STATE OF INDIANA	)	IN THE MARION CIRCUIT COURT
SS:	)	CAUSE NO. 49C01-0006-CT-1217
COUNTY OF MARION	)	
	)	
Chanelle Linet Alexander,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
The Marion County Sheriff;	)	
The Indiana Department	)	
Of Administration; and,	)	
The State of Indiana,	)	
	)	
Defendants	)	

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Summary judgment should be granted to the Plaintiff classes rather than to the State or Sheriff. The facts are not in dispute and the law supports the Plaintiffs on their common law and statutory claims that the State and the Sheriff had no authority during the relevant time to receive bonuses and commissions on prisoner telephone calls.

Statement of the Issue

The Indiana Court of Appeals remanded this case with the explicit direction to this Court to resolve the following issue:

> In reliance upon Foltz, it is apparent that the trial court may--and should--exercise its jurisdiction in this matter with respect to the common law claims that the Class has asserted, with the understanding that the threshold issue of whether the Sheriff is entitled to reap a benefit from the contracts at issue must be decided at the outset. Only then might the IURC invoke jurisdiction and determine the reasonableness of the rates that this "captive audience" is charged for telephone service.

> Thus, we are compelled to remand this case to the trial court so that the parties may litigate the issue of whether the Sheriff and the State are permitted to enter into the contracts with Ameritech and AT&T. In the event that it is determined that there is no authority for the Sheriff or the State to reap a margin under the arrangement here, then the trial court must fashion a remedy for the Class. On the other hand, if the trial court determines that such a practice is permissible, it can then determine the reasonableness of the rates and to what extent the profit or margin generated is permissible, or it may refer the matter to the IURC in accordance with Austin Lakes for such a determination.

Anderson v. Cottey, 801 N.E.2d 651, 661 (Ind. Ct. App. 2004).

Based upon the undisputed facts, this Court should conclude that the Sheriff and the State did not have the authority to reap the benefits they exacted in these contracts, and the remedy should be the return of the money paid by class members.

Statement of Undisputed Facts

The following facts are undisputed:

1. The State of Indiana and the Marion County Sheriff have included in their contracts with various telephone companies provisions which grant the telephone companies exclusive access to the prisoner telephone call markets under the respective control of the State or the Sheriff, in exchange for substantial signing bonuses and considerable percentages of the gross telephone billing revenues of the telephone companies. See Contracts attached as exhibits to Plaintiffs' Third Amended Complaint.

2. Specifically, the State's contract with AT&T Communications provides that only AT&T is allowed to provide collect telephone call services originated by persons incarcerated in the State's correctional facilities. This contract is attached as Exhibit A to Plaintiff's Third Amended Complaint. Under this contract, AT&T is required to pay the State fifty-three percent (53%) of each call billed.

3. Additionally, under the State's contract with AT&T, "all costs and expenses … [are] borne by Contractor." *Id*., at p. 9

4. Similarly, the Sheriff's contract with Ameritech provides that only Ameritech is allowed to provide collect telephone call services originated by persons incarcerated in the Sheriff's correctional facilities. This contract is attached as Exhibit B to the Plaintiffs' Third Amended Complaint. Under this contract, Ameritech is required to pay a commission to the Sheriff of Two Hundred and Sixty Two Thousand Dollars ($262,000) annually and forty percent (40%) of Ameritech's "gross income" derived from each collect call.

5. The Sheriff's contract with Ameritech provided that the telephone company "shall install, operate, and maintain inmate telephones at no charge to the agent [sheriff]." Third Amended Complaint, Ex. B, at p. 2, ¶ IV.

6. With minor modifications, the practice of signing bonuses and substantial commission percentages have been continued in the subsequent contracts entered into between the State and Sheriff with other telephone companies. *See* Plaintiffs' Third Amended Complaint and exhibits thereto.

7. Since deregulation of the telecommunications industry in the mid-1990s, telephone companies have had to file their rates with various regulatory agencies, but those rates are not normally reviewed or subject to regulation, with the effect being that the telephone companies' filing become the effective rates. Sweet Aff. ¶ 44; Defendants' Admission, Oral Argument Tr. at 32-33.

8. The reasonably foreseeable result of the combination of telecommunication deregulation and substantial commissions paid to prison authorities "in the prison

telephone sector has been a sharp increase in price, as new market entrants compete for monopoly service contracts on the basis of steadily escalating commissions paid to state and private prison authorities, costs which are then passed on to the (literally) captive market through exorbitant end-user rates." Jackson Declaration, (quote from attached: Steven J. Jackson, "*Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry,*" Critical Studies in Media Communication, Vol. 22, No. 4, October 2005, pp. 263-280) (hereafter "Ex-Communication.") at 263; Sweet Aff. ¶ 14; Guess Aff. ¶ 5; Defendants' Admission from Oral Argument Tr. at 13-14 ("the counties and the State have attempted to recruit (sic, s/b "recoup") several of the enormous costs of maintaining prisons by entering into these contracts with the telephone companies that in turn pass on the costs for telephone calls to prisoners and their families.").

9. The Federal Communications Commission concluded in 2002 that "In fact, under most contracts, the commission is the single largest component affecting rates for inmate calling services." *In the Matter of Implementation of the Pay Telephone, Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, "Order on Remand on Remand and Notice of Proposed Rulemaking," at ¶ 6, Federal Communications Commission, FCC 02-39, CC Docket No. 96-128, (Feb. 21, 2002); Sweet Aff. ¶ 51 b.

10. The effect of these exorbitant charges has been a reduction in the contact between inmates and family members. Jackson Declaration, "*Ex- Communication"* at 272 ("the ultimate effect of profit-sharing and what amount to price-gouging arrangements in the prison phone sector has been a long-term trend towards ex-communication, by making contact between inmates and family members on the outside more costly and therefore

more difficult to maintain. This goes directly against the findings of several decades of recidivism and community impact studies, some of which were used to justify the introduction of prison calling in the first place.").

11. It is because of the importance of telephone communication between prisoners and those on the outside that the ABA adopted the following resolution:

> RESOLVED, That the American Bar Association encourages federal, state, territorial and local governments, consistent with sound correctional management, law enforcement and national security principles, to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

ABA Recommendation As Adopted by the House of Delegates (August 8-9, 2005) (Pl's SJ Ex. 14).

12. The ABA's report supporting this resolution recognized:

> Telecommunications services are integral to human interaction in today's society. Accessing these services is especially important to people who are incarcerated, separated from family, friends and legal counsel by the fact of incarceration. Telephone access is particularly important for the significant percentage of the incarcerated population with limited literacy skills.[1]
>
> Leaders in the corrections profession have long recognized the importance of extending telephone privileges to people in their custody as a means of fostering and strengthening ties with their families and their communities.[2]

---

1 Approximately 40% of the national prison population is functionally illiterate. The Center on Crime, Communities & Culture, *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief: Occasional Paper Series 2 (Sept. 1997).

2 *See, e.g.*, the October 1996 Resolution on Excessive Phone Tarriffs adopted by the American Correctional Association (ACA); ACA's Public Correctional Policy on Inmate/Juvenile Offender Access to Telephone (adopted 24 January 2001); and ACA's related standards (*Standards for Adult Correctional Institutions (3rd ed.); Standards for Adult Local Detention Facilities (3rd ed.); Standards for Adult Community Residential Facilities (4th ed.); Standards for Adult Correctional Boot Camp Programs (1st ed.);*

> Telephone access can be a critical component of a prisoner's successful transition to a productive, law-abiding life after leaving prison.[3] It can also contribute to safer prisons by reducing the number of disciplinary incidents.[4]

Id. at 3.

13. Indeed, in Indiana, the costs to receive prisoner telephone calls has increased dramatically since the mid-1990s, with the effect being that many inmates have less or no contact with their loved ones on the outside. Sweet Affidavit, ¶ 16 ("Due to the high cost of prison phone calls, families are often unable to accept calls. This means that children are often unable to maintain contact with a parent who is incarcerated. This means that parents and grandparents are often unable to maintain contact with children and grandchildren who are incarcerated."); *Id*., at 25 ("The effect of this great increase in the

---

Standards for Juvenile Community Residential Facilities (3rd ed.); Standards for Juvenile Detention Facilities (3rd ed.); Standards for Juvenile Correctional Boot Camp Programs (1st ed.); Standards for Juvenile Training Schools (3rd ed.); Standards for Small Juvenile Detention Facilities (1st ed.); and Small Jail Facilities (1st ed.)). See also, the National Sheriffs' Association Resolution of 14 June 1995; and USDOJ-BOP, Program Statement 5264.06, *Telephone Regulations for Inmates* (Jan. 31, 2002).

3 *See, e.g.*, U.S. Department of Justice, Office of the Inspector General, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, Ch. II, n.6 (Aug. 1999), *available at* http://www.usdoj.gov/oig/special/9908/callsp2.htm (last accessed 30 January 2005)("telephone usage and other contacts with family contribute to inmate morale, better staff-inmate interactions, and more connection to the community, which in turn has made them less likely to return to prison….") and State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p. 5 (2004).

