SUPREME COURT, STATE OF NEW YORK
COUNTY OF ALBANY

IVEY WALTON, et al.,	:	
	:	Index No. 04-1048
Petitioners,	:	
	:	**Oral Argument**
-against-	:	**Requested**
	:	
NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,	:	
	:	
Respondent.	:	

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

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April 26, 2004

April 26, 2007

Charles E. Diamond, Chief Clerk
Court Clerk's Office
New York State Supreme and County Courts
Albany County Courthouse, Room 102
16 Eagle Street
Albany, NY 12207

Re: Walton, et al., v. NYSDOCS, et al.
Supreme Court, Albany County
Index NO. 04-1048

Dear Mr. Diamond:

Enclosed for filing please find Petitioners' Supplemental Memorandum of Law in Opposition to Respondent Department of Correctional Services' Motion to Dismiss the Verified Petition and Complaint, as well a proof of service of one copy of the Memorandum upon Respondent.

Petitioners request oral argument. Thank you for your time and attention.

Sincerely,

Rachel Meeropol, Esq.

Enclosures
cc:

Hon. George B. Ceresia, Jr.
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PRELIMINARY STATEMENT

This matter is before the Court as a result of a Decision and Order of the New York Court of Appeals, (Walton v. New York State Dept. of Correctional Servs., 8 NY3d 186 [2007]), remanding it so this Court may determine whether Petitioners Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender, and the New York State Defenders Association ("Petitioners") state a claim for relief. Petitioners are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. They bring this combined Article 78 and declaratory judgment action seeking relief from the imposition of an unlawful tax.

Petitioners commenced this action on February 25, 2004, to challenge unauthorized charges (hereinafter the "DOCS tax" or "surcharge") collected by MCI WorldCom Communications ("MCI")[1] and paid to Respondent New York State Department of Correctional Services (hereinafter "DOCS") that were imposed upon them when they accepted collect telephone calls from New York State prisoners.

Petitioners originally sought relief from the unlawful DOCS tax by means of: (1) an order that MCI and DOCS must cease collecting and assessing the

[1] Count I of the Petition was brought against both MCI and DOCS. As that Count was dismissed (Walton, 8 NY3d at *15), MCI is no longer a party to this case.

unlawful tax; (2) a refund of the taxes unlawfully assessed upon them during the six years proceeding initiation of this action; and (3) a declaration that the DOCS tax is: (a) an illegal and unlegislated tax in violation of Articles I, III, and XVI of the New York State Constitution; (b) a taking of Petitioners' property without due process of law in violation of Article I §§ 6 and 8 of the State Constitution; (c) a violation of Petitioners' right to equal protection guaranteed by Article I § 11 of the State Constitution; (d) a violation of Petitioners' speech and association rights guaranteed by Article I § 8 of the State Constitution; and (e) a deceptive act or practice in violation of General Business Law § 349. See Petitioners' Verified Petition and Complaint, dated February 25, 2004 ("Petition") at ¶¶ 74 - 117.

On May 6, 2004, Respondents DOCS and MCI moved to dismiss the Petition on several grounds, alleging jurisdictional defects and failure to state a claim for relief. In a decision and order entered October 22, 2004 this Court, Honorable George B. Ceresia, Jr., granted Respondents' motion in its entirety on the grounds that counts II through VII were untimely, and count I did not state a claim for relief. The Appellate Division, Third Department thereafter affirmed the decision of the lower court, although it dismissed count VII, for an accounting, not on timeliness grounds, but for failure to state a claim. (Walton v. New York State Dept. of Correctional Servs., 25 AD3d 999 [3d Dept 2006].)

Petitioners sought and received leave to appeal to the Court of Appeals. (Walton v. New York State Dept. of Correctional Servs., 7 NY3d 706 [2006].) By Decision and Order dated February 20, 2007, the Court of Appeals reversed in part the courts below, reinstating each of Petitioners' constitutional claims, counts II through V, and remitting so this Court may determine if each claim states a cause of action. (8 NY3d at *15.) The Court of Appeals affirmed dismissal of count I and VII for failure to state a claim, and count VI as untimely. (Id.)

Now, by Motion dated April 10, 2007, Respondent DOCS again moves to dismiss Petitioners' claims, alleging that the filed-rate and primary jurisdiction doctrines bar this challenge and denying that the collection of the DOCS tax implicates Petitioners' constitutional rights.

As more thoroughly discussed below, Petitioners oppose the instant motion on the grounds that:

1) Petitioners have adequately alleged that the DOCS surcharge constitutes: (a) an unconstitutional tax; (b) a taking of Petitioners' property without due process of law; (c) a violation of Petitioners' rights to equal protection under the law; and (d) a violation of Petitioners' speech and association rights; and

2) The filed-rate and primary jurisdiction doctrines do not insulate Petitioners' claims from review by this Court.

NATURE OF THE CASE & RELEVANT FACTS

Petitioners are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. Upon remand from the Court of Appeals, they seek relief from Respondent's imposition of an unlawful tax by means of: (1) an order enjoining DOCS from assessing and collecting the unlawful tax; (2) a refund of the taxes unlawfully collected from them between October 30, 2003 and March 31, 2007; and (3) a declaration that the DOCS fee is: (a) an illegal and unlegislated tax in violation of Articles I, III, and XVI of the New York State Constitution; (b) a taking of Petitioners' property without due process of law in violation of Article I §§ 6 and 8 of the State Constitution; (c) a violation of Petitioners' rights to equal protection guaranteed by Article I § 11 of the State Constitution; and (d) a violation of Petitioners' speech and association rights guaranteed by Article I § 8 of the State Constitution. (Petition at ¶¶ 77-111.) Petitioners style their challenge as a putative class action. (Id. at ¶¶ 2, 67 – 73.)

Any New York State prisoner who wishes to speak to a loved one, friend, or lawyer must do so by placing a collect call from a telephone in his or her facility. (Petition at ¶ 48.) Pursuant to contracts between MCI and DOCS signed

on April 1, 1996 and August 1, 2001, MCI is the exclusive provider of telephone services to the New York State Department of Correctional Services. (Id. at ¶¶ 5, 6.) The 2001 contract ran through March 31, 2006, with the option of two, one-year renewals. (Id. at ¶ 33.) DOCS exercised this option and renewed the contract for two additional one-year terms. Upon information and belief, the second extension, set to run from April 1, 2007 through March 31, 2008 does not include the DOCS tax.[2]

Under the 2001 contract, DOCS demanded a "commission" of 57.5 percent of the gross annual revenue MCI garnered from its operation of the prison telephone system. (Id. at ¶ 6.) To finance the State's 57.5 percent tax, MCI charged recipients of prisoners' collect calls exorbitant rates. This arrangement was extremely lucrative for the State. For instance, in 2003 alone the State earned approximately $23.4 million from the commission payments. (Id. at Ex. B.) The millions of dollars collected from Petitioners and other collect call recipients was tendered by MCI to the State, which deposited it into the general

[2] In a brief footnote on p. 4 of DOCS' brief, Respondent argues that, once finalized, the elimination of the DOCS tax from the current contract will moot Petitioners' claim for injunctive relief. However, Respondent's voluntary cessation of its challenged activity does not divest this Court of jurisdiction, or remove the need for injunctive relief. (See, Montalvo v. Consolidated Edison Co. of N.Y., 110 Misc 2d 24, 28 [Sup Ct NY County 1981], citing, United States v. W.T. Grant Co., 345 US 629 [1953].) Should Respondent seek to dismiss Petitioners' claim for injunctive relief in the future on mootness grounds, Petitioners respectfully request the opportunity to brief the issue for the Court.

fund. (Id. at ¶ 45.) The proceeds were then appropriated and earmarked for deposit into DOCS' "Family Benefit Fund." (Id. at ¶ 12.) The monies deposited in the Fund were used to cover the costs of DOCS' operations wholly unrelated to the maintenance of the prison telephone system. (Id.) For example, the vast majority of the revenue generated in 2003 was spent on services, like medical care, that the State is required by law to provide for prisoners. (Id. at Ex. B.) The high cost of collect calls from New York State prisoners between 2003 and 2007 was a direct result of the DOCS tax, and placed a substantial financial burden on Petitioners and putative class members, limiting the duration and number of calls that they could accept from prisoners. **(**Id. at ¶¶ 7, 18-24, 49-50, 52-63.)

