STATE OF NEW YORK **SUPREME COURT**
APPELLATE DIVISION **THIRD DEPARTMENT**

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

Plaintiffs-Appellants.

-against-

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

Defendants-Respondents.

County Index No. 04-1048

BRIEF FOR PLAINTIFFS-APPELLANTS

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

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1. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, and that tax is unauthorized by the state legislature and violates the New York State Constitution and the General Business Law, and the telephone customers seek: (a) a declaration that the tax is unlawful; (b) an order enjoining the continued collection of the tax; and (c) an order to return money unlawfully collected, the customers' claims properly accrue on the effective date of the contract between the state agency and the private corporation, or on the date the challenged rates were approved and put into effect? The court below erroneously decided that Plaintiffs' claims accrue on the effective date of the contract.

2. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, and that tax is unauthorized by the state legislature and violates the New York State Constitution and the General Business Law, and the telephone customers seek: (a) a declaration that the tax is unlawful; (b) an order enjoining the continued collection of the tax; and (c) an order to return money unlawfully collected, each form of relief is available through an CPLR Article 78 proceeding? The court below erroneously answered this question in the affirmative.

3. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, and that tax is unauthorized by the state legislature and violates the

New York State Constitution and the General Business Law, and the telephone customers seek: (a) a declaration that the tax is unlawful; (b) an order enjoining the continued collection of the tax; and (c) an order to return money unlawfully collected, each unlawful billing that includes the tax and is mailed by the private corporation, at the continued direction of the state agency, is a continuing violation of the telephone customers' constitutional, statutory and common law rights, such that a new cause of action accrues with each billing? The court below erroneously answered this question in the negative.

4. Whether, when the Public Service Commission disavows jurisdiction over the portion of the telephone rate filed by a private company and attributable to a state agency's demand for a tax to fund its general operations and that portion of the rate is charged to private telephone customers, telephone customers can seek relief from the continued collection and retention of the tax by the state agency and the private company or whether only the explicit directives of the PSC Order are subject to judicial review and enforcement? The court below erroneously determined that Plaintiffs are entitled to no relief based on the PSC order.

NATURE OF THE CASE

Plaintiffs-Appellants Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender, and the New York State Defenders Association ("Plaintiffs") are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. They bring this appeal from the lower courts' dismissal of their combined Article 78/declaratory judgment proceeding seeking relief from the imposition of an unlawful tax. Plaintiffs challenge this tax (the "DOCS tax," "commission" or

"surcharge") collected by Defendant-Respondent MCI WorldCom Communications ("MCI") and paid to Defendant-Respondent New York State Department of Correctional Services (the "State," "Department" or "DOCS") as a surcharge imposed upon them when they receive collect telephone calls from prisoners.[1] The DOCS tax is a charge imposed over and above the telephone rate filed by MCI which was deemed "just and reasonable" by the New York State Public Service Commission ("PSC"). [R. 36]. Plaintiffs seek relief from the unlawful DOCS tax by means of: (1) an order that MCI and DOCS cease assessing and collecting the unlawful tax; (2) a refund of the taxes unlawfully collected from them; 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 Plaintiffs' property without due process of law in violation of Article I §§ 6 and 8 of the State Constitution; (c) a violation of Plaintiffs' rights to equal protection guaranteed by Article I § 11 of the State Constitution; (d) a violation of Plaintiffs' 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. [R. 55-65].

I. SUMMARY OF ARGUMENT

On October 22, 2004, the Honorable Judge George B. Ceresia, Jr., granted Defendants' Motions to Dismiss and dismissed as untimely Counts II through VII of the Complaint. The court also dismissed Count I, seeking to enforce the Public Service Commission Order ("PSC Order"), on the merits.

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

In granting Defendants' Motions to Dismiss the Complaint, the court below erred in four fundamental ways. First, the court erred in holding that Plaintiffs' claims accrued at the date of the implementation of the last contract between MCI and DOCS and thus wrongly determined that six of Plaintiffs' seven claims were time-barred. Second, the court failed to properly apprehend the nature of the claims Plaintiffs raise, as it was required to do in this combined Article 78/declaratory relief action. Because it failed to do so, the court below applied the wrong statute of limitations to six of the seven counts of the Complaint, wrongly determining that those claims were time-barred. Third, the court failed to apply the doctrine of continuing harms, causing it to wrongly determine that Plaintiffs' claims were time-barred. Finally, the court below failed to recognize the implications of the PSC Order, resulting in its erroneous determination that there was nothing to enforce with respect to the findings in the Order. In this appeal, Plaintiffs show why this Court should reverse the decision of the court below and order a trial on the merits.

Plaintiffs will show that the court below erred in dismissing Counts II through VII of the Complaint because they were timely filed. First, each claim accrued, at the very earliest, on the effective date of the PSC Order, because that is the date on which the rates challenged by Plaintiffs were filed and "approved" such that they would be charged to Plaintiffs, and because that is the date the PSC determined that it lacked jurisdiction over the DOCS "commission" portion of the rate, such that Plaintiffs were informed that the rate they would be charged was unauthorized by any official body. Because all of Plaintiffs' claims accrued less than four months before the Complaint was filed, they are timely no matter what statute of limitations this Court applies.

Second, Plaintiffs' claims against DOCS delineated in Counts II through VII are claims for declaratory judgment and for moneys had and received – all of which are governed by the six-year statute of limitations set out in N.Y.C.P.L.R § 213 (McKinney 2005). The relief sought pursuant to these constitutional and statutory claims is not available through an Article 78 proceeding. Because a six-year limitations period applies to these counts, the court below erred in dismissing Counts II through VII as untimely and Plaintiffs are entitled to damages for all unlawful billings within the six years prior to initiation of this action.

Furthermore, even if these claims were found to have accrued at the time of the 2001 contract, and to fall within the Article 78 four-month limitations period, they nevertheless would be timely pursuant to the doctrine of continuing harm, in as much as a new claim accrues each time Defendants unlawfully bill and collect the DOCS surcharge.

Finally, Plaintiffs will show that the court below erred in dismissing Count I on its merits. Plaintiffs here seek enforcement of the PSC Order not in terms of what it affirmatively orders, but in terms of what it prohibits Defendants from doing. The PSC held that it does not have jurisdiction to review the reasonableness and justness of the tax monies collected by MCI from telephone customers and retained by DOCS as a "commission." Because DOCS tax was not reviewed and approved by the PSC, its continued collection and retention by Defendants as a telephone surcharge is unlawful. Because both DOCS and MCI continue to act in violation of these prohibitions, the court below erred in failing to stop Defendants from filing and collecting the tax as a telephone surcharge and in failing to order the return of the monies unlawfully collected.

II. STATEMENT OF FACTS

The court below erred because it dismissed these claims without properly declaring the rights and obligations of the parties. 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. [R. 47]. Pursuant to the MCI and DOCS contract, MCI is the exclusive provider of telephone services to the New York State Department of Correctional Services. [R. 33]. Under the Contract, MCI remits to DOCS a "commission" of 57.5 percent of the gross annual revenue garnered from its operation of the telephone system. [R. 33]. To finance the State's 57.5 percent tax, MCI charges recipients of prisoners' collect calls exorbitant rates. The current rate structure, which includes a $3.00 flat surcharge and a set rate of $0.16/minute on all local and long distance calls, was *not* established by the 2001 contract, but was instead created by an amendment to the contract effective July 1, 2003. [R. 220-224]. As explained below, this new rate was not approved by the PSC until its order effective October 30, 2003. [R. 67-92].

The Contract between MCI and DOCS is extremely lucrative for the State. For instance, between April 1, 1996 and March 31, 2001, prisoners' telephone calls paid for by Plaintiffs and putative class members provided the State with revenues totaling approximately $109 million. [R. 46]. The 57.5 percent DOCS tax is paid by Plaintiffs and tendered by MCI to the State, which deposits it into the general fund. [R. 46]. The proceeds are then appropriated and earmarked for deposit into DOCS' "Family Benefit Fund." [R. 35]. The monies deposited in the Fund are used to cover the costs of Departmental operations wholly unrelated to the maintenance of the prison telephone

system. [R. 35]. For example, the vast majority of these monies are spent on services, like medical care, that the State is required by law to provide for prisoners. [R. 46]. The high cost of collect calls from New York State prisoners is a direct result of the DOCS tax. [R. 33]. The DOCS tax places a substantial financial burden on Plaintiffs and putative class members and limits the duration and numbers of calls that they can accept from prisoners. [R. 48 – 53].

