typically litigated under this constitutional provision. Nor can petitioners claim a property interest in telephone calls or visitation. Instead, as their petition makes clear, they allege only that the cost of a particular service is too high for their liking. Petition, ¶ 92. An alleged loss of moneys in this regard is insufficient to state a claim. In the zoning context, for example, courts have recognized that it is "not enough for plaintiff to show that he would realize a greater return under a less restricted use." Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 82 (1973). As such, petitioners have asserted a unique takings claim where they themselves have pointed to no process to which they allege they are due. Moreover, since money is the only property allegedly lost through this confiscation, the petition has failed to explain why they failed to mitigate their damages by not accepting collect calls from prison and instead relying on other forms of communication.

Accordingly, Count III should be dismissed.

POINT IX

PETITIONERS' EQUAL PROTECTION CLAIM FAILS IN THE ABSENCE OF A SIMILARLY SITUATED CLASS AND BECAUSE THE CONTRACT AND COMMISSION HAVE A RATIONAL BASIS IN LAW

In New York, "the essence of the right to equal protection of the laws is that all persons similarly situated be treated alike." In re Jennifer G., 182 Misc. 2d 278, 287 (Queens Co. Fam. Ct. 1999) (quoting 20 N.Y. Jur.2d Constitutional Law § 347). That principle long enumerated as part

of the federal guarantee of equal protection, see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985), is equally true in New York's jurisprudence. In re Urcuyo, 185 Misc. 2d 836, 848 (Kings Co. Sup. Ct. 2000) (citing Alevy v. Downstate Medical Center, 39 N.Y.2d 326 (1976)). A party alleging the violation of equal protection "must show that for no reasonable purpose he or she is being treated differently than others who are similarly situated." Majid, 193 Misc.2d at 714 (citing Gray v. Town of Oppenheim, 289 A.D.2d 743 (3d Dep't 2001)). A threshold pleading requirement for an equal protection claim, therefore, is that petitioners are being treated differently from similarly situated individuals. Affronti v. Crosson, 96 N.Y.2d 713, 718, cert. denied, 534 U.S. 826 (2001). Because petitioners cannot pass this threshold, their equal protection claim must be dismissed. Even considered on the merits, however, this equal protection claim cannot withstand dismissal.

A. There Is No Similarly Situated Group Being Treated Differently Than Petitioners

Petitioners cannot satisfy the threshold showing of a similarly situated group that is treated more favorably by DOCS. From the face of the pleadings it is clear that all individuals who receive telephone calls from New York correctional inmates are treated exactly alike. DOCS does not discriminate against or even classify call recipients in any way. Race, gender, location, level of education, financial resources, nature of employment or relationship to the inmates play no role affecting the operation of the contract for DOCS or its receipt of a commission. Equally as significant is the self-evident fact that individuals receiving inmate collect calls are not similarly situated to those individuals who do not receive such calls. Courts around the country have rejected equal protection challenges to prison phone policies based on this very lack of a similarly situated

class. McGuire v. Ameritech Servs., Inc., 253 F. Supp.2d 988, 1000-1001 (S.D. Ohio 2003); Daleure v. Commonwealth of Kentucky, 119 F. Supp.2d 683, 691 (W.D. Kent. 2000); Clark v. Plummer, No. C 95-0046, 1995 WL 317015, at *2 (N.D. Cal. May 18, 1995) (copy annexed in Appendix as Exhibit 2); Levingston v. Plummer, No. C 94-4020, 1995 WL 23945, at *1 (N.D. Cal. Jan. 9, 1995) (copy annexed in Appendix as Exhibit 3).

B. The Contract Provision Under Attack Has A Rational Basis

Even were the Court to find that petitioners could pass the threshold question of similarly situated groups, their allegations, when viewed on the merits, fail to state a claim.

