

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF ALBANY

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IVEY WALTON; RAMONA AUSTIN;	:	:
JOANN HARRIS; the OFFICE OF THE	:	:
APPELLATE DEFENDER; and the	:	:
NEW YORK STATE DEFENDERS	:	Index No. 04-__
ASSOCIATION,	:	:
Petitioners-Plaintiffs,	:	:
- against -	:	Venue: CPLR § 506(b)
	:	:
	:	VERIFIED PETITION
	:	AND COMPLAINT
	:	:
THE NEW YORK STATE DEPARTMENT	:	:
OF CORRECTIONAL SERVICES; and	:	:
MCI WORLDCOM COMMUNICATIONS,	:	:
INC.,	:	:
Respondents-Defendants.	:	:
	:	:
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Petitioners-Plaintiffs IVEY WALTON, RAMONA AUSTIN, JOANN HARRIS, the OFFICE of the APPELLATE DEFENDER, and the NEW YORK STATE DEFENDERS ASSOCIATION (“Plaintiffs”), by their attorneys, allege as follows for their petition and complaint:

NATURE OF THE CASE

1. With this application, Plaintiffs seek an order compelling Defendants New York State Department of Correctional Services (the “State” or “DOCS”) and MCI WorldCom Communications, Inc. (“MCI”) to cease collecting the State’s “commission” charges from people who receive collect telephone calls from their family members, friends, and clients incarcerated in New York State correctional facilities.
2. Plaintiffs are the family members, attorneys, and other bill payer recipients of collect telephone calls from inmates who are confined in the 71 correctional facilities run by the State. Plaintiffs bring this class action on behalf of themselves and all others similarly

situated to challenge the unauthorized and unapproved commission imposed upon them pursuant to the exclusive services contract between DOCS and MCI. This fundamentally unjust and constitutionally offensive arrangement has improperly garnered the State well over \$150 million in profit since its inception at the direct expense of Plaintiffs and class members.

3. On October 30, 2003, the New York State Public Service Commission ("PSC") determined that, with regard to the inmate telephone system: (i) the PSC does not have jurisdiction over DOCS because "DOCS is not providing telephone service pursuant to the Public Service Law" and "DOCS is not a telephone corporation pursuant to the Public Service Law;" (ii) the 57.5 % commission payable to DOCS "is received by DOCS as a requirement of its contract with MCI;" (iii) the PSC does not have jurisdiction to review the commission and therefore "will review only the portion of the rate that reflects what MCI retains from the provision of inmate calling services." As a result, the PSC bifurcated MCI's proposed tariff into two legally distinct portions: the jurisdictional portion of the rate charged and retained by MCI pursuant to the Public Service Law, and the non-jurisdictional portion of the rate comprising the "commission" or profit charged and retained by DOCS pursuant to its single provider contract with MCI. A copy of the PSC's Order is attached hereto as Exhibit A.
4. The PSC did not review and approve the 57.5% DOCS commission, yet this charge is now on file with the PSC, continues to be collected by MCI from recipients of inmate telephone calls, and continues to be remitted to the State. Recipients of prisoner collect calls are forced to pay the DOCS commission despite the fact that it has neither been approved by

the PSC as a telephone rate nor authorized by the New York State Legislature as a tax.

MCI's collection and the State's retention of this commission violates the constitutional and statutory rights of Plaintiffs and class members.

5. New York State entered into an exclusive services contract for the operation of the inmate telephone system with MCI WorldCom, Inc., and its subsidiary, MCI Telecommunications Corporation, on April 1, 1996. That contract was renewed through March 31, 2001, and MCI was awarded a new contract to continue operating the program on August 1, 2001. This new contract runs through March 31, 2006.
6. These agreements cover all DOCS facilities and restrict inmates, who cannot receive telephone calls, to using MCI as the sole provider of telephone services. The exclusive services contract further restricts inmates to making only station-to-station collect calls. To secure the DOCS contracts, MCI agreed to pay "commissions" to the State equal to 60 percent, and now, 57.5 percent¹ of the gross annual revenues garnered from its operation of the prison telephone system.
7. To meet the State's demands for these "commissions" (at least in part) a surcharge of \$3.00 is assessed for each and every call placed. Operator assisted station-to-station collect calls are the most expensive type of telephone communication and the surcharge only adds to these already significant charges. The immediate impact of the fees charged under this system is obvious. Together these charges sharply limit the duration and number of telephone calls that inmates can make and that petitioners and class members can afford to

¹Upon information and belief, the DOCS commission under the 1996 contract was 60% of gross annual revenue, while its commission under the current contract is 57.5% of gross annual revenue.

accept.

8. More fair and less expensive telephone services exist (such as inmate debit account systems or dial-around systems) that would not unjustifiably affect petitioners, who are seeking to maintain their relationships with the approximately 70,000 persons confined in State correctional facilities. At no more cost to the State, those alternatives meet security concerns (e.g., preventing calls to unauthorized numbers) purportedly addressed by the current single provider/collect call-only system. Indeed, the New York City Department of Corrections, the Federal Bureau of Prisons, and other states employ such alternative systems.
9. Given that less expensive alternatives satisfy security concerns, revenue maximization must be the reason that the State of New York does not use them. Indeed, the profit motive could not be clearer given the huge sums of money involved.² In fact, Plaintiffs maintain that the State has taken advantage of the revenue-generating opportunities presented by the single provider/collect call-only system to impose an unauthorized tax on those who receive calls from their friends and loved ones who are incarcerated in New York. One can draw no other conclusion given the terms of the exclusive services contract which mandates the payment of a significant revenue stream to the State.
10. For instance, under the contract, between September 2001 and August 2002, inmate calls in New York generated more than \$39 million dollars in gross revenues. The State received 57.5% of that revenue, or \$22,425,000. In the past eighteen years, the State has plainly

² The total nationwide business for inmate telephone services has been estimated to be over \$1 billion.

taken advantage of the fact that the higher the rates charged to the call recipients, the greater the "commissions" remitted to the State. Under the current exclusive services contract, the State and MCI have attempted to realize the financial potential of the single provider/collect call-only system.

