STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

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

Plaintiffs-Appellants.

-against-

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

Defendants-Respondents.

AD No. 98700

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

RACHEL MEEROPOL
BARBARA J. OLSHANSKY
ROBERT BLOOM
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6432

JUAN CARTAGENA
CRAIG S. ACORN
COMMUNITY SERVICE SOCIETY
105 E.22nd Street
New York, NY 10010
(212) 614-5323

Attorneys for Plaintiffs-Appellants
Ivey Walton, Ramona Austin, Joann Harris, the Office of the Appellate Defender, and the New York State Defenders Association

To be Argued by: Rachel Meeropol
Time Requested: 30 Minutes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Other Authorities

Preliminary Statement

Plaintiffs-Appellants Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender and the New York State Defenders Association ("Plaintiffs") submit this reply memorandum in further support of their Appeal from the Supreme Court's dismissal of their combined Article 78/declaratory judgment proceeding seeking relief from an unlawful tax, by responding briefly to the arguments made by Defendants-Respondents MCI Worldcom Communications ("MCI") and New York State Department of Correctional Services ("the State" or "DOCS")[1] in their Briefs[2] served upon Plaintiffs on October 13, 2005.

Re-Statement of the Case and Facts

Except to correct several factual errors in Defendants' statement, Plaintiffs rely upon their statement of the facts and the case as presented in their Appeal Brief. First, Defendants state that DOCS amended the MCI rate structure in a "revenue neutral" manner after it determined that the existing structure was "unfair to a majority of families who receive calls from inmates." State Br. at 7. In fact, the revenue increase to MCI was estimated to be about $141,000/month, or $1,692,000/year [R. 25] and DOCS acknowledged a potential revenue increase, should calling patterns remain the same, of 1.7%. [R. 21]. Moreover, it is clear that the change in the rate structure was not intended to make the system more equitable for families, but to disable Outside Connections and other call forwarding providers from poaching profits away from MCI and the State. [R. 6]. Further, Defendants' argument that the filed rate doctrine applies here is premised on their factual assertion that the New York State Public Service Commission ("PSC") "authorized" and "approved" the DOCS surcharge. State Br. at 26.

---

[1] MCI and DOCS will be referred to collectively as "Defendants."

[2] See, Brief for Respondent New York State Department of Correctional Services, Walton v. New York State Department of Correctional Services, No. 98700 (Oct. 13, 2005) ("State Br."); Brief for Respondent-Appellee MCI, Walton v. New York State Department of Correctional Services, No. 98700 (Oct. 13, 2005) ("MCI Br.").

However, there simply cannot be any such interpretation of the facts here: the PSC repeatedly disavowed regulatory jurisdiction over DOCS as well as any power to authorize additional charges sought by DOCS, and they certainly did not approve it. [R. 22 - 27].

Argument

I. PLAINTIFFS' COUNTS II – VI ARE TIMELY

As explained in Plaintiffs' Appeal Brief,[3] all of Plaintiffs' claims were timely commenced because: (1) Defendants' monthly telephone billings represent a continuing violation of Plaintiffs' rights; (2) the six year statute of limitations for declaratory judgments applies because Plaintiffs seek relief that is not available in an Article 78 proceeding; and (3) in the alternative, if the Court holds that Plaintiffs do seek Article 78 relief, the earliest their claims could have accrued is the effective date of the October 2003 PSC decision. See Appeal Br. at 8 – 27. Defendants' attempt to dispute each of these propositions fails. Moreover, because the monthly telephone billings are a continuing violation of Plaintiffs' rights, Defendants' arguments about the proper accrual date and the applicable statute of limitations are relevant only to calculate the number of years of unlawful billings for which Plaintiffs may collect damages. This is a remedial issue going to the calculation of damages; it is not a ground for dismissal of any claim. Finally, because Counts II through V are properly subject to the six year statute of limitations for declaratory judgments, these claims are timely even if the Court agrees with Defendants' argument that Plaintiffs' claims accrued upon the signing of the 2001 contract.

A. Under the Continuing Violation Doctrine, Plaintiffs' Claims are Timely No Matter What Statute of Limitations Applies, and No Matter When These Claims First Accrued.

[3] Brief for Plaintiffs-Appellants, Walton v. New York State Department of Correctional Services, No. 98700 (Aug. 15, 2005)("Appeal Br.").

Defendants' arguments with respect to the continuing violation doctrine require little additional comment because Defendants make no effort to respond to or distinguish the cases relied upon by Plaintiffs to support the applicability of this doctrine. See Appeal Br. at 21 – 27, (citing Davis v. Rosenblatt, 559 N.Y.S.2d 401 (3d Dept. 1990)); Cahill v. Public Service Commission, 498 N.Y.S.2d 499 (3d Dept. 1986); Merine v. Prudential-Bache Utility Fund, Inc., 859 F. Supp. 715 (S.D.N.Y. 1994), among others. Instead, Defendants rest their argument on this Court's decision in Bullard, and as cited (without analysis) by the Court of Claims in Smith v. State (N.Y. Ct. Cl., July 8, 2002, Claim No. 101720). State Br. at 21. (citing, Bullard v. State, 763 N.Y.S.2d 371 (3d Dept. 2003)). As stated in Plaintiffs' Appeal Brief, the Bullard court's discussion of the continuing violation doctrine involved minimal analysis, went against the significant weight of precedent, and should not be followed. See Appeal Br. at 22 – 27. Because the continuing violation doctrine applies, Plaintiffs' claims are timely even if the Court holds that they are subject to the Article 78 period and / or the claims initially accrued upon the signing of the 2001 contract.