The DOCS tax has not been authorized by the New York State legislature, nor has it been approved as a legitimate component of MCI's filed telephone rate by the PSC. [R. 36]. On August 15, 2003, MCI filed revised tariffs setting out the new rate to be charged to the recipients of prisoners' collect calls beginning on September 14, 2003. [R. 44]. Family member, friends, lawyers, and other recipients of prisoner collect calls (including Plaintiffs Austin and Office of the Appellate Defender and counsel for Plaintiffs) filed comments on the proposed tariff amendments in a timely manner. [R. 45, 124-153]. In their comments, Plaintiffs 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. [R. 124-153].

By order effective October 30, 2003, the PSC held that it did not have jurisdiction over the DOCS tax. [R. 88]. The PSC reasoned that because DOCS is not a telephone corporation subject to the Public Service Laws, it does not have jurisdiction over either the Department or the tax charged by it. [R. 88]. 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." [R. 88]. The PSC reviewed the jurisdictional portion of the MCI rate by comparing it to rates MCI charges

for analogous services. [R. 88]. Based upon this comparison and other factors, the PSC approved the jurisdictional rate as "just and reasonable" under the Public Utilities Law. [R. 89]. The PSC did not undertake *any* review of the reasonableness of the DOCS tax or of the entire combined rate. [R. 89]. The PSC directed MCI to file a new tariff reflecting the two separate charges: the DOCS tax and MCI's filed rate. [R. 89, 432-434]. Since the October 30, 2003 PSC Order, MCI has continued to bill Plaintiffs and putative class members for both charges, the 42.5 percent of the total that the PSC approved as a just and reasonable telephone rate, and the unapproved 57.5 percent DOCS tax.

ARGUMENT

I. THE COURT BELOW ERRED IN DISMISSING COUNTS II THROUGH VII OF THE COMPLAINT BECAUSE THOSE CLAIMS ARE NOT TIME-BARRED

The Court below erred in dismissing as time-barred Plaintiffs' claims in Counts II through VII of the Complaint. In its Decision, the court found that those claims accrued on April 1, 2001, the effective date of the current contract between DOCS and MCI, and that they are subject to Article 78's four-month statute of limitations. Because more than four months elapsed from that triggering date and the filing of this action the court dismissed each claim as untimely. [R. 24]. In so holding, the court below erred in several significant ways.

All of these claims are timely. In their Verified Petition and Complaint, Plaintiffs brought their claims as a combined Article 78 / declaratory judgment action, challenging the continuing wrongs perpetrated by Defendants each time Plaintiffs receive a monthly telephone bill. Plaintiffs' claims are timely under any applicable statute of limitations, in

as much as the earliest date their claims could have accrued was October 30, 2003, the effective date of the PSC decision approving MCI's revised tariff and ordering bifurcation of the rate for future tariffs.

As discussed below, the nature of the relief sought and the relationship of the parties dictates that the claims set out in Counts II through VII of the Complaint could not have been brought through an Article 78 proceeding. Counts II, III, IV, V and VII are each subject to a six-year statute of limitations, and Count VI is subject to a three-year statute of limitations. The court below erred in that it failed to determine the true nature of each of these claims and their respective statutes of limitation.

Moreover, even if the court below properly determined that the claims arising in Counts II through VII each accrued on April 1, 2001 and are Article 78 claims, they are nevertheless timely. Because Plaintiffs' claims result from a continuing harm perpetrated upon them each time they are billed unlawfully, the claims accrue as of the most recent bill and Plaintiffs may properly challenge all billings made within the limitations period preceding the filing of this action on February 25, 2004.

A. Plaintiffs' Claims in Counts II through VII Are Timely because they Accrued Well Within the Applicable Statute of Limitations.

The court below correctly stated that assessing the proper statute of limitations for a combined Article 78 / declaratory judgment action requires the Court to "determine the true nature of the case and the relief requested … . If the Court determines that the matters at issue can be resolved in the context of an Article 78 proceeding then the four month Statute of Limitations period will govern." Walton v. New York State Department of Correctional Services, No. 1048-04, Oct. 8, 2004 Opinion ("Op.") at 4 (citing Llana v.

Pittstown, 651 N.Y.S.2d 675, 676 (3d Dept. 1996), Solnick v. Whalen, 401 N.E.2d 190, 194 (1980)).[2] [R. 22].

To determine which statute of limitations applies, the court's inquiry must focus on the nature of the claims brought and the relief Plaintiffs seek, and then determine whether that relief is available in an Article 78 proceeding. Solnick, 401 N.E.2d at 193. As the Court of Appeals stated in Solnick:

> it is the nature of the relief sought…rather than its substance, which gives the action its identity…. In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought.... If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are…open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action.

Id.

In this case, the court's task was to determine whether Plaintiffs sought relief from each Defendant that was available pursuant to Article 78 or any other cause of action with a specific statute of limitations, or whether the default six-year statute under CPLR §213 (2) applies. Solnick, 401 N.E.2d at 194.

In Count I, Plaintiffs seek a declaration that MCI and DOCS' past, present, and future collection and retention of the unauthorized DOCS "commission" is unlawful, an order restraining DOCS and MCI from continuing to collect the DOCS tax, and a refund

[2] Despite its recitation of the correct inquiry, the court below relied in part on the fact that "petitioners styled this action as one seeking judgment pursuant to Article 78 of the New York Civil Practice Law and Rules…". [R. 23]. The court erred in making this conclusion. Plaintiffs quite clearly styled their action as a "petition *and* complaint" seeking both a declaratory judgment and Article 78 relief. Furthermore, even if this were not the case, the manner in which Plaintiffs characterized their action is irrelevant, for as the court below acknowledged, it is the court's duty to determine the true nature of the relief sought and to treat the claims accordingly.

of all unlawful charges collected, with interest. [R. 55]. Defendants have conceded, and the court below agreed, that Plaintiffs' first claim was timely commenced, as it was brought within four months of the PSC's approval of MCI's new rate tariff, and disavowal of jurisdiction over the DOCS "commission." [R. 22-25].

In Counts II through VI, Plaintiffs request a declaration from the Court that the DOCS "commission" is: (1) an illegal and unlegislated tax in violation of Articles I, III, and XVI of the State Constitution; (2) a taking of Plaintiffs' property without due process of law, in violation of Article I §§ 6 and 8 of the State Constitution; (3) a violation of Plaintiffs' right to equal protection guaranteed by Article I § 11 of the State Constitution; (4) a violation of Plaintiffs' speech and association rights guaranteed by Article I § 8 of the State Constitution; and (5) a deceptive act or practice in violation of General Business Law § 349. [R. 56-63]. In Count VII, Plaintiffs request an accounting of the unlawful tax collected from them. [R. 63-64]. The court below held that each of these claims was time-barred, as they "emanate from two contracts entered into by DOCS and MCI … effective on April 1, 1996 and April 1, 2001 respectively" and are challenges to "the actions of DOCS, an administrative agency, in entering into the contracts at issue." [R. 12]. This holding rests on a fundamental misunderstanding of the nature of Plaintiffs' claims and the relief sought.

First, Plaintiffs' claims accrued, at the very earliest, on October 30, 2003, the effective date of the PSC decision approving MCI's revised tariff, and ordering bifurcation of the rate for all future tariffs, and thus are timely no matter which statute of limitations applies. In disregarding the October 30, 2003 date and holding that Plaintiffs' claims accrued on April 1, 2001, the court relied, without analysis, on the Appellate

Division, Third Department's decision in Bullard v. State,763 N.Y.S.2d 371, 373-74 (3d Dept. 2003), a case challenging an earlier incarnation of the same prison telephone system. In Bullard, the court held that a set of challenges similar to those of the instant case stemmed from DOCS' April 1, 1996 contract with MCI. [R. 12].

Plaintiffs' current challenge to the rates charged by MCI and DOCS could not possibly have accrued upon the signing of the April 1, 2001 contract however, because that contract did not establish the rates charged to recipients at the date of the filing of this Complaint. The 2001 contract did purport to set rates, in that it required that "the rates charged for inmate calls shall not exceed the rates and rules listed in Attachment G." [R. 269]. However, the rate ceilings listed in Attachment G were changed by contract modification in July of 2003 and approved by the PSC in October of 2003. [R. 220-224, 67-92]. It defies all logic to hold, as did the court below, that Plaintiffs should have filed this challenge to the 2003 rates charged by MCI and DOCS in 2001, two years before those rates were proposed and put into effect.