4 Bureau of Prisons Program Statement 5264.07, "Telephone Regulations for Inmates," codified at 28 C.F.R § 540.100 ("Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development. . . . Contact with the public is a valuable tool in the overall correctional process."); State of Louisiana Department of Public Safety and Corrections, *Time in Prison: The Adult Institutions*, p. 5 (2004), *available at* http://www.corrections.state.la.us/Whats%20NEw/PDFs/TimeInPrison.pdf.

exorbitant charges has been a reduction in the contract [sic, s/b "contact] between inmates and family members since it makes contact both more costly and thus more difficult to maintain."); Guess Aff. ¶ 5 ("The costs of these calls increased significantly in the mid-1990s…. Since the cost of these calls have increased, I have had to reduce and limit contact with my brother, which has had a negative effect on him and me.").

14. For those who maintain contact with their loved ones on the inside, the effect of the high costs of these telephone calls has been devastating. For example, class member Selena Kingsley "had to choose between keeping contact with my husband and other necessities of life." Kingsley Aff. ¶ 5. She chose to accept the collect calls, and paid approximately $5,000 in collect telephone charges communicating with her imprisoned husband between 1995 and 1999. *Id*., at ¶ 6. She had to do such things as sell her wedding ring and incur high interest short term debt to simply get by. *Id*., at ¶ 5. Still, the costs of these calls were too high, and she still owes an additional $3,000 for such calls which she has not been able to pay, and which has wrecked her credit rating. *Id*., at ¶ ¶ 6 and 9. She had to stop accepting such calls in late 1998, because she could no longer afford to pay them. *Id*., at ¶ 7. Kingsley attributes the lack of communication due to her limited ability to accept and pay for these calls as a "major factor" in the breakup of her marriage. *Id*., at 8.

15. Similarly, class member Geneva Guess is the only relative on whom her incarcerated brother can depend; but she has had to limit contact with him because of the high cost of the telephone charges. She lives four hours from the facility in which her brother is incarcerated, too far to regularly travel. She has tried to keep in contact with him with telephone calls; but in order to be able to afford to do so, she has had to work

two jobs and forgo paying other bills. The telephone charges have caused significant hardship to her brother and her. Guess Aff. ¶ ¶ 5, 8, 9, 10.

16. Telephone calls are often the only way for prisoners to communicate with their loved ones on the outside. Many prisons are located far from population centers, and people do not have the means to travel with any kind of frequency for in person visits. Many prisoners and many of their loved ones are illiterate, thus making written communication impracticable. Sweet Aff. ¶ ¶ 18, 19.

17. Many of the class members are poor and unable to afford the high cost of these calls. Sweet Aff. ¶ 19; Kingsley Aff. ¶ 9; Guess Aff. ¶ ¶ 8, 9, 10.

18. The high costs of prison telephone calls also make it very difficult for prisoners to keep in contact with their lawyers. Sweet Aff. ¶ 17.

19. The preservation and strengthening of families is an historically important public policy, and one important way to keep families with incarcerated members strong is to keep family members connected throughout the period of incarceration. Hairston Aff. ¶ 17.

20. Family contact serves to prevent recidivism and delinquency. Dean Hairston's review of research on prisoners' family relationships has yielded two consistent findings. First, male prisoners who maintain strong family ties during imprisonment have higher rates of post release success than those who do not. Second, men who assume responsible husband and parenting roles upon release have higher rates of success than those who do not. Hairston Aff. ¶ 19.

21. Communication between people in prison and their children is important not only for the people in prison, but for their children as well. Hairston Aff. ¶ 22.

22. Correctional policies that promote the maintenance of familial bonds and responsible parenting serve the best interests of people in prison, their families, and society at large. Hairston Aff. ¶ 24.

23. Communication between prisoners and their families is an essential strategy that families and prisoners use to manage separation and maintain connections. Hairston Aff. ¶ 25.

24. Telephone calls are an important way for prisoners and their families to maintain contact, given that other methods are difficult if not impossible altogether. Hairston Aff. ¶ 37.

25. Indeed, telephone communication is vital to maintaining family bonds, particularly between parents and children. Hairston Aff. ¶ 50.

26. The Plaintiffs filed this action on June 16, 2000.

27. The Plaintiffs served the Defendants with Notice pursuant to the Indiana Tort Claims Act. SJ Exs 6 (Marion County Sheriff) and 7 (State of Indiana).

28. The two year statute of limitations prior to the complaint filing date brings the Defendants' contracts into question beginning June 16, 1998.

29. On December 28, 2004, this Court, upon agreement of the parties, certified two subclasses as follows:

> Class A: all persons who, from June 16, 1998 to the present, have been charged for and/or who have paid for collect telephone calls from inmates in the correctional facilities of the State of Indiana.
>
> Class B: all persons who, from June 16, 1998 to the present, have been charged for and/or who have paid for collect telephone calls from inmates in Marion County, Indiana, correctional facilities.

30. Plaintiff Class A is the source of 53% of AT&T's "annual billed revenues" derived from collect calls from prisoners in the custody of the State of Indiana. Sweet Aff. ¶ 49; Defendants' Admission, Oral Arg. Tr. at 13-14; Jackson, "*Ex-Communication,*" at 263, 264, 269.

31. Plaintiff Class B is the source of the 40% Ameritech's "gross revenue" derived from collect calls from prisoners in the custody of the Marion County Sheriff. Sweet Aff. ¶ 49; Defendants' Admission, Oral Arg. Tr. at 13-14; Jackson, "Ex-communication," at 263, 264, 269.

32. Other than general grants of authority to operate correctional facilities and contract for prisoner services, from the inception of this lawsuit until March 20, 2002, to become operative, at the earliest, in August, 2007**,** there was no specific statutory provision in the Indiana Code which authorized the Defendants by implication to include signing bonuses or percentages of revenues from the telephone companies in exchange for access to the prisoner telephone market. (See infra at ¶ ¶ 39-42).

33. The Defendants are not required to impose the prisoner telephone system they have contracted for, and "at least 13 state prison systems allow debit calling at significantly lower rates than collect calls." Sweet Aff. ¶ 51 a.

34. The Federal Bureau of Prisons permits inmates to use debit cards for telephone calls. 28 C.F.R. Ch. V, Sec. 540.105 (2006).

35. At lease two states, Nebraska and New Mexico, accept no commission on prison calls, which results in substantially lower rates for those prisoners. Sweet Aff. ¶ 51 b; Nebraska Department of Correctional Services, Frequently Asked Questions, available at: http://www.corrections.state.ne.us/frequent_questions/telephone-index.html (last

accessed 30 January 2005); *See* 2001 NM Laws, ch. 33, 115 (requires any contract entered into by the telephone service providers and private or public correctional facilities to provide inmates with telephone services at the lowest rate; also prohibits telephone service providers from paying a correctional facility a "commission or other payment").

36. There are no legitimate reasons why a prison system could not allow more than one company to offer inmate telephone calling services. Sweet Aff. ¶ 51 c.

37. Standard security features for prison phone calls, such as branding, time limitations, monitoring, number restrictions, and blocks on third party calls, can be applied to debit calls as well as to collect calls, at no additional cost. Sweet Aff. ¶ 44.

38. Historically, the Marion County Sheriff has spent enormous amounts of the inmate telephone revenue for expenditures having nothing to do with prisoners. Declaration of Fran Quigley with Attached: "A Matter of Trust: Sheriff Jack Cottey, a Multimillion Dollar Trust Fund and the Brutal World of the Marion County Lockup," NUVO, Feb. 11, 1999, at 2 ("A NUVO investigation has revealed that, while a limited portion of the trust is devoted to expenses such as jail food trays or inmate rule books, a large portion of the funds are spent on items that have no direct impact on the inmates' 'betterment.' Cottey insists that trust funds not spent on the inmates are used for the benefit of the Sheriff's Department. However, many of the trust purchases most directly benefit the public profile of the sheriff himself and the comfort of the highest level of the sheriff's administration.").[1]

---

[1] The Marion County Sheriff's Department's own documents revealed the following expenditures from the inmate commissary fund:

Some Purchases From the Jail Commissary Trust; 1995-98
McGruff and Jr. Deputy expenses (dolls, newsletters, golf cart, trading cards)
$221,833.54

39. On March 20, 2002, two years after this lawsuit was filed, the Indiana General Assembly enacted Indiana Code 5-22-23-1 to -6, which provides guidelines for governmental solicitations for inmate telephone services, and which states, in relevant part:

> Section 5 ...
>
> (b) Notwithstanding any other law, the [DOA's] solicitation must include a statement concerning the following:
>
> . . .
>
> (2) The goal of reducing the total cost of a telephone call placed by a confined offender by soliciting competitive proposals that emphasize lower:
> (A) per call service charges;
> (B) per minute rates; and
> (C) commission rates.
>
> Section 6:
>
> (b) [A] solicitation by a [sheriff's] purchasing agent:
> (1) must include any security and fraud control services considered necessary by the purchasing agency, including the use of collect calling services as the sole means of confined offender communications with the general population; and
>
> (2) may not solicit:
> (A) a per call service charge;
> (B) a per minute rate; or
> (C) a commission rate;

Executive travel (leased vehicles, conference and travel expenses, travel to World Police & Fire Games) $71,160.50
Aircraft maintenance and insurance $4,382.59
New furniture and renovation of executive offices $24,850.63
Web site programming and server cost $4,200
Coverage of shortages in 1998 regular sheriff budget $206,064
Donut machine $3,970
Quigely Declaration, "A Matter of Trust" at 2 (citing "Source: Marion County Sheriff's Department").