11. In its original Request for Proposals to provide inmate telephone services, DOCS required that it receive a "commission" of not less than 47% of the contracting company's gross revenues, even though the State pays little or no money at all for the installation, operation, and maintenance of the inmate telephone system. As is clear from the executed contracts, these costs are borne entirely by MCI. Further, included in the costs covered by MCI are those incident to the security measures required by DOCS to serve its institutional security needs.
12. The State has openly stated that the "commission" it collects is used to fund other unrelated DOCS programs. In fact, the "commission" monies collected by MCI and submitted to the State are provided to DOCS and purportedly deposited into an account entitled the "Family Benefit Fund." The monies deposited in the Family Benefit Fund are used to fund various segments of State correctional system operations, such as medical personnel, supplies, and pharmaceuticals -- segments the State is unequivocally required under law to fund and provide. This means that DOCS uses its commission monies to cover a significant portion of its general operating costs. This use of the monies is wholly unrelated to the operation of the inmate telephone system, Plaintiffs' relationships with inmates, or even the rehabilitation of inmates incarcerated in the State's facilities. Copies of DOCS's Family Benefit Fund Summaries from 1993 through 1999 and a DOCS announcement

summarizing family benefit fund expenditures for fiscal year 2003 are attached hereto as Exhibit B.

13. While the State's coffers are supplemented in this fashion, the "costs" of the inmate telephone system are borne by those with no options. Plaintiffs and class members have no choice, short of severely curtailing or ceasing telephone communication with those incarcerated in DOCS facilities, but to accept the terms of the State's deal. In fact, those bill payers cannot use their own providers, which were selected for affordability and reliability of services. Rather, the State has peremptorily abrogated the bill payers' negotiated contracts for telephone service and turned the governmental power of imprisonment to its lucrative advantage.
14. Plaintiffs and class members have the right under the New York State Constitution to be assessed taxes solely pursuant to the fair and equitable taxation system created, authorized, and adopted by the New York State Legislature. Upon information and belief, Defendants have proceeded with the collection of the State's commission from Plaintiffs as set forth in the MCI-DOCS contract notwithstanding the PSC's determination that the commission is not part of the filed rate and has not been determined to be a reasonable rate within the meaning of Public Service Law, notwithstanding the fact that the collection of such commission significantly impairs Plaintiffs' associational rights, and notwithstanding the fact that such commission constitutes the imposition of an unlegislated tax in violation of Article III § 1 and Article XVI § 1 of the State Constitution.
15. This is a proceeding pursuant to CPLR §§ 3001 and 7801 *et seq.* for declaratory and injunctive relief. Plaintiffs seek an order striking the DOCS Commission from MCI's tariff

and a declaration that the DOCS's commission is unlawful and/or unconstitutional because it is a charge assessed by the State that is not approved by the PSC as part of the rate filed by MCI and is instead an unlawful tax levied in violation of Article III § 1 and Article XVI § 1, the free speech and association clause, Article I § 8, the due process clause, Article I § 6, and the equal protection clause of the New York State Constitution. N.Y. Const., Article I § 11. Plaintiffs also seek an order prohibiting Defendant DOCS from enforcing that part of its contract with MCI which requires MCI to collect the portion of the telephone charges attributable to the State's commission, or 57.5% of the charged rate. Finally, Plaintiffs seek an injunction against future imposition of the commission charged by DOCS, and damages to remedy the constitutional and legal infirmities of the commission imposed to date.

JURISDICTION AND VENUE

16. This Court has jurisdiction pursuant to CPLR § 7804(b). Venue is proper in Albany County pursuant to CPLR § 506(b).
17. The claims against Defendants and the injuries to Plaintiffs are continuing in nature. The State's single provider/collect call-only contract with MCI commenced on or about April 1, 1996, and has continued in effect to the present.

PARTIES

18. Plaintiff IVEY WALTON is a resident of Brooklyn, New York. Her post office address is: 598 Barbey Street, Brooklyn, New York, 11207. Ms. Walton's son and nephew are incarcerated in New York State correctional facilities. Her son is presently confined in the Clinton Correctional Facility ("Clinton") and has been there since 1995. Clinton is in the town of Dannemora, New York. Ms. Walton's nephew is also incarcerated in Clinton.

MCI has billed Ms. Walton for the collect calls placed to her by her son and nephew for the period from April 1, 1996 through the present. Because of the high rates charged for inmate calls in New York, Ms. Walton is unable to speak with her son and nephew on a regular basis.

19. Plaintiff RAMONA AUSTIN is a resident of New York, New York. Her post office address is: 13 Crest Drive, East Northport, Long Island, 11731. Ms. Austin's husband is presently confined in the Sullivan Correctional Facility, located in Fallsburg, New York. During his incarceration, Ms. Austin has relied upon the telephone as the primary form of communication with her husband. MCI has billed Ms. Austin for the collect calls placed to her by her husband for the last seven years. Because the rates charged for the calls from her husband are so high, Ms. Austin has been forced to forego speaking with him as often as she would wish, and has had to alter her lifestyle and accrue significant debt in order to speak to him at all.
20. Plaintiff JOANN HARRIS is a resident of the Bronx, New York. Her post office address is: 20 Richmond Plaza, Bronx, New York, 10453. Ms. Harris's cousin and her close friend are both incarcerated in New York State correctional facilities. Her cousin is presently confined in the Mohawk Correctional Facility ("Mohawk") and has been incarcerated in several different State correctional facilities since 1999. Mohawk is in the town of Rome, New York. Ms. Harris's close friend has been incarcerated in Bayview Correctional Facility for two years. MCI has billed Ms. Harris for the collect calls placed to her by her cousin and her close friend for the period from November, 1999 to the present, and November, 2001 to the present, respectively. Because of the high rates charged for inmate

calls in New York, Ms. Harris is unable to speak with her cousin and her close friend on a regular basis.