The Bullard court itself recognized the impact new rates might have on the timeliness of a legal challenge and explicitly rested its decision, not just on the effective date of the contract, but on the date the rates relevant to that challenge were *approved by the PSC*. Bullard, 763 N.Y.S.2d at 373 ("All [claimants'] allegations stem from the April 1, 1996 agreement with Worldcom *and the rates thereafter approved by the PSC on December 16, 1998* – the date after which damages were reasonably ascertainable.") (emphasis added, citations omitted). The lower court in Bullard emphasized the same factor in holding that "it was the date of entering into the contract governing the cost and terms of service which gives rise to the claimants' causes of action" *because* "there is no

allegation or argument made that the terms of the agreement have been changed or modified since that date." [R. 108]. Moreover, it was not until the effective date of the PSC decision that Plaintiffs were informed that the PSC would not exercise jurisdiction over the DOCS "commission," and would not undertake a statutory review of whether that rate is "just and reasonable." The unauthorized and un-reviewed nature of the rate is an important component of Plaintiffs' challenge, and of Counts I & II specifically. [R. 55-58].

An Article 78 proceeding is to be commenced within "four months after the determination to be reviewed becomes final and binding upon the petitioner…." N.Y.C.P.L.R. § 217 (1) (McKinney 2005). The current rate and commission structure challenged by Plaintiffs was not final and binding upon them until after the PSC decision. Cf., Carter v. State, 739 N.E.2d 730, 732 (2000) ("An agency determination is final—triggering the statute of limitations—when the petitioner is aggrieved by the determination…. A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted.") (citations omitted). Moreover, "[i]f an agency has created ambiguity or uncertainty as to whether a final and binding decision has been issued, the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court." Id. (citations omitted).[3]

[3] Indeed, the lower court's opinion is internally inconsistent, for if, as the court concluded, Plaintiffs' primary challenge is to the contract between MCI and DOCS, than it is this Court's duty to convert the proceeding into an action for monies had and received (as explained below) or for equitable reformation of the contract, brought by Plaintiffs as third party beneficiaries to that contract, and subject to the six year statute of

Because Plaintiffs' claims did not accrue until October 30, 2003, each claim is timely even if subjected to the short four-month statute of limitations applicable to Article 78 proceedings. However, application of the four-month Article 78 statute of limitations is not proper in this case. Contrary to the court's understanding, Plaintiffs challenge unauthorized rates charged by MCI and DOCS, *not* DOCS' authority to enter into a contract for the provision of telephone services. Not one of Counts II through VII could have been brought in an Article 78 proceeding because such a proceeding cannot provide the declaratory and equitable relief Plaintiffs seek.

Under the CPLR, Article 78 proceedings provide for four limited types of review:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

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limitations established for such actions by CPLR § 213 (2). See, e.g., Koch v. Consolidated Edison Co., 468 N.E.2d 1, 7 (1984) (holding city and public benefits corporation were third-party beneficiaries to agreement between electric utility and the New York State Power Authority to provide electricity); Pond v. New Rochelle Water Co., 76 N.E. 211, 214 (1906) (holding villagers are third party beneficiaries to a contract between village and water supplier to supply water at fixed rates). As third-party beneficiaries, any challenge by Plaintiffs to the contract between DOCS and MCI sounds in unconscionability. Under section 2-302 (1) of the Uniform Commercial Code:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

See, e.g., Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 759 (Sup. Ct. 1966), rev'd on other grounds, 281 N.Y.S.2d 964 (2d Dept. 1967) (court has power under section 2-302 to refuse to enforce the price and credit provisions of a contract to prevent the unconscionable result of unfair profit); People v. Two-Wheel Corp., 525 N.E.2d 692, 699 (1988) ("a price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors"). The court below may not have it both ways: if Plaintiffs seek relief from an unconscionable contract, then they are entitled to the six-year limitation for contract actions; if their challenge does not sound in contract then the date of the contract cannot be dispositive.

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

N.Y.C.P.L.R. § 7803 (McKinney 2005). Counts II through VII would not be adequately addressed through any of these four discrete categories because Plaintiffs do not seek to challenge any procedure utilized by DOCS, MCI or the PSC, attack any determination made by DOCS, MCI or the PSC, or prohibit action taken by DOCS, MCI or the PSC in excess of jurisdiction.

In finding Article 78 applicable, the court below relied on one case, Abiele Contracting v. New York City School Construction Authority, 689 N.E.2d 864 (1997). [R. 23-24]. Abiele however, provides no support for the court's decision – it merely re-states the well-established proposition that Article 78 review is the appropriate vehicle to address an assertion that the determination of a governmental body or officer is "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Id. at 866-67. The lower court's only exploration of the nature of Plaintiffs' actual claims was to note that there is nothing "unique" about them "which would take them outside normal Article 78 review." [R. 24]. Fortunately, uniqueness is not a pre-requisite for a valid legal claim in New York.

The lower court's insistence upon the suitability of an Article 78 proceeding is not supported by the case law. An Article 78 proceeding, as opposed to an action for a declaratory judgment, provides only for review of an individual determination affecting one's rights or an agency action taken in violation of the agency's own procedures or

applicable law. See, e.g., New York City Health & Hosps. Corp. v. McBarnette, 639 N.E.2d 740, 744-45 (1994) ("[W]here a quasi-legislative act by an administrative agency such as a rate determination is challenged on the ground that it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion a proceeding in the form prescribed by article 78 can be maintained…") (internal citations omitted); McCarthy v. Zoning Bd. of Appeals, 724 N.Y.S.2d 798, 799 (3d Dept. 2001) (holding Article 78 proceeding is appropriate to challenge the procedures followed in enacting a local law, but not the substance of that law); Llana v. Pittstown, 651 N.Y.S.2d 675, 677 (3d Dept. 1996) (holding Article 78 proceeding is appropriate because "*each* of petitioners' causes of action concern matters of procedure only, eschewing any intrusion into the substance of the matter voted on") (emphasis added, internal citations omitted); DiMiero v. Livingston-Steuben-Wyoming County Bd. of Cooperative Educ. Srvs., 606 N.Y.S.2d 92, 94 (3d Dept. 1993) ("Because plaintiffs seek only to challenge discrete, ad hoc determinations regarding their employment benefits, CPLR article 78 review is proper."); Bitondo v. State, 582 N.Y.S.2d 819, 822 (3d Dept. 1992) ("Because plaintiff is seeking … a declaration that the aforementioned practices violated only *his* constitutional rights in this particular instance (as opposed to an across-the-board declaration), these claims likewise could have been resolved in a proceeding pursuant to CPLR 7803 (3)…") (emphasis in original).

The law is clear that an Article 78 proceeding is *not* the appropriate vehicle for a constitutional challenge to the substance of a continuing and generally applicable policy or law. Solnick v. Whalen, cited by the lower court, supports this view. 401 N.E.2d 190

(1980). [R. 22]. In Solnick, the court held that petitioners' procedural due process challenge to the determination of Medicaid reimbursement rates by the Department of Health was properly understood as an Article 78 proceeding, and thus barred by the four-month statute of limitations. Id. at 194. The Solnick court reiterated the availability of Article 78 review for a challenge to "individualized rates established for a particular litigant" and explained that Petitioners' assertions regarding the lack of due process in the agency's determination could be reviewed in an Article 78 proceeding under the third question authorized by CPLR § 7803, "whether the determination was made in violation of lawful procedure [or] was affected by an error of law." Id. at 194. In its reasoning, the Court reaffirmed the holding of Lakeland Water District v. Onondaga County Water Authority, that Article 78 review is unavailable for a challenge to an "across-the-board schedule which increased rates and charges of the authority applicable to all its customers." Id., (citing Lakeland Water Dist. v. Onondaga County Water Authority, 248 N.E.2d 855, 858 (1969)). In collecting other cases to support this proposition, the court carefully distinguished an "*ad hoc* determination of an individual party's right of reimbursement – a determination more accurately classified as administrative rather than legislative" for which an Article 78 proceeding is appropriate, and a constitutional challenge to "a rate increase, ordinance, local law, or statute of general applicability" for which Article 78 review is inapplicable. 401 N.E.2d at 195.

While the Court of Appeals refined the Solnick analysis in New York City Health and Hospitals Corporation v. McBarnette, 639 N.E.2d 740 (1994), Solnick and Lakeland retain their precedential value as applied to this case. The McBarnette Court distinguished between an agency's quasi-judicial determinations, made upon a record

from an adversarial evidentiary hearing on an individual's challenge to agency action, and a quasi-legislative act, in which the agency enacts rules and policies, typically after holding non-adversarial hearings. 639 N.E.2d at 744 n.2. While the former is routinely subject to Article 78 certiorari review, the latter is a closer case:

> in most situations, agencies' generally applicable decisions do not lend themselves to consideration on their merits under the provisions for mandamus to review, because they … [are] not amenable to analysis under the "arbitrary and capricious" standard. Nonetheless, there are certainly cases in which even a nonindividualized, generally applicable quasi-legislative act such as a regulation or an across-the-board rate-computation ruling can be challenged as being "affected by an error of law," "arbitrary and capricious" or lacking a rational basis (CPLR 7803[3]). The claim raised by plaintiff here presents precisely such a case.