B. Whether or Not the Continuing Violation Doctrine Applies, Counts II – V Are Timely Because They are not Cognizable Under Article 78 Review, But are Instead Subject to the Six Year Statute of Limitations Applicable to Actions for Declaratory Judgment.

Defendants' argument that Article 78 review is appropriate (and thus Plaintiffs' claims are barred by the four month statute of limitations) is based on a misunderstanding of the nature of Plaintiffs' challenge to Defendants' unlawful charges. The parties agree that in order to decide whether Article 78 review is appropriate, a court must determine whether the rights of the parties sought to be stabilized by a declaratory judgment are open to resolution through some other proceeding. See Solnick v. Whalen, 401 N.E.2d 190, 193 (N.Y. 1980). As explained in Plaintiffs' Appeal Brief, in New York City Health and Hospitals Corporation v. McBarnette, 639

N.E.2d 740, 745 (N.Y. 1995), the Court of Appeals reconciled the conflicting case law in this area by affirming the principle that "agencies' generally applicable decisions do not lend themselves to consideration on their merits under the provisions for mandamus to review...". The Court of Appeals explained that while generally applicable quasi-legislative actions by administrative bodies, especially those made without notice and hearing, are not subject to Article 78 review, there is an exception for those cases in which "even a nonindividualized, generally applicable quasi-legislative act such as a regulation or an across-the-board rate-computation ruling can be challenged as being 'affected by error of law,' 'arbitrary and capricious' or lacking a rational basis." Id. at 745.

The cases cited by Defendants are illustrative of this exception. See State Br. at 13. In New York State Chapter, Inc. v. New York State Thruway Authority, 666 N.E.2d 185, 190 (N.Y. 1996), for example, the Court of Appeals reviewed the public authority's decision to adopt a Project Labor Agreement (PLA) by examining whether that decision had "as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes." Article 78 review was appropriate in that case because it provided a vehicle for the court to scrutinize the challenged agency action with respect to the policy considerations reflected in the legislative enactment being applied and interpreted by the agency. See, id. at 71 (finding that the authority's "detailed focus on the public fisc ... the demonstrated unique challenge posed by the size and complexity of the project, and the cited labor history collectively support the determination that this PLA was adopted in conformity with the competitive bidding statutes."). New York State Thruway Authority is a prime example of a challenge to a generally applicable quasi-legislative act, as described in McBarnette, which is subject to Article 78 analysis, because

plaintiffs sought to "convince the court that defendants promulgated a rule ... that represented an irrational construction of the governing statute." McBarnette, 639 N.E.2d at 745.

Unlike the decision to implement a PLA, the billing and collection of the DOCS surcharge is not the type of "administrative determination" that can be analyzed as to whether it is "affected by error of law or was arbitrary and capricious." State Br. at 13. Administrative acts are those which are "necessary to carry out legislative policies and purposes already declared by the legislative body or such as are devolved upon it by the organic law of its existence." BLACK'S LAW DICTIONARY 45 (6th ed. 1990). The DOCS surcharge is without any basis in law. There is no statute to interpret, nor any legislative policies against which a court could measure Defendants' actions. Thus, Plaintiffs challenge the DOCS surcharge as an *ultra vires* legislative act, by which the agency is unlawfully usurping the role of the legislature [R. 56]. Such a claim may only be brought in an action for a declaratory judgment seeking a determination as to the constitutionality of the agency's action. See, e.g., Save the Pine Bush v. City of Albany, 512 N.E.2d 526 (N.Y. 1987) (constitutional challenge to ordinance as vague and overbroad delegation of authority cannot be maintained in an Article 78 proceeding); Watergate II Apartments v. Buffalo Sewer Authority, 385 N.E.2d 560, 563 (N.Y. 1978) (challenge to charges by Sewer Authority as a discriminatory tax beyond the power of the authority to impose was properly brought as a declaratory judgment not subject to the exhaustion requirement of Article 78); Hull v. Town of Warrensburg, 620 N.Y.S.2d 570 (3d Dept. 1994) (constitutional challenge to Town's power to assess a sewer rent properly brought as declaratory judgment action, rather than an Article 78 proceeding).

Defendants' reliance on the Bullard court's dictum that an Article 78 proceeding was available to Claimants in that case, and that Plaintiffs made a poor strategic decision in not

challenging the PSC's October 2003 decision, is also unavailing. See State Br. at 14 (citing Bullard, 763 N.Y.S.2d at 678). Had the PSC reviewed the entire rate charged to Plaintiffs (as the Bullard court expected) and determined that it was just and reasonable, Plaintiffs could have chosen to file an Article 78 action challenging that determination. However, that did not occur. Plaintiffs agree with the PSC's finding that it lacks jurisdiction over the DOCS surcharge, and therefore properly did not challenge the PSC Order.

The fact, cited by Defendants, that Plaintiffs seek damages, is similarly irrelevant to this analysis; most actions for a declaratory judgment include demands for additional relief. See, Silverstein v. Continental Casualty Co., 258 N.Y.S.2d 485, 487 (4th Dept. 1965) aff'd by 218 N.E.2d 323 (N.Y. 1966) ("In a declaratory action all relief to which a party is entitled should be given so that a second independent suit is not required").