21. Plaintiff OFFICE OF THE APPELLATE DEFENDER (“OAD”) is a non-profit, government-funded appellate defense office serving an indigent client population, most of whom are incarcerated in New York State correctional facilities. OAD’s office is located at 45 West 45th Street, 7th Floor, New York, New York 10036. In connection with OAD’s work, it is imperative for the organization to maintain regular communication with their clients. Because face-to-face visits are often impossible or impracticable, OAD attorneys rely extensively on correspondence and collect telephone calls. MCI’s exclusive provider contract with DOCS has engendered rates that are exorbitant and far in excess of what OAD would have to pay were it able to use its own long distance carrier.
22. Plaintiff NEW YORK STATE DEFENDERS ASSOCIATION (“NYSDA”) is a not-for-profit corporation which through its state-funded Public Defense Backup Center provides direct assistance and support to New York’s criminal defense community. NYSDA’s mission is to improve the quality and scope of publicly supported legal representation to low income people. NYSDA’s office is located at 194 Washington Avenue, Suite 500, Albany, New York, 12210. Its members include criminal defense attorneys who practice law in New York, non-lawyer client members affected by the adverse impact of the DOCS-MCI contract, and others. NYSDA attorneys are charged with the responsibility of assisting public defense attorneys in the field and clients in need of assistance, many of whom are in state prison. NYSDA is forced to pay exorbitant fees to accept collect calls from inmates in New York State prisons.

23. Defendant NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES (“DOCS”) is a department or agency of the New York State government. The Department has authorized, approved, implemented and profited from the exclusive services system which prevents those confined in State prison facilities from using any telephone service other than that furnished by the single provider MCI and requires them to make only collect calls through MCI. Since 1996, DOCS has retained and continues to retain fees it receives from Plaintiffs and class members in the form of commissions charged on inmate telephone calls.
24. Defendant MCI is a telephone corporation that operates telephone lines in the State of New York. Pursuant to its contract with DOCS, MCI charges and collects from Plaintiffs and class members unreasonably high rates for calls placed through the inmate telephone system. MCI has profited from the exclusive services system which prevents those confined in State prison facilities from using any telephone service other than that which it furnishes and requires them to make only collect calls through MCI. Since 1996, MCI has collected and continues to collect fees it receives from Plaintiffs and class members in the form of commissions charged on inmate telephone calls.

STATEMENT OF FACTS

Genesis of the Single Provider/Collect Call-Only System

25. The State instituted the current telephone system for prisoners in 1985. Over the years, this system has served as the primary means by which prisoners and their families have maintained contact during incarceration. Upon information and belief, the inmate telephone system was also intended to be a source of revenue for the State of New York.

26. Since 1985, the State has allowed only one telephone company at a time to provide inmate telephone services at its correctional facilities.
27. Since its inception, the inmate telephone system has been structured to provide DOCS with large "commissions" from the operation of the telephone systems at each correctional facility. These required "commissions" are incorporated into the exclusive services contracts entered into by DOCS and each successive telephone company awarded the contract.
28. Upon information and belief, from the inception of the prison telephone system through Fiscal Year 1999, DOCS received well over \$150 million dollars from the telephone companies in exchange for the grant of exclusive licenses to provide inmate telephone service to the correctional facilities throughout the State. A very small percentage (less than 8%) of the money received by the State under the present exclusive services contract was used for the maintenance and operation of the prison telephone system. In fact, the contract and renewal agreements have required the telephone company to cover the costs of operation and maintenance of the system.
29. During the nineteen years that the inmate telephone system has been in place, the annual payments made to DOCS have grown in large measure due to the State's demand for progressively larger "commissions."

The Present Single Provider/Collect Call-Only System

30. On October 30, 1995, DOCS circulated its Request for Proposals ("RFP") for the provision of telephone service in the State's prison system. The RFP required a minimum commission of 47 percent of the gross revenues and specified that the services provided to

inmates must be station to station collect only telephone services. In its response, MCI offered DOCS a guaranteed commission of 60 percent of gross revenue, together with a significant signing bonus. The State awarded MCI the exclusive services contract.

31. Under its exclusive services contract with DOCS, MCI paid a significant signing bonus to DOCS. This bonus was provided to DOCS over and above the cost of administration and operation of the telephone system which MCI agreed to bear alone.
32. MCI's contract with DOCS sets forth the terms and conditions under which MCI was to be the exclusive provider of telephone service to and from all State correctional facilities in New York for a three-year period. Under the contract, DOCS had the right to renew the contract for two additional one-year periods.
33. Since April 1, 1996, MCI has been the exclusive provider of inmate telephone services at DOCS's facilities. Originally set to expire on March 31, 1999, MCI's exclusive services contract was extended for two additional one-year terms from April 1, 1999 through March 31, 2000, and from April 1, 2000 through March 31, 2001. Upon information and belief, the current contract between MCI and DOCS extends from August 1, 2001 through March 31, 2006, with the option of two one-year renewals.

Prior Proceedings Regarding the Inmate Telephone System

34. In 2000, a lawsuit was filed in the United States District Court for the Southern District of New York on behalf of a class of inmates' family members, loved ones, ministers, counselors, and legal service organizations challenging three aspects of the New York State inmate telephone system: (a) the restriction of calls to collect only; (b) the limitation of statewide inmate telephone service to one provider only; and (c) the 60% commission

taken by the State. Defendants in that case – which because of the Eleventh Amendment bar sought only declaratory and injunctive relief – DOCS and MCI, filed motions to dismiss based in part on the doctrine of primary jurisdiction and the filed rate doctrine, arguing that the case falls within the exclusive jurisdiction of the PSC and FCC, that the Complaint attacked the tariffed rates for inmate telephone calls, and that all of the claims hinge upon a determination of the “reasonableness” of its rates. The plaintiffs contended in response that they are also challenging conduct outside (or incidental to) the tariffed rates passed upon by the PSC and FCC. Specifically, MCI’s tariffs did not discuss it being the single provider of inmate telephone services for all State correctional facilities, thereby barring plaintiffs from using their chosen providers. The PSC and FCC did not approve the single provider/collect call-only system because it was not delineated in the tariffs. Thus, plaintiffs argued, given the extraneousness of at least some of their claims to the regulatory process, the filed rate doctrine is inapplicable as to those claims. The district court in *Byrd v. Goord*, 00 Civ. 2135 (GBD), has not yet ruled on the motions to dismiss.