Id., at 745. The McBarnette court determined that in the particular case before it the agency action was subject to Article 78 review because petitioners sought "to convince the court that defendants promulgated a rule affecting hospital rates that represented an irrational construction of the governing statutes," Id. However, after McBarnette, it remains the law that quasi-legislative actions such as across the board rate-setting, especially those made without notice and hearing, are generally not subject to review under an Article 78 proceeding because they do not fit within any of the questions set out in CPLR 7801 and 7803. Id. Accordingly, DOCS' actions in contracting with MCI and setting exorbitant telephone rates by contract amendment is simply not reviewable under any of the Article 78 questions, as there was no hearing, determination, or statutory interpretation involved. See Solnick, 401 N.E.2d at 194.

Indeed, the only type of action that could conceivably provide Plaintiffs with the relief they seek in Counts II, III, IV, V and VII[4] is an action for moneys had and received, and such actions are unequivocally subject to the six-year statute of limitations for

[4] Counts VI is dealt with separately, below.

contract challenges. First Nat'l City Bank v. New York Finance Admin., 324 N.E.2d 861 (1975). For example, in Scarborough School Corporation v. Assessor of Ossining, 467 N.Y.S.2d 674 (2d Dept. 1983), petitioners challenged the Town Assessor's actions in placing on the assessment rolls real property that had previously been tax exempt. The petitioners sought to recover the back taxes paid. Id. at 675. The court held that "[a]lthough petitioners have cast this matter as an article 78 proceeding, an examination of the allegations in the petition reveals that the *petitioners' claim for a refund of taxes paid under protest is in the nature of a plenary action for moneys had and received…[s]uch an action is based, in theory, upon a contractual obligation or liability, express or implied in law or fact and is controlled by a six-year Statute of Limitations*." Id. at 675 (internal citations omitted, emphasis added). See also CKC, Inc. v. Kleiman, 679 N.Y.S.2d 637, 638 (2d Dept. 1998) (applying six-year statute of limitations to a challenge by property owners to tax levy based on a contract between village and owners); Riverdale County Sch. v. City of New York, 213 N.Y.S.2d 543, 545 (1st Dept. 1961) ("As a general proposition it is clear that an action to recover back taxes paid is an action for money had and received, and the six-year statute has application.").

If Plaintiffs' claims sound in an action for moneys had and received, than the proper remedy is conversion of the action, not dismissal. New York law directs courts to convert a proceeding into a form proper for its prosecution rather than to dismiss it on the basis of the form in which it was plead. N.Y.C.P.L.R. § 103(c) (McKinney 2005). See, e.g., First Nat'l City Bank**,** 36 N.Y.2d at 94 (holding in action to recover improperly levied taxes, it is proper for the court to convert an Article 78 proceeding into an action for moneys had and received, "to avoid dismissal as to a substantial part of the relief

sought... in the interest of justice and equity.") In Niagara Mohawk Power Corp. v. City School District, 451 N.E.2d 207, 208 (1983), for example, the Court of Appeals treated a case brought under Article 78 to challenge the school district's authority to impose a tax as a suit for moneys had and received, and applied the six-year statute of limitations. The Niagara Mohawk Court emphasized that the critical question was whether the challenge amounted to one alleging that the taxing authority erroneously acted within its authority, a claim for which Article 78 could provide relief, or whether it exceeded its authority entirely, for which Article 78 could not. Id., at 209. Accord, Trizec Western, Inc. v. City of New York, 489 N.E.2d 235, 236 (1985) (finding that City had authority to tax, so action challenging collection was properly dismissed under Article 78 statute of limitations). In this case there can be no doubt that plaintiffs' claim that DOCS exceeded its authority when it imposed an unlegislated tax falls in the same category as the plaintiffs' claim in Niagara Mohawk Power.

An action for moneys had and received is "an obligation which the law creates…when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another…. It lies when taxes have been collected without jurisdiction or in violation of constitutional authority, and the taxpayer paid the tax under formal written protest or duress." Kahal Bnei Emunim v. Town of Fallsburg, 607 N.Y.S.2d 858, 860-61 (Sup. Ct. 1993) (internal citations omitted). This type of plenary action is most frequently used in the context of overpaid taxes, but it is available for other forms of unlawful payment. In Eichacker v. New York Telephone Company, 14 N.Y.S.2d 17, 20 (Mun. Ct. 1939), rev'd on other grounds, 30 N.Y.S.2d 723 (2d Dept. 1940), for example, a doctor sued his telephone provider for charging him in excess of

the tariff on file with the Public Service Commission. The court found that the action was "essentially one to recover back money which the defendant received from the plaintiff, but had no legal right to withhold from him" and as such, was subject to the six-year statute of limitations applicable to contract actions. Id. at 24.

Whether the court should convert this action into one for moneys had and received or merely apply the catch-all six year statute of limitation for declaratory judgments, as is equally appropriate, it is clear that Plaintiffs are entitled to a six-year statute of limitations period. It is also clear that they cannot receive the relief they seek through an Article 78 proceeding and for that reason, the court below erred in dismissing Counts II, III, IV, V and VII as untimely.

Finally, in dismissing Counts II – VII with little analysis, the court below completely ignored the well-established statute of limitations period applicable to Count VI, brought under General Business Law section 349, for deceptive business practices. [R. 62-63]. The three-year statute of limitations for statutory causes of action under C.P.L.R. § 214 (2) applies to cases brought pursuant to GBL § 349. See Busbee v. Ken-Rob Co., 720 N.Y.S.2d 785, 786 (1st Dept. 2001). For this reason, Plaintiffs' sixth claim is timely whether it accrued, as the lower court held, on April 1, 2001, or as Plaintiffs' claim, on October 30, 2003.

B. Plaintiffs' Claims in Counts II through VII are Timely Because Defendants Actions Constitute a Continuing Wrong Causing Plaintiffs' Claims to Accrue Each Billing Cycle

Even if this court were to agree with the holdings of the court below that Plaintiffs seek relief available through an Article 78 proceeding and that their claims initially

accrued on April 1, 2001, it must nevertheless find that the lower court erred in dismissing Plaintiffs' claims as untimely because the court failed to recognize the applicability of the continuing wrong doctrine to Plaintiffs' claims. [R. 24]. Under New York law, a cause of action ordinarily accrues at the time of the wrongful act. However, "certain wrongs are considered to be continuous wrongs, and the statute of limitations, therefore, runs from the commission of the last wrongful act." Neufeld v. Neufeld, 910 F. Supp. 977, 982 (S.D.N.Y. 1996) (citations omitted). If the wrongful acts do not cease, a cause of action for a continuing harm continuously accrues. Davis v. Rosenblatt, 559 N.Y.S.2d 401, 404 (3d Dept. 1990) (citing 1 Weinstein-Korn-Miller, NY Civ. Prac., Para 213.04).

The court below declined to apply the continuing wrong doctrine in reliance once again upon the decision in Bullard v. State. [R. 24]. The Bullard opinion however, involved a very limited analysis of the issue, and went against the significant weight of precedent. For this reason, no weight should be accorded that decision.[5]

The Bullard Court acknowledged the validity of the continuing violation[6] doctrine, but found it inapplicable to claimants' challenges to the telephone rates charged to them as recipients of prisoners' collect calls, because it believed that claimants were really challenging the "continuing effects of the April 1, 1996 Worldcom contract." Bullard v. State, 763 N.Y.S.2d 371, 374 (3d Dept. 2003). In reaching this conclusion, the

[5] "It is now well settled in this State and elsewhere, that the courts will not, as a general rule, follow a former decision 'where it can be shown that the law has been misapplied, or where the former determination is evidently contrary to reason.'" In re Estate of Eckart, 348 N.E.2d 905, 908 (1976) (citing Rumsey v. New York & New England R.R. Co., 133 N.Y. 79, 85 (1892)).

[6] The doctrine is variously referred to as "continuing harm" "continuing wrong" or "continuing violation" doctrine.

court cited one case, Commack Self-Service Kosher Meats, Inc. v. State (which in turn cited Selkirk v. New York), for the proposition that the continuing harm doctrine requires continuing unlawful acts, not just the continuing effect of earlier unlawful conduct. See Commack Self-Service Kosher Meats, Inc. v. State, 704 N.Y.S.2d 737, 739 (3d Dept. 2000); Selkirk v. New York, 671 N.Y.S.2d 824, 825 (3d Dept. 1998).