> that exceeds the terms of a contract between the state and a telecommunications provider for the same service under the most recent solicitation submitted by the department under this article.

40. The Court of Appeals, in considering this statutory enactment, rejected it as a basis to reconsider its decision concerning the issues to be addressed by this court, and stated: "In our view, however, the promulgation of these statutes is geared toward the lowering of the telephone call costs to inmates and likewise limits the county sheriffs' telephone contracts to the Department of Correction rates." *Alexander v. Cottey*, 806 N.E.2d 315, 317 (Ind. Ct. App. 2004) (opinion on rehearing).

41. The Statute is not yet effective, as Public Law 65-2002, § 2, effective March 20, 2002, provides: that: "IC 5-22-23, as added by this act, does not apply to solicitations for telephone calling systems (including local, interlata, intralata, and interstate long distance services) for confined offenders made before the effective date of this act."

42. The State's contract with AT&T expired in 2001, and its new contract with T-Netix, as shown immediately below, was solicited prior to that time and extended, under the terms of the contract, until September 1, 2005, with a renewal option of up to four years after that expiration date. A two year renewal option was exercised by the State, hence making Ind. Code 5-22-23 not operative until the solicitation for a new contract put out by the State to begin at the earliest in August, 2007. Renewal Contract between the State of Indiana and T-Netix.

43. A copy of the contract between the State and T-Netix, Inc. (hereinafter "T-Netix"), effective from September 1, 2001 to September 1, 2005, with renewal options of up to four years, is attached to Plaintiffs' Third Amended Complaint as Exhibit AA.

44. Under the terms and conditions of the Contract (Exhibit AA), T-Netix is obligated to pay to the State thirty-five percent (35%) commission on inmate collect telephone calls in exchange for the exclusive and monopolistic right to enter into a contract with the State to provide collect telephone call services for persons in the custody of Defendant State.

45. The State, in its "Executive Document Summary" for the T-Netix contract, admits that "there is no cost to the state for these services." Ex. AA, Box 33.

46. The State, in its Executive Document Summary for T-Netix contract, admits that the "lower commission rate on the inmate calls is due to the need to reduce the current high costs involved for current inmate phone calls placed utilizing AT&T." Ex. AA, Box 33.

47. The State, in its Executive Document Summary for the T-Netix contract, provides that "[t]he new contract will reduce the costs of our current inmate calls over 70% from the current (expired) contract with AT&T."Ex. AA, Box 33.

48. The Defendants have admitted that these commissions and signing bonuses are revenue devises they employ to raise revenue to support the general operations of the correctional facilities. Defendants' Admission, Oral Arg. Tr. at 13-14.

Summary Judgment Standards

A party moving for summary judgment has the burden of establishing that: 1) the designated evidentiary matter shows that there is no genuine issue as to any material fact; and, 2) the movant is entitled to judgment as a matter of law. *Troxel v. Troxel*, 737 N.E.2d 745, 748 (Ind. 2000). Once these two requirements are met, the burden shifts to

the nonmovant to set forth designated facts showing the existence of a genuine issue of material fact for trial. *Schmidt v. American Trailer Court, Inc*., 721 N.E.2d 1251, 1253 (Ind. Ct. App. 1999), *trans. denied* (2000).

Trial Rule 56(C) also requires that each party to a summary judgment motion "designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion." *Rosi v. Business Furniture Corp*., 615 N.E.2d 431, 434 (Ind. 1993). In addition, the opposing party must designate to the trial court "each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto." *Id*.

A trial court must enter summary judgment if the "designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id*. A fact is "material" for summary judgment purposes if it helps to prove or disprove an essential element of the party's claim. *Weida v. Dowden*, 664 N.E.2d 742, 747 (Ind. Ct. App. 1996). A factual issue is "genuine" if the trier of fact is required to resolve an opposing party's different version of the underlying facts. *Id*.

There are no genuine issues of material fact with respect to the dispositive claims and defenses in this case, and the law is that the Sheriff and State have no authority to reap the profits they realized under these contracts at the expense of the Plaintiff classes. Accordingly, the Plaintiff classes are entitled to summary judgment.

Summary of Argument

From June 16, 1998, through August, 2007, the Defendants did not have statutory authority to include in their contracts with telephone providers requirements that the companies pay them signing bonuses and commissions. The Defendants included such provision in their contracts, and these provisions resulted in higher rates paid by the Plaintiff classes. The dispositive facts are not in dispute, and the classes are entitled to summary judgment on their claims.

Argument

The Plaintiffs are Entitled to Summary Judgment

Count I

The Defendants have Breached their Common Law Duty of Reasonableness

The Defendants have a common law duty to act reasonably towards the Plaintiffs, a duty breached when they imposed exorbitant bonuses and commissions on prisoner telephone calls. The reasonably foreseeable result of these actions has been that these increased costs were passed along by the telephone companies to the Plaintiff class.

The source of the Defendants' duty to act reasonably towards the property interests of the Plaintiffs originates in three somewhat related lines of authority. First, because the Defendants are acting for the public purpose, they have a duty to impose only reasonable charges. Second, as governmental entities, the Defendants have the general duty to act reasonably towards others. Third, because the Defendants are acting in a trustee capacity over the persons and property of prisoners, they have a duty to avoid self-

dealing and taking actions to enrich themselves at the expense of the prisoners and their families.

In light of old, but nonetheless controlling, authority, the Defendants have an irrefutable and unavoidable common law duty of reasonableness. In *Foltz v. City of Indianapolis*, 130 NE2d 650 (Ind. 1955), the Indiana Supreme Court in a unanimous decision taught an invaluable and timeless lesson aimed at and to be learned by "businesses 'affected with a public interest'". *Id*., at 659. "...[S]uch business is under a common law duty to serve...without discrimination, not only as to service but also as to person and prices charged." *Id.*, at 659.

Continuing, as to the action which the public-consumers may take, the Court reasoned that "...the public, nevertheless, still has the basic right under the common law, to be served in all particulars, without discrimination, and at a reasonable price, and may bring private actions to enforce the duties owed." *Id.*, at 670. (emphasis added)

As to the duty owed to the "*individuals* composing the public", the Court made clear the "common law right of the individual to compel service, providing for such service to the public on reasonable terms". *Id.*, at 671. (italics in original; underlining added).

Moreover, the Court proclaimed that "[A] consumer may sue to recover damages at common law resulting from...[unreasonable] rates. These are private rights which belong to the individuals constituting the public..." *Id.*, at 657.

The teachings of *Foltz* remain just as vibrant and meaningful today as they were over 50 years ago when they were first announced. The Court spoke to the evolution of the incidents of life:

> "[T]he court decisions, through the centries (sic) recognize that changing economic conditions create new uses and businesses that were not in existence or contemplated in earlier times, and that certain kinds of businesses are affected with a public interest to the extent they may be regulated.
>
> ...

Id., at 657

> [M]eans and methods of transportation have changed from the time of carts and horse drawn vehicles...The newer fine-spun creations of this age are interwoven with the dead fabric of the past, yet the same basic principles apply."

Id., at 664

Little could the Court of 1955 have fathomed how life would be lived in the 21st century: technology, transportation, communications, medicine, etc. Nonetheless, the Court's foresight has made that for which *Foltz* stands unassailable.

With *Foltz* peering over their collective shoulders, the Defendants, as custodian of prisoners, are and have been entrusted with a "public interest" and a corresponding duty to not take advantage of their, the Defendants', positions vis-à-vis the prisoners in their charge.

The Defendants have breached the common law lesson of *Foltz* by imposing on providers of inmate telephone services enormous unearned charges which in turn get passed on to the recipients of those calls in the form of higher rates.

As noted above, the public has the common law right to "bring private actions to enforce the duties owed". *Id*., at 670. That is, this is a matter for the judiciary, not for some administrative agency. For well over 100 years, it has been axiomatic that as a creature of statute in derogation of common law, an administrative agency is strictly

limited to do only that which its enabling legislation provides. *Thornburg v. American Strawboard Co.*, 40 NE 1062 (Ind. 1895); *In re Child Baxter*, 778 NE2d 417 (Ind. Ct. App. 2002); *Buchta v. Trucking, Inc. v. Stanley*, 713 NE2d 925 (Ind. Ct. App. 1999). That is why the Court of Appeals, "[i]n reliance upon *Foltz*" remanded this case for this Court's determination of the legality of the Defendants' actions, and the reasonableness of these contractual provisions. *Alexander*, 801 N.E.2d at 661.

The Defendants' duty to act reasonably in its public purpose endeavors parallels its general duty to act reasonably towards others under general tort law. This later common law duty can constitute negligence when the following three elements are established:

(1) duty owed to Plaintiffs by Defendants;

(2) breach of that duty; and,
(3) compensable injury, proximately caused by Defendants' breach of duty.