1. Standard of Review

Because the scope of review depends on the nature of the right allegedly violated, the first step in equal protection analysis is identifying the proper standard of review. Petitioners themselves do not articulate which level of review should apply to their claim. Respondents submit that any classification created by the commission, the product of a contract between MCI and DOCS, is clearly an economic one. This is especially true given the nature of the pleadings alleging that DOCS is unreasonably profiting from the contract. See generally Petition, ¶ 2. "An economic regulation challenged on equal protection grounds is presumed constitutional and requires only that the challenged classification be rationally related to a legitimate state interest." Wegman's Food Markets, Inc. v. State of N.Y., 76 A.D.2d 95, 100 (4th Dep't 1980) (citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976)); see also AA & M Carting Serv. v. Town of Hempstead, 183 A.D.2d 738, 739 (2d Dep't 1992) (citing cases).

2. Rational Basis Review

The "rational basis" review conducted of such an economic regulation is highly deferential to the government action being challenged. Claims raising challenges under the federal Equal Protection Clause "must be denied if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir. 2001). New York law mirrors these federal standards, also according great deference to classifications subject to rational basis review. People v. Walker, 81 N.Y.2d 661, 668 (1993); People v. Ward, 260 A.D.2d 585, 586 (2d Dep't), lv. denied, 93 N.Y.2d 1029 (1999). "The rational basis standard of review is a paradigm of judicial restraint." Affronti, 95 N.Y.2d at 719 (internal quotations omitted). "Equal protection does not require that all classifications be made with mathematical precision." Mtr. of Tolub v. Evans, 58 N.Y.2d 1, 8 (1982). A classification runs afoul of this review only when it is "so unrelated to the achievement of any combination of legitimate purposes that . . . it is irrational." Id. (citing Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000)). Viewed under this standard the commission clearly withstands scrutiny.

Petitioners concede that the commissions paid to DOCS under the contract are then used by DOCS to fund inmate programs. Petition, ¶ 12. While they make much of the fact that all that money is not used to fund the inmate telephone program, they cannot make a colorable argument that utilization of those funds to serve other inmate needs is irrational. As evidenced by Exhibit B to the petition, the commission helps fund a wide variety of inmate programs. In light of this it stretches the bounds of common sense beyond credulity to suggest that these are not legitimate programs on which DOCS may expend money. It is equally lacking in merit to suggest that use of funds obtained

from one such program cannot be used to maintain that program and other programs directly related to inmate services.

C. Equal Protection Analysis of Taxes

Even viewing the commission as a tax, as petitioners would have it, the equal protection claim lacks merit.[15] First, petitioners again are unable to show a similarly situated group that is unfavorably treated by the commission's structure. "A tax statute violates the Equal Protection Clause[] . . . if it permits similarly situated [parties] to be taxed unequally," Killeen v. New York State Office of Real Property Servs., 253 A.D.2d 792, 793 (2d Dep't 1998) (citing cases), and in the absence of such similarly situated parties, as here, there simply can be no violation of equal protection. Courts have long recognized that taxes do not run afoul of the equal protection guarantee merely because they do not treat all parties equally. Id.; Mtr. of New York State Clinical Lab. Ass'n Inc. v. DeBuono, 250 A.D.2d 95, 98 (3d Dep't 1998) (citing cases); Mtr. of Capital Financial Corp. v. Commissioner of Taxation & Finance, 218 A.D.2d 230, 233 (3d Dep't 1996) (citing cases). This is consistent with the United States Supreme Court's long held view that "the power to tax is the power to discriminate in taxation." Leathers v. Medlock, 499 U.S. 439, 451 (1991) (cited in Stahlbrodt v. Commissioner of Taxation and Finance, 17 Misc. 2d 571, 578 (Alb. Co. Sup. Ct. 1996). Instead, the propriety of taxes must be viewed under principles of reasonableness and uniformity. "Thus the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class." Foss v. City

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15 For the reasons outlined in Point VII, supra, however, respondent does not concede that the commission is, in fact, a tax.

of Rochester, 65 N.Y.2d 247, 256 (1985). A tax that is "palpably arbitrary or amounts to invidious discrimination" would be unconstitutional. Id. at 257 (citing cases).

