To be argued by:
Victor Paladino

10 minutes requested

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

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 a combined article 78 proceeding and action for a declaratory judgment, petitioners challenge DOCS's collect-call-only telephone system provided by respondent MCI WorldCom Communications, Inc. ("MCI") pursuant to an exclusive services contract, claiming that the contract's inclusion of commissions to DOCS violates an October 2003 order of the Public Service Commission ("PSC"), is unconstitutional and violates General Business Law § 349. Petitioners now appeal from a judgment of the Supreme Court (Ceresia, J.), entered in Albany County on October 22, 2004, that granted respondents' motions to dismiss the petition (Record ["R."] 8-15).

As more fully demonstrated below, Supreme Court correctly held that all but one of petitioners' claims are time-barred, and the single timely claim, which seeks enforcement of the PSC's October 2003 order, fails to state a cause of action. Should this Court conclude that any of the other claims were timely commenced, however, it may affirm the dismissal of those claims for failure to state a cause of action and as barred by the filed rate doctrine.

QUESTIONS PRESENTED

1. Whether the statute of limitations bars counts II through VII 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.

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.

[1] For simplicity's sake because the names of MCI and its subsidiaries have changed over the years in connection with a merger and a bankruptcy, MCI-related entities are collectively referred to herein as "MCI."

The 1996 contract with MCI resulted from a competitive bidding process whereby 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.).

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). The Family Benefit Fund is used to support various programs benefitting 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 tariffs containing interstate rates with the Federal Communications Commission (the "FCC"), see 47 U.S.C. § 201 et seq., and it filed 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," but "provides DOCS

with a number of security features not traditionally associated with collect calling." 1998 N.Y. PUC LEXIS 693 at *3. The PSC noted that "the FCC has elected to forbear from imposing rate caps or benchmarks on interstate calls from prisons," "reason[ing] that the communications equipment employed for legitimate security reasons could result in higher rates on collect calls from inmates in prisons that [sic] the rates from ordinary locations." 1998 N.Y. PUC LEXIS 693 at *4. The PSC determined 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." Id. Thus it concluded that "[t]he rates proposed by [MCI] for this service are reasonable, and should be permitted to remain in effect." Id. Critically, petitioners have never challenged these rates by application to the PSC, nor have they 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 essentially the same claims raised here. The Court of Claims granted the State summary judgment, and this Court affirmed. See Bullard v. State of New York, 307 A.D.2d 676

(3d Dep't 2003). Specifically, the Court 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.

An action is also pending in the United States District Court for the Southern District of New York challenging on federal law grounds the collect-call-only system, the exclusive services provision of 1996 contract, and the commissions paid under that contract. By order dated August 26, 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) (discussed, infra at 35-36, 42-43).

D. The 2001 Contract

In April 2001, MCI and DOCS executed a second contract for the period April 1, 2001, through March 21, 2006 (R. 233, 271). The 2001 contract requires MCI to continue charging the same rate, but decreases DOCS's commission from 60% to 57.5% of MCI's gross annual 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 the 2001 contract with MCI to change the rate structure of the Maximum Security Plan (R. 221). This 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 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 that 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-user customers that there is a commission assessed by DOCS on all phone calls, which is part of the charge that appears on their phone bills (R. 89).

The PSC further explained that bifurcating the rate signified that the PSC 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 approved by the PSC (R. 154).