The specific rate structure that is the subject of this challenge[3] was established by an amendment to the 2001 contract effective July 25, 2003; and reflected in an amended tariff filing before the New York State Public Service Commission (hereafter "PSC"), the body authorized to regulate intrastate

[3] DOCS inexplicably argues that Petitioners' challenge to the original 1996 contract is moot. (DOCS Br. at 3 n. 2.) The Court of Appeals held that Petitioners' claims are each subject to a four month statute of limitations, but are nevertheless timely, because the PSC's October 30, 2003 order marked the accrual of Petitioners' claims challenging the 2001 contract. (Walton, 8 NY3d at *8-9, 14.) Under the Court's order, a challenge to the 1996 contract is clearly barred by the statute of limitations. Respondent's mootness argument is itself moot.

telephone charges. (Id. at ¶¶ 39-43; Ex. A.) Under the new structure, Petitioners were charged a $3.00 flat fee and a set rate of $0.16/minute on all local and long distance calls they received from New York State prisoners. **(**Id. at Ex. A at 3-4.) Of the profit garnered by MCI through this structure, 57.5 percent was remitted to DOCS, and placed in the Family Benefit Fund. (Id. at ¶ 12; Ex A at 22.) Upon information and belief, this rate structure remained in effect between October of 2003 and March 31, 2007.

The 57.5 percent DOCS tax challenged by Petitioners was never authorized by the New York State legislature, nor approved as a legitimate component of MCI's filed telephone rate by the PSC. (Id. at ¶¶ 4, 14; Ex. A.) After MCI filed revised tariffs setting the new rate, family members, friends, lawyers, and other prisoner call recipients (including Petitioners Austin and Office of the Appellate Defender and counsel for Petitioners) filed comments on the proposed tariff amendments in a timely manner. (Id. at ¶¶ 39, 40; Ex. E) In their comments, Petitioners and putative class members requested a hearing on the entire MCI rate, and directed the PSC's attention to the constitutional and legal infirmities of certain aspects of the prison telephone system. (Id.)

By order effective October 30, 2003, the PSC held that it did not have jurisdiction over the 57.5 percent tax collected by DOCS from MCI. (Id. at ¶¶ 3, 41-42; Ex. A at 22-25.) The PSC reasoned that because DOCS is not a telephone

corporation subject to the Public Service Law, the PSC does not have jurisdiction over either the Department or the tax it charges. (Id. at Ex. A at 23.) The PSC called the non-jurisdictional portion of the total charge the "DOCS commission," and referred to the other portion of the rate, the 42.5 percent retained by MCI, as the "jurisdictional rate." (Id.) The PSC reviewed the jurisdictional rate by comparing it to rates MCI charges for analogous services. (Id.) Based upon this comparison and other factors, the PSC approved the jurisdictional rate as "just and reasonable" under the Public Service Law. (Id. at Ex. A at 24.) The PSC did not undertake any review of the reasonableness of the DOCS tax or of the entire combined rate. (Id. at Ex. A.) The PSC directed MCI to file a new tariff reflecting the two separate charges: the DOCS tax and MCI's filed rate. (Id. at Ex. A at 27.) Between October 30, 2003 and March 31, 2007 MCI billed Petitioners and putative class members for both charges: the 42.5 percent jurisdictional rate that the PSC approved as a just and reasonable telephone rate, and the unapproved 57.5 percent "DOCS commission." (Id. at ¶¶ 4, 46.)

The DOCS tax does not serve any penological purpose (id. at ¶¶ 64-66); rather, it is a way for the state to alleviate the burden of funding the state prison system by shifting a disproportionate and punitive share of that cost to the family members and friends of New York State Prisoners. (Id. at Ex B.) Respondents can offer no legitimate justification for requiring recipients of prisoner collect

calls to fund general operations of the New York State Prisons. The resulting high telephone rates limited Petitioners' ability to speak to their loved ones despite serious public safety and policy consequences – as it is well established that maintaining family and community ties limits recidivism after release. (Id. at ¶¶ 50-63.) In response, Petitioners filed this action in the Supreme Court, Albany County.

In February of 2006, the Court of Appeals held that each of Petitioners constitutional claims is timely, because each was filed within four months of the PSC's October 30, 2003 order. (Walton, 8 NY3d at *13-15.) Although Respondents urged the Court of Appeals to affirm dismissal of Petitioners' constitutional claims on the alternative theory that the claims were bared by the filed rate doctrine, The Court did not refer to that theory, and instead instructed this Court to "determine the question whether petitioners' constitutional claims state a cause of action." (Id. at *15.) In a concurring opinion, Judge Smith joined with the majority to "avoid the constitutional problems" presented should Petitioners' "quite substantial" constitutional claims be time-barred only four months after the 2001 MCI-DOCS contract. (Id. at *17.)

ARGUMENT

I. Petitioners Have Adequately Stated Claims for Relief from an Unlawful Tax, and Violations of their Rights to Due Process, Equal Protection and Freedom of Speech and Association.

In Counts II through VI of their Petition, Petitioners allege that the DOCS telephone tax is unlawful, and violates their rights to due process, equal protection and freedom of speech and association. DOCS asks the Court to dismiss each count for failure to state a claim. Respondent's motion should be denied in its entirety, as each count adequately states a claim for relief.

A. The DOCS Surcharge is an Unlawful Tax in Violation of Separation of Powers and Petitioners' Due Process Rights.

In Count II of the petition, Petitioners seek a declaration that the DOCS surcharge is an unlawful tax, levied by Respondent in violation of separation of powers and substantive due process. While the PSC could only say what the DOCS surcharge is not – a telephone rate – this Court can state what it is: an unauthorized tax unlawfully levied against a discrete group of New York State residents to fund programs for the general public good. In support of this claim, Petitioners allege that (a) MCI remitted to DOCS a "commission" of 57.5 percent of its gross annual revenue from operating the prison telephone system (Petition at ¶ 6); (b) to finance this "commission," MCI charged recipients of prisoners' collect calls a surcharge of $3.00 for every call accepted (id. at ¶ 7); (c) the

surcharge was paid by Petitioners to MCI, tendered by MCI to the State, and deposited by the State into the general fund (id. at ¶ 16, 45); (d) these funds were then earmarked and appropriated to DOCS for its "Family Benefit Fund" (id. at ¶ 12); (e) the Family Benefit Fund monies were used to cover the costs of DOCS' operations wholly unrelated to the maintenance of the prison telephone system (id. at 45); and (f) the DOCS telephone tax was neither authorized by the State Legislature nor approved as a legitimate component of MCI's filed telephone rate by the PSC. (id. at ¶¶ 4, 14). Petitioners have thus adequately pled the imposition of an unlawful tax.

1. The DOCS surcharge is a "tax".

The New York Courts are clear that any fee which is levied to raise revenue and exceeds a reasonable relationship to the cost of its service is a tax. (See American Ins. Assn. v. Lewis, 50 NY2d 617, 622-23 [1980] (holding "capping provision" a tax, rather than a fee, when it bears no relation to the cost to the State of administering the program); Matter of Torsoe Bros. Constr. Corp. v. Board of Trustees of Inc. Vil. of Monroe, 49 AD2d 461, 465 [2d Dept 1975] ("To the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax"); New York Tel. Co. v. City of Amsterdam, 200 AD2d 315, 318 [3d Dept 1994]

(holding that an excavation permit "fee" which is disproportionate to associated costs and utilized as a revenue-generating measure is an unlawful tax).)

Valid fees, as distinguished from taxes, are intended to defray the costs of the services to which they are attached. (Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 163 [1976] (User fees must be "reasonably necessary to the accomplishment" of the authorized service and "assessed or estimated on the basis of reliable factual studies or statistics"); Suffolk County Bldrs. Assn. v. County of Suffolk, 46 NY2d 613 [1979].) In addition to the required connection between a user fee and the actual cost of the service provided, user fees must -- by definition -- represent "a visitation of the costs of special services upon the one who derives a benefit from them," (Jewish Reconstructionist Synagogue of N. Shore, 40 NY2d at 162) and must be used to finance the same service to which they are pegged, not merely any service that might indirectly benefit the fee-payers. (Id. at 164 – 165; American Ins. Assn., 50 NY2d at 623.)