In Commack, the Department of Agriculture and Markets cited a kosher meats business with violation of an Agriculture and Market Law provision regarding the sale and preparation of kosher foods. 704 N.Y.S.2d at 738. The Department later withdrew the penalty but failed to expunge the violation from claimants' record, causing injury to their reputation. Id. In defending against a statute of limitations argument, claimants characterized the ongoing damage to their reputation as a continuing injury and argued that this continuing injury caused their claim to accrue on a daily basis. Id. at 739. The Third Department found against claimants because "the mere fact that claimants may continue to suffer damage to their reputation does not alter the fact that the Department's unlawful conduct, if any, occurred five years before the claim was filed." Id. In short, claimants' injury emanated from one harmful act on the part of the agency.

Selkirk involved a similar challenge to a single, discrete wrongful act -- the state's wrongful seizure of claimant's assets -- that caused continuing damage to claimant's credit and financial reputation. 671 N.Y.S.2d at 825. Once again, the Third Department refused to apply the continuing violation because the case challenged "the continuing effects of earlier unlawful conduct" rather than "continuing unlawful acts." Id.

The Bullard court, and by its reliance thereon the court below, erred in relying on these cases to deny Plaintiffs the benefit of the continuing wrong doctrine. Selkirk and Commack each involved a single, discrete wrongful act which resulted in ongoing economic injury to claimants. While the 2001 contract between MCI and DOCS contained the DOCS "commission" requirement, it was not the beginning or end of the agency's unlawful conduct. Defendants continue to act unlawfully to this day. [R. 36]. MCI and DOCS engage in a discrete wrongful act each time MCI mails a bill to Plaintiffs charging them the DOCS tax and DOCS retains that unlawful tax. Application of the continuing violation doctrine in such a situation is well established.

New York courts have consistently applied the continuing wrong doctrine to repeated billings or withholding of monies owed. In Davis v. Rosenblatt, for example, former and current City Court Judges from Syracuse, Rochester, Buffalo, and Niagara Falls challenged a disparity between their wages and the wages paid Yonkers judges. 559 N.Y.S.2d 401, 402-3 (3d Dept. 1990). The State conceded, and the Third Department held, that the judges were challenging a continuing harm for which a claim continuously accrues for statute of limitations purposes. Id. at 404. While the salary differential was created by statute (just as the DOCS "commission" at issue in this case was created by contract) the date of that statute was irrelevant to the Third Department's statute of limitations discussion. Id. Rather, the Third Department found that the claims were timely for all judges who had received the allegedly unlawful pay rate within the operative six-year statute of limitations. Id. In other words, the claim accrued upon each pay period until the allegedly discriminatory pay differential ceased. Id., accord Nelson

v. Lippman, 709 N.Y.S.2d 210, 214 (3d Dept. 2000), rev'd on other grounds, 745 N.E.2d. 386 (2000).

Similarly, in Merine v. Prudential-Bache Utility Fund, Inc., 859 F.Supp. 715, 725 (S.D.N.Y. 1994), the federal court applied New York's continuing wrong doctrine to a shareholders' state law claim regarding excessive fees. The Defendants argued that since the fees were charged pursuant to a Distribution Plan approved more than three years prior to commencement of the action, the claim should be barred as falling outside the operative three-year statute of limitations. Id. The court disagreed, and held that under the continuing wrong doctrine, "a new cause of action arose each time defendants charged excessive fees." Id.

Finally, the Third Department applied the continuing harm doctrine in Cahill v. Public Service Commission, a case strikingly similar to the one at hand. 498 N.Y.S.2d 499 (3d Dept. 1986).[7] In Cahill, a customer of New York Telephone Company and Central Hudson Gas & Electric filed an Article 78 proceeding seeking an order directing Defendants to cease passing along the cost of charitable contributions to customers. Id. at 500. The petitioner claimed that a PSC policy, established in 1970, permitted utilities to pass along these costs to ratepayers, in violation of ratepayers' First Amendment rights. Id. at 501. Although the claim was not commenced until 1984, fourteen years after creation of the challenged policy, the Third Department held that the Article 78

[7] Indeed, the Bullard Court cited Cahill for the proposition that the Bullard plaintiffs could have brought an Article 78 action to challenge the relevant conduct, and thus did not require recognition of a constitutional tort cause of action. 763 N.Y.S.2d at 374

proceeding was timely because the petitioner sought relief to address a continuing violation of his constitutional rights. Id. at 500, 502.[8]

The Walton plaintiffs challenge to the continuing imposition of an illegal and discriminatory tax is indistinguishable from the Judges' challenges to continuing unequal pay in Davis, the shareholders' challenge to continuing excessive fees in Merine, and the customer's challenge to continuing charitable contributions in Cahill. In each case, the petitioners or claimants challenged continuing wrongful acts triggered by a policy or law created outside the operative statute of limitations period. And in each case the court held, as it must, that the challenge was timely. To hold otherwise would not only go against the weight of precedent but would also result in a serious injustice to petitioners. The same injustice would arise here. If this Court affirms the lower court's holding that Plaintiffs' claims accrued on April 1, 2001 and are subject to a four-month statute of

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[8] For other cases involving application of the continuing wrong doctrine for money wrongfully collected or withheld see Barash v. Estate of Sperlin, 706 N.Y.S.2d 439, 440 (2d Dept. 2000), ("the plaintiff's claims of withheld profits, etc., constitute a continuing wrong which accrued anew each time the defendants collected income and profits …"); Butler v. Gibbons**,** 569 N.Y.S.2d 722, 723 (1st Dept. 1991) ("[p]laintiff's allegations clearly make out a continuing wrong, i.e., Gibbons' repeated and continuing failure to account and turn over proceeds earned from renting the properties since 1979. Thus … a new cause of action accrued each time defendant collected the rents and kept them to himself"); and Subin v. City of New York, 229 N.Y.S. 628, 629 (Mun. Ct. 1928) (regarding action to recover illegal water tax paid over series of years). The New York Courts have also applied the doctrine in the context of a continuing violation of a constitutional right, Cash v. Bates, 93 N.E.2d 835, 836 (1950); Amerada Hess Corp. v. Acampora, 486 N.Y.S.2d 38, 41 (2d Dept. 1985); continuing trespass, Town of Saranac v. Town of Plattsburgh, 630 N.Y.S.2d 394, 395 (3d Dept. 1995); Cranesville Block Co. v. Niagara Mohawk Power Corp., 572 N.Y.S.2d 495, 497 (3d Dept. 1991); continuing breach of a contract or continuing obligation, Bulova Watch Co. v. Celotex Corp., 389 N.E.2d 130, 132 (1979); Orville v. Newski, 547 N.Y.S.2d 913, 914 (3d Dept. 1989); continuing exposure to a harmful substance, Bikowicz v. Nedco Pharmacy, Inc., 517 N.Y.S.2d 829, 832 (3d Dept. 1987); and continuing sexual harassment, Town of Lumberland v. New York State Div. of Human Rights, 644 N.Y.S.2d 864, 868 (3d Dept. 1996).

limitations, and does not recognize the applicability of the continuing wrong doctrine, no individual who began accepting calls from a loved one in prison after August 1, 2001 could challenge the allegedly unlawful charges. Moreover, any challenge would be completely foreclosed for the family, friends, and lawyers of the thousands of prisoners who have entered New York State prisons since that date. Such a result would not only be against the weight of significant precedent, but would also be manifestly unjust. For this reason, this court should reverse the decision below.

II. THE COURT BELOW ERRED IN DISMISSING COUNT I FOR FAILURE TO STATE A CLAIM

The lower court erred in dismissing Plaintiffs' first claim[9] seeking a declaration that MCI and DOCS' past, current, and future collection and retention of the unauthorized DOCS tax is unlawful, an order restraining DOCS and MCI from continuing to collect the tax, and a refund from DOCS of all unlawful charges collected, with interest. In dismissing Count I, the lower court did not cite a single case or engage in any analysis. Rather, the court found "nothing to enforce in the PSC order" because it looked only at the "decretal paragraphs," rather than considering the impact of the PSC's order as a whole. [R. 13-14]. Plaintiffs' first claim for relief, however, cannot rest on the PSC's own failure spell out the logical and necessary consequences of its order. The PSC's expert determination that it lacks jurisdiction over the DOCS tax has clear implications. Because the DOCS tax is not a filed telephone rate calculated based on the reasonable costs incurred by a telephone company, and because it has not been approved

[9] Count I is the only count that the court below found to have been timely filed within the four-month Article 78 statute of limitations period and therefore was the only claim decided on the merits.

as "just and reasonable" by the PSC, it is the responsibility of this Court to order DOCS to cease imposing its unlawful tax, and require MCI to cease collecting it from Plaintiffs.