Estate of Cullop v. State, 821 NE2d 403, 407 (Ind. Ct. App. 2005); *Williams v. Cingular Wireless*, 809 NE2d 473 (Ind. Ct. App. 2004), trans. denied, 822 NE2d 976 (Ind. 2004).

"Duty has been defined as 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" *Guy's Concrete, Inc. v. Crawford*, 793 NE2d 288, 293 (Ind. Ct. App. 2003), trans. denied 804 NE2d 760 (Ind. 2003). Absent a duty, there can be no breach and, therefore, no recovery in negligence.

Whether a Defendant must conform his conduct to a certain standard for the Plaintiffs' benefit is a question of law for the court to decide. *Estate of Heck ex rel. Heck v. Stoffer*, 786 NE2d 265, 268 (Ind. 2003). Courts will generally find a duty where

reasonable persons would recognize and agree that one exists. *Estate of Heck*, *Id*., at 268. A duty, when found to exist, is the obligation to exercise reasonable care under the circumstances. *Goodrich v. Indiana Michigan Power Co.*, 783 NE2d 793, 796 (Ind. Ct. App. 2003), trans. denied, 792 NE2d 48 (Ind. 2003); *Correll v. Indiana Dept. of Transp*., 783 NE2d 706 (Ind. Ct. App. 2002), trans. denied, 792 NE2d 40 (Ind. 2003). A governmental unit is bound by the same duty of care as a non-governmental unit with a few limited exceptions. *Benton v. City of Oakland City*, 721 NE2d 224, 230 (Ind. 1999); *O'Connell v. Town Of Schererville of Lake County, Indiana*, 779 NE2d 16, 18 (Ind. Ct. App. 2002). The duty never changes, although the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Goodrich*, at 796.

"The court balances three factors in determining whether a duty exists: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns." *Barnes v. Antich*, 700 NE2d 262, 266 (Ind. Ct. App. 1998). The Court should look at the three factors in turn. "In determining whether a relationship exists that would impose a duty, we must consider the nature of the relationship, a party's knowledge, and the circumstances surrounding the relationship." *Downs v. Panhandle E. Pipeline Co.*, 694 NE2d 1198, 1203 (Ind. Ct. App. 1998), trans. denied, 706 NE2d 178 (Ind. 1998).

A. **The Defendants Owe a Duty to Act Reasonably with Respect to the Property of Prisoners and their Families**

(1) The Relationship Between the Parties is one of Total Control by the Defendants over the Persons and Property of the Prisoners and their Telephone Calling Arrangements

The relationship between the Defendants and the Plaintiffs is not equal; rather, the Defendants, as custodians of the persons and property of the Plaintiffs' loved ones, exercise considerable power over when and how any communication occurs between them. The parties are not and, by the very nature of their relationship, are not intended to be equally situated.

The Supreme Court ruled in *Miller v. Griesel*, 308 NE2d 701, 705 (Ind. 1974), that governmental "Defendants must conform themselves to the same standard of conduct which applies to any citizen or corporation of this State." *See* also *Benton v. City of Oakland*, *supra.* Since this case does not involve "crime prevention," making "correct judicial decisions" or appointing "competent officials", the few exceptions recognized in *Benton, id.*, the Defendants are under the same duty as a private party.

The "substantive law establishes the standard of care which must be met, i.e. reasonable care. The standard is a fixed one and is independent of the conduct of others but the conduct required of the individual to measure up to the fixed standard varies depending upon the nature of the duty owed and the surrounding circumstances." *Walters v. Kellam & Foley,* 360 NE2d 199, 214 (Ind. Ct. App. 1977).

This common law duty of reasonableness is nowhere more important than in the custodian-prisoner context. By statute, the Sheriff is mandated to "to take care" of prisoners in his custody. I.C. 36-2-13-5 (a) (7) ("The Sheriff shall ... "take care of the county jail and the prisoners there."). Because of the plenary authority entrusted to correctional authorities over the persons and property entrusted to them, the law imposes a corresponding duty to exercise that authority reasonably.

As the Indiana appellate courts have recognized:

> there exists adequate authority in this state to support the proposition that a public official, charged with the custody and care of a prisoner, owes a private duty to the prisoner to take reasonable precautions under the circumstances to preserve his life, health, and safety--a duty which is in addition to the duty of safekeeping owed to the public generally.

Roberts v. State, 307 N.E.2d 501, 505 (Ind. Ct. App. 1974) (collecting citations). *See also Health & Hospital Corp. v. Marion County,* 470 N.E.2d 1348, 1359 (Ind. Ct. App. 1984) ("The law recognizes an obligation on the part of a sheriff to conform his conduct to a certain standard of care for the benefit of his prisoners. The county sheriff, by himself or deputy, is required to keep the jail and is responsible for the manner in which it is kept.").

This responsibility goes beyond physical safety and extends to other legal rights. In *Ex Parte Jenkins*, 58 N.E. 560, 561 (Ind. App. 1900), the Court held, "It is unnecessary to cite authorities to the effect that, when a sheriff takes property of any kind into his possession by virtue of a writ, he is bound to take ordinary care of the property and prevent its deterioration or destruction, and for a failure in this regard he is liable on his bond."

The Defendants have taken the "ability to choose" to contract that would normally rest with those paying for the telephone calls and effectively exercised it on behalf of and to the detriment of the Plaintiffs. As would no one else, the Plaintiffs would not negotiate a contract in which those persons to whom collect calls were placed would pay the highest rates nor any other contract which would result in them paying the highest rates!

(2) The Reasonably Foreseeable Result of Defendants' Imposing Exorbitant Bonuses and Commissions on Telephone Companies' Gross Revenues Was to Substantially Increase Prisoner Telephone Rates

In analyzing the foreseeability component of duty, the Court must focus on whether the "person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable." *Kottlowski v. Bridgestone/Firestone, Inc.*, 670 NE2d 78, 85 (Ind. Ct. App.1996), trans. denied, 683 NE2d 584 (Ind. 1997).

The type of financial harm in the form of high telephone charges to be suffered by the Plaintiff classes was reasonably foreseeable and foreseen. Collect telephone call charges from jails and prisons increased substantially in the 1990s *because* of these monopoly contracts and substantial signing bonuses and commissions on telephone companies' gross revenues from prisoner telephone calls. Jackson, Ex-Communication at 264; Sweet Aff. ¶ ¶ 14, 21, 23, 24; 51 b; *In the Matter of Implementation of the Pay Telephone, Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, at 6, "Order on Remand on Remand and Notice of Proposed Rulemaking," at ¶ 6, Federal Communications Commission, FCC 02-39, CC Docket No. 96-128, (Feb. 21, 2002);

Guess Aff. ¶ 5; Kingsley Aff. ¶.6

There can be no question that this type of financial harm was reasonably foreseeable.

(3) Public Policy Concerns Support a Finding of Duty

In discerning public policy, the Court is to look to federal and state constitutions, the legislature, and the judiciary. *Trotter v. Nelson*, 684 NE2d 1150, 1152-53 (Ind. 1997); *Creasy v. Rusk*, 730 NE2d 659, 664 (Ind. 2000) ("To assist in deciding whether Indiana should adopt the generally accepted rule, we turn to an examination of contemporary public policy in Indiana as embodied in enactments of our state legislature."); *Stump v. Commercial Union*, 601 NE2d 327, 332 (Ind.1992) (stating "public policy considerations further augment the relationship and foreseeability factors, particularly in view of the strong Indiana policy value embodied in the previously noted constitutional right").

The primary public policy of this State is contained in the Indiana Constitution. *Trotter*, 684 N.E. 2d at 1152. Article I, Sec. 18, of that Constitution provides that rehabilitation is the principle underlying all of our penal laws. As explained in the affidavits of Dean Hairston and Ms. Sweet, as well as the Jackson paper and the ABA resolution, increased communication between prisoners and their loved ones is vital to those relationships, and to society at large, as it increases familial bonds, decreases recidivism, and diminishes the human and financial costs associated with crime and punishment. Exacting exorbitant bonuses and commissions on prisoner collect telephone calls has the opposite effect, diminishing prisoner contact with their families and loved ones, making prisons and jails less safe, increasing crime and recidivism, all while imposing a heavy burden on those least able to afford it. *Id*. This is perverse and contrary to public policy. Considerations of public policy support a finding that the Defendants

owe a duty to the Plaintiffs to work to help bring and keep families together, not to tear them asunder.

Indiana's public policy can also be discerned through an examination of the structure and purpose of government, its common law, and its legislative enactments, such as the statutory counts relied upon by the Plaintiffs. Indiana law limits the power of government, which is supposed to work towards the general welfare, not in opposition to it. Government can tax, but such taxing powers must be explicitly authorized and narrowly exercised. Similarly, government can impose user fees or service charges, but those fees or charges must be limited to the costs of providing the specific service for which they were enacted. If government abuses its power and obtains the money of a person through an inequitable power relationship, it is obliged to give it back. And, the government may not unfairly limit or restrict trade in a commodity or service in a manner which artificially drives up the price to the end user.

The government has a duty to maintain prisons and jails, but the costs of those penal institutions are to be borne by the polity in general, not on the innocent family members of the incarcerated. Public policy dictates that government may not exploit its position of power over some of the weakest and poorest members of society by imposing upon them a disproportionate and unfair share of the cost of a routine and ordinary function of government, the maintaining and operating of prisons and jails.

