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To be argued by:

Victor Paladino
10 minutes requested

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

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

Petitioners-Appellants,

-against-

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

Respondents-Respondents.

BRIEF FOR RESPONDENT
NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES

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PRELIMINARY STATEMENT

Petitioners are recipients of collect calls from inmates in the custody of respondent New York State Department of Correctional Services ("DOCS"). In this combined article 78 proceeding and declaratory judgment action, they challenge DOCS's collect-call-only telephone system provided by respondent MCI WorldCom Communications, Inc. ("MCI") pursuant to an exclusive services contract. They claim that the contractual payment of commissions to DOCS violates an October 2003 order of the Public Service Commission ("PSC"), is unconstitutional, and violates General Business Law § 349. They now appeal from a judgment of Supreme Court (Ceresia, J.), entered in Albany County on January 4, 2008, dismissing the petition for failure to state a cause of action (Record ["R."] 3-24).

On a prior appeal, this Court held that petitioners' constitutional and General Business Law § 349 claims were time-barred, and that the only timely claims –- those seeking enforcement of the PSC's October 2003 order and an accounting -- failed to state a cause of action (R. 453-457). The Court of Appeals modified, finding that the constitutional claims were timely, but affirming the dismissal of the remaining claims (R. 466-472). It remitted the matter to Supreme Court for further proceedings (R. 485). Supreme Court then issued a comprehensive, well-reasoned decision, concluding that the constitutional claims lacked merit, and dismissed the petition (R. 7-24).

Subsequent events rendered moot petitioners' claims for prospective injunctive relief. On January 8, 2007, just after taking office, then-Governor Spitzer directed DOCS to cease collecting commissions on inmate collect calls as of April 1, 2007. Thereafter, the Legislature enacted Correction Law § 623, which, as of April 1, 2008, prohibits DOCS from receiving revenue in excess of its reasonable operating costs for providing telephone service. See L. 2007, ch. 240. As a result, all that remains of this putative class action is petitioners' demand that DOCS refund commissions collected since October 30, 2003, an amount totaling approximately $60 million.

While Supreme Court correctly held that the constitutional claims fail to state a cause of action, this Court need not reach those issues, because these claims run afoul of the filed rate doctrine. Petitioners' alleged injury –- the payment of allegedly excessive telephone charges for inmate collect calls -- arises directly from rates on file with the PSC. Petitioners have failed to challenge the PSC's determinations approving the tariffs or even to name the PSC as a respondent. But even if the file rate doctrine does not apply here, petitioners' constitutional claims lack merit. Accordingly, the judgment dismissing the petition should be affirmed.

QUESTIONS PRESENTED

1. Whether the filed rate doctrine bars petitioners' constitutional challenges to the commissions collected by the telephone company and paid to DOCS, where the PSC authorized the telephone company to charge rates containing the commissions.

2. Whether the commissions the telephone company paid to DOCS on inmate collect calls are properly viewed as rent and access fees and thus do not constitute an unlawful tax, where the telephone company paid the commissions in exchange for the right to provide inmate telephone service, and the commissions are included in the filed tariff.

3. Whether DOCS can receive commissions from the telephone company on inmate collect calls without effecting an unlawful taking of petitioners' property because petitioners are free to refuse to accept the calls.

4. Whether DOCS, consistent with the free speech rights of recipients of inmate collect calls, may contract with a telephone company for inmate collect call services at rates that provide it with the commissions at issue.

5. Whether the State may collect commissions on inmate collect calls consistent with equal protection requirements.

STATEMENT OF THE CASE

A. DOCS's Inmate Call Home Program and the 1996 contract with MCI

In 1985, DOCS instituted an Inmate Call Home Program that permits inmates to place collect calls from coinless telephones, without the intervention of a live operator, to designated family or friends (R. 261). See 7 N.Y.C.R.R. Part 723. To implement the program, DOCS contracted with a long-distance telephone service provider, which installed and maintained the system at each correctional facility. During the time period at issue here, the system was provided by MCI pursuant to an exclusive services contract.[1] The original contract covered the period April 1, 1996, through March 31, 1999 (the "1996 contract"). DOCS exercised renewal options that extended the 1996 contract through March 31, 2001.

The 1996 contract resulted from a competitive bidding process in which DOCS requested bids from telephone companies in conformity with a Request for Proposal ("RFP") (R. 39, ¶ 30). The RFP specified the rates that a provider would charge and also required the provider, for the privilege of operating the system, to pay DOCS a minimum commission of 47% of the gross monthly revenues

[1] The names of MCI and its subsidiaries have changed over the years in connection with a merger and a bankruptcy, but for simplicity's sake, the MCI-related entities are collectively referred to herein as "MCI." Since July 2007, the inmate telephone service has been provided by Global Tel*Link.

generated by all calls accepted (R. 39, ¶ 30). The contract ultimately as awarded to MCI, which bid a commission rate of 60% per call (R. 40, ¶ 30).