Under the Public Service Law, MCI is prohibited from charging a rate that is not on file with the PSC and has not been determined "just and reasonable." This conclusion is compelled by the plain language of the Public Service Laws. New York Public Service Law §91(1) states:

> All charges made or demanded by any telegraph corporation or telephone corporation for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited and declared to be unlawful.

Defendants cannot dispute that the DOCS tax is a charge imposed over and above the "jurisdictional rate" reviewed and declared just and reasonable by the PSC. Nor can they dispute that this separate rate is not validated by any other law. [R. 88-89].

Because the DOCS tax is in excess of the approved jurisdictional rate, MCI may not continue to collect it from Plaintiffs or other consumers.

> No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified…except such as are specified in its schedule filed and in effect....

N.Y. Pub. Ser. §92(2)(d). The law is clear that MCI cannot demand or collect any charge over the filed rate – that portion deemed "jurisdictional" and approved by the PSC. Any surcharges that increase the rate a customer pays over the tariffed rate are invalid. For example, in People ex rel. Public Service Commission v. New York Telephone Co., 29 N.Y.S.2d 513, 514 (3d Dept. 1941), aff'd, 40 N.E.2d 1020 (1942), the court considered whether hotels may charge guests for telephone service in excess of the rate specified in

the tariff schedules. The hotels attempted to justify the practice as a charge for hotel services only, not subject to regulation by the PSC. Id. at 515. The court held that because the hotel was primarily providing telephone service their rates could not exceed the filed rate held just and reasonable by the PSC. Id. at 516-17. See also, United States v. AT&T, 57 F. Supp. 451 (S.D.N.Y. 1944), aff'd sub nom, Hotel Astor v. United States, 325 U.S. 837 (1945) (per curiam) (hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined). These cases are directly analogous to the one at hand. DOCS' surcharge raises the cost of inmate calls over the tariffed rate and is therefore invalid.

The fact that MCI filed a bifurcated rate pursuant to the PSC Order does not in any way legitimize the DOCS tax. [R. 433-434]. Although the DOCS tax is physically listed on MCI's tariff, it is *not* a "filed rate" within the meaning of the Public Service Law. The DOCS tax *cannot* logically be on file because the PSC, according to its own ruling, does not have jurisdiction over that portion of the total telephone charge, and under the Public Service Law, the PSC has jurisdiction to review any rate or charge that has been "filed" with the Commission. N.Y. Pub. Ser. §92(2)(e). Since the PSC does not have jurisdiction over the DOCS tax, the DOCS tax cannot be a part of MCI's "filed rate" as defined by the Public Service Law.

MCI has a duty to cease collecting the DOCS tax because that surcharge is in excess of the rate determined "just and reasonable" by the PSC. See N.Y. Pub. Serv. § 92(2)(d). "[I]t shall be the duty of every…telephone corporation…to obey each and every such order so served upon it and to do everything necessary or proper in order to secure compliance with and observance of every such order…*according to its true intent*

and meaning." N.Y. Pub. Ser. §97(2) (emphasis added). As a telephone company, MCI may not continue to bill consumers in excess of its filed rate.

And just as the Court must order MCI to cease collecting and remitting the unlawful tax to DOCS, it must also order DOCS to cease demanding and accepting the tax from MCI.[10] As demonstrated below, DOCS has no right to continue to assess its unauthorized tax. See infra, Point III, Sections A – E. When an agency acts in violation of a clear legal duty, this Court has the power to order compliance with the law through mandamus and to declare the agency's actions unlawful. See, e.g. Huff v. C.K. Sanitary Sys. Inc., 688 N.Y.S.2d 801, 806 (3d Dept. 1999) (holding that court properly enjoined town sewage system's operator from charging additional fees without town's approval for statutorily-mandated duty to maintain the pumps).

By its Order, the PSC determined that it lacks jurisdiction over the DOCS tax. This tax has not been approved by the PSC and is not a filed rate under the Public Service Law. It is an unauthorized charge assessed upon Plaintiffs and putative class members without any basis in the law. For this reason, Plaintiffs seek an order from this Court reversing the lower court's dismissal of Count I and prohibiting MCI and DOCS from continuing to collect this tax.

III. THE COURT BELOW ERRED WHEN IT FAILED TO ASSESS PLAINTIFFS' PROPERLY PLED AND SUPPORTED CLAIMS

In Counts II through VI of their Complaint, Plaintiffs allege that the DOCS telephone tax is: (1) an unlegislated tax imposed in violation of Articles I, III, and XVI of the State Constitution; (2) a taking of Plaintiffs' property without due process of law in

[10] Under the current contract between MCI and DOCS, MCI must continue to remit to the State the DOCS tax. [R. 234] ("Contractor is obligated to make commission payments to DOCS in strict accordance with [the terms of the contract]").

violation of Article I, §§ 6 and 8 of the State Constitution; (3) a violation of Plaintiffs' right to equal protection guaranteed by Article I, § 11 of the State Constitution; (4) a violation of Plaintiffs' speech and association rights guaranteed by Article I, § 8 of the State Constitution; and (5) a deceptive act or practice in violation of General Business Law § 349. Despite Plaintiffs' comprehensive showing that each claim was properly pled and supported by facts, the court below dismissed them out of hand as untimely. As shown above, this dismissal was erroneous.[11]

A. Plaintiffs Have Adequately Pled the Existence of the DOCS Telephone Tax

With regard to their contention that the DOCS telephone surcharge constitutes an unconstitutional tax, Plaintiffs have alleged that: (a) under the Contract, MCI remits to DOCS a "commission" of 57.5 percent of its gross annual revenue from operating the prison telephone system, [R. 33]; (b) to finance this "commission," MCI charges recipients of prisoners' collect calls a surcharge of $3.00 for every call accepted, [R. 33]; (c) the surcharge is paid by Plaintiffs to MCI, tendered by MCI to the State, and deposited by the State into the general fund, [R. 46]; (d) these funds are then earmarked and appropriated to DOCS for its "Family Benefit Fund," [R. 35]; (e) the Family Benefit Fund monies are used to cover the costs of Departmental operations wholly unrelated to the maintenance of the prison telephone system, [R. 35]; and (f) the DOCS telephone tax has neither been authorized by the State Legislature nor approved as a legitimate component of MCI's filed telephone rate by the PSC. [R. 36]. No more is necessary to adequately plead the imposition of an unlawful tax.

[11] The following sections summarize the merits of Plaintiffs' Counts II through VI. Plaintiffs would welcome the opportunity to provide additional briefing on these claims should the Court reverse the lower court and reach the merits of Plaintiffs' claims.

The surcharge Plaintiffs pay can be nothing other than a tax. It cannot be a user fee, intended to defray the costs of the services to which it is attached (*i.e.,* the prison telephone service) given that DOCS uses only 1.5 percent of the revenue it receives from the surcharge to cover the costs of operating the prison telephone system. [R. 102]. See Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor, 352 N.E.2d 115, 118 (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.") In addition to the required connection between a user fee and the actual cost of the service provided, a user fee must -- by definition -- represent "a visitation of the costs of special services upon *the one who derives a benefit from them,*" Jewish Reconstructionist Synagogue, 352 N.E.2d at 117 (emphasis added), 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 119. The telephone tax fails these tests as well. While the Family Benefit Fund does in (very small) part benefit Plaintiffs and others who receive collect calls from prisoners, the vast majority of the money levied through the DOCS tax pays for unrelated services which would otherwise have been paid for out of the State's or DOCS' general budget. [R. 94-103]. 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." [R. 102].

The small portion of the tax revenue used to cover DOCS' actual costs for providing prison telephone service simply cannot justify the huge surcharge imposed, and the law is clear that a fee that exceeds any reasonable relationship to the cost of its service is an unauthorized tax. "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." Torsoe Bros. Constr. Corp. v. Bd. of Trustees, 375 N.Y.S.2d 612, 616-17 (2d Dept. 1975). See also New York Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d 993, 995-96 (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); State University of New York v. Patterson, 346 N.Y.S.2d 888, 891 (3d Dept. 1973). Because the DOCS "commission" is not reasonably related to the necessary costs to DOCS of providing prison telephone service, and the monies Plaintiffs pay fund unrelated programs that are beneficial to all New Yorkers, the surcharge is an unlawful tax and not a legitimate user fee.