The DOCS tax fails each of these requirements. DOCS used as little as 1.5 percent of the revenue it received from the surcharge to cover the costs of operating the prison telephone system. (Petition at Ex. B at 7) While a miniscule portion of the Family Benefit Fund was used for the direct benefit of Petitioners and others who receive collect calls from prisoners, almost all of the money

collected through the DOCS tax paid for unrelated services that would otherwise have to be paid for out of the State's or DOCS' general budget. (Petition Ex. B.) As DOCS itself has explained, "while [the DOCS tax monies spent on medical care] are certainly legitimate state expenditures, the fact they are made from the [Family Benefit Fund] reduces the taxpayers' burden." (Id. at Ex. B at 7.) Because the DOCS surcharge was not at all related to the necessary costs to DOCS of providing prison telephone service, and the monies Petitioners paid funded unrelated programs that are beneficial to all New Yorkers, the surcharge is an unlawful tax.

Respondent attempts to avoid this analysis by arguing that the DOCS surcharge can be explained away as a valid telephone commission. Even if this is true, and below we demonstrate it is not, it is completely irrelevant. Whether or not a telephone company's commission payment to a premise owner may be considered a valid business expense under state or federal regulatory law has no bearing on whether a state agency may lawfully raise revenue through levying fees on citizens without legislative authorization or guidance. The latter, relevant question can only be answered by reference to federal and state court precedent regarding taxation power; the FCC and PSC regulatory decisions relied on by DOCS shed no light on this central question.

Moreover, in its October 30 2003 order the PSC clearly demonstrated that the DOCS surcharge is not a valid rent or access fee.[4] Respondent is correct that premise owners may demand reasonable commission payments in exchange for allowing payphone operators access to their property, (International Telecharge, Inc. v. American Telephone and Telegraph Company, 8 FCC Rcd 7304, 7306 [1993]), but the regulatory bodies do not grant *carte blanche*. Commissions, like all other operating or business expenses, are reviewable by the PSC and FCC to ensure they do not alter the tariffed rate, and are not excessive. (See Matter of AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834, **17 [1988] (noting that commission payments by AT&T to private payphone companies did not alter the rate charged to the customer); Matter of National Telephone Services, Inc., 8 FCC Rcd 654, 655, 655 n. 12 [1993] (same, and noting absence of allegations that AT&T's commission payments were excessive or otherwise unreasonable, such that they "should be disallowed [by the FCC] as an operating expense"); see also, Matter of Billed Party Preference for InterLATA C+ Calls,

[4] Contrary to Respondent's argument, the PSC did not state that the DOCS commission "is no different from the commissions paid by pay-phone telephone companies to premises owners." (Def. Br. at 11.) The PSC mentioned the existence of payphone commissions in a footnote and did not opine as to their legality, or their relevance to the current case. (Petition at Ex. A at 24 n. 20.)

13 FCC Rcd 6122, 6156 [1998] (surcharges should be considered on a case-by-case basis to insure reasonable rates for calls from inmates).) [5]

Valid commissions are based on expenses incurred by telephone companies to gain access to property in order to be able to provide services there, (Matter of AT&T's Private Payphone Comm'n Plan, 3 FCCR 5834, ¶ 20 [1988]), and must not be excessive, or alter the tariffed rate. (Id.) "Commissions" that increase or decrease the rate a customer pays from the tariffed rate are invalid. (NY Pub. Ser. §91(1); see also People ex rel. Public Serv. Commn. of State of N.Y. v. New York Tel. Co., 262 App Div 440, 444 [3d Dept 1941], affd, 287 NY

[5] Respondent cites Matter of the Rules and Regulations of the Public Service Commission 17 N.Y.C.R.R., Chapter VI, 1989 NY PUC LEXIS 45 [Aug. 16, 1989] for the proposition that the PSC "has no authority to limit the commission charged by governmental premises owners" (Def. Br. at 12), but ignores the obvious power of the PSC to regulate the telephone rates charged to payphone users—even in the lightly regulated field of privately owned payphones, the PSC exercised jurisdiction to retain a rate cap. (Matter of the Rules and Regulations of the Public Service Commission 17 N.Y.C.R.R., Chapter VI, at *19.) Respondent also states that the FCC "had declined to prohibit or impose caps on commissions collected by prisons" (Def. Br. at 12), without acknowledging that the FCC is currently considering a rulemaking proposal that would limit the rates charged to prison telephone call recipients and / or eliminate the commission structure. (See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248 [2002] (Inmate Payphone Rulemaking); Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners' Alternative Rulemaking Proposal, CC Docket No. 96-128 (filed Mar. 1, 2007) (Alternative Proposal).

803 [1942] (hotel cannot impose surcharge over filed rate); United States v. AT&T, 57 F Supp 451 [SDNY 1944], affd sub nom, Hotel Astor v. United States, 325 US 837 [1945] (per curiam) (hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined).)

If the DOCS surcharge was simply a "rent and access expense[]," the PSC would have the power (and obligation) to review it, and thus ensure it was a just and reasonable part of the entire rate. In Matter of General Telephone Company of Upstate New York v. Lundy, (17 NY2d 373, 377 [1966]), for example, the Court of Appeals affirmed the PSC's finding that General Telephone and Electrics Corporation ("GT&E") was being overcharged for goods and services, and ordered the charges excluded from GT&E's rate. The Court of Appeals upheld the PSC's actions because it harbored "no doubt that a regulatory body, such as the Public Service Commission, may review the operating expenses of a utility and thereby prevent unreasonable costs for materials and services from being passed on to rate payers." (Id. at 378.) Indeed, the Court characterized such review as "not only the right but the duty" of a regulatory body empowered to determine "just and reasonable" telephone rates in light of the "danger that the utility will be charged exorbitant prices which will, by inclusion in its operating costs, become the predicate for excessive rates." (Id. at 378 – 380.)

Respondent claims, without support, that "neither the PSC or FCC reviews whether premise owners charge too much rent." This statement is squarely contradicted by both regulatory and judicial precedent. (See id. at 378; Matter of Billed Party Preference for InterLATA C+ Calls, 13 FCC Rcd at 6156.) If the DOCS tax was a legitimate business expense, the PSC would have reviewed it. But when the DOCS surcharge was put before it, the PSC held that it did not have jurisdiction to analyze the reasonableness of the expense. (Petition at Ex. A at 22-23.) DOCS chose not to challenge the PSC's order, and any article 78 proceeding regarding that question is now untimely.

In relying upon largely irrelevant regulatory decisions, DOCS ignores the many cases decided in this State that identify any fee levied to raise revenue as a tax. (See e.g., American Ins. Assn., 50 NY2d at 622-23.) It is this precedent, and not the parallel review of telephone companies by regulatory bodies, that must guide this Court's analysis of DOCS' actions.

The one case cited by Respondent which does address a similar surcharge scheme, Valdez v. State of New Mexico, is distinguishable because the challenged surcharge was included in the approved rate. (54 P3d 71, 75 [2002].) Moreover, the opinion is not binding on this Court, and is unpersuasive because it includes no analysis regarding what constitutes a valid fee; for this reason it should not be followed.

2. The DOCS Tax Was Levied Without Legislative Authorization, and is Thus Unlawful.

The DOCS surcharge is a tax that was never authorized by the legislature, and is thus illegal. In New York "the exclusive power of taxation is lodged in the State Legislature." (Castle Oil Corp. v. City of New York, 89 NY2d 334, 338 [1996] (citing N.Y. Const., Art. XVI, §1).) While the taxing power may be delegated to "legislative bodies of municipalities and quasi-municipal corporations . . . [t]he power to tax may not . . . be delegated to administrative agencies or other governmental departments." (Greater Poughkeepsie Lib. Dist. v. Town of Poughkeepsie, 81 NY2d 574, 580 [1993] (internal citations omitted, emphasis added).) "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 of New York, 131 AD2d 565, 566 [2d Dept 1987].) DOCS can neither point to a law delegating to it general taxing authority nor show that the Legislature has provided it with specific authority to levy taxes upon prisoners' families as a means of raising revenue for the State's general operations. Therefore, its taxing activities here are *ultra vires* and an unconstitutional usurpation of legislative authority under Article XVI, §1. (Yonkers Racing Corp., 131 AD2d at 567.)