All of the commissions received by DOCS were appropriated by the Legislature to the "Family Benefit Fund" in DOCS's operating budget (R. 33, ¶ 12; 99, 102). That fund was used to support programs that directly benefitted inmates and their families, including the family visitation program, inmate family parenting programs, the family reunion program, nursery care at women's prisons, domestic violence prevention, AIDS education and medication, infectious disease control, free postage for inmates' legal and privileged mail, motion picture programs, cable television, and "gate money" and clothing given to inmates upon their release (R. 102-103, 163-165).

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

State and federal agencies are responsible for approving telephone rates such as those charged pursuant to DOCS's contract with MCI. Accordingly, upon winning the contract, MCI filed the interstate tariffs with the Federal Communications Commission (the "FCC"), see 47 U.S.C. § 201 et seq., and the intrastate tariffs with the PSC (R. 42). See Public Service Law § 92. Telephone companies are prohibited from deviating from rates filed with these

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

In March 1996, MCI filed its tariff with the PSC as a "Special Pricing Arrangement," which did not require PSC approval (R. 42). But in October 1998, MCI re-filed the rates with the PSC as a standard tariff offering, known as a "Maximum Security Plan" (R. 42). By determination dated December 16, 1998, the PSC approved the rates as filed. See Ordinary Tariff Filing of MCI Telecommunications Corporation to Introduce a General Service Description and Rates for MCI's Maximum Security Rate Plan for the New York Department of Corrections, No. 98-C-1765, 1998 N.Y. PUC LEXIS 693 (Dec. 16, 1998) ("PSC December 1998 order"). Finding that MCI's "[p]rovision of service to [DOCS] should be considered a unique service, with costs that would not be incurred in the provision of standard alternate operator services," the PSC concluded that MCI's proposed rates were reasonable. Id. at *4. Petitioners neither challenged those rates by application to the PSC nor sought article 78 review of the PSC's order.

C. Prior lawsuits challenging the 1996 contract

In September 2000, the Center for Constitutional Rights, the attorneys for the present petitioners, commenced an action in the Court of Claims on behalf of four New York residents who had paid for collect calls from DOCS inmates to challenge the 1996 contract, raising the same claims asserted here. The Court of Claims granted

the State summary judgment, and this Court affirmed. See Bullard v. State of New York, 307 A.D.2d 676 (3d Dep't 2003). Specifically, this Court held that (1) the claim was untimely under Court of Claims Act § 10; (2) the continuing violation doctrine was inapplicable; (3) the "filed rate doctrine" barred the claim; and (4) a constitutional tort claim was not available because "claimants had an alternative remedy through a CPLR article 78 proceeding." 307 A.D.2d at 677-78.

Parallel litigation was commenced in the United States District Court for the Southern District of New York. In August 2005, the district court, among other things, denied the state defendants' motion to dismiss the plaintiffs' challenge to the 60% commission. See Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005). But in September 2007, after DOCS ceased collecting the commissions in accordance with the Governor's new policy, the district court dismissed the action as moot. See Byrd v. Goord, 2007 U.S. Dist. LEXIS 71279 (S.D.N.Y. 2007).

D. The 2001 Contract

In April 2001, MCI and DOCS executed a second contract for the period April 1, 2001, through March 21, 2006 (R. 238, 277).[2] This contract required MCI to continue charging its existing rate, and thus required no filing with the PSC, but decreased DOCS's

[2]DOCS exercised its right to extend the 2001 contract from April 1, 2006 to March 31, 2007.

commission from 60% to 57.5% of MCI's gross revenues from the program (R. 44, 87, 240). As with the 1996 contract, MCI had to charge the rates set forth in the contract regardless of the amount of commissions it agreed to pay (R. 270, 275).

Two years later, in May 2003, DOCS determined that the existing rate structure "was unfair to a majority of families who receive calls from inmates" (R. 86), and accordingly amended its 2001 contract with MCI (R. 227). The new rate structure did not change the 57.5% commission at issue here; rather, it was designed to be revenue neutral to MCI while at the same time decreasing the rate for 83% of inmates' families (R. 86 & n.13). The amendment was approved by the State Comptroller on July 25, 2003 (R. 228).

In July 2003, MCI filed proposed tariff revisions with the PSC to amend the rate structure for the Maximum Security Plan. The amended rates eliminated the distinction between local and long distance calls, removed the varying rates for time of day and distance, and introduced a single surcharge of $3.00 for all calls and a flat $0.16 per minute rate without regard to time of day and distance (R. 69, 87).