35. Concomitant with the federal court challenge, a complaint was filed on behalf of the same plaintiffs in the New York Court of Claims alleging nine counts paralleling those delineated in the federal case and anchoring those claims in the New York State Constitution, the New York General Business Law, and the Donnelly Act. The Court of Claims lawsuit, entitled *Bullard v. State*, sought money damages against the State for the imposition of an unlawful tax. The State moved for summary judgment before the Honorable Francis T. Collins on the grounds that the court lacked personal and subject matter jurisdiction. Without reaching any other grounds for the State’s motion, and without addressing the merits of the Claim, Judge Collins dismissed the Claim in its

entirety on jurisdictional grounds. In doing so, the court concluded that because the “[t]he central source of the claimants’ alleged injury is that the rate they are charged is excessive . . .,” plaintiffs claims should have brought an Article 78 proceeding to challenge the underlying determination made by the PSC. A copy of the Court of Claims decision is attached hereto as Exhibit C.

36. The Appellate Division, Third Department, on appeal, affirmed the decision of the Court of Claims. A copy of the Third Department’s decision is attached hereto as Exhibit D.

The PSC Proceedings and the New Bifurcated Charge Structure

37. On March 30, 1996, MCI filed a tariff setting forth the per minute rates and per call surcharges that apply to collect and person-to-person calls made from DOCS facilities. MCI filed those rates as a Special Pricing Arrangement tariff, which was not reviewed or approved by the New York State Public Service Commission, as required by law. Those rates were to be charged to the recipients of inmate-initiated collect calls, who are not parties to the contract between DOCS and MCI.
38. Two years and seven months later, on October 29, 1998, MCI filed another tariff offering that re-introduced its rate plan as a Maximum Security Rate Plan for DOCS, and requested that it be treated as a unique service not subject to standard rate caps. On December 31, 1998, after a review, the PSC approved the rate.
39. On July 18, 2003, MCI filed proposed tariff revisions to its PSC No. 5 Telephone tariff to amend the rate structure for its Maximum Security Rate plan for DOCS telephone services for inmates. The tariff was to have been effective on ten days notice, but on August 6, 2003, the PSC Office of Communications determined that the revision had been filed

without proper notice. MCI filed revised tariff pages setting out the entire rate it charges to and collects from recipients of collect calls from inmates on August 15, with a proposed effective date of September 14, 2003.

40. Family members, friends and other recipients of inmate collect calls and interested parties (including Plaintiffs Austin and OAD, and the Center for Constitutional Rights) filed comments on the August, 2003 proposed tariff amendments in a timely manner. The comments by Plaintiffs and others requested that the PSC hold a hearing on the proposed change, and directed PSC's attention to the negative effect the high rates have on prisoners' families and others who receive prisoner collect calls as well as the constitutional and legal infirmities of the new rates and the old single provider/collect call-only telephone system. A copy of the Center for Constitutional Rights' Petition for Hearing filed with the PSC is attached hereto as Exhibit E.
41. By its October 30, 2003 Order, the PSC bifurcated MCI's rate, into: (a) the "jurisdictional rate" representing 42.5% of the cost charged Plaintiffs by MCI for the collect calls they receive from prisoners; and (b) the DOCS commission portion of the rate representing 57.5% of the cost charged to Plaintiffs which is turned over to the State pursuant to the MCI-DOCS contract. The PSC approved *only* the jurisdictional portion of the rate charged by MCI, finding that rate just and reasonable. It then directed MCI to file tariff amendments within ten days to reflect the bifurcation of the rate into the two categories, the "jurisdictional portion" and the "DOCS commission" portion. *See* Exhibit A at 27.
42. The PSC did not review the reasonableness of the DOCS commission portion of the rate. Rather, it held that the Commission does not have jurisdiction over DOCS because "DOCS

is not a telephone corporation pursuant to the Public Service Law,” and it “is not providing telephone service pursuant to the Public Service Law.” Exhibit A at 23-24. The PSC thus determined that the 57.5% commission payable to DOCS is received by DOCS as a requirement of its contract with MCI, and is not a rate subject to PSC review and approval.

See id.

43. On November 7, 2003, MCI filed tariff amendments consistent with the PSC’s Order, setting out the new, bifurcated rate. Both parts of the bifurcated rate are on file with the PSC as required by PSC’s Order. The new rate, which includes both the approved “jurisdictional portion” and the unapproved “DOCS Commission,” were made effective on November 20, 2003. A copy of MCI’s filed tariff amendment is attached hereto as Exhibit F.
44. The State’s commission from inmate calls generates a substantial profit for both MCI and the State of New York. For example, between April 1, 1996 and March 31, 2001, inmate telephone calls paid for by Plaintiffs and class members provided the State with commissions totaling \$109 million. Between September 2001 and August 2002, inmate calls generated more than \$39 million dollars in gross revenues. The State received 57.5% of that revenue, or \$22,425,000.
45. The 57.5 % commission paid by Plaintiffs and tendered by MCI to the State is deposited into the State’s general fund. The vast majority of these monies are spent on services that the State is required by law to provide for prisoners, such as medical care and staff training.
See Exhibit B.
46. While the 57.5% commission exists as an unapproved charge, over which the PSC has

determined it has no jurisdiction, it is an unlegislated tax, imposed upon the family members, friends, and counsel of prisoners and other recipients of prison calls.

47. The State legislature has not adopted an enactment delegating taxing authority to DOCS, nor has it provided the Department with specific authority to levy taxes upon inmates' families, friends, and counsel through the inmate telephone system as a means of raising revenue to cover costs of any sort.