Also informative of public policy are expressions in the popular media about the Defendants' practices. Public indignation concerning the cost borne by the families communicating by telephone with those incarcerated in this state's prisons and jails has been high. *See, e.g.*, Editorial, Penalizing Those Who can Least Afford It, Indianapolis

Star, October 21, 2001 at A8 ("The state should be encouraging families to keep in touch with inmates instead of charging them to death.") ("Charging the families of inmates exorbitant prices for their loved ones' phone calls home borders on cruel and unusual punishment. . . . As a matter of state policy, Indiana needs to encourage prisoners' contacts with their friends and families.").

Indeed, competition itself, rather than the monopoly arrangements accompanied by huge kickbacks negotiated by the Defendants, is consistent with the public policy expressed by deregulation, which was supposed to reduce, not increase, the costs of telecommunications services to the end user. Defendants' contracts have had just the opposite effect.

Public policy compels a finding of duty on the part of the State and Sheriff to act reasonably towards the property interests of the Plaintiffs.

(B) The Defendants Breached their Duty of Reasonable Care

The Defendants breached the duty by placing their own financial interests over the Plaintiffs' rights to fair and reasonable treatment and over society's interest in rehabilitation and crime prevention, and society's interest in competition as a means to reduce, rather than increase, costs. The Defendants could have avoided a breach, assuring price competition by contracting with the telephone company offering the lowest cost to the Plaintiffs, allowing more than one telephone company to offer telephone services to prisoners, or by permitting lower costs options, such as the use of prepaid or debit card calling. Indeed, at least thirteen other states and the Federal Bureau of Prisons

have implemented prisoner telephone services at greatly reduced rates. The Defendants, if they were paying for the calls, would have negotiated for themselves the lowest rates.

Rather than let market forces work to reduce costs, the Defendants have exploited a captive market to increase costs for their own benefit and at the expense of the public at large and the Plaintiffs in particular.

The Defendants have exercised their custodial power to negotiate a contract for the purchase of collect telephone call services with a telephone company which necessarily binds the Plaintiffs to pay the price charged, a price tremendously inflated by the Defendants' imposition of unconscionable bonuses and commissions without any knowledge of participation by the Plaintiffs. Those financial costs, incurred without risk or value added by the Defendants, were imposed for the sole benefit of the Defendants, not the Plaintiffs or even the prisoners under the Defendants' custody and control. The Defendants negotiated these contracts in their own best interests, not that of the Plaintiffs or the prisoners.

Neither the recipients of the call (the Plaintiffs) nor the originators of the call (the prisoners) have the opportunity to enter into a contract with a telephone company to provide this service. Moreover, the Defendants' actions eliminated any opportunity which the prisoners or the Plaintiffs might have had to shop the market-place for cheaper rates. The Defendants have total omnipotence over the Plaintiffs and the terms of the contract with the entities selected by the Defendants for the Plaintiffs. The Plaintiffs receive the collect telephone calls originated by prisoners and have no choice but to use the entity selected by the Defendants if they, the Plaintiffs, wish to speak with the caller.

The Defendants have excluded all competitors from this commercial activity as a result of which there are no free market forces in play. The Defendants have entered into a contract in which they, the Defendants, provide no "thing" or "service" of value to the Plaintiffs that is associated with the collect telephone call. In return for providing no "thing" or "service", the Defendants are paid 40% or 53% of gross income from prisoner telephone calls. These costs imposed on the telephone companies are simply passed-on to the ultimate consumer of those services, the Plaintiff classes. Defendants' Admission, Oral Arg. Trans. at 13-14; Jackson, *Ex-Communication*, at 264; Sweet Aff. ¶ ¶ 44-46; *In the Matter of Implementation of the Pay Telephone, Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, at 6, "Order on Remand on Remand and Notice of Proposed Rulemaking," at ¶ 6, Federal Communications Commission, FCC 02-39, CC Docket No. 96-128, (Feb. 21, 2002).

In virtually all other settings, the person paying for telephone services has the right and opportunity to search the marketplace for the best prices and services and to make a considered selection therefrom. Here, the Plaintiffs have neither.

Thus, it is the Defendants' actions in creating and imposing binding legal relationships upon the Plaintiffs that causes the duty to take due care in the exercise of this effective authority. The Defendants are *de facto* agents of the Plaintiffs whose decisions bind the Plaintiffs. Here, the Court should impose the recognized duty of all agents owed to all principals—avoiding self dealing at the expense of the principal, and should find that this duty has been breached.

C. The Defendants' Breach Proximately Caused Damages to the Plaintiff Class

As shown above, the Plaintiff classes are the ultimate source of the telephone revenues that the Defendants have reaped under these contractual provisions. Defendants' Admissions, Oral Arg. Tr. at 13-14; *See supra* at 4 (Facts 8 and 9).

The harm that this has created is substantial, both in terms of financial hardship and personal suffering. *See supra* at 4-8 (Facts 8-18).

There is no doubt that the Plaintiffs have been harmed. The Plaintiffs' funds that the Defendants have received should be returned to the Plaintiffs in the form of a common fund, from which all class members may claim their damages. The precise accounting of those funds can await a ruling on liability and the certain appeal that either side will take upon any entry of judgment on the merits of the case.

Count II

The Defendants Contractual Bonuses and Commissions are Unauthorized Taxes

Indiana law proscribes certain taxing activities. Indiana Code 5-7-2-1 provides:

> It shall be unlawful for any officer in this state, under color of his office, to tax, or permit to be taxed in his office, any fee or sum of money that is not legally allowable under the statute or statutes of the state.

Indiana Code 5-7-2-2 contains several broad prohibitions against governmental officials, state and local, from imposing charges for services without specific authority from the General Assembly. Additionally, Indiana Code 8-1-2-101, effective March 13, 1998, explicitly prohibits local governments "from receiving any form of 'payment' other than the 'direct, actual, and reasonably incurred management costs' for a utility's

occupation of a public right-of-way." *City of Gary v. Indiana Bell Telephone*, 732 NE2d 149, 159 (Ind. 2000) (quoting statute).

Recognizing that the ever-present fiscal needs of government and the ingenuity of taxing authorities to raise revenue, the General Assembly used broad and sweeping language to forbid all such direct and indirect taxing practices unless specifically authorized by the legislature. Here there is no such specific authority; instead, there are specific prohibitions against these sorts of funding schemes.

A tax is defined as: " … a compulsory payment, usually a percentage, levied on income, property value, sales price, etc., for the support of government." Webster's New World College Dictionary (3rd ed. 1986).

Generally, a governmentally imposed fee for access to a market is recognized as a tax. In applying Illinois law and recognizing the distinction between taxes and other fees or costs imposed by government, the Court in *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388 (7th Cir. 1992) held:

> if the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.
>
> 958 F.2d at 1399

The State argues for the following similar definition of a tax: "a [usually] pecuniary charge imposed by the legislature or other public authority upon person or property for public purposes: a forced contribution of wealth to meet the public needs of a government." State's SJ Brief at 22 (citing Webster's Third New International Dictionary 2345 (1st ed. 1986)).

This definition fits precisely what the defendants *have already admitted* they are doing – i.e., taxing the plaintiff class. To offset the general burden of funding prisons and jails. Arguing before this Court on July 31, 2001 and seeking dismissal of this case, Attorney Jeffrey McQuary, speaking on behalf of both the Sheriff and the State, made the following admissions:

> MR. MCQUARY: We will your Honor. I will speak for both the Sheriff and for the Attorney General.
>
> …
>
> Mr. MCQUARY: [cont]
>
> I'd like to leave this Court with an analogy that Judge Posner uses in Arsberry. He points out that airport concessions charge a lot more for food than sandwich shops everywhere else. The reason they do that is that the airports which are licensed by the federal government in turn license the concessions in these airports, which in order to pay the costs of those concession fee licenses, charge high costs for food and take advantage of the fact that people using airports are essentially held hostage to that monopoly. Judge Posner held that there is nothing wrong with that; that the government has to raise money somehow: that the regulation of airlines and airports is expensive. And if the government decides to raise money for those functions by, in essence, taxing the food costs of people who are forced to spend time in airports that that decision to have airport concession fees rather than general tax revenue is no business of the federal courts.
>
> Likewise, your Honor, the counties and the State have attempted to recruit (sic, s/b (recoup") several of the enormous costs of maintaining prisons by entering into these contracts with the telephone companies that in turn pass on the costs for telephone calls to prisoners and their families. That decision is-to raise money in that manner is a legislative and executive decision that is no business of the courts to interfere with.

Defendants' Admissions from Oral Arg. Tr. at 3, 13-14.