Even if Respondent could point to legislation granting DOCS the authority to impose this tax upon Petitioners, in the absence of specific legislative guidelines designating the property to be taxed and delineating the tax rate as well as the proportionate share of the tax to be raised from different groups, any exercise of such authority by DOCS would still be unconstitutional. Given that the prison telephone tax is wholly unauthorized, it follows that there is not now – nor has there ever been – any delineation of the appropriate tax rate or any guidelines governing the parameters of any tax to be levied. The courts have consistently concluded that such schemes violate due process requirements. (See Yonkers Racing Corp., 131 AD2d at 566 (holding that any tax imposed pursuant to a limited agency delegation, "must be accompanied by proper guidelines set by the legislature"); Matter of Rego Prop. Corp. v. Finance Admin. of City of New York, 102 Misc 2d 641, 647 [Sup Ct Queens Co 1980] ("Delegating to an administrative agency the power to fix the ratio of assessment, without formulating a definite and intelligible standard to guide the agency in making its determination, constitutes an unconstitutional delegation of legislative power.") (internal quotation omitted).)

The record before this Court shows clearly that DOCS unlawfully exercised taxation power. In 2001, DOCS signed a new contract that altered the DOCS surcharge, changing the fees levied upon individuals from 60% to 57.5%,

without legislative authorization. **(**Petition at ¶¶ 5-6 & n.1.) In 2004, DOCS and MCI changed the rate structure, shifting the burden of funding the commissions from one group of prison call recipients to another. (Petition at Ex. A at 3-4.) Upon information and belief, DOCS ceased collection of the tax all together on April 1, 2007. Each of these alterations in taxation rates was made at the sole discretion of DOCS and MCI, without legislative authorization or debate.

Respondent argues that the DOCS tax was actually authorized by the legislature because the PSC "approved" the commissions as a component of MCI's filed rate in its role as the "alter ego of the legislature." (Def. Br. at 14.) First, as explained at length above, the PSC held that it lacked jurisdiction over the DOCS surcharge, thus it could not, and did not, approve it. Moreover, this argument completely ignores the fact that a state agency has no authority to levy a tax. (See Greater Poughkeepsie Lib. Dist., 81 NY2d at 580; Yonkers Racing Corp., 131 AD2d at 566.)

Contrary to Respondent's argument Arsberry v. State of Illinois, provides no support for DOCS' proposition that PSC "approval" satisfies New York State constitutional requirements. (DOCS Br. at 14, citing 244 F3d 558, 565 [7th Cir 2001].) Indeed, the case is more helpful to Petitioners' argument, as Judge Posner characterized the Illinois fee as a tax when analyzing the plaintiffs' impairment of contract and equal protection claims. (Arsberry, 244 F3d at 565

("in any event a tax, which is what the allegedly exorbitant component of the questioned telephone rates functionally is, is not an impairment of contracts…").) Although recognizing that the telephone commission functions as a tax, the Arsberry Court declined to consider the constitutional implications of that tax. (Id.) Instead, because the Illinois Commerce Commission (unlike the PSC) had reviewed and approved the telephone fee at issue, that court held that plaintiffs' equal protection claim fell within the agency's primary jurisdiction, and thus should be dismissed under the filed rate doctrine. (Id. at 561, 565.) While Judge Posner's recognition of the Illinois telephone charge as a "tax" is instructive for this Court, the outcome in that case was based on a different regulatory scheme and administrative determination (see infra, Section II.), rendering it unpersuasive here.

Finally, Respondent insists that even if the DOCS tax was unlawful, it may not be refunded because Petitioners have not claimed that it was paid under protest. (DOCS Br. at 15.) However, protest is not required in all circumstances; rather, payment under protest is simply one indication that money was not paid voluntarily. (Mercury Mach. Importing Corp. v. City of New York, 3 NY2d 418, 424 [1957].) "Protest 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 Distrib. Corp. v. State of New York, 27 AD2d 420, 421 [3d Dept 1967].) As Petitioners cannot speak to their loved ones without paying the allegedly unlawful fees, such fees are clearly coerced. (Petition at ¶¶ 48-49.) Moreover, the purpose of protest is to alert the individual or entity that it may have to refund money paid. (Corporate Prop. Invs. v. Board of Assessors of County of Nassau, 153 AD2d 656, 660 [2d Dept 1989].) For that reason, even if protest were required, Petitioners' continued complaints and efforts to litigate this issue suffice. (Petition at ¶¶ 34-36, 40; see e.g. Corporate Prop. Invs., 153 Ad2d at 660 (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).)

3. The DOCS' Tax Violates Due Process.

Beyond DOCS' *ultra vires* exercise of taxation power and its unfounded claim to the power to levy taxes in any amount it sees fit, it has also violated the well-established substantive due process principle that "assessments for public improvements laid upon [specific individuals] are ordinarily constitutional only if based on benefits received by them." (HBP Assocs. v. Marsh, 893 F Supp 271, 278-279 [SDNY 1995]; see also Norwood v. Baker, 172 US 269, 279 [1898]; Matter of Aldens, Inc. v. Tully, 49 NY2d 525, 534 [1980] ("In determining whether a state tax falls within the confines of the due process clause … the

'simple but controlling question is whether the State has given anything for which it can ask return")(quoting Wisconsin v. J.C. Penney Co., 311 US 435, 444 [1940]); Board of Ed. of Cent. School Dist. No. 2 v. Village of Alexander, 197 Misc 814, 820 [Sup Ct Genesee Co 1949] (a special assessment is based upon the theory that it represents a payment for special benefits accruing to the property as a result of the local improvement and, unless a benefit can be found, no special assessment may be sustained).)

The tax monies Petitioners paid under DOCS' scheme were added to the general State fund to cover DOCS' overall operating costs, compensating for what otherwise must be funded by general tax dollars or would result in a budgetary shortfall. (Petition at ¶12; Ex. B) Petitioners received no commensurate benefit from the operations of the State Correctional System funded by the tax; they merely benefited as did all State residents. Therefore, the distinction drawn by the tax scheme between Petitioners and other State taxpayers for the purpose of serving the Department's general revenue raising objective was unconstitutionally baseless and irrational. (See Foss v. City of Rochester, 65 NY2d 247, 256-257 [1985] (Holding unconstitutional a property tax scheme to tax properties differently based on geography, without justification).)

The Department's revenue raising scheme also violates the prohibition against double taxation by imposing a tax on Petitioners in addition to the state taxes they already pay that are apportioned through the budgetary process to DOCS. "Double taxation is prohibited unless specifically authorized by the legislature." (Radio Common Carriers of N.Y. v. State of New York, 158 Misc 2d 695, 701 [1993] (citing Sage Realty Corp. v. O'Cleireacain, 185 AD2d 188 [1992]).) As the Supreme Court observed in Tennessee v. Whitworth, (117 US 129, 137 [1886]):

> Justice requires the burdens of government shall as far as practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislation was unmistakably so enacted. All presumptions are against such an imposition.

Respondent defends the assessment by claiming that Petitioners "receive a benefit" from the collection of the commission because a portion of the commission monies fund the prison telephone system. (DOCS Br. at 15.) DOCS also argues that the other inmate programs funded by the commissions "bear a reasonable relationship to important community interests." (Id. at 16) This argument ignores the fact that DOCS used as little as 1.5 percent of the revenue it received from the surcharge to finance the prison telephone system. (Petition at Ex. B at 7.) This means that 98.5 percent of the revenue from the DOCS tax financed programs that benefit Petitioners no more than any other citizen of New

York. Whether or not the programs themselves are legitimate is irrelevant; forcing Petitioners to bear the burden of financing these generally beneficial expenditures is arbitrary and unlawful.

B. The DOCS Tax is an Unlawful Taking.

By count III of the Petition, Petitioners seek a declaration that the DOCS tax is an unlawful taking of their property. (Petition at ¶¶ 90 – 94.) The Takings Clause of Article I, § 7(a) of the New York State Constitution prohibits confiscation of private property for public use without just compensation. Specifically, Petitioners allege that the prison telephone tax: (1) works a taking of their property – the money they pay to cover the DOCS tax (id. at ¶¶ 7, 18-22); (2) for a public purpose – funding a portion of the Department's general operating costs (id. at 45; Ex B); and (3) without any compensation.