The "Costs" of the Single Provider/Collect Call-Only System

48. Under the exclusive services contract, inmates confined to DOCS facilities may use the telephone under severe restrictions. An inmate may not receive telephone calls. He or she may make collect telephone calls to an individual listed on pre-approved calling list through the sole service provider, MCI. An inmate may not use other providers (such as the telephone call recipient's chosen provider) nor alternative billing methods (such as "800" or "888" services). Consequently, those who receive telephone calls from DOCS inmates incur excessive charges from MCI, a company with which they never contracted.
49. The high costs of calls made under this system places a significant financial burden on those receiving calls. This, in turn, results in fewer calls made, thereby curtailing the access of family members, ministers, counsel and others in the outside community to inmates.
50. The high rates charged under the sole service provider/collect call system also directly undermines the widely acknowledged goal of maintaining family and community ties that so greatly increase the probability of successful re-entry upon release. For this reason, the American Correctional Association, the organization of prison and jail administrators

Tariffs, which provides that:

WHEREAS, correctional professionals have a fundamental responsibility to encourage and support activities which foster the maintenance of family and community ties between offenders and the free world;

THEREFORE BE IT RESOLVED, that correctional agencies should discourage profiteering on tariffs placed on phone calls which are far in excess of the actual cost of the call, and which could discourage or hinder family or community contacts.

51. Despite the fact that Plaintiffs and class members have contracts with their own telephone companies, they are compelled to pay MCI for the collect calls they receive from inmates confined in State correctional facilities. They cannot take advantage of the numerous options available to them under the contracts they have negotiated with their chosen providers.

Examples of Specific Hardships Suffered by Plaintiffs

52. The high rates charged by MCI limit Ms. Walton's ability to communicate with her son and nephew. Ms. Walton is only able to visit her son and nephew at most once a month. This is due to their incarceration at the Clinton facility in Dannemora, over 350 miles from New York City and the fact that Ms. Walton is a physically disabled, senior citizen living on a fixed income. Ms. Walton is sixty-nine years old and was in an automobile accident that left her permanently disabled. Along with other injuries, she lost one eye and broke her kneecap. She now relies upon a walker to get around.
53. Ms. Walton and her son are not able to speak on the phone as much as they would like. When her son first went away, they made a pact that he would not call her too frequently, because they both understood that Ms. Walton would not be able to afford his calls and they did not want to risk disconnection of her telephone service. They would to talk to each

other every day if they could, but Ms. Walton's son understands that she cannot afford that, and so he saves up his calls so that he can get in touch with her when there is an emergency. He understands that if he calls just because he wants to talk to her, he may not be able to call sometime later that month when he really needs to. Some months he calls several times, and other months he does not call at all in order to save her money. The months that he does call, Ms. Walton loves speaking with him, but she has trouble paying the telephone bill for that month.

54. Ms. Walton also speaks with her nephew, the son of her husband's sister, on the telephone. Although Ms. Walton's son has explained his mother's financial situation to her nephew, Ms. Walton's nephew is not as good at refraining from calling and her son always has to remind him that she cannot afford the calls. Because Ms. Walton's nephew's parents have passed away and he is not close with any of his siblings, Ms. Walton is the only family he has contact with. Along with her family members living with her, she often accepts his calls because he does not have anyone else to talk with.
55. The high cost of telephone calls resulting from the State's imposition of the commission charges has made it extremely difficult for Ms. Walton to maintain her connection with her son and nephew. In November, for example, Ms. Walton accepted seven collect calls from Clinton, several from her son and several from her nephew. These seven calls, lasting a total of 66 minutes, cost \$54.30.
56. Plaintiff Ramona Austin's husband has been incarcerated at Sullivan Correctional Center for the entire duration of their marriage. Ms. Austin and her husband write letters to each other frequently, and she visits when she can, traveling from her home, 146 miles away, in

East Northport, Long Island to the Sullivan facility in Fallsburg, New York. However, the telephone is their primary source of communication, and they speak frequently. Ms. Austin has to balance her need to speak with her husband frequently, which she feels is required to maintain their marriage, with the financial burden posed by the costs of his collect calls. For this reason, the length of time that she speaks with her husband each month varies according to how much she can afford to pay.

57. Because she has not been able to afford her monthly telephone bills in the past year, Ms. Austin has had to start speaking to with her husband less frequently. Her latest telephone bill was approximately \$500. Paying the high rates for calls from her husband is a real hardship for Ms. Austin. The burden of paying between \$200 to \$600 per month for these bills has caused her to alter her lifestyle and accrue substantial debt. However, to Ms. Austin the hardest part of the inmate telephone system is not being able to communicate with her husband as much as they both need.
58. Because of the high cost of inmate telephone calls and her financial circumstances, Plaintiff Joann Harris cannot afford to speak to her cousin and her friend even twice a month. Ms. Harris in currently enrolled in college in order to complete her master's degree and is required to pay tuition and repay the student loans she received for her undergraduate education. She therefore does not have the time and resources necessary to visit her cousin, who is incarcerated more than seven hours from her home in New York City. As a result, she relies on the telephone as the primary means of communication with both her cousin and her friend. However, Ms. Harris has little money available to pay the costs of these collect calls. Last year, a block was placed on Ms. Harris's telephone because she was

unable to pay the full amount due MCI for inmate collect calls for four months. Ms. Harris is currently working out an extended payment plan with MCI because she cannot pay her current telephone bill.

59. Because Plaintiff OAD's attorneys choose to continue to accept their clients' calls and pay MCI, they must do so at the expense of other work that they would otherwise be able to do on behalf of clients. Further, to the extent that OAD has a very limited budget and is funded by the City of New York, the commissions charged by DOCS limit the work that OAD has the capacity to handle for the City.
60. In addition to the curtailment of other work, DOCS-MCI contract has also caused OAD difficulties in its efforts to maintain consistent telephone communication with clients. Administrative errors on the part of MCI have caused OAD to have its calls blocked for varying lengths of time. Although OAD has always made all of its required payments in a timely fashion, MCI has nevertheless blocked all of OAD's State-incarcerated clients' collect calls to the office. In virtually all of these instances, OAD only learned of the block after receiving correspondence from clients indicating that they had not been able to reach OAD for a number of days. Moreover, even after OAD notified MCI of its error, it generally took the company several days to remove the block and restore service to the office. As a result, during these periods OAD was wholly unavailable to those clients whose situation warranted emergency contact with the organization. In some instances, the unavailability of telephone communication caused clients' appeals to be unnecessarily delayed.
61. Plaintiff NYSDA assists inmates in gaining constitutionally protected access to the courts,

consults with *pro se* inmates involved in legal proceedings, assists inmates in communicating with their attorneys, and refers inmates to appropriate legal and/or other organizations in order to meet their legal and rehabilitative needs.