E. The PSC's October 2003 order

By order dated October 30, 2003, the PSC found that the "jurisdictional portion" of MCI's proposed rate change (i.e., the portion of the rate retained by MCI) was "just and reasonable" (R. 87). However, the PSC concluded that it lacked jurisdiction to

review the portion of the rate attributable to DOCS's commission because DOCS was not providing telephone service and was "not a telephone corporation pursuant to the Public Service Law" (R. 88). Rather, MCI was providing telephone service to DOCS pursuant to contract, and the 57.5% commission was not retained by MCI, but received by DOCS as a requirement of the contract (R. 88).

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

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

In accordance with the PSC's October 2003 order, MCI filed a revised tariff reflecting the jurisdictional and nonjurisdictional portions of the rate (R. 157). In January 2005, the PSC denied petitions for rehearing of the October 2003 order, reaffirming that it lacked jurisdiction over the DOCS commission and that the

jurisdictional portion of the rate was just and reasonable. See 2005 N.Y. PUC LEXIS 20 (January 14, 2005) ("January 2005 PSC order").

F. This proceeding

In February 2004, petitioners commenced this proceeding in Supreme Court, Albany County, naming as respondents DOCS and MCI, but not the PSC (R. 25). While labeled a class action (R. 29, 51-53), the case was never certified as such under C.P.L.R. 902. In seven separate causes of action, the petition challenges DOCS's imposition of the commissions and seeks refunds, claiming that DOCS imposed an unauthorized tax, denied them their state constitutional rights to due process, freedom of speech and association and equal protection, and violated General Business Law § 349 (R. 53-62). Before answering, DOCS and MCI moved to dismiss the petition as time-barred and for failure to state a cause of action (R. 158, 200-201).

Supreme Court (Ceresia, J.) granted respondents' motions to dismiss (R. 449), and this Court unanimously affirmed (R. 457). The Court of Appeals, however, reinstated the constitutional claims, finding them timely because the proceeding was commenced within four months of the PSC's October 2003 determination[3] (R.

[3] Accordingly, petitioners now limit their demand for refunds to the period between October 30, 2003 and March 31, 2007 (Brief at 2).

462, 472). It affirmed the dismissal of the remaining claims, and remitted the matter to Supreme Court (R. 472).

DECISION OF SUPREME COURT

On remittal, Supreme Court (Ceresia, J.) again granted DOCS's motion to dismiss, concluding that none of the constitutional claims stated a cause of action.[4] The court rejected petitioners' claim that the commissions MCI paid to DOCS constituted an unlawful tax. It also rejected petitioner's substantive due process, unlawful taking, equal protection, and free speech claims (R. 18-21). Other state and federal courts had consistently rejected the same or similar claims, and Supreme Court found their reasoning persuasive (R. 18-21).

ARGUMENT

POINT I

THE FILED RATE DOCTRINE BARS PETITIONERS' CONSTITUTIONAL CLAIMS

Although Supreme Court correctly concluded that petitioners' constitutional claims failed to state a cause of action, this Court need not decide -- and therefore should avoid -- those issues. Under an "established principle of judicial constraint . . . courts should not address constitutional issues when a decision can be reached on other grounds." Matter of Syquia v. Board of

[4] As a result of the dismissal of the claim seeking to enforce the PSC's order, the only claim asserted against MCI, MCI did not participate in the proceedings on remittal.

Education, 80 N.Y.2d 531, 535 (1992). There is no need to reach the merits of petitioners' constitutional claims because they run afoul of the filed rate doctrine.

On this issue, this Court's decision in Bullard controls. There, this Court affirmed the dismissal of the Court of Claims action challenging the 1996 contract, squarely holding that the action -- which raised constitutional claims identical to those advanced here –- was barred by the filed rate doctrine, because "the alleged injury asserted by claimants arose directly from their payment of the filed rate approved by the PSC." Bullard, 307 A.D.2d at 678. Indeed, in Bullard, this Court explained that claimants' remedy was an article 78 proceeding challenging the PSC's determination approving the rates. Id. Despite this clear guidance, petitioners incredibly declined to name the PSC as a party in this proceeding or to seek annulment of the PSC's October 2003 order.

Moreover, the Bullard Court's conclusion was correct. 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). It is well settled that "a consumer's claim, however disguised, seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission, is viewed as an attack upon the rate

approved by the regulatory commission. All such claims are barred by the 'filed rate doctrine.'" Porr v. NYNEX Corp., 230 A.D.2d 564, 568 (2d Dep't 1997), lv. denied, 91 N.Y.2d 807 (1998).