The "general rule is that a client is bound by his attorney's actions in civil proceedings." *Parker v. State*, 676 N.E.2d 1083, 1086 (Ind. Ct. App. 1997) (citing *Lystarczyk v. Smits*, 435 N.E.2d 1011, 1014 n.5 (Ind. Ct. App. 1982); *Koval v. Simon Telelect, Inc.*, 693 NE2d 1299 (Ind. 1998) (client bound by its attorney's action made

with apparent authority in a "procedure in court"). In *Lystarczyk*, the Court of Appeals concluded "that an attorney can make an admission during opening statement that is binding upon his client and relieves the opposing party of the duty to present evidence on that issue." 435 N.E.2d at 1014. It is well settled law that a "clear and unequivocal admission of fact by an attorney is a judicial admission which is binding on the client." *Bowlers Country Club, Inc. v. Royal Links USA, Inc.*, 2006 Ind. App. LEXIS 810 (Ind. Ct. App. May 3, 2006); *In re K.H.*, 838 N.E.2d 477, 480 (Ind. Ct. App. 2005).

Both defendants are bound by their lawyer's candid statement during argument that the defendants are in essence taxing the plaintiff classes to support the maintenance of the state's prisons and the county's jail.

While there may nothing erroneous in Judge Posner's reading of federal law when a governmental entity passes along the costs of government in the form of indirect taxes, Indiana statutes forbid such an arrangement unless expressly and specifically provided for by statute. Here there is no such authority.

This policy and prohibition against executive/administrative branch indirect and unauthorized taxing also appears elsewhere. For example, I.C. 5-7-2-2 provides that local officials shall not "charge, tax up, or receive, or permit to be taxed up or received, in relation to *any* service in or about the officer's office, *any* fee or sum of money *except* such fee or sum of money as is plainly specified in I.C. 33-37 and IC 36-2 without resort to implication." (emphasis supplied). It forbids both "charging" and implying charges and forbids "receiving" any amount even if it isn't "charged." It is illegal to "ask and accept" fees; and imply that there are fees; and, to "not ask for but accept fees." *Id*. Even accepting amounts that are the result of "completely voluntary giving" is forbidden. If

the General Assembly has set a fee, then, under I.C. 5-7-7-3, that is **all** that can be charged and payment of the specified charge "...shall be construed to be in full." It forbids the government from using a "construction of law" to attempt to obtain more from the public than authorized by the General Assembly.

In accord with I.C. 5-7-2-4, the Defendants are forbidden to obtain money if "services ... were not actually executed and rendered." I.C. 5-7-7-5 forbids the use of "legal fiction(s)" to get money. A broader prohibition against taking money by the government is hard to imagine and harder still to design. Any profit by officers must be specifically approved and statutorily authorized or it may not be lawfully accepted into the public coffers.

The Court should rely upon the plain language of the statute as the key towards the intent of the legislature.

I.C. 5-7-7-1 may be dissected into the following elements:

1. A officer in this state;
2. under color of his office;
3. in his office;
4. taxing, or permitting to be taxed;
5. any fee or sum of money; and
6. not allowed by a statute.

Any officer in this State

The first element is whether the Defendants are "officer[s] in this state." The Defendant Commissioner admits that it is an officer in the State. *See* Amended Complaint, ¶53 and Answer of Defendant State, ¶53. It is rather disingenuous of the Sheriff to deny he is an "officer" in the State. The Attorney General has issued an official opinion discussing the fees for service of process that a sheriff may collect, and, in that opinion, considered sheriffs "officers" of the state, and, further, concluded that

"It is well settled in this State that an officer is only entitled to such fees as the statute provides, and that he has no right to tax and collect any fee for services unless he can produce a statute which authorizes him to do so." 1985 Ind. AG LEXIS 10 (Ind. AG 1985). The Attorney General also noted that applicability to sheriffs of I.C. 5-7-2-4, which "provides that it shall be unlawful to charge, tax up or receive, or permit to be charged, taxed up or received under claim or color of title of office or official right, any fee or sum of money for or on account of services that were not actually executed and rendered." 1985 Ind. AG LEXIS 10, 2-3 (Ind. AG 1985). "Officer" usually means any person holding any "office" whether the office is elective or appointed. *Wells v. State*, 175 Ind. 380, 94 N. E. 321 (1911) ("An office is a public charge or employment, in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof."). The Sheriff holds an elective office, and hence is an officer. The first element is established.

Under Color of Office

Although the Plaintiffs contend the contracts were entered into without authorization and, thus, were *void ab initio*, there is no genuine issue as to whether Defendants entered into the contracts "under *color* of (their) office(s)." Each contract is signed by a person claiming authority of the respective office. The second element is thus established.

In the Defendants' Offices

The third element is whether the activity is "in the Defendant's offices." This is satisfied just as the second element is satisfied. It is "in" their offices that the Defendants entered into and reap the benefit of the performance of the contracts.

Tax or Permit to Tax

The fourth element has two disjunctive prongs and is established when either prong is satisfied.

It is certainly beyond challenge that the Plaintiffs are the source of the money since "but for" the contracts, the Plaintiffs would not be paying the telephone companies and "but for" the contracts, the telephone companies would not be paying either 40% (40% of Ameritech's "gross annual income" is forwarded to the Sheriff) or 53% (53% of AT&T's "annual billed revenues" is forwarded to the State) to the Defendants.

Neither the State nor the Sheriff has the authority to impose charges on collect phone calls. This may well be a case of first impression; as it involves statutory interpretation, it is purely a question of law. *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n,* 715 NE2d 351, 354 (Ind. 1999); *Miller Brewing Co. v. Bartholomew County Beverage Co.*, 674 NE2d 193, 200 (Ind. Ct. App. 1996), trans. denied.

The first and often the last step in interpreting a statute is to read its language. *Ind. Bell*, 715 NE2d at 354. When confronted with an unambiguous statute, the Court must give the words and phrases of the statute their plain, ordinary, and usual meaning. *Poehlman v. Feferman*, 717 NE2d 578, 581 (Ind. 1999). The clear intent of IC 5-7-7 is to require that there be legislation already in-place for each fee, tax, assessment, etc., the government would charge to those who must pay it.

The Court need be mindful of the factual circumstances at-hand. The Defendants have, without authority, created a monopoly. The Defendants have without authority refused to allow price competition, competition which could only have worked in favor of the Plaintiffs' financial interests, but which would have reduced the Defendants' remuneration. The Defendants, without authority, demanded, and obtained, as the price of doing business, a huge percentage of gross revenues of the "take" from the phone companies. The Defendants provide no "thing" or "service" of value related to the telephone call to either their confederates or the Plaintiffs. The Defendants are in the enviable position of getting "money for nothing." This is a position, however, which the General Assembly has forbidden the government from occupying. The Defendants are in essence imposing a tax in the sense this is a compulsory charge imposed upon an activity for which the Defendants are providing nothing of value in return. For example, the Federal 3% telephone excise tax is imposed on an activity but is not related to the government providing any specific service, and was imposed legislatively, not by administrative action.[2]

Although not being able to identify any statute authorizing the Sheriff to impose the at-issue charge, the Court in *Alexander*, 801 NE2d at 660-661, identified many statutorily authorized charges the Sheriff has been granted:

> under Indiana Code section 36-2-13-2.5(a), the sheriff, ... may enter into a salary contract for the sheriff (which)... must contain a fixed amount of compensation in place of fee compensation. I.C. § 36-2-13-2.5(b)(1). ... (must contain) language pertaining to the deposit by the sheriff of tax warrant collection fees into the county general fund, (and)... for financing prisoners' meals. I.C. § 36-2-13-2.5(b)(3), (4). The statutes ... specifically define the duties and obligations ... provisions specifically and absolutely

[2] See 26 U.S.C. 4251. Imposition of tax

> prohibit the sheriff, (or subordinates)... from generating any "profit from the meal allowances. I.C. § 36- 2-13-2.5(b)(4)(B). ... required to file an accounting of the expenditures for feeding prisoners ... I.C. § 36-2-13-2.5(b)(4)(B)(5). ... Indiana Code section 36-8-10-7, requires the state examiner of the state board of accounts to fix the exact amount per meal that the sheriff of each county receives for feeding the prisoners. ... I.C. § 36-8- 10-7(a). ... sheriff is required to deposit the moneys received in the county general fund with the exception of a "ten percent collection fee." Ind. Code § 6-8.1-8- 3(c)(3). ... Indiana Code section 36-2-13-2.5, the sheriff is required to deposit the above-referenced ten percent into the county general fund. I.C. § 6-8.1-8-3(c)(4).
>
> In light of the above, it is apparent that these very precise and specific statutes regarding meal allowances and collecting judgments arising from tax warrants direct what a sheriff might receive in the form of compensation in addition to the salary that is set by contract. We see no such analogous statute pertaining to fees that are generated from inmates' telephone calls. Thus, we cannot glean from the record before us, including the arguments advanced by the parties, whether such an agreement allowing the Sheriff or the State in this case to retain a commission or a signing bonus from Ameritech is permissible or enforceable. (emphasis added)

"Expressio Unius Est Exclusio Alterius" is a canon of construction holding that to express or include one thing implies the exclusion of the other, or the alternative. For example, the rule that "each citizen is entitled to vote" implies that noncitizens are not entitled to vote. Cf. Ejusdem Generis; Noscitur a Sociis. -- Black's Law Dictionary. Here the Legislature by specifically identifying many authorized charges by implication excludes all other charges.