62. For the 63 months between 11/10/98 and 1/10/04, a little more than five years, NYSDA spent \$32,088.74 on inmate collect phone calls. MCI's charges accounted for 42% of this amount, or \$13,295.96. In the year 2000, the cost of MCI phone calls reached an annual amount of \$5,071.88 with a monthly average of \$422.66 per month.
63. In October of 2000, NYSDA was forced to establish a new procedure for handling inmate calls due to its need to reduce its monthly telephone bills. Under the new policy, NYSDA only accepts calls from a list of known inmates, and thus must deprive clients and potential clients of their ability to speak directly with attorneys at the office. Those calls that NYSDA does take continue to be billed at an exorbitant rate.

Alternative Systems Meet Security Concerns

64. The injuries specified above and those suffered by other Plaintiffs and class members cannot be excused as merely the regrettable by-products of a system that must address valid security concerns. Any security concerns that DOCS might have can be equally served at no greater cost to the governmental authorities by far less onerous telephone systems. The network functions which allow for call monitoring, call blocking and other security measures are separate from those needed to deliver the telephone services. Those network functions can be effectuated no matter what type of telephone services are used. For example, DOCS could block, monitor and record calls with a fully automated debit account system, which would allow inmates to place calls to persons on pre-approved lists using

personal identification numbers. The charges would then be debited to inmates' commissary accounts. The inmates incur the direct dial charges.

65. In fact, the Federal Bureau of Prisons as well as the correctional departments in Arizona and Florida use debit account systems. Furthermore, New York City uses a debit account system, combined with a system in which inmates may also make collect calls via the bill payers' chosen telephone service provider.

66. In short, a number of alternative systems are available. But absent relief from the Court, the State will not change course. The single provider/collect call-only system is too seductively lucrative. Profits, not security concerns, dictate the system imposed on the family, counsel and other bill payer Plaintiffs and the class.

CLASS ACTION ALLEGATIONS

67. Plaintiffs bring this action on behalf of themselves and all others similarly situated, under Section 901 of the New York Civil Practice Laws and Rules, as representatives of the following class:

Bill payers who from April 1, 1996 to the present have been billed for collect calls from inmates confined in DOCS facilities.

68. The members of this class are too numerous to be joined in one action. While the exact number of members in the class is presently unknown to Plaintiffs, it is believed to be in the thousands. Joinder of all class members is therefore impracticable.

69. Common questions of law and fact exist as to all class members and predominate over any questions that affect only the individual members. Those common questions include, but are not limited to:

- (a) Whether the fees imposed by the State on Plaintiffs and class members constitute illegal regulatory fees, and if so, whether the costs were intended to subsidize governmental functions and maximize profits;
- (b) Whether any enactment by the New York State Legislature has singled out Plaintiffs and class members as directly responsible for the burden of subsidizing the DOCS system;
- (c) Whether the fees imposed by the State on Plaintiffs and class members are unlegislated and therefore unauthorized taxes;
- (d) Whether the State's economic motive, in contrast to any valid security or penalogical concerns, account for the establishment of the single provider/collect call-only system in DOCS's facilities;
- (e) Whether the State used the governmental power of imprisonment to exploit economically Plaintiffs and class members and to infringe upon their constitutional rights;
- (f) Whether alternative telephone services exist that adequately address the State's purported security and penalogical concerns regarding telephone use by inmates with minimal or no additional cost to DOCS;
- (g) Whether the DOCS commission deprives Plaintiffs and class members of rights guaranteed to them by the Constitution of the State of New York;
- (h) Whether Plaintiffs and class members are entitled to damages from the State and /or MCI for the constitutional, statutory and/or common law violations they have suffered as a result of the new rates under the single provider/collect call-only system.

- 70. The claims or defenses of the representative Plaintiffs are typical of those of the class.
- 71. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the class representatives are consistent with those of the class members. In addition, Plaintiffs' counsel are experienced in class actions and civil rights litigation.
- 72. Plaintiffs' counsel know of no conflicts among class members or between the attorneys and class members.

73. Use of the class action mechanism here is superior to other available methods for the fair and efficient adjudication of the claims and will prevent the imposition of undue financial, administrative and procedural burdens on the parties and Court that individual litigation of these claims would impose.

COUNT I

ENFORCEMENT OF THE PSC'S ORDER

74. Plaintiffs repeat and reallege paragraphs 1 through 73 above as if fully set forth herein.
75. The commission collected by MCI and retained by DOCS was not approved by the PSC, and for this reason, it is not and has never been a valid telephone rate under the Public Service Law. MCI, as a telephone corporation under the jurisdiction of the PSC, cannot charge Plaintiffs or class members any rate that is not approved by that Commission. DOCS is not a telephone corporation, and for that reason, it may not charge Plaintiffs and class members any telephone rate at all. *See Exhibit A.*
76. Plaintiffs and class members seek a declaration stating that MCI's and DOCS's past, present, and future collection and retention of this charge is unlawful, an order restraining Defendants DOCS and MCI from imposing any charges and collecting any fees for inmate telephone calls above MCI's jurisdictional rate filed with and approved by the PSC in its October 30, 2003 Order, and a refund of all unlawful charges collected, with interest, from 1996 to the present.

COUNT II

VIOLATION OF THE POWER TO TAX

77. Plaintiffs repeat and reallege paragraphs 1 through 76 above as if fully set forth herein.
78. The power to tax and to determine what transactions are taxable is vested in the State Legislature, pursuant to Article III § 1 and Article XVI § 1 of the State Constitution.
79. The revenues collected by the State as a result of payments made by Plaintiffs pursuant to the unapproved DOCS Commission, as filed with the PSC on November 20, 2003, under the single provider/collect call-only system, constitute an improper tax or regulatory fee on Plaintiffs that has not been approved by the State Legislature.
80. By imposing, without legislative approval, what amounts to a tax or fee on Plaintiffs through the use of the single provider/collect call-only system, DOCS has unlawfully usurped the power resting within the legislative branch of government, in violation of the State Constitution.
81. The law in New York is clear that 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.
82. The New York State Legislature has not adopted an enactment which delegates taxing authority to DOCS; nor has it provided the Department with specific authority to levy taxes upon inmates' families through the inmate telephone service as a means of raising revenue to cover costs of any sort.
83. The State's taxing activities have therefore been exercised without any legislative authority in violation of Article XVI of the State Constitution.