Under these standards, petitioners cannot establish the invidiousness or arbitrariness required to invalid a tax on equal protection grounds. Certainly, no claim of invidious discrimination can be made here. As already noted, the contract treats everyone electing to accept a phone call from an inmate the same. It makes no difference whether that individual is a family member or attorney of the inmate. The structure of the phone system, therefore, belies any claim of invidious discrimination and simply demonstrates beyond question that the charges imposed on users of the system are uniform. These facts demonstrate clearly that petitioners have failed to exhibit the type of actions which "maliciously singled [them] out" or showed "an evil eye and unequal hand" toward them so as to rise to the level of an equal protection violation. Masi Management, Inc. v. Town of Ogden, 273 A.D.2d 837, 838(4th Dep't 2000). Likewise, for the reasons outlined above petitioners cannot show that the imposition or use of the commission is so arbitrary and without rational basis as to violate the law.

For all these reasons, no equal protection challenge lies as to the contract or DOCS' receipt of the commissions under it. Petitioners' equal protection claims, therefore, should be dismissed.

POINT X

THE SINGLE-PROVIDER SYSTEM AND THE RESPONDENTS' CONTRACT ARE ENTIRELY CONSISTENT WITH ALL REQUIREMENTS FOR PROTECTING PETITIONERS' SPEECH AND ASSOCIATION RIGHTS

A. Petitioners' Conclusory Claims Must Be Dismissed

Count V of the Verified Petition and Complaint alleges violations of the rights to free speech and association under the state constitution. The precise basis of these claims, however, is unclear and petitioners' failure to sufficiently articulate them warrants dismissal of these claims. Purely conclusory allegations are insufficient basis for relief in an Article 78 proceeding. Federation of Mental Health Ctrs. v. De Buono, 275 A.D.2d 557, 561 (3d Dep't 2000); Davis v. Peterson, 254 A.D.2d 287 (2d Dep't 1998); Bogle v. Coughlin, 173 A.D.2d 992 (3d Dep't 1991). The same is true in a declaratory judgment action. Van Valkenburg v. Durfee, 115 A.D.2d 157, 158 (3d Dep't 1985); Buchko v. Board of Educ. of Connetquot Cent. Sch. Dist., 43 Misc. 2d 43, 47 (Suffolk Co. Sup. Ct. 1964) ("conclusory allegations of unconstitutionality . . . are insufficient"). Petitioners bear the burden in this case of alleging sufficient facts to withstand dismissal. See generally Frederick v. Civil Serv. Comm'n of Co. of Schenectady, 175 A.D.2d 428, 430 (3d Dep't 1991). Here, having failed even to articulate the precise legal basis of their claim, they cannot meet this burden and these claims should be dismissed.

B. There Is No Violation Of The Freedom Of Speech Or Association

Article I, section 8 of the New York Constitution provides:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press.

The collection of commissions from the Phone Home Program does nothing in any way to impinge on that right to speak or to associate. By implementing the Call Home Program, DOCS has provided another vehicle through which to foster communication between incarcerated individuals and their families, friends, and counsel. It supplements the ability to visit and communicate via letter, which are not at issue here, and thus expands the opportunities for speech between petitioners and inmates. While petitioners have simply failed to particularize the nature of their constitutional speech and association claims, based on the nature of petitioners' pleadings, it would appear that this claim is based on a purported right to communicate inexpensively via telephone. In the context of prisons, certainly, no such right can credibly be found in the state constitution. That type of attack is foreclosed by the Third Department's decision in Montgomery v. Coughlin, 194 A.D.2d 264, 267 (3d Dep't 1993) where the court found, guided by United States Supreme Court precedent that "the loss of cost advantages does not fundamentally implicate free speech values." There, the court rejected a challenge which sought to attack a prison regulation on the ground that it had the effect of requiring inmates to pay higher costs for reading material. Id. Simply seeking to save money does not implicate fundamental speech rights. In light of that precedent DOCS "cannot fathom how higher telephone charges can amount to a constitutional claim." Chapdelaine v. Keller, No. 96-CV-

1126, 1998 WL 357350, at *10 (N.D.N.Y. Apr. 16, 1998) (Report-Recommendation) (copy annexed in Appendix as Exhibit 4).[16]