The financial imposition on the Plaintiffs, as consumers, could fairly be designated an "excise" tax since it is "is imposed at the time of a purchase or sale transaction." It could also be characterized as a "sales tax," if the telephone call is a commodity. Sales taxes are a form of excise levied when a commodity, or service, is sold to its final consumer. The statute's use of both the active ("to tax") and passive ("permit to be taxed") senses of the verb "to tax" supports the conclusion that the

legislature intended the widest possible prohibition of conduct that results in financial impositions upon those dealing with the executive/administrative branch of government. The General Assembly has forbidden any official in the state to directly tax, by collecting it him/her self, or indirectly, by, e.g. contracting with another entity to collect.

The fact that plaintiffs "voluntarily" accept collect calls from their incarcerated family members or friends does not alter the nature of these charges as taxes. Under this argument, the gasoline "tax" would not be a tax, since motorists could always walk. A poll "tax" would not be a tax since citizens could choose to not vote. A "sales tax" would not be a tax because the person could choose to not buy anything.

This financial imposition is a either a "tax" on telephone services; a "fee" on telephone services and/or a "sum of money" required to be paid for allowing telephone services. Applying either a "but for" or "substantial factor" measure of causation, the Defendants cause the charge to be imposed upon the members of the Plaintiff class since they are hostage to the situation which is a monopoly created by and for the benefit of the Defendants as a part of which the telephone companies are merely the collection agents for the Defendants.

The Defendants may with no more success call it a "commission"; but, commissions are earned and paid for value received. A salesperson actively "sells" a product and is paid a commission for his efforts related to the sale. The labor is the sale. Here, the Defendants do nothing and provide nothing of value but get paid and paid well for doing nothing. Again, Indiana law specifically prohibits the defendants "from receiving any form of 'payment' other than the 'direct, actual, and reasonably incurred

management costs' for a utility's occupation of a public right-of-way." *Indiana Bell Telephone*, 732 NE2d at 159 (quoting I.C. 8-1-2-101).

Perhaps the Defendants will argue that these charges are "fees." Such an argument is also flawed. Defendants are not allowed by Indiana statute to charge fees for phone calls unless there is such a statute allowing fees for phone calls. *See*, IC 5-7-2-1.

Any Fee or Sum of Money

The fifth element is whether what is taxed or permitted to be taxed is "any fee or sum of money." There is no issue as to the fact that these contracts result in fees or sums of money paid by the Plaintiffs with those sums ultimately ending up in the Defendants' coffers. The State's contract causes Plaintiff Class A to pay 53% of the "annual billed expenditures" for collect telephone calls originating from state prisoners while the Sheriff contract causes Plaintiff Class B to pay 40% of its "gross annual expenditure" for collect telephone calls originating from the Sheriff's prisoners.

Not Allowed by Statute

The sixth element is whether there is a statute that specifically allows this action. Defendants have cited none in support of their authority to engage in the acts in which they have engaged. They cite none because there are none. Nor have the Plaintiffs discovered any such statute; however, it is not the Plaintiffs' burden to justify the Defendants' conduct. It is the Defendants' burden, a burden they cannot bear. A fortiori, the Court of Appeals could find no such statute.

The Defendants have taxed or permitted to be taxed substantial sums of money on inmate telephone calls. In response to the Court of Appeals' directive to determine whether the Defendants' contractual provisions are permissible, this Court should find

that there was no statutory authority permitting such contractual provisions during the relevant time, and that there are a number of statutes which prohibit this practice.

Count III

The Defendants' Charges Constitute Excessive Licensing Fees

Indiana prohibits a governmental entity from imposing a licensing fee "greater than that reasonably related to the administrative cost of exercising a regulatory power." I.C. 36-1-3-8(5). The costs Defendants impose on the telephone companies which get passed on to the plaintiffs constitute impermissible licensing fees, in the sense that there is no administrative costs to the Defendants of exercising any regulatory powers, and I.C. 8-1-2-101 specifically prohibits "any form of 'payment' other than the 'direct, actual, and reasonably incurred management costs' for a utility's occupation of a public right-of-way." *Indiana Bell Telephone*, 732 NE2d at 159 (quoting statute).

The Sheriff argues that the resolution of this issue is controlled by *Schloss v. City of Indianapolis*, 553 N.E.2d 1204 (Ind.1990). In *Schloss*, the Indiana Supreme Court determined that the franchise fee paid by cable companies to the City of Indianapolis were not "license fees" governed by I.C. 36-1-3-8 (5). That decision is inapplicable to this case for two reasons. First, the Indiana Court of Appeals has already suggested that this provision in the Sheriff's contracts in this case constitutes a licensing fee covered under Ind. Code 36-1-3-8. Second, the contracts at issue in *Schloss* were between a municipal corporation which was renting its own streets and rights of way

and cable companies. Here, the Sheriff and State are not renting anything, but rather selling access to a captive audience of people, for whom they are acting in a trustee capacity.

There is no question that the Sheriff's forty percent (40%) commission rate and $262,000 annual payment are greatly disproportionate to any cost it incurred in regulating any provision of inmate telephone services. Indeed, here, as the Court of Appeals observed, despite a contract provision that it has no costs associated with the telephone services, the Sheriff reaps enormous profits. Indeed, we are not writing on a clean slate on this licensing issue (and the taxing issue, under Count II), as the Court of Appeals has already reasoned:

> We first point out that Indiana Code section 5-7-2-1 relates to illegally taxed fees. Specifically, the statute provides that "It shall be unlawful for any officer in this state, under color of his office, to tax, or permit to be taxed in his office, any fee or sum of money that is not legally allowable under the statute or statutes of the state." Additionally, Indiana Code section 36-1-3-8 (5) provides that a unit is prohibited from imposing "a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power." *Contrary to these statutory provisions*, the Sheriff's own contract makes it clear that he is entitled to hundreds of thousands of dollars as a signing bonus, and millions of dollars of the telephone company's gross sales revenues, notwithstanding the language in the agreement that the telephone companies "shall install, operate, and maintain inmate telephones at no charge to the agent [sheriff]." Complaint, Ex. B.

Alexander v. Cottey, 801 N.E.2d at 659 (emphasis supplied; footnote omitted).

Accordingly, the Court of Appeals decision in this case should be followed, rather than the defendants' arguments about the applicability of *Schloss*. The Defendants have charged impermissibly excessive licensing fees under I.C. 36-1-3-8(5) and should be required to return them to the plaintiffs, the ultimate source of those fees.

There is a question whether a Sheriff constitutes a "unit" for purposes of the Home Rule Statute. The Statute itself defines a "unit" as a "county, municipality, or township." I.C. 36-1-2-23. Judge Tinder concluded that under the Home Rule Statute, sheriff's departments "are none of these," and hence dismissed a lawsuit against the Marion County and Bartholomew County Sheriff's Departments, as not having separate corporate existences. *Long v. Barrett*, 2002 U.S. Dist. LEXIS 7144 * 7-8 (S.D. Ind. 2002).

Powers are granted to "units" not individual officeholders. *Coonrod v. Marsh*, 830 NE2d 91, 95 (Ind. Ct. App. 2005) (county auditor did not have authority to contract for collection of taxes on behalf of county, even though county would have such authority under Home Rule Statute). Thus, even if a county is authorized to do something, the Sheriff would not. *Id.*, at 95.

If the Sheriff is not a "unit", then it would fall "outside the Home Rule Act" and be "governed by the traditional rule that once applied to local governmental units." *See, Ind. Bell Tel. Co., Inc.*, 732 NE2d at 153; *City of South Bend v. Krovitch*, 273 NE2d 288, 291-92 (1971). The traditional rules are vastly more restrictive and limiting. Under the traditional rule, Indiana courts recognized that subordinate offices, such as Sheriff, are "are creatures of the state" possessing only such powers as are specifically granted by the Legislature in express words and those necessarily implied and incidental to those expressly granted, and those indispensable to the declared objects and purposes of the corporation, and to its continued achievements. *Dunn v. City of Indianapolis*, 196 N.E. 528, 532 (Ind. 1935).

As the Supreme Court noted in *Tippecanoe County v. Indiana Manufacturer's Association*, 784 NE2d 463, 465 (Ind. 2003):

> [T]here was a time when municipal law in most of the country was dominated by the Dillon Rule, which was: '(A) municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation--*not simply convenient, but indispensable.* Any fair, reasonable doubt concerning the existence of power is resolved by the courts ***against*** the corporation, and the power is denied. Dillon, Municipal Corporations (1st ed.1872) (emphasis in original).' *Indiana embraced Judge Dillon's views on this narrow approach to implied powers, with its presumption against existence of powers not explicitly granted by statute*, virtually from the publication of his treatise until well into modern times.
>
> (emphasis added)

A Sheriff's duties, powers and authority are defined by statute, I.C. 36-2-13-5:

> "(a) The sheriff shall:
> (1) arrest without process persons who commit an offense within the sheriff's view, take them before a court of the county having jurisdiction, and detain them in custody until the cause of the arrest has been investigated;
> (2) suppress breaches of the peace, calling the power of the county to the sheriff's aid if necessary;
> (3) pursue and jail felons;
> (4) execute all process directed to the sheriff by legal authority;
> (5) serve all process directed to the sheriff from a court or the county executive;
> (6) attend and preserve order in all courts of the county;
> (7) take care of the county jail and the prisoners there;
> (8) take photographs, fingerprints, and other identification data as the sheriff shall prescribe of persons taken into custody for felonies or misdemeanors; and
> (9) on or before January 31 and June 30 of each year, provide to the department of correction the average daily cost of incarcerating a prisoner in the county jail as determined under the methodology developed by the department of correction under IC 11-10-13.

