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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") with respect to a telephone contract between respondents. The Verified Petition and Complaint (hereinafter "Petition") alleges that the commissions are unlawful and originally asserted 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.

Respondent DOCS moved to dismiss the Petition pursuant to CPLR sections 7804(f) and 3211(a) on a number of grounds, including that the untimeliness of the Petition under CPLR section 217(1) and the failure to state a claim on the merits. Supreme Court, in a Decision/Order/Judgment dated October 8, 2004, granted the motion to dismiss the Petition as untimely. Petitioners appealed to the Appellate Division, Third Department which unanimously affirmed the dismissal. Walton v. New York State Dep't of Correctional Servs., 25 A.D.3d 999 (3d Dep't 2006). Petitioners then sought leave to appeal to the New York Court of Appeals which was granted. 7 N.Y.3d 706 (2006). In a decision rendered on February 20, 2007, with two dissents, the Court of Appeals reversed, reinstated the second through fifth causes of action set forth in the Petition, and remanded the matter to Supreme Court. 8 N.Y.3d 186 (2007)[1] Inasmuch as this Court's initial decision was rendered on

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[1] As a result of this order, the remaining claims, including all those asserted against MCI have been dismissed.

the threshold timeliness question, the other defenses raised by DOCS were not addressed and are now ripe for decision. This supplemental Memorandum of Law is offered, with leave of Court, in further support of DOCS' motion to dismiss.

For the reasons set forth in greater detail below, DOCS submits that the Petition should be dismissed because:

1) the proceeding is barred by the filed rate and primary jurisdiction doctrines;

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

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

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

5) the contract and commission is reasonable and has a rational basis; and

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

**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[2], and went into effect on April 1, 2001. Id.[3] 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.

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[2] 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).

Not about MOOTNESS when seeking Damages! But barred by SL...

[3] 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.

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.[4] 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. 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. Id. at 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 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

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[4] While this matter was pending on appeal before the Court of Appeals, Governor Eliot Spitzer announced that the Department of Correctional Services would restructures its phone contract to eliminate the commission. Once finalized, this action will moot any remaining claims for injunctive relief moving forward.

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).

## Argument

Upon remand only petitioners' four constitutional challenges to the DOCS commission remain to be litigated. Those claims allege that the telephone commission is an unlawful tax and violates substantive due process; is a taking of property without just compensation; violates petitioners' right to equal protection; and violates the free speech and association rights of the petitioners. DOCS submits, as outlined below, that on the merits each fails to state a claim for relief and should be dismissed. In addition, DOCS submits that the claims are barred by the application of the filed rate and primary jurisdiction doctrines.

### POINT I

### PETITIONERS' CLAIMS ARE BARRED BY THE FILED RATE DOCTRINE

As a threshold matter, petitioners are barred from litigating the merits of these claims by application of 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).

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 "second guess the regulator's decisions and overlay their own resolution." Id. The Second Circuit has also noted that "courts have uniformly held . . . that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies." Id. at 20. This claim, like others raising these same issues in other New York courts must be dismissed in the face of application of the filed rate doctrine. Bullard, 307 A.D.2d at 678; Smith v. State of N.Y., Claim No. 101720, slip op. at 4 (Ct. Cl. July 8, 2002) (copy annexed in Appendix as Exhibit 1).

Petitioners cannot persuasively argue that their petition is outside the reach of the doctrine because inherent in their claim is a challenge to the reasonableness of the filed rates. Petitioners' alleged injury arises directly from the imposition of the rates duly filed by MCI which expressly incorporated commissions to the State in accordance with the DOCS/Worldcom contract. 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"). Thus, regardless of how claimants 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, 238 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 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 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). Though

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); Valdez v. State of New Mexico, 132 N.M. 667, 671, 54 P.3d 71, 75 (Sup. Ct. N. Mex. 2002).

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

## POINT II

## 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 which has primary jurisdiction over such claims.

> 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, 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[5] the precise elements behind the operation of the DOCS phone 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 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.")

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

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 III

## 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 an unauthorized tax

The commissions are not taxes imposed on recipients of collect calls, but rather are rent and access fees paid by MCI to DOCS for the right to operate the prison telephone system.