Petitioners' alleged injury arose directly from the imposition by MCI of rates duly filed with the FCC and the PSC, see 47 U.S.C. § 203(a); Public Service Law § 92(1), and those rates included commissions to the State in accordance with the 2001 contract. Once filed, the tariffs attained the status of binding law and became the legal rate that MCI was entitled -- indeed, legally mandated -- to charge. See Marcus v. AT&T Corp., 138 F.3d 46, 56 (2d Cir. 1998) ("federal tariffs are the law") (internal quotation omitted); see also Public Service Law § 92(2)(d) (utilities may collect only charges that are filed with the PSC and in effect).

Regardless of how petitioners characterize their claim, they "seek[] relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission," Porr, 230 A.D.2d at 568, a claim that is thus barred by the filed rate doctrine. Petitioners' purported injury -- the payment of excessive rates -- "is illusory . . . because [they have] merely paid the filed tariff rate that [they were] required to pay." Id. at 576. Having paid the filed rate -- the rate MCI was legally required to charge -- petitioners have as a matter of law "suffered no legally cognizable injury . . . . In the absence of injury, [petitioners] cannot sue for damages, nor may [they] seek equitable redress, because there

is nothing to redress." Id.; see City of New York v. Aetna Cas. & Sur. Co., 264 A.D.2d 304 (1st Dep't 1999) (same).

The fact that, right or wrong, the PSC declined to review the reasonableness of the commissions themselves in October 2003 does not make the filed rate doctrine any less applicable. Application of the filed rate doctrine does not depend on whether the PSC reviewed the commission component of the rates. What matters is that it authorized MCI to charge the bifurcated rate, a rate that included the commission (R. 89, 157). That rate was the only rate MCI was legally authorized to charge. Consequently, petitioners' alleged injury arises from a rate duly filed with and authorized by the PSC.

New Mexico's highest court has addressed this very issue and reached the same result. In Valdez v. State of New Mexico, 132 N.M. 667, 671, 54 P.3d 71, 75 (Sup. Ct. N. Mex. 2002), as in this case, plaintiffs challenged the commissions received by the state prison system pursuant to contracts with telephone companies. In rejecting their challenge, the court explained that the basis of the filed rate doctrine is not that the rate is "reasonable or thoroughly researched," but rather that it is "the only legal rate." Id. (internal quote omitted). Thus it held that the filed rate doctrine barred a challenge to commission contracts where the regulatory agency had "exempted inmate telephone services from

several of its regulations and [had] authorized the rates at issue." Id.

Granting the relief petitioners seek would require the Court to nullify the rate on file with the PSC. Petitioners' proper remedy thus was to challenge the PSC's October 2003 order. As then-Presiding Judge Read stated in dismissing a nearly identical challenge to DOCS's inmate telephone system, to the extent that claimants "seek a refund of alleged overcharges or otherwise challenge the intrastate rates, their sole route to potential redress lies, in the first instance, through the PSC and, if they are dissatisfied with the outcome, a CPLR article 78 proceeding in Supreme Court." Smith v. State, Claim No. 101720, Motion No. M-64458, July 8, 2002 (Read, P.J.) (see addendum, A.5).

Even if petitioners had sued the PSC, the PSC would have been powerless to order the retroactive refunds petitioners seek in this proceeding. Upon finding that a filed tariff is unjust or unreasonable, the PSC's power under Public Service Law § 97(1) to determine the rates to be charged "is prospective only." Matter of Burke v. Public Serv. Comm'n, 47 A.D.2d 91, 95-96 (3d Dep't 1975), aff'd, 39 N.Y.2d 766 (1976); Long Island Lighting Co. v. Public Serv. Comm'n, 80 A.D.2d 977, 978 (3d Dep't), lv. denied, 54 N.Y.2d 601 (1981). The PSC's authority to order refunds is limited to the instances specified in the statute, none of which include the circumstances presented here. Matter of Niagara Mohawk Power Corp.

v. Public Serv. Comm'n., 54 A.D.2d 255, 256-57 (3d Dep't 1976). If the PSC, which has exclusive jurisdiction to set intrastate telephone rates, could not order retroactive refunds, this Court should not have the power to do so either.

POINT II

IN ANY EVENT, THE CONSTITUTIONAL CLAIMS FAIL TO STATE A CAUSE OF ACTION

Even if petitioners' constitutional claims survive the filed rate doctrine, none states a cause of action. In reviewing DOCS's motion to dismiss, the Court must accept as true the petition's factual allegations and draw all reasonable inferences in petitioners' favor, but it "need not accept as true legal conclusions" disguised as factual allegations. Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (3d Dep't 2001). Applying this standard, Supreme Court correctly concluded that petitioners' constitutional claims are meritless and should be dismissed.

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

The commissions were not taxes imposed on recipients of collect calls, but rather were rent and access fees paid by MCI to DOCS for the right to operate the prison telephone system. Commissions are a well-recognized business expense in the telephone industry in general and the prison context in particular. Moreover, the PSC specifically authorized MCI to recover them when

it directed MCI to file an amended tariff that included the DOCS commission. Because the commissions were a component of the filed and approved tariff, they were not taxes as a matter of law.