Similarly, Defendants cannot show that its surcharge is a valid telephone service "commission." Valid commissions are specifically based on expenses incurred by telephone companies to gain access to property in order to be able to provide services there, In re AT&T's Private Payphone Comm'n Plan, 3 F.C.C.R. 5834, ¶ 20 (1988), and must be included in the tariffed rate. Id. The DOCS tax is obviously unrelated to the cost of gaining access to the prisons, because it runs the prisons. It cannot be a valid commission because it is not claimed as an expense by MCI included in its filed rate. Furthermore, the law is clear that "commissions" which increase the rate a customer pays over the tariffed rate are invalid. See People ex rel. Public Serv. Comm'n v. New York Tel. Co., 29 N.Y.S.2d 513, 514 (3d Dept. 1941), aff'd, 40 N.E. 2d 1020 (1942) (hotel can not impose surcharge over filed rate); United States v. AT&T, 57 F. Supp. 451 (S.D.N.Y. 1944), aff'd sub nom, Hotel Astor v. United States, 325 U.S. 837 (1945) (per curiam)

(hotel surcharge which raises cost of call over tariffed rate is invalid and should be enjoined).

B. Plaintiffs Have Shown that the Telephone Tax is Unauthorized, Violates Their Rights to Substantive Due Process and is an Unlawful Taking

In Counts II & III Plaintiffs have adequately pled violations of their constitutional rights based on the unauthorized and unlawful DOCS tax. The law in New York is eminently clear that "the exclusive power of taxation is lodged in the State Legislature." Castle Oil Corp. v. City of New York, 675 N.E.2d 840, 842 (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 Library Dist. v. Town of Poughkeepsie, 618 N.E.2d 127, 130 (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, 516 N.Y.S.2d 283, 284 (2d Dept. 1987). Because DOCS can neither point to a law delegating 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, its taxing activities are *ultra vires* and unconstitutional under Article XVI, § 1. Id.

Plaintiffs' allegations properly delineate their substantive due process claims. It is a well-established principle that "[t]axes, or more specifically, the monies used to pay taxes, are a type of 'property' of which a citizen cannot be deprived without due process

of law." Weissinger v. Boswell, 330 F. Supp. 615, 624 (M.D. Ala. 1971) (three-judge constitutional panel); Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352-53 (1918). Substantive due process violations may be found when there are "[a]ny substantial departures . . . in the collection of taxes, from the law, either as to the authority for a tax, for its purpose, or the provisions for the just distribution of its burdens." Chicago Union Traction Co. v. State Bd. of Equalization, 114 F. 557, 566 (C.C.S.D. Ill. 1902). There can be no doubt that Plaintiffs have shown that the prison telephone taxation scheme -- from the lack of any authority to impose the tax, to the use of an undefined and unbounded surcharge to collect that tax, to the inequitable distribution of that tax burden among the State's citizens -- violates due process.

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., 516 N.Y.S.2d at 284 (holding that any tax imposed pursuant to a limited agency delegation, "must be accompanied by proper guidelines set by the legislature"); Rego Properties Corp. v. Finance Adm'r of New York, 424 N.Y.S.2d 621, 625 (Sup. Ct. 1980) (quoting Weissinger, 330 F. Supp. at 625) ("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.").

Beyond DOCS' *ultra vires* action in exercising taxing power that exceeds its jurisdictional mandate and the State Constitution, and its unfounded claim to the power to

levy taxes in any amount it sees fit, it has also violated the well-established principle of substantive due process 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, 278-79 (S.D.N.Y. 1995).[12] The tax monies paid by Plaintiffs under DOCS' scheme are added to the general State fisc to cover DOCS' general operating costs; they compensate for what otherwise would be funded by general tax dollars or would be a budgetary shortfall. Plaintiffs receive no special benefit from the general operation of the State Correctional System; they merely benefit as do all State residents. For this reason, the tax imposed bears no relationship to Plaintiffs as a group. The distinction drawn by the tax scheme between Plaintiffs and other State taxpayers for the purpose of serving the Department's general revenue raising objective is thus unconstitutionally baseless and irrational. See Foss v. City of Rochester, 480 N.E.2d 717, 722 (1985).

The Department's revenue raising scheme also violates the prohibition against double taxation by imposing a tax on Plaintiffs 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 v. State, 601 N.Y.S.2d 513, 517 (Sup. Ct. 1993) (citing Sage Realty Corp. v. O'Cleireacain, 586 N.Y.S.2d 118 (1st Dept. 1992)). As the Supreme Court observed in Tennessee v. Whitworth, 117 U.S. 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

[12] See also Norwood v. Baker, 172 U.S. 269, 279 (1898); Aldens, Inc. v. Tully, 416 N.Y.S.2d 425, 427 (3d Dept. 1979); Board of Ed. v. Village of Alexander, 92 N.Y.S.2d 471, 477-78 (Sup. Ct. 1949).

> 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.

In sum, Plaintiffs have properly alleged their substantive due process and unauthorized taxation claims.

Plaintiffs have also stated a claim for an unlawful taking. The Takings Clause of Article I, § 7(a) of the New York State Constitution prohibits the taking of private property for public use without just compensation. Here, DOCS imposed an assessment that confiscates Plaintiffs' property in violation of their rights to due process under Article I of the New York Constitution. More specifically, Plaintiffs allege that the prison telephone tax system: (1) works a taking of their property – the fees they pay to cover the costs imposed by the DOCS tax, [R. 33, 34-35, 37 – 39, 46]; (2) for a public purpose – funding a portion of the Department's general operating costs [R. 46]; and (3) without just compensation.

The sums paid by Plaintiffs for the DOCS tax constitute their personal property. The United States Supreme Court has stated that the Takings Clause of the Constitution applies to such monetary interests. See, e.g., Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 160 (1980). And the New York Court of Appeals has followed suit, ruling that Article 1 § 7 of the State Constitution applies to monetary interests as well. See Alliance of Am. Insurers v. Chu, 571 N.E.2d 672 (1991). Because New York does not provide a procedure for seeking just compensation of claims such as those alleged, Plaintiffs have adequately pled their takings claim.

C. Plaintiffs Have Properly Alleged Violations of Their Free Speech and Associational Rights

Plaintiffs have stated a cause of action for violation of their free speech and associational rights by their allegations regarding (1) the States' imposition of a fee on their expressive activity that bears no relationship to related regulatory costs, [R. 35]; (2) the burden the telephone tax places on their ability to maintain contact with incarcerated family members, [R. 48 – 52]; and (3) the attenuated relationship between the surcharge and any penological objective [R. 35, 75-76, 85].

The prison telephone system clearly implicates Plaintiffs' rights to freedom of speech and association under the State Constitution. 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 U.S. 401, 407 (1989). Our free speech guarantees protect Plaintiffs' communication with their friends and family not only by mail, but also by telephone. See, e.g., Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994) (recognizing that non-inmates' rights may be implicated by prison telephone regulations). To the extent they restrict Plaintiffs' ability to communicate with family members in prison, DOCS' policies also burden Plaintiffs' rights to familial and marital association protected by the New York Constitution. 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 U.S. 494, 503-504 (1977), the states are required to protect the "[i]ntegrity of the family unit." Stanley v. Illinois, 405 U.S. 645, 651 (1972). Plaintiffs' right to familial association survives the incarceration of their loved ones, see Turner v. Safley, 482 U.S. 78, 95-97

(1987), because attributes of the family relationship – expressions of emotional support, decision-making regarding family obligations and child-rearing, and expectations of the prisoner's reentry into the family – exist despite the fact of imprisonment. See id. at 95-96.

In Turner, the Supreme Court limited judicial scrutiny of the "day-to-day" decisions of prison administrators to address "security problems," 482 U.S. at 89. It then applied this reasoning to prison rules regulating "the order and security of the internal prison environment" in Thornburgh v. Abbott, 490 U.S. at 407. However, courts have expressly declined to apply the Turner standard to prison policies that do not implicate such concerns. Thus, in Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989), the D.C. Circuit applied traditional intermediate scrutiny to the District of Columbia's decision to incarcerate female offenders in 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.[13] Like the policy decision in Pitts, DOCS' tax reflects a purely "budgetary" choice that does not implicate prison security, control of prisoners' behavior,

[13] See also Beauchamp v. Murphy, 37 F.3d 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 F.2d 1521, 1530 (9th Cir. 1993) (declining to apply Turner standard to inmates' Eighth Amendment challenge to cross-gender clothed body searches).

or the internal prison environment. As such, it is subject to the level of scrutiny traditionally applied to challenges to fees that burden free speech rights. Pitts, 866 F.2d at 1453-54.

As noted above, while government may assess a fee to recoup the costs incurred in regulating expressive activity, Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941), it may not impose a fee that bears no relationship to those regulatory costs. See Murdock v. Pennsylvania, 319 U.S. 105 (1943). 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." Id. at 113-14. Since Murdock, courts have consistently applied its simple rule -- defraying costs is permissible, taxing speech is not -- in striking down similar measures.[14] Similarly here, because the surcharge imposed on inmate telephone calls bears minimal relationship to the regulatory costs incurred by DOCS in connection with the prison telephone service, [R. 35], it is, in effect,

[14] See, e.g., Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 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 defray "cost incurred or to be incurred . . . for processing plaintiffs' request to use the property"); Sentinel Communications Co. v. Watts, 936 F.2d 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 F.2d 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 F.2d 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").