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

Contrary to petitioners' characterizations, the commissions are not a "tax." Rather, they are a legitimate business expense incurred by telephone companies for the privilege of accessing the prisons and providing telephone service. As the PSC observed in its October 2003 order, the DOCS commission is no different from the commissions paid by pay-phone telephone companies to premises owners. Petition, Ex. A. While payphones are now largely deregulated, see Public Service Law §

90(3), before such deregulation, the PSC recognized that it had no authority to limit the commissions charged by governmental premises owners, which are a matter of contractual agreement with the payphone companies, or to bar them from entering into exclusive service arrangements. See Matter of the Rules and Regulations of the Public Service Commission 16 N.Y.C.R.R., Chapter VI, 1989 N.Y. PUC LEXIS 45 at *60-*62 (Aug. 16, 1989) (copy annexed in Appendix as Exhibit 2).

Federal law is to the same effect. According to the FCC, "[c]ommission payments have traditionally been considered a cost of bringing payphone service to the public." Matter of AT&T's Private Payphone Commn. Plan, 3 F.C.C. Rcd. 5834, 5836 (1988). The FCC's "regulations reflect that payphone commissions have been traditionally treated as a business expense paid to compensate for the rental and maintenance of the space occupied by the payphone and for access to the telephone user," i.e., "business expenses paid to gain a point of service to the individual user." Id.; see also International Telecharge, Inc. v. AT&T Co., 8 F.C.C. Rcd. 7304, 7306 (1993) (commission payments, which are "a standard practice in the operator services industry," are a "legitimate business expense"); Matter of National Tel. Servs., Inc., 8 F.C.C. Rcd. 654, 655 (1993) (same). Likewise, the FCC has recognized commissions as a legitimate business expense in the prison context. The DOCS commission is well within the range charged by other prison systems nationwide, which "usually range between 20% and 63%, with most states charging more than 45%." See Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 17 F.C.C. Rcd. 3248, 2002 F.C.C. LEXIS 889 at *13, n.34 (2002). The FCC, which has primary jurisdiction to regulate interstate telephone tariffs, has declined to prohibit or impose caps on commissions collected by prisons.

Thus, under pertinent regulatory law, the commission payments are an expense incurred by MCI for access to the prisons and the privilege of installing, maintaining and operating the telephone system. They are essentially access fees or rent paid by the telephone company. That MCI passes these expenses on to recipients of collect calls does not transform them into taxes. If, for example, MCI rented office space from a government entity, and factored its rental costs into the calculation of the tariffs, the monthly rental payments thus passed on to MCI's customers would not constitute taxes on those customers. Neither the PSC nor the FCC reviews whether premises owners charge too much rent; rent is simply a matter of contractual negotiation between the parties.

Further distinguishing the commissions from taxes is the absence of any legal liability of petitioners to pay the commissions to the State. If the commissions were taxes on petitioners, then recipients of collect calls who failed to pay their telephone bills to MCI would be liable to the State for the unpaid commissions and subject to the State's tax enforcement procedures. See, e.g., Tax Law § 1133(b),(c) (buyers of items are liable to the State for unpaid sales taxes). Here, while MCI must pay commissions to DOCS on all completed collect calls regardless of whether it receives payment for them the collect call recipients are not liable to the State for non-payment of the commission component of the telephone rates. Their only liability is to MCI pursuant to their service contracts.

Notably, in Valdez, the Supreme Court of New Mexico addressed this issue and held that, in collecting prison telephone commissions, the prison was not imposing an illegal tax. Filed rates that include commissions, the court held, were not taxes, but rather "a price at which and for which the public utility service or product is sold." 54 P.3d at 77 (internal quotation omitted). It also noted that the commissions could not be viewed as a tax because plaintiffs had "voluntarily accepted collect

call services" and thus the payment for such voluntary services could not be considered a mandatory tax. Id.

Thus, the commissions are not taxes imposed on recipients of collect calls.

2. Any required legislative approval was obtained here.

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

The telephone rates paid by petitioners incorporate the commissions payable to DOCS pursuant to the 1996 and 2001 contracts, and these rates were approved by the PSC, which is "the alter ego of the Legislature." Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn., 135 A.D.2d 4, 7 (3d Dep't 1987), appeal dismissed, 72 N.Y.2d 840 (1988); see Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn., 117 A.D.2d 156, 160 (3d Dep't 1986) (same). The PSC directed MCI to file a tariff identifying the DOCS commission as part of the approved rate thus making those rates the only ones that MCI was legally authorized to charge. See Public Service Law § 92(2)(d). Because rates containing commissions have been approved by the very body created by the Legislature to exercise exclusive jurisdiction over such matters, the commissions are not an unauthorized tax. See Arsberry v. State of Illinois, 244 F.3d 558, 565 (7th Cir.), cert. denied, 534 U.S. 1062 (2001). In Arsberry, the Court rejected the claim that prison telephone commissions constitute an illegal tax, holding that they are instead part of the approved rate and that "a claim of discriminatory tariffed telephone rates is precisely the kind of claim that is within the primary jurisdiction of the telephone regulators." Id.

occurs because the "prospective recipient of a collect call is in complete control over whether she chooses to accept the call and thereby relinquish her money to pay for it." McGuire v. Ameritech Services, Inc., 253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003).