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). In seven separate causes of action, the petition primarily challenges DOCS's imposition of the commission,[2] claiming that DOCS has imposed an unauthorized tax, and infringed on their state constitutional rights to due process, freedom of speech and association and equal protection, and also violated General Business Law § 349 (R. 55-64). Petitioners seek a judgment (1) declaring "DOCS's practices, actions and policies to be illegal," (2) enjoining DOCS and MCI from imposing charges and collecting fees from petitioners for amounts over the tariff filed and approved by the PSC in its October 2003 order, (3) enjoining DOCS from enforcing the part of the contract that requires MCI to collect the portion of the telephone charge attributable to DOCS's 57.5% commission, (4) directing DOCS and MCI to produce an accounting of the revenues

[2]It is unclear to what extent if any the petition also seeks to raise an independent challenge to the collect-call-only aspect of the telephone system, though petitioners certainly make no separate argument in that regard in their brief to this Court.

generated under the collect call only/single provider system, (5) directing DOCS to refund to petitioners the commissions collected by MCI and provided to DOCS from April 1, 1996 to the present, and (6) awarding petitioners' attorneys' fees and costs (R. 28 [notice of petition], 64-65 [petition, wherefore clause]).

In lieu of answering, both DOCS and MCI moved to dismiss on the ground that the petition was time-barred and failed to state a cause of action (R. 156, 196-97).

Decision of Supreme Court

Supreme Court (Ceresia, J.) granted respondents' motions to dismiss. It held that the four-month statute of limitations set forth in C.P.L.R. 217(1) applied to all of petitioners' causes of action (R. 23). According to the court, the bulk of petitioners' claims arise from the 1996 and 2001 contracts between MCI and DOCS and challenge actions of DOCS, an administrative agency, in entering into the contracts (R. 23). Finding "nothing unique" about petitioners' claims that would take them outside of normal article 78 review, the court concluded that all but one of petitioners' claim were time barred because they were not brought within four months of April 1, 2001, the effective date of the 2001 contract (R. 24).

Moreover, the court rejected petitioners' argument that those claims were timely under the continuing violation doctrine (R. 24). Relying upon this Court's decision in Bullard, which

had directly ruled on the issue, Supreme Court held that any damages sustained by petitioners were merely the continuing effects of the 1996 and 2001 contracts, rather than any continuing wrongful conduct (R. 24).

The court then held that petitioners' only timely claim, which purportedly sought to "enforce" the PSC's October 2003 order, failed to state a cause of action (R. 24). This was so, because petitioners had not provided any evidence that respondents had failed to comply with any part of the PSC's order (R. 24).

Judgment dismissing the petition was entered on October 22, 2004, and this appeal by petitioners ensued (R. 3).

ARGUMENT

POINT I

ALL BUT ONE OF PETITIONERS' CLAIMS ARE TIME-BARRED

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

Supreme Court correctly held that 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).[3] Although declaratory judgment actions are subject to a six-year

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[3]Count VI, which asserts a violation of General Business Law § 349, is subject to a three-year statute of limitations and is discussed separately, infra.

statute of limitations, see C.P.L.R. § 213(1), "if the underlying dispute could have been resolved through an action or proceeding for which a specific, shorter limitations period governs, then such shorter period must be applied." Trager v. Town of Clifton Park, 303 A.D.2d 875, 876 (3d Dep't 2003); 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, 229-30 (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, the substance of those claims is an attack on the provisions in the 1996 and 2001 contracts providing for the payment of commissions by MCI to DOCS. The subject contractual provisions, however, resulted from DOCS's administrative determination, set forth in its RFP, to implement a collect-call-only system and to require any telephone

corporation submitting a bid to pay a minimum commission of 47% (R. 35).

That determination is an administrative determination reviewable in an article 78 proceeding. In this way, it is no different from the project labor agreements adopted by the public authorities, the legality of which the Court 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). See also Matter of United Health Services, Inc. v. Cuomo, 180 A.D.2d 172 (3d Dep't 1992) (reviewing in an article 78 proceeding the legality of an agreement between New York and Pennsylvania concerning regional health planning activities); Matter of Konski Engineers, P.C. v. Levitt, 69 A.D.2d 940, 941 (3d Dep't 1979) (holding that Comptroller's refusal to approve a contract is reviewable in an article 78 proceeding). Thus, petitioners' 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 error of law or was arbitrary and capricious."