84. The laws of this State provide that any law which classifies the subjects of fees or taxes must treat all persons in the same situation alike, and that taxes be imposed equally upon all persons in the same class. The singling out of Plaintiffs to pay a tax or fee, pursuant to their use of the telephone to speak with inmates incarcerated in the DOCS, violates the State Constitution, including Article I § 11 and Article III.
85. The State's singling out of Plaintiffs to pay a tax or fee, pursuant to their use of the telephone to speak with inmates incarcerated in the DOCS also violates the well-established principle of substantive due process. While money raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, assessments for public improvements laid upon specific individuals are constitutional only if based on benefits received by them.
86. The State population as a whole benefits from the general operation of the correctional system, however Plaintiffs and class members receive no special benefit from the multimillions of dollars they unwillingly pay as a tax or regulatory fee to the State, which is remitted by MCI.
87. The Department's revenue sharing 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 Defendant DOCS.
88. Plaintiffs are subject to a tax or regulatory fee that bears no relation to the actual administrative and enforcement costs incurred in facilitating inmate telephone service.
89. Plaintiffs and class members seek a declaration stating that MCI's and DOCS's past, present, and future collection and retention of this charge is an unconstitutional tax, an

order restraining Defendants DOCS and MCI from imposing any charges and collecting any fees for inmate telephone calls above MCI's jurisdictional rate filed with and approved by the PSC in its October 30, 2003 Order, and a refund of all unlawful charges collected, with interest, from 1996 to the present.

COUNT III

VIOLATION OF DUE PROCESS RIGHTS

90. Plaintiffs repeat and reallege paragraphs 1 through 90 above as if fully set forth herein.
91. Plaintiffs bring this claim against the State for violation of the rights guaranteed to them under the State Constitution, Article I §§ 6 and 8.
92. The single provider/collect call-only system unlawfully burdens Plaintiffs' due process rights by imposing regulatory fees for telephone services and prohibiting less costly alternatives for inmate calls. The State's operation of this system constitutes a confiscation of Plaintiffs' property in violation of the Due Process Clause of the State Constitution, Article I § 6.
93. The State has acted with deliberate indifference to the due process rights of Plaintiffs. As a direct, proximate result of the State's acts and omissions, Plaintiffs' due process rights have been violated. By those same acts and omissions, the State under color of State law has deprived Plaintiffs of their due process rights pursuant to the constitutional tort laws of this State.
94. Plaintiffs and class members seek a declaration stating that MCI's and DOCS's past, present, and future collection and retention of this charge is unconstitutional, an order restraining Defendants DOCS and MCI from imposing any charges and collecting any fees

for inmate telephone calls above MCI's jurisdictional rate filed with and approved by the PSC in its October 30, 2003 Order, and a refund of all unlawful charges collected, with interest, from 1996 to the present.

COUNT IV

VIOLATION OF THE RIGHT TO EQUAL PROTECTION

95. Plaintiffs repeat and reallege paragraphs 1 through 94 above as if fully set forth herein.
96. Plaintiffs bring this claim for violation of the right to equal protection of the law guaranteed to them under the State Constitution, Article I § 11.
97. The State has implemented and enforced actions, policies, and practices that result in the creation of a tax that is imposed solely upon Plaintiffs as the family members, loved ones, and counsel of people incarcerated in State facilities. This tax is not imposed upon any other State residents or taxpayers. As a result, the State's actions, policies, and practices violate the Equal Protection Clause of the State Constitution.
98. The State has created a dual taxation system which unlawfully burdens Plaintiffs' right to equal protection.
99. By reason of the foregoing, the State has abridged Plaintiffs' right to equal protection in violation of the Constitution of the State of New York, Article I § 11.
100. The State has acted with deliberate indifference to the right to equal protection of Plaintiffs. As a direct, proximate result of the State's acts and omissions, the State has violated Plaintiffs' constitutional rights. By those same acts and omissions, the State has acted under color of State law to deprive Plaintiffs of their constitutional rights pursuant to the constitutional tort laws of this State.

101. Plaintiffs and class members seek a declaration stating that MCI's and DOCS's past, present, and future collection and retention of this charge is unconstitutional, an order restraining Defendants DOCS and MCI from imposing any charges and collecting any fees for inmate telephone calls above MCI's jurisdictional rate filed with and approved by the PSC in its October 30, 2003 Order, and a refund of all unlawful charges collected, with interest, from 1996 to the present.

COUNT V

VIOLATION OF FREE SPEECH AND ASSOCIATION RIGHTS

102. Plaintiffs repeat and reallege paragraphs 1 through 101 as if fully set forth herein.
103. Plaintiffs bring this claim for violation of the rights to freedom of speech and association guaranteed to them under Article I § 8 of the State Constitution.
104. There exist alternative telephone systems that will burden substantially less speech than the present single provider/collect call-only system and will equally serve the State's legitimate governmental interests at little or no additional cost and negligible additional impact on the allocation of prison resources generally.
105. To the extent that MCI's rates for inmate telephone service are higher than they would otherwise have been but for the commission charged by DOCS, Plaintiffs are subject to a regulatory fee that bears no relation to the actual administrative and enforcement costs incurred in facilitating inmate telephone service.
106. By requiring that the State receive significant revenues from the single provider/collect call-only system, the State has singled out Plaintiffs for imposition of special fees. The State Legislature has not authorized that treatment, which has a seriously chilling effect on

communication by Plaintiffs with DOCS's inmates.

107. The State has created the single provider/collect call-only system at DOCS's facilities, which unlawfully burdens the free speech rights of Plaintiffs. In addition, the State has devised and implemented the actions, policies and practices that require use of the single provider/collect call-only system, which unlawfully burdens the free speech rights of Plaintiffs.