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

Contrary to petitioners' characterizations, the commissions were not a "tax." They were a legitimate business expense incurred by the telephone company for the privilege of accessing the prisons and providing telephone service. As the PSC observed in its October 2003 order, the DOCS commission was no different from commissions paid by pay-phone telephone companies to premises owners in exchange for the right to install, operate and maintain payphones on their property (R. 89 n.20).

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." Id. In other words, they are "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 at issue here fell 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 were an expense incurred by the telephone company for access to the prisons and for the privilege of installing, maintaining and operating the telephone system. They were essentially access fees or rent paid by the telephone company. That the telephone company passed these expenses on to recipients of collect calls did not transform them into taxes.

Indeed, it is not uncommon for private businesses to pay the government a commission or rent for the privilege of doing business on, or leasing, state property. For instance, McDonald's rents

space from the Office of General Services in the Empire State Plaza, concession vendors pay commissions for the right to do business on the New York State Thruway rest areas or in state parks, and telephone companies pay commissions to governmental premise owners from payphone proceeds. See, e.g., Public Lands Law §§ 3(2)-(4) (lease of state lands); Parks, Recreation and Historic Preservation Law §§ 3.09(2-a) through (2-g) (authorizing concession license agreements and the leasing of various state parks and historic sites). These businesses factor the rental costs into the prices they charge for their goods and service, and recover such costs from consumers; the price of every Big Mac reflects the rent paid to the governmental landlord. The fact that these rental or commission payments are passed on to consumers does not transform them into "taxes." The commission payments made here by MCI to DOCS are indistinguishable from such rental or commission payments.

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 have been 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 had to pay commissions to DOCS on all completed collect

calls regardless of whether it received payment for them (R. 270), the collect call recipients were not liable to the State for non-payment of the commission component of the telephone rates. Their only liability was to MCI pursuant to their service contracts. Thus, the commissions were not taxes imposed on recipients of collect calls.

The Supreme Court of New Mexico addressed this issue in Valdez 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). Moreover, 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.

Petitioners argue that the commission payments from MCI to DOCS had to be either a tax or a fee, and they were taxes because the amounts received by DOCS exceeded its cost of administering the inmate telephone program (Brief at 15-16). Their argument overlooks that "it is simply not the law that all payments to the state must be regarded as either taxes or regulatory fees." Henderson v. Stadler, 434 F.3d 352, 355 (5th Cir. 2005) (eight-judge dissent from denial of rehearing en banc). For instance,

lease payments by private parties to a state for the rental of state land are not taxes within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341, but are payments pursuant to a contract in exchange for the use of the land. See Lipscomb v. Columbus Mun. Separate Sch. Dist., 269 F.3d 494, 500 n.13 (5th Cir. 2001); see also American Civil Liberties Union of Tenn. v. Bredesen, 441 F.3d 370, 374 (6th Cir.), cert. denied, 126 S. Ct. 2972 (2006) (sales of specialty license plates create contractual debts, not taxes). Like the lease payments at issue in Lipscomb, the commissions MCI paid to DOCS were neither taxes nor fees imposed on petitioners, but rather were contractual payments by the telephone company in exchange for a valuable business opportunity, the right to operate the prison telephone system.

But even if the fee/tax distinction applied here, the commission payments would be indistinguishable from the access fees paid by rental car companies, taxi cabs and limousine companies for the privilege of doing business at government-owned airports. Such fees are typically imposed as a percentage of the company's gross sales, and they generate revenues greatly in excess of the government's cost of repairing and maintaining the roads. Courts throughout the country have uniformly held that such payments are not unauthorized taxes, but instead are access fees paid in return for a valuable business opportunity. See, e.g., A&E Parking v. Detroit Metro. Wayne County Airport Auth., 271 Mich. App. 641, 723

N.W.2d 223, 226-28 (2006); Ace Rent-A-Car, Inc. v. Indianapolis Airport Auth., 612 N.E.2d 1104, 1107-08 (Ind. Ct. App. 1993); Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So. 2d 1159, 1160 (Fla. App. 1992). These enterprises, like MCI, pass the cost of the access fees onto consumers, but since the fees are not taxes on the business, they are also not taxes on the consumers.

2. Any required legislative approval was obtained here.

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

First, the telephone rates paid by petitioners incorporated the commissions payable under the 1996 and 2001 contracts, and those rates were approved by the PSC, "the alter ego of the Legislature." Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn., 135 A.D.2d 4, 7 (3d Dep't 1987), appeal dismissed, 72 N.Y.2d 840 (1988); see Matter of Rochester Gas & Elec. Corp. v. Public Serv. Commn., 117 A.D.2d 156, 160 (3d Dep't 1986) (same). The PSC directed MCI to file a tariff identifying the DOCS commission as part of the approved rate (R. 89), thus making those rates the only ones that MCI could legally charge. See Public Service Law § 92(2)(d).