Indeed, this Court has already determined that an article 78 proceeding is available to review those claims. In Bullard, where claimants sought to advance in the Court of Claims essentially the same claims advanced here, this Court squarely found that "claimants had an alternative remedy through a CPLR

article 78 proceeding," and thus that it was not necessary to imply a constitutional tort cause of action. Bullard, 307 A.D.2d at 678 (citing Matter of Cahill v. Public Serv. Comm'n, 113 A.D.2d 603, 605 (3d Dep't), aff'd, 69 N.Y.2d 265 [1986], cert. denied, 484 U.S. 829 [1987]).[4]

Moreover, and contrary to petitioners' argument, the nature of the relief sought here further supports Supreme Court's determination that these claims are reviewable under article 78, and thus subject to a four-month limitations period. Among other things, 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" (R. 28 [notice of petition, ¶ 3]). Petitioners further demand that DOCS refund all commissions it received from MCI from April 1, 1996, to the present, which could be construed as a request for incidental damages under C.P.L.R. § 7806. See Gross v. Perales, 72 N.Y.2d 231 (1988). Thus, it is clear that petitioners ask the Court to declare illegal and annul the commission provisions of the 1996

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[4]While this Court in Bullard, in citing Cahill, apparently believed that the available remedy was an article 78 proceeding to challenge the PSC's determination approving the rates, here petitioners have not sued the PSC or sought to annul any order of the PSC (a strategic decision that has significant legal consequences, see Point II, infra).

and 2001 contracts and provide them with incidental monetary relief.

Petitioners' attempts to recast the essential nature of their claims are unpersuasive. Even though the petition expressly states that it seeks relief pursuant to article 78 (R. 27, 37), petitioners nonetheless ask the Court to view it as a plenary action against DOCS for money had and received, which is subject to a six-year statute of limitations (See Brief, p. 19).

This Court can do no such thing, inasmuch as Supreme Court lacks jurisdiction over an action for money had and received against DOCS, an arm of the State. A plenary action for money had and received is "based on a contractual obligation or liability, express or implied in law and fact." See Matter of First National City Bank v. City of New York Finance Administration, 36 N.Y.2d 87, 93 (1975). Because this action is brought against DOCS, a state agency, any claim for money had and received would be a claim against the State of New York. See Morell v. Balasubramanian, 70 N.Y.2d 297, 300 (1987); Matter of Gebman v. Pataki, 256 A.D.2d 854, 855 (3d Dep't 1998); CC&F Buffalo Dev. Co. v. Tully, 103 Misc. 2d 1060, 1063 (Sup. Ct. Erie Co. 1980). And any such claim can only be brought 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). Moreover, 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). The cases upon which petitioners rely (Brief, p. 19) all involve claims against local governments, which do not enjoy sovereign immunity, and thus may properly be sued in Supreme Court for money had and received.

In any event, the petition fails to allege an essential element of a claim for money had and received, namely, that petitioners paid the subject rates under protest. See Riverdale County School Dist., Inc. v. City of New York, 13 A.D.2d 103, 105 (1st Dep't 1961); Niagra Mohawk Power Corp. v. City School Dist. of the City of Troy, 59 N.Y.2d 262, 267 (1983).

Finally, application of the short four-month statute of limitations to this case is consistent with the policies identified in Solnick v. Whalen, namely, that requiring petitioners to bring their challenge to administrative action promptly "facilitates rational planning by all concerned parties and ensures that the operation of government [will] not be trammeled by stale litigation and stale determinations." McBarnette, 84 N.Y.2d at 206 (internal quotes and cites omitted). Here, it would be difficult to understate the disruptive effect on DOCS and the State of a judgment annulling commission provisions in effect for over nine years, as it could require

DOCS to refund all commissions collected since 1996, a sum petitioners estimate to total over $150 million dollars (R. 32).

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 beyond the four-month limitations period. 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). A determination is final and binding when it has an impact upon the petitioner and it is clear that the petitioner has been aggrieved. See Matter of Halpin v. Perales, 203 A.D.2d 675, 677 (3d Dep't 1994).