108. These constitutional violations have been directly and proximately caused by the State actions, policies, and practices, including:

- (a) the creation of the single provider/collect call-only system for inmate telephone service at all DOCS facilities, thereby eliminating all competition for such services;
- (b) the imposition of special regulatory fees on the free speech rights of Plaintiffs and class members;
- (c) the imposition of unlegislated taxes upon Plaintiffs and class members;
- (d) the prevention of Plaintiffs and class members from using their chosen telephone service providers to receive inmate-initiated calls at lower costs;
- (e) the prevention of Plaintiffs and class members from using alternative calling plans (such as, "800" or "888" services) to receive inmate-initiated calls at lower costs; and
- (f) the provision of inadequate telephone services to Plaintiffs and class members.

109. By reason of the foregoing, the State has abridged Plaintiffs' freedom of speech and association in violation of Article I § 8 of the State Constitution.

110. The State has acted with deliberate indifference to Plaintiffs' free speech and association rights. As a direct, proximate result of the State's acts and omissions, Plaintiffs' constitutional rights have been violated. By those same acts and omissions, the State has deprived Plaintiffs of their constitutional rights in violation of the laws of this State

pursuant to the constitutional tort laws.

111. Plaintiffs and class members seek a declaration stating that MCI's and DOCS's past, present, and future collection and retention of this charge is unconstitutional, an order restraining Defendants DOCS and MCI from imposing any charges and collecting any fees for inmate telephone calls above MCI's jurisdictional rate filed with and approved by the PSC in its October 30, 2003 Order, and a refund of all unlawful charges collected, with interest, from 1996 to the present.

COUNT VI

GENERAL BUSINESS LAW SECTION 349 CLAIM

112. Plaintiffs repeat and reallege paragraphs 1 through 111 above as if fully set forth herein.
113. Plaintiffs are consumers who utilize the telephone services imposed upon them by the State pursuant to the single provider/collect call-only system.
114. The alleged conduct of the State in its business, commerce or the furnishing of services within and without the State, with respect to the single provider/collect call-only system, constitutes deceptive acts or practices.
115. The State's materially misleading and/or deceptive acts or practices concerning the single provider/collect call-only system include:
 - (a) failing to disclose to the public and class members that it was receiving "commissions" amounting to nearly 60 percent of the revenue generated from inmate initiated telephone calls during the time period from April 1, 1996 through October 30, 2003;
 - (b) representing falsely that the single provider/collect call-only system was necessary to meet security and penalogical concerns; and

(c) profiting from the commissions imposed on Plaintiffs and class members.

116. Plaintiffs have been injured by the State's deceptive acts or practices.

117. Plaintiffs and class members seek a declaration stating that MCI's and DOCS's past, present, and future collection and retention of this charge is unlawful, an order restraining Defendants DOCS and MCI from imposing any charges and collecting any fees for inmate telephone calls above MCI's jurisdictional rate filed with and approved by the PSC in its October 30, 2003 Order, and a refund of all unlawful charges collected, with interest, from 1996 to the present.

COUNT VII

ACCOUNTING CLAIM

118. Plaintiffs repeat and reallege paragraphs 1 through 117 above as if fully set forth herein.

119. Notwithstanding the State's rehabilitative responsibility for ensuring that inmates incarcerated in DOCS's facilities are able to maintain contact with their families, ministers, counsel, and others in the community, the State has:

(a) implemented the single provider/collect call-only system for inmate telephone use at DOCS facilities, thereby eliminating competition for such services;

(b) imposed the special and unauthorized regulatory fees as part of single provider/collect call-only system;

(c) imposed unlegislated taxes upon Plaintiffs;

(d) prevented Plaintiffs from using their chosen telephone service provider to receive inmate-initiated calls;

(e) prevented Plaintiffs from using alternative calling plans (such as, "800" or "888"

services); and

(f) provided inadequate telephone services to Plaintiffs inhibiting the exercise of their rights under the State Constitution, Article I §§ 6 and 8.

120. The State's actions, policies and practices have directly and proximately violated Plaintiffs' legal rights. The single provider/collect call-only system seriously impedes Plaintiffs' ability to communicate with DOCS inmates, and also determines the terms under which that communication occurs. Thus, along with past violations, a real and immediate threat exists that the State will violate all Plaintiffs' legal rights in the future. Further, because the State's single provider/collect call-only system determines the mode of inmate telephone communication -- and all communication in some instances -- Plaintiffs cannot alter their behavior to avoid future injuries at the hands of the State.

121. Plaintiffs will suffer serious, irreparable harm to their rights in the future unless the State provides an accounting to assess the true costs of the single provider/collect call-only system and the uses of the generated revenue. This information is necessary to determine, among other things, whether the State's alleged security concerns have any relationship to the costs of the system, and whether the State has been using the revenues to subsidize governmental functions that they are mandated by law to provide.


122. Plaintiffs are therefore entitled to an accounting of the revenues generated under the exclusive services contract, of the payments made to the State, and of the uses to which the received money has been put.

WHEREFORE, Plaintiffs respectfully request that the Court:

123. Certify this case as a class action;

124. Issue an order declaring that Defendant DOCS's actions, practices, customs, and policies, and those of all persons acting on their behalf and/or their agents and/or employees, are illegal and violate the constitutional and statutory rights of Plaintiffs and class members as to each applicable count;
125. Order the Defendants to immediately cease collecting the unapproved DOCS commission portion of the rate from Plaintiffs and class members;
126. Order Defendant DOCS to provide damages to the Plaintiffs for all losses they have incurred;
127. Order an accounting by the State of all monies received during the same period from the telephone company pursuant to the single provider/ collect call-only system, and further order an accounting of all uses to which the State put the monies received during the same period;
128. Award Plaintiffs attorneys' fees, costs and expenses; and
129. Provide for such other relief as is just and proper.

Dated: New York, New York
February 25, 2004



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

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Joann Harris, being duly sworn, deposes and says that deponent is a Petitioner-Plaintiff in the within action; that deponent has read the foregoing Petition-Complaint and knows its contents; that the same is true to deponent's own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matter deponent believes them to be true.



Petitioner-Plaintiff

Sworn to me before this
25th day of February, 2004



Notary Public, State of New York

BARBARA J. OLSHANSKY
Notary Public, State of New York
No. 02OL5063740
Qualified in New York County
Commission Expires July 29, 2006