Because rates containing commissions were approved by the very body created by the Legislature to exercise exclusive jurisdiction

over such matters, the commissions were 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.

Contrary to Supreme Court's rationale, it does not matter whether the PSC had authority to review the reasonableness of the commissions. The commissions were not taxes regardless of whether the PSC could have and thus should have determined how much rent MCI could agree to pay DOCS for the privilege of operating the prison telephone system. In either case, the PSC directed MCI to file a tariff incorporating the commissions as part of the approved rate for inmate collect calls, thereby authorizing MCI to collect the commissions.

Second, the Legislature itself approved the commissions when it annually appropriated them to DOCS's Family Benefit Fund. Between 1996 and 2007, DOCS deposited in the State's general fund between $15 and $24 million per year in commission revenues. DOCS's budget proposals expressly disclosed to the Legislature that these revenues were generated by the Inmate Phone Home Program, which DOCS uses "to pay for various inmate programs . . . which

directly benefit the inmate population." See, e.g., DOCS 2006-2007 All Funds Budget Request, at 22 (see addendum, A.30). Additionally, the DOCS Commissioner testified before legislative committees about the contracts and the commission revenues. See Matter of 2001-2002 Joint Budget Hearing on Public Protection, Feb. 5, 2001, at 95-100; Joint Hearing of the Senate Finance Committee and Assembly Ways and Means Committee on Public Protection, Feb. 24, 2003, at 116-18, 158-61; Matter of 2006-2007 Joint Budget Hearing on Public Protection, Feb. 16, 2006, at 131-36 (see addendum, A.7-A.28).

Thus, the Legislature knew that DOCS collected commissions, it knew how much DOCS collected each year, and it knew DOCS used the commissions to pay not only for the telephone system itself, but for various inmate programs as well. Fully aware of these facts and despite vigorous debate on bills proposing to do away with the commissions,[5] the Legislature each year from 1996 through March 31, 2007, appropriated the commissions to DOCS for expenditure on Family Benefit Fund programs. See, e.g., L. 2003, ch. 50, pp. 26-27 (reproduced at R. 163-165). That is all the approval the law requires. If the Legislature regarded the commissions as an unauthorized tax, or improper in any way, it would not have

[5]See, e.g., A4181 (2005 N.Y. Bill Tracking A.B. 4188); A7231-A; A7231-B; A7231-C; A7231-D (2005 N.Y. Bill Tracking 7231); S5299-A; S5299-B; S5299-C; S5299-D (2005 N.Y. Bill Tracking 5299).

legitimized them by expressly authorizing DOCS to spend the proceeds on inmate programs.

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

Even if the commissions were a tax, petitioners' demand for refunds would still fail to state a claim. An essential element of a claim for the refund of an illegal tax is that the taxpayer paid the tax involuntarily -- that is, under protest or duress. See Video Aid Corp. v. Town of Wallkill, 85 N.Y.2d 663, 666-67 (1995); City of Rochester v. Chiarella, 58 N.Y.2d 316, 323, cert. denied, 464 U.S. 828 (1983). The petitioners do not allege that they paid any of their telephone bills under protest. Nor can they show that they paid under duress, since they were free to decline to accept the collect calls (R. 283, § 3.10[d]). Accordingly, any claim for the refund of commissions paid before the commencement of this proceeding must be dismissed. See Community Health Plan v. Burckard, 3 A.D.3d 724, 725 (3d Dep't 2004).

B. Petitioners' free speech rights are not violated.

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

New York's free speech provision generally is interpreted no more broadly that its federal counterpart. See Courtroom Television Network LLC v. State of New York, 5 N.Y.3d 222, 231 (2005); cf. O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 530-32 (1988) (Kaye, J., concurring) (noting breadth of State's protections for freedom of the press). Nothing in DOCS's telephone system abridges those rights, because nothing in the State's free speech provision guarantees inmates or their families the right to communicate by telephone, let alone by the least expensive means possible.

In Arsberry v. State of Illinois, 244 F.3d at 564, the Seventh Circuit properly rejected a similar First Amendment claim by inmates and their families. Judge Posner explained that it "is true that communications the content of which is protected by the First Amendment are often made over the phone, but no one before these plaintiffs supposed the telephone excise tax an infringement of free speech." Accord Chapdelaine v. Keller, 1998 U.S. Dist. LEXIS 23017 at *28 (S.D.N.Y. 1998) (rejecting free speech challenge to commissions on inmate collect calls). Even in a case in which a prison regulation restricted an inmate's right of access to newspapers, and thus implicated the First Amendment, "'the loss of 'cost advantages does not fundamentally implicate free speech values.'" Matter of Montgomery v. Coughlin, 194 A.D.2d 264, 267

(3d Dep't 1993) (quoting Bell v. Wolfish, 441 U.S. 520, 552 (1979)), appeal dismissed, 83 N.Y.2d 905 (1994).