Even were this insufficient ground on which to base dismissal, application of well-established standards amply demonstrates that the phone home program is not constitutionally infirm. Prison confinement does "impose limitations on constitutional rights, including those derived from the First Amendment." Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977). And among those, the right to freely associate "is among the rights least compatible with incarceration." Overton v. Bazzetta, 539 U.S. 126, ___, 123 S. Ct. 2162, 2167 (2003). Under the First Amendment, when a prison regulation is alleged to violate constitutional rights it "is valid if it is reasonably related to legitimate penological interests," Turner v. Safley, 482 U.S. 78, 89 (1987). New York follows a similar test, "balancing . . . the competing interests at stake: the importance of the right asserted and the extent of the infringement are weighed against the institutional needs and objectives being promoted." Lucas v. Scully, 71 N.Y.2d 399, 406 (1988). Application of these standards demonstrates that no violation of speech or association rights is present here.

"The concept of incarceration itself entails a restriction on the freedom on inmates to associate with those outside of the penal institution." Jones, 433 U.S. at 126 (1977). This long settled principle must serve as the background for consideration of petitioners' claims. While petitioners themselves are not inmates, they cannot claim, as a practical matter, that the constitutional

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[16] The docket of this case from the Northern District of New York, attached as Exhibit C to the Rock Affirmation, indicates that the Report-Recommendation was adopted on January 16, 2001 and judgment was entered dismissing the complaint on January 18th. See Docket Nos. 167 & 168. That judgment was subsequently affirmed on appeal. Docket No. 174.

limitations imposed on DOCS' inmates do not play a role in an analysis of their claims. Limitations inherent in incarceration must, of course, affect the rights petitioners now seek to assert. "If security precautions affect the telephone services that are available to inmates, this will inevitably impact the inmate call recipients." Daleure, 119 F. Supp.2d at 691; see also Goodwin v. Turner, 908 F.2d 1395, 1399 (8th Cir. 1990).

As such, the purported freedoms to speak and associate unquestionably have limits in the prison context. Certainly no one would argue that a citizen has an unqualified constitutional right to enter and circulate freely within a prison. DOCS does not run afoul of the constitution when it limits the number of people an inmate may communicate with by telephone to fifteen. Massey v. Coughlin, 212 A.D.2d 909 (3d Dep't 1995). And DOCS has imposed a host of other restrictions on access to telephone use, see 7 N.Y.C.R.R. Part 723, which have not even been challenged here. Indeed some courts have found that inmates possess no constitutional right to telephone calls at all, see Acosta v. McGrady, No. Civ. A. 96-2874, 1999 WL 158471, at *7 (E.D. Pa. Mar. 22, 1999) (copy annexed in Appendix as Exhibit 5), or at the very least have only a highly limited right of access to phones. See Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir.1994); Benzel v. Grammar, 869 F.2d 1105, 1108 (8th Cir.1989); Lopez v. Reyes, 692 F.2d 15, 17 (5th Cir.1982); Fillmore v. Ordonez, 829 F. Supp. 1544, 1563-64 (D. Kan.1993), aff'd, 17 F.3d 1436 (10th Cir.1994); Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir.1986); Gilday v. Dubois, 124 F.3d 277, 293 (1st Cir.1997); Martin v. Tyson, 845 F.2d 1451, 1458 (7th Cir.1988).[17] As the Seventh Circuit has

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[17] DOCS does not concede that inmates have a right to telephone usage at all, a position which a number of unpublished federal appeals court decisions make plain is not untenable. See Cook v. Hills, 3 Fed. Appx. 393, 394 (6th Cir. 2001); Martinez v. Mesa Co. Sheriff, 69 F.3d 548 (10th Cir. 1995) (Table, Text in Westlaw).

noted, "[n]ot to allow prisoners access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme." Arsberry v. Illinois, 244 F.3d 558, 564-65 (7th Cir. 2001). It would not at all be an unreasonable reading of these cases to hold that this limited right does not include the right to have those calls received in the most inexpensive manner possible. Most telling, however, is the Appellate Division's view that "[i]t is well settled that the use of telephones by prison inmates is a privilege and not a right." Crandall v. State, 199 A.D.2d 883, 994 (3d Dep't 1997).