Accordingly, Count III should be dismissed.

## POINT V

## 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, 119 F. Supp.2d 691 ("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."); Clark v. Plummer, No. C 95-0046, 1995 WL 317015, at *2 (N.D. Cal. May 18, 1995) (copy annexed in Appendix as Exhibit 3); Levingston v. Plummer, No. C 94-4020, 1995 WL 23945, at *1 (N.D. Cal. Jan. 9, 1995) (copy annexed in Appendix as Exhibit 4).

**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.

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.

**C. Equal Protection Analysis of Taxes**

Even viewing the commission as a tax, as petitioners would have it, the equal protection claim lacks merit.[8] 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 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).

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[8] For the reasons outlined in Point III, supra, however, respondent does not concede that the commission is, in fact, a tax.

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 VI

## 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). 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.**

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

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.

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). As federal courts addressing First Amendment challenges to similar arrangements around the country have overwhelmingly found, 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 Phone 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. Indeed, such an 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 5), adopted, January 16, 2001.

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, 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 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 6), 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).[9] As the Seventh Circuit has 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

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[9] 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).

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).

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); but see Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005) (holding on motion to dismiss that plaintiffs' challenge to the 60% commission DOCS received under the 1996 contract stated a First Amendment claim, because plaintiffs could prevail by demonstrating "that the costs are so exorbitant that they are unable to communicate.").

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

Even accepting the reasoning of Johnson and Byrd, the detailed allegations of the petition here, accepted as true, preclude petitioners from establishing that they are "unable to communicate" with their incarcerated relatives and friends or have been denied telephone access altogether. Petitioner Walton alleges that she visits her son and nephew once a month, and that, while she and her son "are not able to speak on the phone as much as they would like," Petition, ¶ 53, she accepted

a total of seven collect calls from her son and nephew in a given month. Id. at ¶ 55. Walton does not allege what efforts she makes to correspond with her son and nephew. While petitioner Austin alleges that the high cost of the collect calls prevents her from speaking by phone with her husband "as much as they both need," id. at ¶ 57, she readily admits that she and her incarcerated husband "write letters to each other frequently, and she visits him when she can." Id. at ¶ 56. 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, she is silent as to her efforts to write to her cousin and friend. See id. at ¶ 58.

These allegations simply do not establish that the DOCS commission prevents the petitioners from communicating at all with their friends and relatives in prison. To the contrary, they highlight the alternative means of communication that DOCS makes available to them, including face-to-face visitation at the prison, see 7 N.Y.C.R.R. Part 200, and communication through written correspondence. Id. at Part 720. Together, these programs provide an ample opportunity for inmates to communicate with the outside world, which is all the Constitution requires. See Overton, 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" by telephone or any particular means. See McGuire v. Ameritech Servs, Inc., 253 F. Supp. 2d at 1002 n.11.

Any telephone rate greater than zero will restrict an individual's ability to make calls. Petitioners do not even suggest what telephone rate is constitutionally permissible, or how many calls

per month an inmate's relative should be able to afford to make. Simply put, there is no constitutional right to low cost telephone service for inmates and their families. See Carter v. O'Sullivan, 924 F. Supp. 903, 911 (C.D. Ill. 1996) (rejecting plaintiffs' argument that calls are overpriced because "nothing precludes the prisoners and their outside contacts from writing to each other to save money").

Finally, even if the commission requirement implicates free speech rights, the requirement is rationally related to legitimate governmental and penological interests. See Turner v. Safley, 482 U.S. 78, 89 (1987); Matter of Lucas v. Scully, 71 N.Y.2d 399, 405 (1988). As the FCC aptly observed, prison officials "must balance the laudable goal of making calling services available to inmates at reasonable rates, so that they may contact their families and attorneys, with necessary security measures and costs related to those measures." 17 F.C.C. Rcd. 3248 at **72. While single provider arrangements and the prison's exclusive control over access to inmate calling may lead to higher rates, "higher commissions may give confinement facilities a greater incentive to provide access to telephone services [and] [c]ommission proceeds may be dedicated to a fund for inmate services." Id. at **73.

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

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.

**Conclusion**

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

Dated: Albany, New York
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