To be sure, inmates have a qualified right to communicate with the outside world, and so the State must provide a reasonable opportunity for them to do so. See Overton v. Bazzetta, 539 U.S. 126, 135 (2003). But the New York Constitution does not require the State to provide inmates with telephone service at all –- or with any particular means of communication for that matter -- let alone telephone service at a particular rate. See Arsberry, 244 F.3d at 565; United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000). Inmates have no more right to use the telephone than they do to e-mail or text-message their friends and families.

While the Ninth Circuit has suggested in dictum that inmates have a qualified right to telephone access, see Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000), it has since repudiated that position, stating that the genesis of the purported right is "obscure" and its "pronouncements of its existence have been conclusory and unnecessary to the decisions." Valdez v. Rosenthal, 302 F.3d 1039, 1048 (9th Cir. 2002). But even under its now-repudiated dictum, the Ninth Circuit took 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, 207 F.3d at 656. Similarly, the court in

Byrd v. Goord, 2005 U.S. Dist. LEXIS 18544 (S.D.N.Y. 2005), held that the federal constitutional challenge plaintiffs raised there to the 60% commission DOCS received under the 1996 contract stated a First Amendment claim, because plaintiffs could prevail by demonstrating "'that the costs are so exorbitant that they are unable to communicate.'" Id. at *26 (quoting McGuire v. Ameritech Servs, Inc., 253 F. Supp. 988, 1002 (S.D. Ohio 2003)).

Johnson and Byrd do not bind this Court's interpretation of the parallel provision of the State Constitution. See Brown v. State, 9 A.D.3d 23, 28 (3d Dep't 2004). But they 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 to the more general right to communicate with the outside world. See Valdez, 302 F.3d at 1046-47; Arsberry, 244 F.3d at 565; United States v. Footman, 215 F.3d at 155.

But even accepting the reasoning of Johnson and Byrd, petitioners' detailed allegations here, accepted as true, preclude them from establishing that they were "unable to communicate" with their incarcerated relatives and friends during the time period at issue. Petitioner Walton alleged that she visits her son and nephew once a month, and that, while she and her son "are not able to speak on the phone as much as they would like" (R. 46), she accepted a total of seven collect calls from her son and nephew in a given month (R. 47). Walton's allegations do not address what

efforts she made to correspond with her son and nephew. Petitioner Austin alleged that the high cost of the collect calls prevented her from speaking by phone with her husband "as much as they both need" (R. 48), but she readily admitted that she and her incarcerated husband "write letters to each other frequently, and she visits him when she can" (R. 47). While petitioner Harris alleged that she "cannot afford to speak to her cousin and friend even twice a month" and, because she is in graduate school, does not have the time or resources to visit them (R. 48), she was silent as to her efforts to write to her cousin and friend.

These allegations simply do not establish that the DOCS commission prevented petitioners from communicating at all with their friends and relatives in prison. To the contrary, they highlight the alternative means of communication 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 provided and continue to provide an ample opportunity for inmates to communicate with the outside world, which is all the Constitution requires. In Overton v. Bazzetta, in upholding certain prison visitation regulations, the U.S. Supreme 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." 539 U.S. at 135.

Nothing in the Constitution mandates that the State ensure that inmates and their relatives are able to communicate "as much as they would like" (R. 47) 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 to some extent. Petitioners do not suggest what telephone rate would be constitutionally permissible, or how many calls per month an inmate's relative should be able to afford to make. But since inmates and their families have no constitutional right to telephone service, they have no constitutional right to low cost telephone service. See Carter v. O'Sullivan, 924 F. Supp. 903, 911 (C.D. Ill. 1996) (rejecting plaintiffs' argument that calls are overpriced because "nothing precludes the prisoners and their outside contacts from writing to each other to save money").

While petitioners alleged that the commissions impermissibly burden the legal work of the Office of the Appellate Defender and the New York State Defenders' Association (R. 49-50), petitioners abandoned that claim by failing to raise it in their brief. But these allegations did not state a free speech claim in any event. The petition alleges that because these organizations have "a very limited budget," the commission portion of the rate "limits the work" that these organizations can perform (R. 49-50). But all budgets are limited, and any telephone rate greater than zero will

place constraints on that budget. Although the Appellate Defender alleges that "administrative errors" by MCI have sometimes caused it to block calls for varying lengths of time (R. 49), such administrative errors have nothing to do with the size of the commission.