Defendants also mischaracterize Plaintiffs' argument regarding actions for money had and received. Plaintiffs do not attempt to "recast the essential nature of their claims" (State Br. at 18) but rather point out the Court below's failure to fulfill the Solnick imperative. 401 N.E.2d at 193. Plaintiffs directed this Court's attention to actions for money had and received because, after examining the rights of the parties sought to be stabilized by this action, that is the "kind of action that would have been most likely to raise the same substantive issues had there been no declaratory action available." Id. at 194 (emphasis added). Under Solnick, once an analogous action has been identified, the court must determine if that alternative action is time-barred. If it is still timely then a challenge to the untimeliness of the declaratory judgment must fail. Id. In other words, this Court need not convert Plaintiffs' action into that for money had and received;

it can simply hold, by analogy, that Plaintiffs' action for a declaratory judgment is not time-barred.[4]

Finally, Defendants' citation of the policy purposes behind the short four month statute of limitations applicable to Article 78 actions is irrelevant. Plaintiffs have no quarrel with the statute of limitations applicable to such actions; they simply disagree with its applicability in this case.

C. In the Alternative, if the Court Holds that Plaintiffs' Claims Are Subject to Article 78 Review, the Earliest The Claims Could Have Accrued was October 2003.

In analyzing the time of accrual of Plaintiffs' claims, Defendants spend a remarkable amount of time attempting to refute an argument Plaintiffs have not advanced: that determination of the time of accrual should be based on when each individual received actual notice of the allegedly unlawful charges. See State Br. at 17 – 19. If Plaintiffs' claims are subject to Article 78 review, and are not subject to the continuing violation doctrine, the earliest date of accrual is the effective date of the new MCI rates, in October of 2003. Defendants' factual argument that Plaintiffs only challenge the "determination to use a collect-call-only system and to require a minimum commission" and not the new rate structure filed by MCI, and their legal argument that

---

[4] On the other hand, should the Court disagree and hold that this action should have been brought as one for money had and received, and that this Court does have jurisdiction over Plaintiffs' claims, Plaintiffs have fully alleged all elements of a claim for money had and received. First, protest is not required in all circumstances; rather, payment under protest is simply one indication that money was not paid voluntarily. Mercury Machine Importing Corp. v. City of New York, 144 N.E.2d 400, 402 (N.Y. 1957). However, "[p]rotest is not necessary to dispel the implication of voluntariness in event of duress, where present liberty of person or immediate possession of needful goods is threatened by nonpayment of the money exacted." Id.; Paramount Film Distributing Corp. v. State, 279 N.Y.S.2d 781, 782 (3d Dept. 1967). Plaintiffs could not speak to their loved ones without paying the allegedly unlawful fees; such fees were thus clearly coerced. [R. 13]. Moreover, the purpose of protest is to alert the individual or entity that it may have to refund money paid. Corporate Property Investors v. Board of Assessors, 545 N.Y.S.2d 166, 169 (2d Dept. 1989). For that reason, even if protest were required, Plaintiffs' continued complaints and efforts to litigate this issue suffice. [R. 34, 35, 40]; See. e.g., Corporate Property Investors, 545 N.Y.S.2d at 170 (holding protest requirement is satisfied by the pendency of an action for a declaratory judgment or other legal proceeding challenging the assessment at the time of payment).

a second review by the PSC of new rates does not give rise to a new claim (State Br. at 19 – 21), are both flawed.

Plaintiffs challenge the rates collected by MCI and retained by DOCS, as inflated by the unlawful DOCS surcharge. Should the Court disagree with Plaintiffs, and hold that their claims are subject to review under Article 78, then the 2003 Public Service Commission decision marks the accrual of Plaintiffs' claims, because it was then that the PSC disavowed its jurisdiction over the DOCS tax, such that Plaintiffs were put on notice that the tax would be charged to them despite the fact that it had not been reviewed or authorized by any governmental body. Indeed, a central component of Plaintiffs' claims is that DOCS and MCI continue to collect this surcharge despite the PSC's express disavowal of jurisdiction.

Defendants' argument that the 2003 PSC determination did not trigger a new accrual date is not supported by a single case, and indeed is completely insupportable by decisional authority. Full agency review of an issue begins the statutory period anew, even if the *exact* same issue has already been considered. See Chase v. Board of Education of the Roxbury Central School, 593 N.Y.S.2d 603, 606 (3d Dept. 1993) (explaining that when an agency "holds a new hearing at which new testimony is taken, new evidence is proffered and new matters are considered, or reconsideration of the matter appears to have been a fresh, complete and unlimited examination on the merits, the statutory period within which to commence a review proceeding is renewed.") (internal citations omitted). Accord, Quantum Health Resources v. DeBuono, 710 N.Y.S.2d 422, 423 (3d Dept. 2000). The 2003 PSC review was not merely a re-consideration of issues raised in 1998; it was an entirely new and complete review in which comments from interested parties (including Plaintiffs) were solicited and considered. [R. 70 – 86]. Many of these comments raised the constitutional infirmities challenged in this case. Id. In contrast, the 1998 review did

not reference a single comment by any interested party save MCI and DOCS, nor were any constitutional or equity concerns raised or addressed. 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 Correction, No. 98-C-1765, 1998 N.Y. PUC LEXIS 693 (Dec. 16, 1998) ("1998 PSC Order"). As new issues were addressed and new evidence considered, the 2003 PSC review was a fresh look, giving rise to a new cause of action.