In view of this litany of constitutional restrictions on speech and associational abilities between inmates and their families, friends, etc., petitioners' claim that the cost alone of telephone calls violates those rights must be dismissed.

POINT XI

PETITIONERS HAVE NO CLAIM UNDER NEW YORK GENERAL BUSINESS LAW SECTION 349

Petitioners allege that they are consumers, Petition, ¶ 113, and that DOCS has engaged in deceptive acts or practices in relation to its phone contract. Id. at ¶ 114. Specifically, DOCS has allegedly acted unlawfully by falsely representing the necessity for the single provider calling system, failing to disclose its receipt of commissions and profiting from the commissions. Id. at ¶ 115. This, petitioners allege, violates the prohibition on deceptive practices contained in New York General Business Law section 349. This claim clearly lacks merit and must be dismissed.

A. General Business Law Section 349 Is Not Implicated On These Facts

General Business Law section 349(a) provides:

> Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

"The essential elements of a cause of action alleging fraud in violation of General Business Law § 349 are that the defendant engaged in a consumer-oriented misleading practice and that the plaintiff was injured thereby." Negrin v. Norwest Mortg. Inc., 263 A.D.2d 39, 48 (2d Dep't 1999). A defining element of the statute is that it has "only been applied to frauds or other deceptive practices arising out of commercial transactions." NYPRIG v. Insurance Information Inst., 161 A.D.2d 204, 205 (1st Dep't 1990). Nothing in the pleadings alleges that DOCS was engaged in a consumer oriented commercial transaction. This failure is fatal to petitioners' claims. See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25 (1995) ("as a threshold matter, plaintiffs . . . must charge conduct of the defendant that is consumer-oriented") ("Oswego Laborers'"). DOCS entered a contractual relationship with MCI for provision of telephone service. Petition, ¶ 5. It is MCI alone that actually provides that phone service to consumers such as petitioners. See id. at Ex. A, pp. 21-22. The contract between MCI and DOCS relates only to the business relationship between the two and does not place DOCS in the position of providing any services to consumers. The terms of that telephone services contract do not subject DOCS to liability under section 349 as it relates to the use of MCI's phone system by third parties because as the Court of Appeals has noted, "[p]rivate contract disputes, unique to the parties . . . would not fall within the ambit of the statute." Oswego Laborers', 85 N.Y.2d at 25.

B. Petitioners' Substantive Claims Lack Merit

Moreover, petitioners' allegations are patently frivolous in at least one regard. While alleging that DOCS acted unlawfully in "failing to disclose to the public and class members that it was receiving 'commissions' amounting to nearly 60 percent," Petition, ¶ 115(b), the petition attaches as an Exhibit a DOCS document that does precisely this. Exhibit B to the petition includes a reproduction of a press release from DOCS, which says, inter alia, "MCI pays New York's taxpayers a commission rate equal to 57.5 percent of the gross profits on calls" placed through the single provider system. Pet., Ex. B., p. 4. Clearly, therefore, DOCS has not secreted the terms of its contract as alleged by these petitioners. In addition, the filing of the rate with the PSC put the public of notice of the rates that would be charged and precludes any claim of lack of notice. Porr, 230 A.D.2d at 576-77.