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. For example, in Matter of Owners Committee on Electric Rates, Inc. v. Publ. Serv. Comm., 150 A.D.2d 45, 53 (3d Dep't 1989) (dissent of Levine, J.), rev'd on dissenting opn below, 76 N.Y.2d 779 (1990), the Court held that a petition challenging a PSC determination ran from the effective date of

the PSC's determination, not when each individual petitioner received actual notice. Other cases have similarly so held. See Matter of Federation of Mental Health Centers, Inc. v. DeBuono, 275 A.D.2d 557, 560 (3d Dep't 2000) (challenge to regulations was untimely where proceeding was commenced more than four months after the effective date of the regulations); New York State Rehabilitation Assoc. v. Office of Mental Retardation and Development Disabilities, 237 A.D.2d 718, 721 (3d Dep't 1997) ("the official promulgation of the amended September 1993 regulations constituted notice to petitioners that the elimination of the rate appeals process, by which they were clearly aggrieved, was final and binding upon them for CPLR article 78 purposes"). As explained by Justice Levine 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 determination 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 these determinations 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.

Notably, 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 long the Office of the Appellate Defender was first billed by MCI for collect calls from inmates, it can reasonably be inferred that it began receiving such bills more than four months before the commencement of this proceeding (R. 39). Each petitioner, therefore, was first made aware of the fees charged for collect inmate phone calls many years before the commencement of this proceeding.

Alternatively, 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 in December 16, 1998, when it approved MCI's

Maximum Security Plan as a unique service. See PSC December 1998 order, 1998 N.Y. PUC LEXIS 693.

While the PSC subsequently approved a modified rate structure, its October 2003 determination doing so did not trigger a new accrual date, because petitioners do not challenge the only change approved at that time. That is, the PSC's October 2003 order only reviewed a change in the rate structure of MCI's Maximum Security Rate Plan -- a change petitioners do not contest in this proceeding -- so that the rates no longer varied for local and long distance calling (R. 69, 87). But MCI sought no change in the commission component of the rate at that time, and the PSC expressly declined to pass on the legality or reasonableness of the DOCS commission, finding it lacked jurisdiction over DOCS (R. 87-88).

None of the claims in the petition challenges the rate structure change approved by the PSC in its October 2003 order. Petitioners have neither sought to annul the PSC's October 2003 order nor named the PSC as a respondent in this proceeding (indeed, their first claim actually purports to seek enforcement of the PSC's 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 for lack of jurisdiction. Thus, the fact that the PSC issued a new order in October 2003 cannot be found

to have triggered a new accrual date for statute of limitations purposes.

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.

Finally, Supreme Court properly rejected petitioners' argument that their claims are timely under the continuing violation doctrine (R. 24). As the court aptly observed (R. 24), this Court in Bullard expressly rejected the same argument. See Bullard, 307 A.D.2d at 678. Here, as in Bullard, 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]." Id. Indeed, petitioners virtually concede that Bullard is dispositive, and instead ask the Court to reject its own precedent (Brief, p. 22). Notably, Judge Read also rejected the same continuing violation theory in Smith v. State of New York (Ct. Claims July 8, 2002, Claim No. 101720) (attached as an addendum), another case challenging DOCS's inmate telephone system.

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

Though petitioners' claim under General Business Law § 349 is most easily disposed of on the merits, see, infra, at 43-45, 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 first 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." On this issue, this Court's decision in Bullard is once again 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. Commission, 113 A.D.2d at 605). Despite this clear guidance, petitioners incredibly declined to name the PSC as a party in this proceeding or to seek annulment of the PSC's

December 1998 or October 2003 orders approving the rates charged pursuant to the 1996 and 2001 contracts.

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). "This doctrine is applicable to tariff filings with the PSC since to hold otherwise would unnecessarily involve the courts in rate determinations better left to agencies with the required experience." Matter of Concord Assoc. v. Public Serv. Comm., 301 A.D.2d 828, 830-31 (3d Dep't 2003).