D. Plaintiffs' General Business Law § 349 Claim is Timely

The three-year statute of limitations for statutory causes of action under C.P.L.R. § 214 (2) applies to cases brought pursuant to GBL § 349. See Busbee v. Ken-Rob Co., 720 N.Y.S.2d 785, 786 (1st Dept. 2001). Defendants argue that accrual of a § 349 (h) private right of action first occurs when Plaintiffs have been injured by the deceptive act. See State Br. at 22. However, under New York's "separate accrual rule" applicable to General Business Law claims, a new claim accrues, triggering a new three-year limitations period, each time the plaintiff discovers, or should have discovered, new injury caused by violations of the statute. See Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 272-73 (E.D.N.Y. 2001), rev'd in part on other grounds 344 F.3d 211 (2d Cir. 2003). Because MCI and DOCS have continuously billed Plaintiffs for the unapproved DOCS tax, a new three-year limitations period is triggered with each bill.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE FILED RATE DOCTRINE

Defendants' argument that the filed rate doctrine bars Plaintiffs' challenge to the DOCS tax (State Br. at 23-27) misreads that doctrine and misconstrues the case at bar. That doctrine bars suits that challenge utility rates approved by a governing regulatory agency. See Arkansas

Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981); Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 163 (1922). The parameters of the filed rate doctrine are quite clear: "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 (2d Cir. 1994) (emphasis added). But the doctrine is not an absolute bar to every kind of suit aimed at utilities. See, e.g., Am. Tel. & Tel. Co. v. Central Office Tel., 524 U.S. 214, 230-31 (1998) (Rehnquist, C.J., concurring). Notably, the filed rate doctrine can only insulate from suit "a rate the PSC has previously determined to be just and reasonable." Concord Assocs., L.P. v. Public Service Commission, 754 N.Y.S.2d 93, 95 (3d Dept. 2003).

Here, Plaintiffs do not challenge a filed rate "approved by" a governing regulatory agency. The DOCS surcharge is not part of a filed rate because the PSC has never approved it, nor assessed it to be "just and reasonable." [R. 88]. Rather, the PSC held that "[b]ecause DOCS is not a telephone corporation pursuant to the Public Service Law, the Commission does not have jurisdiction over DOCS. Therefore, we will review only the jurisdictional portion of the rate that reflects what MCI retains from the provision of inmate calling services." Id. (emphasis added). Because the PSC only examined (and approved of) the non-surcharge portion of the rate, the DOCS tax was never "approved by the governing regulatory agency." [R. 88-89].

The State quotes Porr v. NYNEX Corporation for the proposition that the filed rate doctrine bars suits against rates "on file with a regulatory commission," presumably to imply that the doctrine protects rates merely because they are written on a piece of paper that has been lodged with the PSC, even if they were never approved by the PSC. State Br. at 24 (quoting Porr v. NYNEX Corp., 660 N.Y.S.2d 440, 442 (2d Dept. 1997)). However, the Porr court explicitly states that the PSC is charged with the special "task of ensuring that NYNEX's rates

are just and reasonable in light of, *inter alia*, its costs. The agency is uniquely equipped with the resources, experience, and expertise to make these assessments. The courts are not." Id. at 447. For this reason, Porr cannot be used to support application of the filed rate doctrine to the portion of a rate not reviewed by the relevant agency.

Moreover, the policies behind the filed rate doctrine argue against its application in this case. The predicate for the filed rate doctrine is an agency's meaningful review and approval of a rate or tariff. Wegoland, 27 F.3d at 18; see also Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992). "The filed rate doctrine is motivated by two principles (1) preventing carriers from engaging in price discrimination between ratepayers and (2) preserving the exclusive role of federal agencies in approving rates for telecommunications services that are 'reasonable' by keeping courts out of the rate-making process." Byrd v. Goord, No. 00 Civ. 2135, 2005 U.S. Dist. LEXIS 18544, at *25 (S.D.N.Y. Aug. 29, 2005). These principles are advanced by allowing Plaintiffs' claims to go forward. First, the surcharge would no longer exact an unequal toll on these recipients of collect calls compared to other recipients. Second, there will be no need for the Court to engage in its own determination of a reasonable rate because the PSC has already exercised its expertise in approving the non-commission portion of the rate as "just and reasonable." [R. 91]. By ordering MCI to collect only the PSC-approved rate, and not the DOCS surcharge, this Court would protect the PSC's regulatory authority over utility rates.

Defendants' argument that even if it cannot be used to bar a dispute over the bifurcated rates, the filed rate doctrine bars a challenge to the rates charged during the period of time after the PSC Order of 1998, and before its 2003 decision (State Br. at 27) is incorrect for several reasons. First, the filed rate doctrine applies only to rates charged by utilities. See, e.g., Concord

Associates, 754 N.Y.S.2d at 95. The State of New York is not a regulated utility and for that reason it cannot be subject to the filed rate doctrine.

Moreover, the PSC did not "meaningfully review" the DOCS surcharge in 1998, because it does not appear that the PSC was apprised of the details of the kickback scheme at that time. See 1998 PSC Order. In fact, the 1998 Order makes no mention of the DOCS surcharge or kickback structure. Id. Without adequate knowledge of rate structure, the PSC could not have engaged in meaningful review of the rate even if, *arguendo*, it had jurisdiction over the surcharge portion of the telephone rate. See Porr, 660 N.Y.S.2d at 447 (holding that the filed rate doctrine applied in large part because "defendants' billing practices were fully aired . . . at various public rate-setting hearings") (emphasis added). In 2003, when directly called upon to evaluate it, the PSC explicitly held that the DOCS surcharge is not a utility rate and thus is not subject to the jurisdiction of the PSC. [R. 88]. Neither the nature of the surcharge, nor the PSC statutory authority changed during the intervening years. When the PSC was made aware of the binary nature of the MCI rate, it held that it did not have jurisdiction to review the surcharge, a conclusion it no doubt would have reached in 1998, had it been armed with sufficient information.