The remaining alleged violations of section 349 are equally unsupported. The claim that DOCS has falsely represented the penological necessity for the single provider system, Petition, ¶ 115(b), is raised for the only time in this cause of action. Other than three brief, conclusory paragraphs, id. ¶¶ 64-66, petitioners fail to offer much insight or support for their position that the single provider system is inappropriate. The conclusory nature of this pleading, therefore, is an initial basis for rejecting this claim. More importantly, however, questions regarding the propriety of a particular security mechanism within the DOCS system is plainly not an appropriate subject of review in a statutory claim under the General Business Law. As noted above, section 349 has its application in consumer transactions. Oswego Laborers', 85 N.Y.2d at 25; NYPRIG, 161 A.D.2d at 205. The implementation of security measures and determinations regarding the appropriateness of such measures is a far cry from a consumer transaction. Courts have long deferred to prison

officials in the implementation of such security protocols. See, e.g., Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"); Mtr. of Rivera v. Smith, 63 N.Y.2d 501, 512-13 (1984) (prison officials should "be vested with broad discretion in their formulation of security-related policies"). Petitioners' attempt to circumvent that discretion, under the guise of consumer litigation, should not be countenanced.

Finally, the allegation that DOCS has profited from the commissions its receives, Petition, ¶ 115(c), is, on its own, no basis for relief. At the outset, the petition cites nothing suggesting that profit-making in the absence of wrongdoing is actionable under section 349. For obvious reasons, DOCS submits that it clearly is not a basis for a claim. Having demonstrated why the allegations of wrongdoing that petitioners have made as to this claim cannot survive dismissal, respondent submits that this last claim must too be dismissed as insufficient to withstand dismissal.

C. Claims Prior to February 26, 2001 Are Untimely

Even were the claim sufficient to proceed, its scope must be limited by application of the appropriate statute of limitations. Petitioners allege that DOCS has been acting in violation of section 349 since April 1, 1996, but did not file this action until February 26, 2004. As discussed at length in Point II supra:

> It is well settled that in determining the limitations period to be applied to a declaratory judgment action, [courts] must look to the underlying claim and the nature of the relief sought to ascertain whether the rights the parties are seeking to have adjudicated in the declaratory judgment action could have been raised in an action or proceeding having a statutorily prescribed limitation period. In the event

> that no prescribed period of limitations applies, the action will be governed by the six-year Statute of Limitations set forth in CPLR 213 (1).

Mtr. of Save the Pine Bush, Inc. v. Town Bd. of the Town of Guilderland, 272 A.D.2d 689, 691 (3d Dep't 2000) (internal quotations and citations omitted). Petitioners' claims under section 349 are governed by a three year statute of limitations. Gaidon v. Guardian Life Ins. Co. of America, 96 N.Y.2d 201, 210 (2001); Wender v. Gilberg Agency, 276 A.D.2d 311, 312 (1st Dep't 2000). Accordingly, all damages claims predating February 24, 2001 must be dismissed.[18]

POINT XII

PETITIONERS ARE NOT ENTITLED TO THE EQUITABLE RELIEF OF AN ACCOUNTING

Finally, petitioners seek an accounting of "the revenues generated under the exclusive services contract, of the payments made to the State , and of the uses to which they received money has been put." Petition, ¶ 122. This claim also fails to state a claim.

Although the precise legal basis for petitioners' claim of entitlement to an accounting is not plain from their papers, they clearly premise it on an assumption that respondents have violated certain legal rights of theirs. See id. at ¶ 120. For the reasons outlined at length above, petitioners cannot demonstrate that DOCS has acted in any improper or unlawful manner and, therefore, are not entitled to the accounting they seek. While "[a]n allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief," Morgulas v. J.

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[18] And because the current contract did not commence until April 2001, no claim prior to that date should be considered. See Point I supra.

Yudell Realty, Inc., 161 A.D.2d 211, 213-14 (1st Dep't 1990), the pleadings do not allege, nor could they credibly do so, such a relationship here between DOCS and petitioners. This failing, made more striking by petitioners' inability to demonstrate a claim for relief as to any of the theories asserted in the petition, warrants dismissal of their claim for an accounting. Id.; Bettan v. Geico General Ins. Co., 296 A.D.2d 469 (2d Dep't), app. dismissed, 99 N.Y.2d 552 (2002) ("equitable relief of an accounting is not available since no fiduciary relationship existed between the parties".

Accordingly, Count VII of the petition should be dismissed.

Conclusion

For the reasons set forth above, the petition should be dismissed in its entirety as to the New York State Department of Correctional Services.

Dated: Albany, New York
May 6, 2004

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