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

Finally, even if the commission requirement implicated free speech rights, it was 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 occurred here. Far from denying access to telephone service, the commissions facilitated access. During the period at issue, DOCS's telephone program handled over 500,000 completed calls a month, or 6 million calls per year (R. 99). And the commission revenues gave DOCS a strong incentive to provide inmates with telephone service despite the security challenges it implicated by enabling DOCS to fund not only the Inmate Call Home Program, but also a variety of programs that directly benefitted inmates and their families. These programs, some of which are optional, undeniably served legitimate penological goals. Without the commissions as the funding source, many of these programs might not have existed.

C. The contractual commission provision did not effect a taking of petitioners' property without just compensation.

Nor is there any merit to petitioners' claim that the commissions paid by MCI to DOCS effected a taking of their property without just compensation in violation of article VII, § 1(a) of the New York State Constitution. No taking occurred because the "prospective recipient of a collect call [was] in complete control over whether . . . to accept the call and thereby relinquish her money to pay for it." McGuire v. Ameritech Services, Inc.,

253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003). Thus, "[t]here is no taking of which to speak, such as where the government confiscates property or forecloses its commercial use by fiat or legislation." Id. If the State had the authority to collect the commission in the first place, it is absurd to assert that the State should then have turned around and gave the money back as "just compensation."

D. Petitioners have not stated an equal protection claim.

Petitioners' equal protection claim fails at the threshold. The Equal Protection Clause of the State Constitution, like its federal counterpart, "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Cent., Inc., 473 U.S. 432, 439 (1985). The Equal Protection Clause, however, does not prohibit dissimilar treatment of persons who are not similarly situated. See Matter of Daimlerchrysler Company, LLC v. Billet, ___ A.D.3d ___, 2008 N.Y. App. Div. LEXIS 4346 at **9 (3d Dep't May 22, 2008); Matter of Jarrett, 230 A.D.2d 513, 525 (4th Dep't 1997). Where, as here, the governmental action does not infringe on a fundamental right or involve a suspect classification, the difference in treatment need only satisfy rational basis scrutiny to comport with equal protection. Port Jefferson Health Care Facility v. Wing, 94 N.Y.2d 284, 289 (1999).

Petitioners brought this case because the commissions they paid were imposed only on inmate collect calls, and thus they paid higher rates than were paid by other telephone service customers. But petitioners do not allege that other telephone service customers receive collect calls through a collect-call system made available at a state facility. Nor are petitioners not similarly situated to recipients of non-inmate calls. The calls at issue here are initiated by inmates from the confines of a correctional facility, and thus "the recipients are necessarily constrained by whatever security measures are appropriate to place on the inmates themselves," and "[i]f security precautions affect the telephone services that are available to inmates, this will inevitably impact the inmate call recipients." Daleure v. Commonwealth of Kentucky, 119 F. Supp. 2d 683, 691 (W.D. Ky. 2000), appeal dismissed, 269 F.3d 540 (6th Cir. 2001). Indeed, in approving the rates, the PSC noted this obvious difference, explaining that MCI's "[p]rovision of service to [DOCS] should be considered a unique service, with costs that would not be incurred in the provision of standard alternate operator services." See 1998 N.Y. PUC LEXIS 693 at *4. "Because the recipients of inmate calls are not similarly situated with the recipients of non-inmate calls, Plaintiffs would have to allege that they were discriminated against as compared to other recipients of inmate calls to state a supportable claim. They have not done so." Daleure, 119 F. Supp. 2d at 691; see also

Glimore v. County of Douglas, 406 F.3d 935 (8th Cir. 2005) (rejecting claim that 45% commission paid to county by telephone company was a tax or levy imposed on friends and relatives in violation of the equal protection clause); Turk v. Plummer, 1994 U.S. Dist. LEXIS 12745, *4 (N.D. Cal. 1994) (inmate failed to state equal protection claim that collect call-only system treated him differently from non-inmates). Accordingly, this claim also fails.

In concluding otherwise, the court in Byrd v. Goord failed to grasp the critical distinction between recipients of inmate collect calls and recipients of other collect calls. The Byrd court reasoned that "the state defendants have offered no rational basis to justify placing the burden of [the] additional commission solely on friends and families of inmates, and those individuals providing counseling and professional services, thereby charging them more per call than similarly situated collect call recipients." 2005 U.S. Dist. LEXIS 18544 at *32.

But the Byrd court overlooked that inmates' friends and family members who receive collect calls, unlike recipients of non-inmate collect calls, received 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 enjoyed 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 provided a rational basis for any differential treatment.

CONCLUSION

The judgment dismissing the petition should be affirmed.

Dated: Albany, New York
June 10, 2008

Respectfully submitted,

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