Furthermore, while this case attacks the entire rate as unjustified and unconscionably high, the challenge is aimed at Defendants' illegal inflation of the rate. Thus this case is not simply about the reasonableness of the rates for the telephone services provided. For this very reason, the Southern District held that the filed rate doctrine does not apply:

> [This suit is] not simply a challenge to the rates ... plaintiffs' claims against the state defendants challenge the sixty percent commission that DOCS receives from MCI, which artificially inflates the rate in a manner unrelated to the service provided. These claims, therefore, are not properly dismissed under the filed rate doctrine as "such an attack does not seek to invalidate any tariff, but merely to

create an environment in which the regulated firm is more likely to file a tariff that contains terms more favorable to customers."

Byrd, 2005 U.S. Dist. LEXIS 18544, at *23 (quoting Arsberry v. Illinois, 244 F.3d 558, 563 (7th Cir. 2001)).

III. PLAINTIFFS' COUNTS I THROUGH VII STATE A CLAIM FOR RELIEF

A. Plaintiffs Properly Seek Enforcement of the PSC Order.

In their Complaint, Plaintiffs demand that the Supreme Court determine that Defendants' billing and collection of the DOCS surcharge is illegal, because, *inter alia*, it is billed along with telephone service even though the PSC has determined that it is not a fee for telephone service. [R. 88]. Plaintiffs agree with the PSC that the surcharge is outside its jurisdiction and seek to enforce the PSC order in the only way that it can be understood: within the context of the Public Service Law that provides the PSC's authority.[5] Enforcing the Order means that MCI may only charge and collect the rate that the PSC approved.

Defendants' contention that if the PSC believed that the DOCS surcharge could not be legally imposed it would have "exercised its authority to prohibit MCI from charging" it, (MCI Br. at 3), is absurd, because the PSC determined that it had no authority over the surcharge. Instead, the PSC's Order authorized the "reasonable rate" and also caused MCI to acknowledge that it is charging the DOCS surcharge. [R. 92]. The PSC did not authorize collection of the surcharge because it could not.

[5] New York Public Service Law §91(1) authorizes the PSC to determine the reasonableness of telephone service rates. In the Order Plaintiffs seek to enforce, the PSC determined that the MCI rate is reasonable, but that it had no jurisdiction over the DOCS surcharge because DOCS is not a telephone service provider. It then ordered MCI to file what it called a "bifurcated" tariff, stating the jurisdictional and non-jurisdictional fees.

Although Defendants scoff at the notion that Plaintiffs want this Court to enforce what is implicit in the PSC Order, the Public Service Law explicitly requires just that result.[6] Indeed, in examining only the decretal paragraphs, and not the Order as a whole, the court below failed to enforce the Public Service Law and the PSC Order. Once the PSC found that it had no authority over the DOCS surcharge, implicit in its Order is that only the jurisdictional portion is a reasonable telephone service fee: the DOCS surcharge is something else. In violation of the intent and meaning of the PSC Order, Defendants charge and collect the DOCS surcharge as part of the telephone service fee.

Defendants would have this Court believe that the DOCS surcharge is a reasonable part of the rate, (MCI Br. at 4 - 5), even though the PSC explicitly rejected that view in its Order. [R. 88]. Defendants argue that because the Public Service Law permits telephone companies to charge rates sufficient to yield reasonable compensation and because the FCC has determined elsewhere that the cost of paying for payphone space may be passed on to customers as part of a reasonable rate, the DOCS surcharge should be seen as part of a reasonable rate. MCI Br. at 6. Had the PSC so determined in its Order, Defendants' argument might be sound, and this would be a different lawsuit[7] – but it did not: the DOCS surcharge is simply not part of the reasonable rate approved by the PSC.

Furthermore, Defendants' less than complete story only serves to mislead the Court. Even if the DOCS surcharge falls within the "customary range" of certain surcharges recognized

---

[6] "[I]t shall be the duty of every...telephone corporation...to obey each and every such order so served upon it and to do everything necessary or proper in order to secure compliance with and observance of every such order...according to its true intent and meaning." N.Y. Pub. Ser. Law § 97(2) (emphasis added).

[7] In fact, if Defendants would seek to have the PSC Order construed to include the DOCS surcharge as part of the reasonable rate, they could only have done so by challenging the Order themselves in an Article 78 proceeding – now untimely.

by the FCC, (MCI Br. at 4)[8] that fact alone says nothing about whether the surcharge is reasonable in this particular instance. The FCC acknowledged this problem, when it noted that it was troubled that the surcharge scheme, "does not exert downward pressure on rates for consumers. Instead, perversely, because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates." 17 FCC RCD 3248, at 3254 [citing In the Matter of Billed Party Preference for InterLATA C+ Calls, 13 FCC Rcd 6122, 6156 (1998) (surcharges should be considered on a case-by-case basis to insure reasonable rates for calls from inmates).