Respondents analogize Petitioners' takings claim to a challenge to the diminished value of property subject to use restrictions. (DOCS Br. at 17.) But Petitioners' argument is not so complicated. Contrary to Respondent's assertion, Petitioners do challenge a total deprivation of property—the sums they are required to pay DOCS through its tax upon their communication with New York State prisoners. (See e.g. Phillips v. Washington Legal Found., 524 US 156, 172 [1998] (takings clause of the Constitution applies to monetary interests); Webb's Fabulous Pharms. v. Beckwith, 449 US 155, 160 [1980] (same); Alliance of Am.

Insurers v. Chu, 77 NY2d 573, 584-585 [1991] (same).) Petitioners receive nothing of proportional value in compensation for this taking.

Respondents cite McGuire v. Ameritech Services, Inc., (253 F Supp 2d 988, 1004 [SD Ohio 2003]), for the proposition that voluntary payments cannot work a taking. (DOCS Br. at 18.) However, the McGuire court's holding comes in the context of a procedural due process claim – the plaintiff claimed his money was taken without sufficient notice and hearing. (253 F Supp 2d at 1003-1004.) Because Petitioners make no procedural due process claim but argue instead that their property was taken without just compensation, McGuire is irrelevant.

For the forgoing reasons, Petitioners' have adequately pled a takings claim.

C. The DOCS Tax Violates Petitioners' Right to Equal Protection Under the Law.

In Count IV, Petitioners allege that Respondent's arbitrary imposition of the DOCS tax upon them alone, among all taxpayers, violates their right to equal protection under the law. (See Matter of Huckaby v. New York State Div. of Tax Appeals Trib., 4 NY3d 427, 439 [2005] (In the taxation context, the equal protection clause forbids distinctions that are not based on plausible policy goals or are so attenuated from their goal "as to render the distinction arbitrary or irrational"), citing Norlinger v. Hahn, 505 US 1 [1992].)

The equal protection clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not

imposed on others of the same class." (Allegheny Pittsburgh Coal Co. v. County Comm'r, 488 US 336, 345 [1989] (re-valuing property for purposes of setting tax assessment at the time of recent sales violated equal protection because there was no justification for not also re-valuing similar property); see also Corvetti v. Town of Lake Pleasant, 227 AD2d 821, 823 [3d Dept 1996] (equal protection violated when property taxes of new residents arbitrarily increased subject to "welcome neighbor" policy); Matter of Chasalow v. Board of Assessors of County of Nassau, 202 AD2d 499, 501 [2d Dept 1994].) Here, DOCS arbitrarily imposed a tax upon Petitioners that it did not impose on other taxpayers. This tax was unauthorized by the Legislature, and cannot be justified by any legitimate state interest.

When a governmental classification that burdens fundamental rights is challenged on equal protection grounds, "it must withstand strict scrutiny and is void unless necessary to promote a compelling State interest and narrowly tailored to achieve that purpose." (Golden v. Clark, 76 NY2d 618, 623 [1990].) Here, as fully explained below (see infra, Section I.D), the telephone tax unreasonably burdened Petitioners' ability to freely speak and associate with their loved ones and clients. This Court has recognized that speech and association are among the fundamental rights that, when burdened by a governmental act, trigger strict scrutiny of that act. (Golden, 76 NY2d at 627-628; Matter of Roth v.

Cuevas, 82 NY2d 791 [1993].) New York courts also recognize that "the creation and sustenance of a family" is a constitutionally protected associational right. (Sinhogar v. Parry, 53 NY2d 424, 443 [1981]; People v. Rodriguez, 159 Misc 2d 1065, 1070 [1993] (citing series of U.S. Supreme Court cases).) For this reason, DOCS' discriminatory treatment of Petitioners must be subjected to strict scrutiny, rather than the rational basis review urged by DOCS.[6]

Respondent argues that Petitioners have not adequately alleged an equal protection violation because they are not similarly situated to other taxpayers based on the "self-evident fact" that Petitioners alone receive collect calls from prisoners. (DOCS Br. at 19.) But DOCS does not explain how Petitioners' need to speak with New York State prisoners situates them differently than other New York State residents with respect to funding and operation of New York State prison programs wholly separate from the telephone system. Only 1.5 percent of the tax revenue was used to operate the inmate phone system. (Petition at Ex. B.) As such, the tax levied on Appellants bears virtually no relation to the benefit they receive through operation of the prison telephone system, or to the security needs of that system. (Id.)

[6] As explained below however, the DOCS tax is completely arbitrary, and thus cannot even pass rational basis review.

In Byrd v. Goord, No. 00Civ2135, 2005 US Dist LEXIS 18544, *31-33. [SDNY Aug 29, 2005] the Southern District of New York upheld an identical claim against the State's motion to dismiss after finding that plaintiffs were similarly situated to non-prisoner collect call recipients. As the Byrd court recognized, the DOCS tax had no relationship to security or functioning of the institution. (Id. at *31.) Because 98.5% of the DOCS tax was used to fund programs unconnected to the prison telephone system or the security needs of that system, there is no rational basis to justify placing the burden of the surcharge on individuals who accept collect calls from prisoners. (See id.)

Respondent's reliance on challenges to prison telephone systems in other states to support its "self-evident proposition" is misplaced. In Daleure v. Kentucky, (119 F Supp 2d 683 [WD Ky 2000]), the Western District of Kentucky differentiated between prisoner collect-call recipients and other collect-call recipients on the assumption that that the telephone surcharge at issue 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). Here, Petitioners have alleged that the DOCS tax was completely unrelated to security needs. (Petition at ¶¶ 8, 12, 64-66.) This allegation is supported by the undisputed fact that DOCS spent as little as 1.5 percent of the revenue it raised on maintenance of the telephone system (id. at

Ex. B), and moreover, must be taken as true upon a motion to dismiss. Because the DOCS tax was completely unrelated to security concerns, such concerns cannot justify treating Petitioners differently than other collect-call recipients.

The other decisions DOCS relies on are equally unavailing. McGuire v. Ameritech Servs., Inc., 253 F Supp 2d 988, 1000-1001 (SD Ohio 2003) simply relies on the (inapplicable) reasoning in Daleure, while Clark v. Plummer, No. C 95-0046, 1994 WL 317017, at *2 [ND Cal May 18, 1995], and Levingston v. Plummer, No. C 944-4020, 1995 WL 23945, at *1 [ND Cal Jan. 9, 1995] are each *pro se* cases by prisoners, and thus raise the very different question of whether inmates are similarly situated to non-inmates.

Because 98.5 percent of the DOCS tax was used to fund programs unrelated to telephone calls, or the security needs of the telephone system, imposition of the DOCS tax on petitioners was completely arbitrary, and cannot even pass rational basis review, much less strict scrutiny. (See Byrd, 2005 US Dist. LEXIS 18544, at *31.) DOCS ignores this point, and instead argues that because DOCS spent the Family Benefit Fund on "legitimate programs" from which Petitioners "receive a direct and special benefit" it was rational to fund those programs by imposing fees on Petitioners. (DOCS Br. at 21.) First, Respondent provides no evidence, nor can they on a motion to dismiss, to explain how Petitioners have received any direct benefit from the non-telephone

programs funded by the Family Benefit Fund. Respondent is welcome to demonstrate at trial how prisoners' lawyers receive a direct benefit from TB vaccines; or how prisoners' spouses receive a direct benefit from training DOCS medical personal. (Petition at Ex. B.)

Even though the DOCS tax appears to have been used for legitimate correctional programs, the method DOCS employed to fund those programs is improper and unrelated to any legitimate State interest. (See Metropolitan Life Ins. Co. v. Ward, 470 US 869, 881 [1985] (state law which sought to promote domestic business by discriminating against nonresident competitors could not be said to advance a legitimate state purpose).) The burden of supporting a general public welfare program cannot be imposed disproportionately on particular individuals. (See Manocherian v. Lenox Hill Hosp., 84 NY2d 385, 396-97 [1994]; 19th Street Assoc. v. State of New York, 79 NY2d 434, 443 [1992].)

For the foregoing reasons, Petitioners have adequately pled an equal protection violation.