Petitioners' alleged injury arises directly from the imposition of rates duly filed by MCI with the FCC and the PSC, see 47 U.S.C. § 203(a); Public Service Law § 92(1), and those rates expressly incorporate 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) ("No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file 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).

The fact that the PSC, in its October 2003 order, did not review the reasonableness of the portion of the revised rates attributable to the DOCS commission (which it delineated as the

"non-jurisdictional" portion of the rate) does not change the result. While the PSC required MCI to file a new, bifurcated rate, it nevertheless authorized MCI to charge the rate as so bifurcated, which includes the commission. Consequently, petitioners' alleged injury arises from a rate duly filed with and authorized by the PSC. See Valdez v. State of New Mexico, 132 N.M. 667, 54 P.3d 71, 75 (Sup. Ct. N. Mex. 2002) (basis of filed rate doctrine is not that the rate is "reasonable or thoroughly researched," but rather that it is "the only legal rate") (internal quote omitted).

To grant 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 Susan Read succinctly 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.) (attached hereto an addendum). 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 2004).

Even if the filed rate doctrine somehow does not apply to the filed rates approved by the October 2003 PSC order, the doctrine indisputably bars any challenge to the total rates authorized by the PSC's December 1998 order, because this Court squarely so held in Bullard. Thus, at the very least, any challenge to rates charged prior to the PSC's October 2003 determination must be dismissed.

POINT III

THE PETITION FAILS TO STATE A CAUSE OF ACTION

In any event, Supreme Court's judgment may 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.

There is no merit to counts II and III of the petition, which allege that the DOCS commission constitutes an unauthorized tax and violates petitioners' substantive due process rights. As

previously explained, the telephone rates paid by petitioners incorporate the commissions payable to DOCS pursuant to the 1996 and 2001 contracts, and thus these rates were approved by the PSC, which this Court has repeatedly characterized as "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). Surely, where the rates incorporating the commissions have been approved by the very body created by the Legislature to have exclusive jurisdiction over such matters, the claim that the commissions in any sense constitute a legislatively unauthorized tax on claimants is meritless. See Arsberry v. State of Illinois, 244 F.3d 558, 565 (7th Cir.), cert. denied, 534 U.S. 1062 (2001) ("But here the fact is that it is not a tax but a tariffed rate bites. A claim of discriminatory tariffed telephone rates is precisely the kind of claim that is within the primary jurisdiction of the telephone regulators.").

Moreover, the Legislature has signaled its approval of the commissions by specifically appropriating them to DOCS's Family Benefit Fund (R. 35, 99). See, e.g., L. 2003 ch. 50, pp. 26-27 (reproduced at R. 160-161). Surely, if the Legislature regarded the commissions as an unauthorized tax, or improper in any way,

it would not legitimize them by expressly appropriating the subject funds for DOCS's Family Benefit Fund.

Furthermore, these commissions are not in any legal sense a "tax," but rather constitute one component of the overall charge for providing telephone service. Notably, 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). Thus, under pertinent regulatory law, MCI's commission payments to DOCS are merely a charge for providing a service, and the fact that they are paid to a governmental entity -- and thus used for a public purpose -- cannot by itself transform them into a tax.

In this regard, petitioners simply miss the point in arguing (Brief, p. 33) that the DOCS commission "is unrelated to the cost

of gaining access to the prisons, because [DOCS] runs the prisons." As explained more fully in MCI's brief, a commission represents an expense incurred by the telephone company, not the prison, for the privilege of installing and operating the telephone system in the prisons.