Plaintiffs properly seek enforcement of the PSC Order under Public Service Law §97(2). Defendants violate the Order by charging and collecting the DOCS surcharge as part of MCI's routine billing when neither the PSC nor the FCC has approved of such a billing scheme. Accordingly, this Court should find that Plaintiffs properly state a claim to enforce the PSC Order.

B. The DOCS Surcharge is an Unlawful Tax in Violation of Plaintiffs' Due Process Rights.

Plaintiffs have consistently argued that the DOCS surcharge is an unlawful tax, levied only against them, though used for the general public good, without proper legislative authorization. None of Defendants' counterarguments warrant dismissing this claim.

Defendants' first argument, that the DOCS surcharge has been approved by the PSC (State Br. at 28), is patently untrue. Because the PSC determined that the surcharge falls outside its jurisdiction [R. 88], the PSC could not have authorized it.[9] Defendants' reliance on Arsberry

---

[8] Defendants cite Implementation of the PayTelephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,17 FCC RCD 3248, 3252-53, n.34 (2002) for this proposition, noting that surcharges usually range from 20 to 63% of the base service rate.

[9] It is true that the PSC had previously authorized the entire MCI rate. However, as explained in Section II, above, that was done without meaningful review of the DOCS kickback.

v. Illinois, 244 F.3d 558 (7th Cir. 2001), here is misplaced because unlike in this case, in Arsberry the surcharge was part of the rate authorized by the governing agency. 244 F.3d at 565.

Defendants' claim that the New York legislature "approved" this tax when it authorized appropriation of the surcharge to the Family Benefit Fund is equally unsound. Taxes may not be imposed in the absence of affirmative legislative action. "The exclusive power of taxation is lodged in the State Legislature." Castle Oil Corp. v. City of New York, 675 N.E.2d 840, 842 (N.Y. 1996) (citing N.Y. Const. art. XVI, § 1).[10] "Only after the Legislature has, by clear statutory mandate, levied a tax on a particular activity, and has set the rate of that tax, may it delegate the power to assess and collect the tax to an agency." Yonkers Racing Corp. v. State, 516 N.Y.S.2d 283, 284 (2d Dept. 1987). Conferring assessment and collection authority upon an administrative agency requires the State Legislature to make the delegation "in express terms by enabling legislation." Castle Oil, 675 N.E.2d at 842. No such legislation has been enacted here.

The DOCS surcharge is not a "commission" within the meaning of the law. Defendants argue that the surcharge is comparable to a charge by a property owner for the use of space allocated to payphones. State Br. at 29. While Defendants are correct that such fees may be part of the reasonable rate for telephone service under the regulatory law, in fact the PSC found that the DOCS surcharge is not such a commission and so could not be included in the reasonable rate. Defendants' claim that the New Mexico Supreme Court agrees with this argument (State Br. at 30) is misleading. That surcharge was incorporated into the rate by the state regulatory agency, so the court determined that it could not consider it a tax.[11] Valdez v. New Mexico, 54 P.3d 71, 75 (N.M. 2002). Here the PSC has determined that the surcharge is not part of the reasonable rate.

---

[10] Accord United States Steel Corp. v. Gerosa, 166 N.E.2d 489 (1960).

[11] Moreover, Plaintiffs disagree with the New Mexico court's reasoning on this point, and it is not binding on this Court.

Defendants' distinction between taxes and fees supports Plaintiffs' position. State Br. at 30-31. The amount of a user fee must be reasonably close to the necessary cost of the particular service to which the fee is attached. See Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor, 352 N.E.2d 115, 118 (N.Y. 1976). Reasonable user fees are those that are "estimated on the basis of reliable factual studies or statistics." Id. The burden is on the agency charging the user fee to show that the costs are necessary. Id. at 119-120. Furthermore, "[w]ithout the safeguard of a requirement that fees bear a relation to average costs, a board would be free to incur...not only necessary costs but also any which it... might think desirable or convenient, no matter how oppressive...." Id. at 118. By their own admission, the DOCS surcharge is not tied to the necessary costs of the Inmate Call Home Program, but also supports various other programs. State Br. at 31 - 32. These programs are not benefits directly tied to the fee paid by Prisoners' families and friends. Appeal Br. at 32.

C. The DOCS Surcharge is an Unlawful Taking.

Plaintiffs argue that the DOCS surcharge unlawfully takes their property without just compensation. Because the surcharge is without authorization in law, is appropriated from a discrete segment of the populace, and is applied toward the general public good, it violates the State takings clause. See Appeal Br. at 37.

Defendants now argue, citing Byrd v. Goord, that because Plaintiffs chose to pay the surcharge, there can be no taking. State Br. at 39 - 40. However, Defendants thoroughly misstate what the District Court said in Byrd, when holding that it would not reach the takings question. 2005 U.S. Dist. LEXIS 18544, at *29 n.10. The Byrd court cited McGuire v. Ameritech Services, Inc., 253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003), only for the proposition that a procedural due process claim failed therein because recipients were not deprived of their

property without a hearing, since their property was taken when they chose to accept collect calls from inmates. 2005 U.S. Dist. LEXIS 18544, at *28. Plaintiffs here made no procedural due process claim, so the McGuire argument Defendants advance is irrelevant.

Defendants' second refutation of the takings claim is based upon the erroneous assumption: that "the State has the authority to collect the commission" so it is illogical to require them to return it. State Br. at 40. First, there has not been any judicial determination as to the State's authority to collect the surcharge and, if it is found to be unauthorized, it is perfectly logical to require its return. Second, even if the surcharge was "authorized" in some way, such authorization may work an unconstitutional taking, which this Court must invalidate. Alliance of Am. Insurers v. Chu, 571 N.E.2d 672, 678 (N.Y. 1991).