D. The DOCS Tax Violates Petitioners' Right to Free Speech and Association.

In Count V of the Petition, Petitioners allege that the DOCS tax violates the free speech and associational rights secured by the New York State Constitution, Article I, §8 because it: (1) imposes a fee on Petitioners' expressive and associational activity that bears no relationship to related regulatory costs

(Petition at ¶ 12), and (2) burdens their ability to maintain contact with incarcerated family members without legitimate penological purpose. (Id. at ¶¶ 12, 52-64.)

1. The DOCS tax Implicates Petitioners' Freedom of Speech and Association Rights

Although Petitioners communicate with imprisoned persons, it is critical to bear in mind that they are not subject to the same degree of regulation as are prisoners. Moreover, while incarceration – for prisoners and non-prisoners alike – necessarily limits the complete enjoyment of some constitutional freedoms, it does not "bar free citizens from exercising their [First Amendment] rights" to contact family and friends who are in prison. (Thornburgh v. Abbott, 490 US 401, 407 [1989].) Indeed, "'(I)nmates 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 [SDNY Aug. 29, 2005] (quoting McGuire v. Ameritech Servs., 253 FSupp 2d 988, 1002 [SD Ohio 2003] (emphasis added).)

First, the DOCS tax violated Petitioners' speech and association rights by placing an arbitrary financial burden on protected speech. The state's power to impose burdens and limitations on a citizen's free speech and association rights is limited, "not by mere rationality of purpose but by a more stringent requirement

of real necessity." (People v. Taub, 37 NY2d 530, 532 [1975] (citing Cox v. Louisiana, 379 US 536, 550-558 [1965].) Therefore, while government may assess a fee to recoup the costs incurred in regulating expressive activity (Cox v. New Hampshire, 312 US 569, 577 [1941]), it may not impose a fee that bears no relationship to those regulatory costs. (See Murdock v. Pennsylvania, 319 US 105 [1943]; cf. Matter of Steinbeck v. Gerosa, 4 NY2d 302, 315 [1958] (holding privilege tax applied to novelist did not violate freedom of speech or press as the author made no allegations that "the amount levied was arbitrary or harsh in nature, or oppressive or confiscatory, or that his freedom to write or disseminate his writings had been actually curtailed by the tax); see also Children of Bedford, Inc. v. Petromelis, 77 NY2d 713, 725 [1991].)

Thus, in Murdock, 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 guaranteed by the First Amendment." (319 US at 113-14.) Since Murdock, courts have consistently applied its simple rule -- defraying cost is permissible, taxing speech is not -- in striking down similar measures.[7] Here,

[7] See e.g. Eastern Conn. Citizens Action Group v. Powers, 723 F2d 1050, 1056 [2d Cir 1983] (invalidating fee charged to hold demonstration on abandoned railway because state agency had offered no evidence that fee was necessary to

the record is clear that the DOCS surcharge imposed on inmate collect calls bore minimal relationship to the regulatory costs DOCS incurred in providing the prison telephone service. (Petition at ¶ 12.) Therefore, it is an impermissible "flat tax imposed on exercise of [free speech rights]." (Murdock, 319 US at 113.)

The DOCS' tax also burdened Petitioners' rights to familial and marital association, protected by the New York Constitution, by restricting Petitioners' ability to communicate with family members in prison. (See e.g., Sinhogar, 53 NY2d at 443.) Because "[i]t is through the family that we inculcate and pass down many of our most cherished values" (Moore v. City of East Cleveland, 431 US 494, 503 – 504 [1977]), the states are required to protect the "[i]ntegrity of the family unit." (Stanley v. Illinois, 405 US 645, 651 [1972].) Plaintiffs' right to familial association survives the incarceration of their loved ones (Turner v. Safley, 482 US 78, 95 – 97 [1987]), because attributes of the family relationship – expressions of emotional support, decision-making regarding family

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defray "cost incurred or to be incurred . . . for processing plaintiffs' request to use the property"); Sentinel Communications Co. v. Watts, 936 F2d 1189, 1205 [11th Cir 1991] (holding that "[t]he government may not profit by imposing licensing or permit fees on the exercise of first amendment rights ... and is prohibited from raising revenue under the guise of defraying its administrative costs"); Fernandes v. Limmer, 663 F2d 619, 633 [5th Cir 1981] (striking down license fee for literature distribution at airport, in part because defendants failed to show that fee matched regulatory costs incurred); Baldwin v. Redwood City, 540 F2d 1360, 1371 [9th Cir 1976] (striking down fees on postering in part because "[t]he absence of apportionment suggests that the fee is not in fact reimbursement for the cost of inspection but an unconstitutional tax upon the exercise of First Amendment rights").

obligations and child-rearing, and expectations of the prisoner's reentry into the family – exist despite the fact of imprisonment. (Id. at 95 – 96.)

Despite Petitioners' clear pleadings,[8] Respondent mischaracterizes their free speech and association claim as one based on a purported right to communicate inexpensively via telephone and thus ignores relevant precedent regarding imposition of a regulatory fee that burdens expressive activity. (DOCS Br. at 24-25.) Instead DOCS urges the Court to hold that telephone communication between prisoners and their family members deserves no constitutional protection whatsoever. (DOCS Br. at 25-28.) They claim: (1) that any burden placed on telephone communication merely creates a "loss of cost advantage" that does not implicate free speech; and (2) that speech and associational rights are not implicated in the prison context unless family members and friends of prisoners are rendered completely unable to communicate with that prisoner. (Id.) Neither argument is supported by New York State precedent.

For the first proposition, Respondent seeks support from several prisoner lawsuits, none of which are binding on this court. For example, Respondent relies heavily on Arsberry v. State of Illinois. (244 F3d 558 [7th Cir 2001].) In

[8] Given the extensive factual allegations supporting this claim (see Petition at ¶¶ 7, 8, 18-22, 48-49, 53, 55, 57-58, 59-60, 63, 102-111), Respondent's argument that Petitioners have "failed to sufficiently articulate" their claim merits little response. (See DOCS Br. at 24.)

that opinion, Judge Posner held that, while telephone communication in general may implicate the First Amendment, it would be "extremely rare for inmates and their callers to use the telephone for this purpose." (Id. at 564.) Judge Posner cites no authority to distinguish between the protected communications of free people and the undeserving communications of prisoners and their loved ones. Nor does the Arsberry court address associational rights. There is nothing in New York precedent to support such a discriminatory analysis.

Chapdelaine v. Keller is equally unavailing. (1998 US Dist LEXIS 23017 [NDNY 1998].) In that case, the court examined an allegation by a prisoner that the Kentucky prison telephone system "overcharged" inmates. (Id. at *27 – 28.) It is not clear from the opinion whether the prisoner, litigating *pro se*, based his claim on any particular constitutional right, much less freedom of speech, and the Court did not even mention that constitutional provision. (Id.) Finally, Matter of Montgomery v. Coughlin (194 AD2d 264, 267 [1993]), also cited by DOCS, does not support Respondents' argument that high cost can never implicate free speech values, as that Court dismissed the plaintiff's freedom of speech claim only after conducting Turner analysis, and finding that the "publisher-only rule" was reasonably related to the institution's security concerns regarding introduction of contraband into the facility.

Respondent argues that burdens on telephone communication may never implicate freedom of speech, even as it acknowledges the existence of significant adverse precedent. (DOCS Br. at 28, citing Johnson v. California, 207 F3d 650 [9th Cir 200]; Byrd v. Goord, 2005 US Dist LEXIS 18544 [SDNY 2005].) DOCS attempts to distinguish this precedent as requiring plaintiffs to allege they are completely precluded from communicating at all with their friend and relatives in prison. (DOCS Br. at 28.) Neither Johnson nor Byrd support such a conclusion. The Byrd court did not require plaintiffs to allege that the DOCS surcharge kept them from communicating at all. Indeed, in upholding First Amendment claims identical to those advanced in this case, the court cited allegations by the mother of a prisoner who keeps her phone bills down by "limiting the duration of [her son's] calls" as the type of facts that, if proven, would establish a freedom of speech claim. (Byrd, 2005 US Dist LEXIS 18544, at *26 n.9.) And in Johnson, the Ninth Circuit held that, although prisoners do have a First Amendment right to reasonable telephone access, the complaint in that case did not set forth sufficient facts to establish that the prison call surcharge created any burden on that right. (207 F3d at 656.)

Petitioners have made extensive allegations describing the burden the DOCS tax places on their speech. (Petition at ¶¶ 52-63.) Any dispute as to the

veracity of this burden presents a question of fact not properly determined by the Court at this early stage.