For this reason, the Supreme Court of New Mexico recently rejected a claim remarkably similar to that of petitioners. In Valdez v. State of New Mexico, 54 P.3d at 77, the plaintiffs challenged the commissions received by the state prison system pursuant to contracts with the telephone companies, claiming that the State was imposing an unlawful tax and an unlawful special tax. Rejecting this argument, the court held that the rate charged for public utility services was not a tax, but a price at which and for which the public utility service or product was sold. Id. (quotation omitted). Moreover, the court noted that the commissions could not be viewed as a tax because plaintiffs had "voluntarily accepted collect call services" and the payment for such voluntary services could not be considered a mandatory tax. Id.

Indeed, contrary to petitioners' argument, the commissions here are more akin to a fee for services. "Taxes are imposed for the purpose of defraying the costs of government services generally." Albany Area Builders Ass'n v. Town of Guilderland, 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). "They are in the strict sense 'payable into the general fund of the government to defray customary government expenditures.'" Matter of Joslin v. Regan, 63 A.D.2d 466, 470 (4th Dep't 1978) (quoting People v. Brooklyn Garden Apartments, 283 N.Y. 373 [1940]), aff'd, 48 N.Y.2d 746 (1979). On the other hand, fees are "a visitation of the costs of special services upon the one who derives a benefit from them," Synagogue v. Roselyn Harbor, 40 N.Y.2d 158, 162 (1976), and "are imposed to defray or help defray the cost of particular services." Matter of Joslin v. Regan, 63 A.D.2d at 470.

All of the commissions received by DOCS are appropriated by the Legislature to the "Family Benefit Fund" in DOCS's operating budget (R. 35, 99). The Family Benefit Fund is used not only to maintain the Inmate Call Home Program, but also to support various programs directly benefitting 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).

Thus, the commission paid to DOCS under the contracts are not used to defray the "cost of government services generally," such as repairing roads and bridges, or even to defray the cost of DOCS's general expenses, such as the cost of officers' salaries and the like. Rather, the revenues defray the cost of the telephone system and the special services that DOCS provides for the direct benefit of inmates and their families, the users of the Inmate Call Home Program.

B. Petitioners' free speech rights are not violated.

1. The commission payments.

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' telephone system simply does not implicate petitioners' free speech rights at all.

At the outset, 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.

Thus, in Arsberry v. State of Illinois, 244 F.3d 558, 564 (7th Cir.), cert. denied, 534 U.S. 1062 (2001), the Seventh Circuit rejected a claim by inmates and their families that the State's imposition of excessive rates on collect call services violated their First Amendment rights. In so doing, 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, this Court has reasoned that "'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 Morgan v. La Vallee, 526 F.2d 221, 225 (2d Cir. 1975); Overton v. Bazzetta, 539 U.S. 126, 135 (2003); Walker v. Litscher, 2003 U.S. Dist. LEXIS 24625 at *7 (W.D. Wisc. 2003). But the New York Constitution does not require the State to provide inmates with telephone service at all -- or any particular means of communication for that matter -- let alone telephone service at a particular rate. See Arsberry v. State of Illinois, 244 F.3d at 565; United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000).

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). No such allegation is made here.

This Court should decline to follow the recent decision in Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005), which concluded that the plaintiffs' challenge to the 60% commission DOCS received under the 1996 contract stated a First Amendment claim. The court in Byrd stated that the sixty percent commission "has no obvious penological interest" and that the

plaintiffs could prevail if they were able to demonstrate "'that the costs are so exorbitant that they are unable to communicate.'" Id. at *26 (quoting Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994)). This decision, which is 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), is flawed and should not be followed.

Even accepting the reasoning of Johnson and Byrd, the allegations of the petition here, accepted as true, do not establish that petitioners are "unable to communicate" with their incarcerated relatives and friends. 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). No allegations are made concerning Walton's efforts 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. Indeed, these allegations show that DOCS makes available several means of communication between inmates and the outside world: In addition to providing the Inmate Call Home Program, DOCS allows inmates to receive face-to-face visits at the prison, see 7 N.Y.C.R.R. Part 200, and permits inmates to communicate through written correspondence. Id. at Part 721. These programs, taken together, provide an ample opportunity for inmates to communicate with the outside world. 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. 988, 1002 n.11 (S.D. Ohio 2003).