D. The DOCS Surcharge Impermissibly Infringes Upon Plaintiffs' Rights of Free Speech and Association.

Defendants continue to mischaracterize Plaintiffs' First Amendment claim as one based on a purported right to communicate inexpensively via telephone. State Br. at 32 - 33. Plaintiffs assert no such right, but rather complain of: (1) the State's imposition of a fee on their expressive activity that bears no relationship to related regulatory costs; (2) the burden the DOCS tax places on their ability to maintain contact with incarcerated family members, friends, and clients; and (3) the lack of a relationship between the State's surcharge and the penological objective it purportedly serves. [R. 35, 47 - 53]; See Appeal Br. at 38 - 43.

The prison telephone system implicates Plaintiffs' rights to freedom of speech and association under the State Constitution. "'Inmates do not lose all First Amendment protections once they enter the prison gates, and ... prisoners are entitled to reasonable telephone access.' Moreover, non-inmates lose none of their First Amendment protections." Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544, at *25 – 26 (quoting McGuire v. Ameritech

Servs., 253 F. Supp. 2d 988, 1002 (S.D.Ohio 2003)). Defendants acknowledge that prisoners have a right to communicate with the outside world, but argue that the current telephone system merely creates a "loss of cost advantage" that does not implicate the First Amendment. State Br. at 33-34. However, the law is clear that "prisoners have a First Amendment right to telephone access, [that is only subject to] reasonable limitations arising from the legitimate penological and administrative interests of the prison system." Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000) rev'd on other grounds, 125 S.Ct. 1141 (2005) (emphasis added). The DOCS surcharge has no valid penological purpose. [R. 52-53]; Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544, at *26.

Because the DOCS surcharge has no reasonable connection to a legitimate penological interest, it is an unlawful burden on Plaintiffs' First Amendment rights. Defendants' misunderstanding of this central issue is betrayed by their complaint that, "Petitioners do not even suggest what telephone rate is constitutionally permissible." State Br. at 36 – 37. But of course, Plaintiffs' complaint is with the unauthorized and unreasonable DOCS surcharge. As explained in section II, supra, the rate approved by the PSC, without the DOCS tax, is a reasonable rate, which would not work the same infringement on Plaintiffs' First Amendment rights. See, Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943) (in which the Supreme Court struck down a licensing fee for distributing literature because it was not "imposed as a regulatory measure to defray the expenses of policing the activities in question" but rather served as "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is protected by the First Amendment.") Because the surcharge imposed on inmate telephone calls bears no relationship to the cost to DOCS of providing prison telephone service, or to any other legitimate penological purpose, [R. 35], it is, in effect, "a

flat tax imposed on [call recipients'] exercise of [their free speech rights.]" Murdock, 319 U.S. at 113. As such it must be struck down.

Furthermore, as the Byrd court stated, "at this stage of the litigation, [it] cannot conclude that there is 'no set of facts' upon which relief under the First Amendment might be granted." 2005 U.S. Dist. LEXIS 18544 at *26. "For example, if Plaintiffs could show that the costs are so exorbitant that they are unable to communicate...then relief might be warranted." Id. (quoting Mcguire v. Ameritech Services, Inc., 253 F. Supp. 2d 988, 1002 (S.D. Ohio 2003)) (omission in original). Given that Plaintiffs here are affected by exactly the same scheme as those in Byrd, this court should recognize that they may be able, at trial, to show a similar constitutional deprivation.

Defendants, after urging this Court to ignore Byrd without providing a single reason why it should do so, next attempt to distinguish the case based on their faulty assumption that the Byrd court required would-be plaintiffs to allege that the DOCS surcharge kept them from communicating at all. State Br. at 34 - 35. This inference is completely unwarranted, as shown by the example cited by the Byrd Court in upholding the claim – of the mother of a prisoner who keeps her phone bills down by "limiting the duration of [her son's] calls." Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544, at *26 n.9. Plaintiffs have made extensive allegations describing the burden the DOCS tax places on their speech. [R. at 47-52]. While Defendants may dispute these claims (State Br. at 35 – 38) whether the alternatives available to Plaintiffs provide a constitutionally adequate substitute for telephone communication presents a question of fact not properly determined by the Court at this early stage.[12]

[12] Cf. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (noting that alternatives to physical presence of foreign intellectual would not necessarily "extinguish[] altogether any constitutional interest in this particular form of access" to his ideas); accord Baldwin v. Redwood City, 540 F.2d 1360, 1368 (9th Cir.

Finally, to the extent they restrict Plaintiffs' ability to communicate with family members in prison, DOCS' policies also burden Plaintiffs' rights to familial and marital association protected by the New York State Constitution. Defendants completely ignore this aspect of Plaintiffs' First Amendment claim, fully explained in their Appeal Brief. See Appeal Br. 38-39.

E. Imposition of the DOCS Surcharge on One Group of New York State Taxpayers Violates Equal Protection.

Plaintiffs are New York State taxpayers who are treated differently than other New York State taxpayers in that only they are subject to the DOCS surcharge, an unlawful tax. Under the New York Constitution, equal protection rights are implicated when a group of persons is treated differently from others who are similarly situated. In re K.L, 806 N.E.2d 480, 486 (N.Y. 2004). In response, Defendants argue only that Plaintiffs, recipients of inmate collect calls, are not similarly situated to recipients of non-inmate collect calls. Not only do Defendants fail to respond to Plaintiffs' actual argument, that they are treated differently from other tax-payers without justification (see, Appeal Br. at 43) but their argument is itself thoroughly flawed.