2. The DOCS Tax Violates Freedom of Speech and Association Under the *Turner* Standard.

As a fallback, Respondent argues that, even if Petitioners' telephone communications do implicate freedom of speech and association, the system is constitutional because it is rationally related to a legitimate penological purpose. (DOS Br. at 30, citing Turner v. Safely, 482 US 78, 89 [1987].) However, the DOCS surcharge had no valid penological purpose (Petition at ¶¶ 8-9, 12, 64-66; Byrd, 2005 U.S. Dist. LEXIS 18544, at *26, 31), and cannot justify any limitation on Petitioners' right to communicate with their loved ones, friends, and clients. Because the DOCS tax was completely unrelated to any penological purpose, DOCS may no more lawfully impose the unauthorized tax than it may arbitrarily confiscate every fifth letter (for example), or every third visitor an inmate receives.

Prison regulations may lawfully infringe on freedom of speech and association only when "reasonably related to legitimate penological interests." (Turner, 482U.S. at 89.) Under the Turner[9] standard the Court must explore: (1)

[9] Some courts have expressly declined to apply the Turner standard to prison policies that do not implicate security concerns. Thus, in Pitts v. Thornburgh (866 F2d 1450 [DC Cir 1989]), the D.C. Circuit applied traditional intermediate scrutiny to the District of Columbia's decision to incarcerate female offenders in

whether there is a rational connection between the regulation and the legitimate governmental interest set forth to justify it; (2) whether inmates will have alternative means of exercising the right infringed upon; (3) the impact of recognition of the right on corrections officers, other inmates and the allocation of prison resources; and (4) whether alternative means of regulation exists. (Matter of Lucas v. Scully, 71 NY2d 399, 406 [1988].) Under this standard courts balance the importance of the constitutional right being infringed against any institutional objectives intended to be served by the regulation. (Matter of Rivera v. Smith, 63 NY2d 501, 511 [1984].) This Court need not engage in

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federal prisons far from the city while similarly situated male offenders were incarcerated nearby. The D.C. Circuit reasoned that Turner was applicable only to cases involving "regulations that govern the day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prisons." (Id. at 1453.) Because the District's policy was the result of "general budgetary and policy choices" that "[did] not directly implicate either prison security or control of inmate behavior, [or] go to the prison environment and regime," the Court concluded Turner was inapposite. (Id. at 1454; See also Beauchamp v. Murphy, 37 F3d 700, 704 [1st Cir 1994] (refusing to apply Turner deference to challenge to denial of sentencing credit because considerations of discipline and security are "greatly diluted when the issue is the calculation of a sentence, a task performed by an administrator with a pencil"); Jordan v. Gardner, 986 F2d 1521, 1530 [9th Cir 1993] (declining to apply Turner standard to inmates' Eighth Amendment challenge to cross-gender clothed body searches).) Like the policy decision in Pitts, DOCS' tax reflects a purely "budgetary" choice that does not implicate prison security, control of prisoners' behavior, or the internal prison environment. As such, is should be subject to the level of scrutiny traditionally applied to challenges to fees that burden free speech rights. (Pitts, 866 F2d at 1453-54.) The Court need not address this issue however, as the DOCS surcharge cannot even withstand the deferential standard set forth in Turner.

extensive analysis or balancing, as the DOCS tax does not serve *any* legitimate penological purpose.

First, there is no rational connection between the regulation and any legitimate government interest. Examining the same tax at issue here, the Byrd court explained that

> it does not involve matters of security or safety, which have traditionally been held to the Turner standard. Receiving an alleged "kickback" from an additional fee added to the reasonable rate for collect calls made by inmates to family members and those individuals providing counseling and professional services, is neither a rule nor regulation related to the functioning of a prison.

(2005 U.S. Dist. LEXIS 18544, at *31.) While raising revenues from prisoners can sometimes be deemed a legitimate penological objective, (see Allen v. Cuomo, 100 F3d 253, 261 [2d Cir 1996]), raising revenue from their families and other outsiders, who have not been found guilty of any crime, is not. And while the revenue derived from the surcharge was earmarked for the Family Benefit Fund, this money was spent on correctional programs unrelated to the prison telephone system. (Petition at ¶ 12; Ex. B.) Most troubling, however, is that the immediate effect of the surcharge was to deter the families and friends of inmates from communicating with them – a goal precisely contrary to the rehabilitative justification asserted by DOCS. (Petition at ¶¶ 49-50; Ex. A at 20.)

Respondent, alarmingly, argues that the surcharge does serve a legitimate penological purpose because it provides DOCS with an incentive to provide

telephone services in its facilities. (DOCS Br. at 30.) Petitioners are at loss to understand how incentivizing public servants already sworn to operate the State Prison system in a manner that facilitates rehabilitation is a legitimate penological purpose. (See NY Penal Law § 1.05.) Petitioners agree that provision of telephone service to prisoners and other programs funded by the tax (like AIDS care) "serve a legitimate penological purpose," but singling out and taxing the family members, friends, and lawyers of prisoners to pay for such programs is completely arbitrary and serves no legitimate penological purpose whatsoever.

Petitioners have alleged that those among them who are elderly, impoverished, and/or disabled have limited access to other alternative avenues of communication (letter writing and visitation). (Petition at ¶¶ 52, 58; see Allen v. Coughlin, 64 F3d 77, 80 [2d Cir 1995].) They have also pled the existence of an "obvious, easy alternative[]" policy (Petition at ¶¶ 64-66; Turner, 482 US at 90), as Respondent could provide the same security measures under the current system without charging the DOCS tax[10], or could use a debit card system like that utilized by the Federal Bureau of Prisons, that also meets the security concerns allegedly addressed by the current system. (Petition at ¶¶ 64-65.)

[10] Indeed, as of April 1, 2007 Respondent has in fact ceased collecting the DOCS tax; Petitions are unaware of any other changes made to the prison telephone system, or any security concerns raised by the switch.

These alternatives would have no deleterious "ripple effect" for prison administration, making the accommodation of Petitioners' constitutional rights readily attainable. (Turner, 482 US at 90.) "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." (Id. at 90-91.)

For the above reasons, Petitioners have properly stated a claim for relief based on Respondent's violation of their right to freedom of speech and association under the New York State Constitution.

II. Petitioners' Well-Pled Claims Are Not Barred by the Filed Rate or Primary Jurisdiction Doctrine.

Along with arguing that Petitioners have failed to state a claim, Respondent also argues that the operation of two related legal doctrines should insulate their allegedly unlawful actions from judicial review. However, because the PSC has explicitly disavowed jurisdiction over the DOCS tax, neither the filed rate doctrine, nor the doctrine of primary jurisdiction bar this Court's review.

A. The Filed Rate Doctrine is Inapplicable to Petitioners' Claims.

Respondent's argument is little more than a distraction from the merits of this case. The filed rate doctrine cannot apply here because the DOCS tax is not a "filed telephone rate."

The filed rate doctrine only bars suits that challenge the reasonableness of utility rates approved by a governing regulatory agency. (See Arkansas Louisiana Gas Co. v. Hall, 453 US 571, 577 [1981]; Keogh v. Chicago & Northwestern Ky., 260 US 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 F3d 17, 18 [2d Cir 1994] (emphasis added).) The doctrine "prohibits a regulated entity from discriminating between customers by charging a rate for its services other than the rate filed with the regulatory agency…" (Saunders v. Farmers Ins. Exch., 440 F3d 940, 943 [8th Cir 2006].)

The filed rate doctrine insulates from suit utility rates "the PSC has previously determined to be just and reasonable." (Matter of Concord Assoc. v. Public Serv. Commn. of State of N.Y., 301 AD2d 828, 831 [2003].) Here, the PSC unambiguously held that it lacked jurisdiction to determine that exact question:

> The Commission will direct MCI to file new tariffs that identify the bifurcation of the total rate as a jurisdictional rate and DOCS' commission. This will indicate that the Commission has reviewed and approved the jurisdictional portion of the rate….The tariff will also serve to notify end-user customers that there is a commission assessed by DOCS on all phone calls, which is part of the charge that appears on their phone bills.

> The bifurcation of the rates signifies that the Commission does not have jurisdiction over DOCS…or the manner in which it enters into contracts with providers.