Any telephone rate that is 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").

Nor do the petition's allegations concerning the impact of the rates on the work of the Office of the Appellate Defender and the New York State Defenders' Association state a free speech claim. 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 implicated 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). The commission provision, an integral part of the collect-call-only system, is the means by which DOCS funds not only the Inmate Call Home Program, but also a variety of programs that directly benefit inmates and their families. These programs undeniably serve legitimate penological goals. Without the commissions as the funding source, it is doubtful whether many of these programs could exist.

2. The collect-call-only system.

Petitioners' brief does not argue that DOCS's determination to use a collect-call-only/single provider system -- apart from the commission component -- is unconstitutional. Thus, to the extent the petition sought to raise this issue as an independent claim, it is abandoned. See Matter of Lue-Shing v. Travis, 12 A.D.3d 802, 803 n.1 (3d Dep't 2004), lv. denied, 4 N.Y.3d 705 (2005).

In any event, in light of the manifest penological benefits inherent in collect-call-only/single provider inmate telephone systems, every court that has addressed the constitutionality of such systems -- including the Southern District in Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 at *18-*21 (S.D.N.Y. 2005) -- has found them reasonable and consistent with free speech rights. See, e.g., Arsberry v. State of Illinois, 244 F.3d 558 (7th Cir.), cert. denied, 534 U.S. 1062 (2001); Arney v. Simmons, 26 F. Supp.2d 1288, 1293 (D. Kan. 1998); Carter v. O'Sullivan, 924 F. Supp. 903, 909 (C.D. Ill. 1996); Loden v. Peters, 1995 U.S. Dist. LEXIS 2429, *42 (N.D. Ill. 1995); Levingston v. Plummer, 1995 U.S. Dist. LEXIS 696 (N.D. Cal. 1995); Clark v. Plummer, 1995 U.S. Dist. LEXIS 7048 (N.D. Cal. 1995); Adams v. McGee, 1994 U.S. Dist. LEXIS 14272 (D. Or. 1994); Turk v. Plummer, 1994 U.S. Dist. LEXIS 12745 (N. Dist. Cal. 1994); Lane v. Hutcheson, 794 F. Supp. 877, 881 (E.D. Mo. 1992). In accordance with the foregoing cases, petitioners fail to state a viable free speech challenge to DOCS' inmate telephone system.

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. This claim fails for the same

reasons that the plaintiffs' procedural due process claim failed in Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 at *28. "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, it is illogical 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). It is elementary that the Equal Protection Clause 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 accept collect calls from inmates, are not similarly situated to the recipients of non-inmate calls. Because the calls are initiated by inmates from the confines of a correctional facility, "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 (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; accord 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 and non-recipients of inmate 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 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 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, 205-206 (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. 2d 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" which "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 telephone service (R. 88). Rather, DOCS is performing a government function in operating its Inmate Call Home Program and in 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 constitute deceptive or misleading acts or practices are quintessentially governmental in nature: They 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. 45). Even if the commissions are an unauthorized tax (a point we do not concede), the collection of them are indisputably for governmental purposes.

Moreover, to the extent petitioners seek damages from DOCS, a state agency, for an alleged violation of General Business Law § 349, the claim is barred by sovereign immunity. There is no evidence in the statute or legislative history that the Legislature, in providing a private damages remedy, clearly intended to waive the State's immunity from suit for damages in Supreme Court. 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 Hydro Investors, Inc. v. Trafalgar Power, 6 A.D.3d 882, 886 (3d Dep't 2004); Weisman v. Awnair, 3 N.Y.2d 444, 450 (1957); Bettan v. Geico General Ins. Co., 296 A.D.2d 469 (2d Dep't), lv. denied, 99 N.Y.2d 552 (2002).

CONCLUSION

The judgment dismissing the petition should be affirmed.

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Respectfully submitted,

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