In arguing against this alternate formulation of the equal protection claim – that Plaintiffs are treated differently than other collect call recipients without justification – Defendants once again urge this Court to ignore the precedent set in Byrd v. Goord. State Br. at 42. In Byrd, the District Court denied a motion to dismiss Plaintiffs' similar equal protection claims, because the court found "no rational basis to justify placing the burden of this additional commission solely on the [plaintiffs] thereby charging them more per call than similarly situated collect call recipients." 2005 U.S. Dist. LEXIS 18544, at *31.

Defendants argue that the Byrd court "failed to grasp the critical distinction between recipients and non-recipients of inmate collect calls," (State Br. at 42) but that is not the case.

1976) (stating that existence of alternatives to postering was "not alone enough to justify any regulation [Defendants] may desire to impose on this means of expression").

Instead, the court flatly rejected the validity of the State acting upon that distinction, which is the nature of a rational basis analysis. In arguing for a real distinction between the two groups, the State cites Daleure v. Kentucky, 119 F. Supp. 2d 683 (W.D. Ky. 2000), in which the court assumed that the telephone surcharge at issue there implicated security concerns: "[i]f security precautions affect the telephone services that are available to inmates, this will inevitably impact the inmate call recipients." 119 F. Supp. 2d at 691. The Byrd Court did not overlook this issue; instead it squarely held that the DOCS surcharge "does not involve matters of security or safety" such that the distinction between the two groups of collect call recipients could not be used to justify imposition of the extra charge. Byrd, 2005 U.S. Dist. LEXIS 18544, at *31. Nor did the Byrd court overlook the argument that Plaintiffs receive a "direct and special benefit" from the surcharge, (State Br. at p. 42), but instead found that "fact" to be questionable based on the defendant's own papers, which indicate – as is true here – that surcharge monies are used for a general inmate fund. Byrd, 2005 U.S. Dist. LEXIS 18544, at *31 n.13.

F. Plaintiffs State a Claim Against DOCS Under General Business Law § 349.

Defendants argue that operating the collect-call telephone system is a "government function" such that GBL §349 does not apply. State Br. at 44. However GBL § 349 is applicable when a state engages in a consumer-oriented practice. See Appeal Br. at 45; cf. Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc., 181 N.E.2d 1140, 1143 (N.Y. 2004) (holding that the scope of the deceptive business practices statute is "intentionally broad, applying to virtually all economic activity") (internal citations omitted).

Defendants' reliance on Kinkopf v. Triborough Bridge & Tunnel Authority, 792 N.Y.S.2d 291 (2d Dept. 2004) is misplaced. State Br. at 43. There, the Authority was performing an "essential governmental function" and was authorized by the Legislature to set

and collect tolls for the use of its facilities. However, the Kinkopf toll was "in essence a use tax" rather than a consumer transaction. Kinkopf, 792 N.Y.S.2d at 292. As discussed more fully in Section III.B., the DOCS surcharge cannot be considered a valid user fee because it is unauthorized and disproportionate to the cost of operating the prison telephone system.

Defendants also argue that damages against DOCS are barred by the doctrine of sovereign immunity. State Br. at 44 - 45. But when a state agency exceeds its authority, it is stripped of its governmental immunity. Ransom v. St. Regis Mohawk Education and Community Fund, Inc., 658 N.E.2d 989, 995 (N.Y. 1995). Because DOCS' consumer-oriented practice of collecting an unauthorized tax from recipients of inmate collect-calls is not an essential government function and is outside of DOCS' authority, the State cannot claim immunity from suit.

G. Plaintiffs Are Entitled to an Equitable Accounting

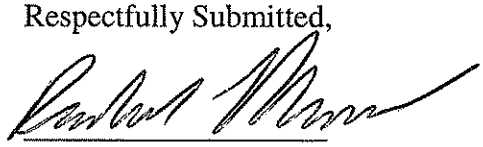
Defendants incorrectly state that plaintiffs are entitled to an accounting of funds only when there exists a fiduciary relationship between the parties. State Br. at 45. See Leveraged Leasing Admin. Corp. ex rel Dweck, v. PacifiCorp Capital, Inc., 87 F.3d 44, 49 (2d Cir. 1996). However, an accounting may also be available merely as "a method to determine the amount of the monetary damages.'" Arrow Communications Labs. v. Pico Prods. Inc., 632 N.Y.S.2d 903, 905 (4th Dept. 1995) ((quoting Cadwalader Wickersham & Taft v. Spinale, 576 N.Y.S.2d 24, 25 (1st Dept. 1991)). Because Plaintiffs here seek monetary damages, they are entitled to an accounting.

Conclusion

For all the foregoing reasons, Plaintiffs respectfully request that this Court reverse the court below and reinstate all of Plaintiffs claims.

Dated: October 22, 2005

Respectfully Submitted,



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

Juan Cartagena, General Counsel
Craig Acorn, Associate Counsel
COMMUNITY SERVICE SOCIETY
105 E. 22nd Street
New York, NY 10010
(212) 614-5323

On brief, law students:
Tara Jensen, Molly Kovel, Matthew Scott