(Petition at Ex. A at 24) (emphasis supplied).) As Petitioners have pointed out throughout the course of this litigation, they agree with the PSC's Order with regards to its treatment of the DOCS tax. It is not a part of the just and reasonable rate. In this unique context, the cases cited by DOCS, including Bullard v. State of New York, 307 AD2d 676 [3d Dept 2003], are irrelevant, as none involve an agency's own disavowal of jurisdiction over the challenged fee. (See DOCS Br. at 7-9.)

Moreover, the policies behind the filed rate doctrine do not support its application in this case. "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, 2005 US Dist LEXIS 18544, at *23 [SDNY Aug. 29, 2005].) Petitioners' claims do not compromise these principles.

Award of the relief Petitioners seek will not create discrimination among rate payers, as Petitioners ask that all prison call recipients be charged the same PSC-approved just and reasonable rate. Neither will Petitioners' attack "unnecessarily enmesh the courts in the rate-making process" because all the

Court need do is strike down the DOCS tax. (See e.g. Matter of Leftkowitz v. Public Serv. Commn., 40 NY2d 1047, 1048 [1976] (holding filed rate doctrine does not bar the Court from striking down adjustment made by PSC).) The PSC has already determined that the resulting rate, the jurisdictional MCI rate, is "just and reasonable." [11] (Petition at Ex. A at 22.)

As applied in New York, the filed rate doctrine is based on judicial recognition that the PSC is the body specifically designated by New York's legislature to oversee telephone rates, and that only an entity with the PSC's expertise can determine the reasonableness of a telephone rate. (Wegoland, 27 F3d at 19; Poor v. NYNEX Corp., 230 AD2d 564, 569-70 [2d Dept 1997] ("Where the legislature has conferred power upon an administrative agency to determine the reasonableness of a rate, the ratepayer can claim no rate as a legal right that is other than the filed rate.") (Internal citations omitted).) However, when the PSC performed its legislatively mandated function it bifurcated the proposed collect call rate, found the DOCS commission portion to be outside its jurisdiction, and, found the MCI "jurisdictional" portion of the total charge just and reasonable. (Petition at Ex. A at 24-26.) The filed rate doctrine is predicated

[11] DOCS disingenuously states that Petitioners paid the filed rate, and now seek "some portion" of it back, thus requiring the judicial determination of a reasonable rate. (DOCS Br. at 8). Petitioners don't seek return of "some portion" of the DOCS tax; they seek return of all the unlawful taxes collected from them between October 30, 2003 and March 31, 2007.

on deference to the administrative body's expertise—disavowal of expertise by the agency itself must end the inquiry.

Since Petitioners seek relief related solely to the non-jurisdictional DOCS tax, the filed rate doctrine does not apply.

B. The Doctrine of Primary Jurisdiction is Inapplicable to Petitioner's Claims.

Respondent's argument for application of the primary jurisdiction lacks merit of any kind. Petitioners challenge only the DOCS tax, and the PSC has already held that it lacks jurisdiction over this charge. (Petition at Ex. A at 23.)

The doctrine of primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." (Albany-Binghamton Express, Inc. v. Borden, Inc., 192 AD2d 887, 888 [3d Dept 1993], quoting Staatsburg Water Co. v. Staatsburg Fire Dist., 72 NY2d 147, 156 [1988].) As no issue remaining in this case falls within the PSC's special competence, the doctrine may not be used to avoid judicial review.

DOCS urges dismissal on this ground of Petitioners' challenge to the single-provider, collect call only system. (See DOCS Br. at 9-11.) However Petitioners do not challenge the single-provider, collect call only system in itself; rather, Petitioners challenge the DOCS tax, which they could not avoid paying

due to the single-provider, collect call only system. (See Petition at ¶¶ 79-80, 92 104-108.) Contrary to DOCS' characterizations of the case, Petitioners' references to the structure of the prison telephone system—i.e. the fact that DOCS has aggregated all correctional facilities in order to let the contract to a single provider and it has required the use of the collect-call only mechanism—are included solely to advise the Court of the means by which DOCS has forced Petitioners to either pay the DOCS tax, or else forego telephone communication with their loved ones and clients. The record is clear that the DOCS tax is completely segregable from the provision of telephone service by MCI (see Petition at Ex. A at 23; see also supra, Note 10). Any security purposes allegedly served by the single-provider, collect call only system are completely irrelevant to this case, as Petitioners do not here oppose imposition of such a system as long as they are not simultaneously forced to pay the DOCS tax.

The PSC drew this exact same distinction by considering prison security issues when it determined whether the "jurisdictional rate" charged by MCI under the single-provider, collect call only system was just and reasonable. (Petition at Ex. A at 24 (Noting that MCI's rate "includes the costs … of maintaining the unique secure features of the service").) Petitioners mount no challenge to the PSC's analysis or its determination that MCI's "jurisdictional rate" is just and reasonable. The DOCS tax, in contrast, which Petitioners do

challenge, is unrelated to provision of telephone service or prison security, and is not within the jurisdiction of the PSC.[12] (Petition at ¶¶ 12, 64-66; Ex A.)

Referral back to the PSC for a second review of the DOCS tax makes no sense, and would constitute a request for a determination on matters that the agency has already determined to be outside its jurisdiction. The principle is well established under New York law that the PSC has only those powers specifically conferred upon it by statute, together with such implied powers as are necessary to carry out the specific grant. (See, e.g., Matter of City of New York v. Public Serv. Commn. of State of New York, 53 AD2d 164, 165 [3d Dept 1976], aff'd, 42 NY2d 916 [1977].) When a party seeks to challenge a telephone company practice falling within those powers enumerated at §90-101(a) of the Public Service Law, the PSC has primary jurisdiction over the matter. Thus, if Plaintiffs here were challenging the reasonableness of MCI's filed rate or the adequacy of its service, for instance – technical matters within the agency's particular competence – the PSC would indeed provide the appropriate forum for resolution of the complaints.

[12] That Respondent "does not concede" the correctness of the PSC's finding that it lacks jurisdiction over the DOCS tax (DOCS Br. at 10 n.5), is both irrelevant and ironic in this context. First, Respondent is almost three years too late to raise an objection to the PSC Order. More importantly, given that the PSC already applied its 'special competence' to determine the limits of its own jurisdiction, it is Respondent's position, not Petitioners', that fails to observe the constraints of the primary jurisdiction doctrine.

However, in cases involving questions of law beyond the PSC's administrative expertise and outside its statutory authority, the courts have refused to confer primary jurisdiction on the Commission. (See, e.g., Capital Tel. Co. v. Pattersonville Tel. Co., 56 NY2d 11, 21-22 [1982].) In Capital Telephone, the Court of Appeals reasoned that the antitrust issue before the court was not within the "agency's specialized field." (Id.) The court held, moreover, that should issues arise in the course of discovery requiring the PSC's expertise, their view might be sought at that time. (Id. at 22.) As no such issues were currently before the court, the doctrine of primary jurisdiction did not bar judicial review. (Id.) The constitutionality of the DOCS tax, currently before this Court, is not within the PSC's expertise and thus primary jurisdiction does not apply.

Moreover, because Plaintiffs' constitutional claims challenge actions by DOCS, an agency that is not regulated by the PSC, these claims are beyond the PSC's jurisdictional reach. (See Matter of Ceracche Tel. Corp. v. Public Serv. Commn. of State of New York, 49 Misc 2d 554, 557 [Sup Ct Albany Co 1960].) The PSC itself declined to assert jurisdiction over the DOCS tax on just this basis. (Petition at Ex. A at 23.)

This case presents precisely the type of claims that the courts have deemed improper for resolution by the PSC. First, the heart of the constitutional claim here requires that a determination be made regarding DOCS' authority to levy a

tax on those seeking to speak with prisoners, as well as an assessment of the burdens placed on family members' speech and association rights by the telephone system mandated by the contract between the State and MCI. These issues do not involve any technical considerations within the PSC's particular field of expertise. Indeed, the constitutional issues Plaintiffs raise here are far afield from the statutory mandates of the PSC. For these reasons, the doctrine of primary jurisdiction cannot bar judicial review of Petitioners' claims.

CONCLUSION

For all the reasons stated above, the Court should deny Respondent's motion to dismiss in its entirety.

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Respectfully Submitted,

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