"a flat tax imposed on [prisoners'] exercise of [their free speech rights]." Murdock, 319 U.S. at 113.

The DOCS surcharge also fails traditional free speech scrutiny because it is not narrowly tailored to achieve a legitimate governmental interest and leaves Plaintiffs without ample alternative channels of communication. National Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995); accord Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). Plaintiffs have made extensive allegations describing the "undu[e] burden" Defendants' surcharges place on their speech. [R. 48 – 52]. See Natl. Awareness, 50 F.3d at 1165. There are obviously less speech-restrictive ways to fund the Family Benefit Program, such as appropriating monies from the General Treasury.

Finally, even assuming the Turner standard were applicable here, Plaintiffs would still make out a constitutional claim for violation of their associational and speech rights. Turner requires an analysis of (1) whether there is a rational connection between the prison regulation and the legitimate governmental interest set forth to justify it; (2) whether alternative means of exercising the right remain open; (3) what impact accommodation of the right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether easy alternatives to the regulation exist. Turner, 482 U.S. at 89-90. The Turner Court noted that "if 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. Defendants have failed to articulate a satisfactory penological justification for the telephone tax. While raising

revenues from *prisoners* can sometimes be deemed a legitimate penological objective, see Allen v. Cuomo, 100 F.3d 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 revenues derived from the surcharge are earmarked for the Family Benefit Fund, this money is spent on correctional programs that have no relation to the prison telephone system. [R. 94 – 103]. Moreover, the immediate effect of the surcharge is to deter the families and friends of inmates from communicating with them – a goal precisely contrary to the rehabilitative justification asserted by DOCS. [R. 85].

Plaintiffs 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). [R. 48, 50]. See Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995). They have also pled the existence of an "obvious, easy alternative[]" policy, Turner, 482 U.S. at 90, -- a debit card system like that utilized by the Federal Bureau of Prisons -- that meets the security concerns allegedly addressed by the current system. [R. 52-53]. Such an alternative would have no deleterious "ripple effect" for prison administration, making the accommodation of Plaintiffs' constitutional rights readily attainable. Turner, 482 U.S. at 90.

While DOCS proffers penological justifications for various structural limitations on prison telephone service, none of these justifications are relevant to Plaintiffs' specific challenge here to the telephone tax. [R. 85]. The Department has merely asserted that there are legitimate penological objectives served by other features of the system -- such as the limitation on the number of people on a prisoner's calling list – and in doing so, merely reinforce Plaintiffs' allegations that the surcharge aspect of the system serves only

purely economic ends. In fact, Defendants have never identified a *single* penological justification for the imposition of the telephone surcharge. Plaintiffs contend there is no such justification. Given the unequivocal burden on Plaintiffs' free speech and associational rights, Plaintiffs have stated a constitutional challenge to the system.

D. Plaintiffs Have Adequately Stated an Equal Protection Claim

Under the New York Constitution, equal protection rights are implicated when a group of persons is treated differently from others who are similarly situated. In re K.L, 806 N.E.2d 480, 486 (2004). By the challenged system, DOCS has created two classes of taxpayers and has arbitrarily imposed upon one an additional tax burden that is not only unauthorized by the Legislature, but also cannot be justified by any legitimate state interest. "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 U.S. 336, 345 (1989) (holding 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, 642 N.Y.S.2d 420, 422 (3d Dept. 1996) (equal protection violated when property taxes arbitrarily increased subject to "welcome neighbor" policy).

When a challenged provision establishes a classification that burdens fundamental rights, "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, 564 N.E.2d 611, 613-14 (1990). Here, the telephone tax unreasonably burdens Plaintiffs' ability to freely speak and associate with their loved ones and clients. [R. 48-

52]. The Court of Appeals 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, 564 N.E.2d at 616; Roth v. Cuevas, 624 N.E.2d 689 (1993). New York courts also recognize that "the creation and sustenance of a family" is a constitutionally protected associational right. People v. Rodriguez, 608 N.Y.S.2d 594, 597 (Sup. Ct. 1993) (citing Roberts v. Jaycees, 468 U.S. 609 (1984)).

Under strict scrutiny review, Defendants must show that its discriminatory treatment of Plaintiffs is warranted by a compelling state interest, and that the method chosen to achieve that goal is narrowly tailored to achieve that purpose. See Golden, 564 N.E.2d at 614. In this case, DOCS has advanced no theory under which its differential treatment of Plaintiffs can be justified. While the DOCS telephone tax may be used to fund legitimate corrections programs, the method employed to fund these programs is improper and cannot be rationally related to any legitimate State interest. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 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., 643 N.E.2d 479, 484-85 (1994).

E. Plaintiffs Have Properly Pled a Violation of General Business Law Section 349

Plaintiffs' deceptive business practices claim meets the statutory requirements under New York General Business Law section 349(a) ("GBL §349").[15] A prima facie

[15] Section 349 of the General Business Law provides, "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby

case of deceptive practices requires a showing that: 1) the Defendant's acts are directed to consumers; 2) the Defendant's acts are deceptive or misleading in a material way; and 3) the Plaintiff has been injured by the Defendant's acts. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 744 (1995). Defendants' provision of telephone service while failing to disclose the DOCS tax, making false representations regarding purported penological justifications for the tax, and profiting from the illegal tax constitutes a prima facie case under GBL § 349.

The provision of telephone service is a consumer-oriented practice. See, e.g, Drizin v. Sprint Corp., 771 N.Y.S.2d 82, 84 (1st Dept. 2004); Naevus Int'l, Inc., v. AT&T, 713 N.Y.S.2d 642, 646 (Sup. Ct. 2000) aff'd, 724 N.Y.S.2d 721 (1st Dept. 2001). "Practices that have a broad[] impact on consumers at large" Oswego, 647 N.E.2d at 744, or "affect[] numerous consumers," Drizin, 771 N.Y.S.2d at 84, meet the threshold "consumer-oriented" requirement. The Department's provision of telephone service is consumer-oriented because it affects numerous people and is available to any individual in New York called by a prisoner.

The Department cannot escape liability by claiming that MCI alone provides telephone services to Plaintiffs; it is a clear participant in the prison telephone taxation scheme. DOCS is the agency that has arranged for prisoners in its facilities to be able to place collect calls; it established the criteria for the prison telephone system through its Request for Proposals, and it required the provider to restrict Plaintiffs to collect-calls only. [R. 220 – 431]. Moreover, DOCS receives 57.5 percent of the proceeds from Plaintiffs' calls. [R. 32].

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declared unlawful." N.Y. Gen. Bus. Law § 349 (Consol. 2004).

Plaintiffs have adequately pled that DOCS engaged in acts that are "deceptive or misleading in a material way" such that they are "likely to mislead a reasonable consumer acting reasonably under the circumstances." Oswego, 647 N.E.2d at 744. Excessive charges and misrepresentations in billing practices may constitute "deceptive acts and practices." Naevus Int'l, Inc., 713 N.Y.S.2d at 645. Several of DOCS' actions constitute "deceptive acts or practices" under GBL § 349 including, among others, that: (1) Defendant DOCS failed to disclose to the public and Plaintiffs that it was receiving surcharges amounting to nearly 60 percent of the revenue generated from prison initiated telephone calls from April 1, 1996 through October 30, 2003; (2) Defendant DOCS represented falsely that the prison telephone system was necessary to meet security and penological concerns; and (3) Defendant DOCS has wrongfully profited from the taxes imposed on Plaintiffs even after the PSC failed to approve that portion of the rate. [R. 62-63].

Each of these allegations, if proven, would amount to a deceptive act or practice under New York law. See e.g., McKinnon v. Int'l Fidelity Ins. Co., 704 N.Y.S.2d 774, 778 (Sup. Ct. 1999) (holding false representations "as to the amounts defendant was authorized to charge for bail premiums, which exceeded the statutory maximum" and false representation of expenses "which had no relation to actual expenses" established a prima facie case of "deceptive acts and practices" under GBL § 349). Plaintiffs have clearly alleged financial, emotional, and constitutional injury by these practices. [R. 48 – 53, 55- 63].

CONCLUSION

For all of the foregoing reasons, the Supreme Court erred in dismissing Counts I through VII of Plaintiffs' Complaint. We therefore respectfully request that this Court reverse the judgment of the Supreme Court and direct that trial be held as promptly as possible.

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Respectfully Submitted,

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