The Court of Appeals in this case has already concluded it could find no authority granted to the Sheriff to enter into the contractual provision under consideration.

> In light of the above, it is apparent that these very precise and specific statutes regarding meal allowances and collecting judgments arising from tax warrants direct what a sheriff might receive in the form of compensation in addition to the salary that is set by contract. We see no such analogous statute pertaining to fees that are generated from inmates' telephone calls. Thus, we cannot glean from the record before us, including the arguments advanced by the parties, whether such an agreement allowing the Sheriff or the State in this case to retain a commission or a signing bonus from Ameritech is permissible or enforceable.

Alexander v. Cottey, 801 NE2d at 659-660.

If the Sheriff is not a "unit", it has no "inherent" or "implied" authority to engage in establishing a monopoly and entering into monopolistic contracts, or charging unauthorized fees, charges, or taxes.

Count IV: These Bonuses and Commissions Are Prohibited Service Charges or User Fees

Indiana Code 36-1-3-8 prohibits a "unit" imposing a "service charge or user fee greater than that reasonably related to reasonable and just rates and charges for services." Indiana Code 8-1-2-101, prohibits units from receiving any form of "payment" other than the "direct, actual, and reasonably incurred management costs" for a utility's occupation of a public right-of-way. In *City of Gary v. Indiana Bell Telephone Company, Inc*., 732 N.E.2d 149, 157-159 (Ind. 2000), the Supreme Court made clear that these statutes are directly applicable to the Sheriff's charge at issue. Furthermore, the undisputed facts establish that the service charges and user fees charged by the Sheriff for the telephone company's access to the inmate telephone market are "at no cost" to it, the Sheriff. *Alexander*, 801 N.E.2d at 659 (quoting the Sheriff's contract with Ameritech) ("Contrary

to these statutory provisions, [including I.C. 36-1-3-8] the Sheriff's own contract makes it clear that he is entitled to hundreds of thousands of dollars as a signing bonus and millions of dollars of the telephone company's gross sales revenues, notwithstanding the language in the agreement that the telephone companies 'shall install, operate, and maintain inmate telephones at no charge to the [sheriff].'"); (Exhibit B to Plaintiffs' Third Amended Complaint).

Since there is no cost to the Sheriff, these charges are *ipso facto*, "greater than that reasonably related to reasonable and just charges for services," and greater than the "direct, actual, and reasonably incurred management costs" for the telephone company's occupation of a public right of way. Accordingly, given the applicable law and based upon the undisputed evidence, plaintiffs are entitled to summary judgment on this claim against the Sheriff.

In *Indiana Bell*, the Indiana Supreme Court considered the City of Gary's imposition of a charge of up to twenty percent (20%) of telephone companies' revenues for access to the telephone market in the City of Gary. Indiana Bell mounted a challenge to these charges as a result of which the Supreme Court determined that the challenged charges constituted to "service charges or user fees" governed by I.C. 36-1-3-8 . *City of Gary*, 732 N.E.2d at 157 ("we do find that the requirements-based fee is the type of 'service charge or user fee' contemplated by the legislature under Indiana Code § 36-1-3-8(a)(6)."). Similarly, the Defendant Sheriff's charges of $262,000 annually is based on no costs to the Sheriff and 40% of Ameritech's annual revenues are the very types of service charges and user fees contemplated, addressed and outlawed by the Legislature in I.C. 36-1-3-8 (a) (6).

The Court also determined that the City of Gary's charges to Ameritech were also contrary to I.C. 8-1-2-101. *City of Gary,* 732 N.E.2d at 159 ("we nevertheless agree with the Court of Appeals that Gary was without authority to charge the fee as of March 13, 1998. On this date, the General Assembly amended I.C. § 8-1-2-101 (P.L. 127-1998) by adding new subsection (b) to prohibit municipalities from receiving any form of 'payment' other than the 'direct, actual, and reasonably incurred management costs" for a utility's occupation of a public right-of-way.'"). Like the City of Gary, the Sheriff is similarly without authority to charge more than the "direct, actual, and reasonably incurred management costs" for Ameritech's access to the prisoner telephone market. The Sheriff presents no evidence of management costs, because there is none. Given the undisputed facts that the Sheriff incurs no such costs under the contract, its user fees and service charges are impermissible.

The Sheriff points out in his summary judgment brief at p. 10 that the Court in *City of Gary, supra* remanded the case to the Indiana Utility Regulatory Commission for the determination of whether Gary's user fees and service charges were reasonable under I.C. 36-1-3-8 (a) (6) and costs under I.C. 8-1-2-101, and suggests such a course be undertaken here. There is nothing to remand since the Sheriff has no costs. That the Court in *City of Gary* remanded that case to the IURC does not mean that this Court should remand this case to the IURC. Rather, as the Indiana Court of Appeals has already determined, this Court has primary jurisdiction of plaintiffs' claims and, if it determines that the Sheriff had no authority to reap the profits called for in the contracts, then "the trial court must fashion a remedy for the Class." *Alexander,* 801 N.E.2d at 661. The remedy for benefit to the class would be to disgorge from the Sheriff the ill-gotten

gains extorted from the Plaintiffs under these contracts. "On the other hand, if the trial court determines that such a practice [the Sheriff profiting from selling access to the prisoner telephone market] is permissible, it can then determine the reasonableness of the rates and to what extent the profit or margin generated is permissible, or it may refer the matter to the IURC in accordance with *Austin Lakes* for such a determination." *id.*. Because the law is clear under I.C. 36-1-3-8 (a) (6) and I.C. 8-1-2-101 that the Sheriff is prohibited from extracting profits from these charges, and because the evidence is undisputed under the Ameritech contract that there is "no cost" to the Sheriff under these contracts, there is nothing for the IURC to determine. Rather, this Court should hold as a matter of law that all of the bonuses and commissions charged and collected by the Sheriff are not permitted and require the Sheriff to account for and place the unauthorized sums into a common fund for the benefit of and return to members of the classes who were the ultimate source of these revenues.

Count V: The Defendants Have Been Unjustly Enriched at the Expense of the Plaintiff Classes

The substantial benefits the Defendants have profiteered under these contractual provisions are at no expense to them and have been in the form of higher rates imposed upon and passed on to the plaintiff classes by the telephone companies. The Sheriff and the State have betrayed those whose best interests the Marion County Sheriff and the State were to protect by "giving-up" their inmates' friends and family, to the highest bidder captive inmate telephone market for the exclusive use of the contracting telephone company. Because of deregulation, all the telephone companies have to do in order to impose a new rate is file one with the Indiana Utility Regulatory Commission, a process

which can take as little as a few days.[3] The commissions and bonuses that the telephone companies are charged by the defendants are a cost of doing business to those companies, which they, in turn, pass along to the consumer. The IURC has already determined that it does not have the authority to even question let alone regulate those contractual provisions. *Alexander*, 801 N.E.2d at 658 (citing *Sims v. AT&T and its Contract with the Indiana DOC, No. 41429* (Ind. Utility Reg. Comm. Aug. 24, 2001)).

The phenomena of correction officials peddling access to an ever-growing prisoner telephone market, coupled with deregulation of the telecommunications industry, has created a "deeply inequitable pricing scheme that has seen the cost of inmate phone calls skyrocket, even as rates available to businesses and consumers on the outside world have fallen dramatically." Jackson, "Ex-communication" at 264.

This is an inequitable and unjust scheme in which the defendants have exploited the plaintiffs, added nothing of value to the provision of telephone services, and pocketed obscene profits ultimately derived from those individuals least able to afford the costs and most incapable of contesting them. Under the common law doctrine of unjust enrichment, the Defendants should be required to return these funds to those individuals, i.e. the Plaintiffs, who are the source of those funds.

---

3 The defendants are correct that the telephone companies still file tariffs on their various services. Yet, defendants ignore that the telecommunication industry has been substantially deregulated; that the rates referred to by the defendants are set by the telephone companies and merely filed as received by the IURC; that the IURC does not substantially review or approve those rates; and, as admitted by defendants during the oral argument on the motion to dismiss, the rates can be changed at will by the telephone companies, with no review or action taken by the IURC. Defendants' Admissions, Oral Argument Tr. at 32-33.

The doctrine of unjust enrichment is an equitable one providing for recovery where one party has benefited at the expense of another in an inequitable manner. As explained by the Indiana Supreme Court:

> Plaintiffs' sole common law claim is unjust enrichment, also referred to as quantum meruit, contract implied-in-law, constructive contract, or quasi-contract. A quasi-contract, of course, is not a contract at all; it "is a legal fiction invented by the common-law courts in order to permit a recovery . . . where, in fact, there is no contract, but where the circumstances are such that under the law of natural and immutable justice there should be a recovery as though there had been a promise." The Restatement of Restitution sets out the theory broadly: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937)....To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust.

Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991) (footnote and citation omitted). "It is well established that one is enriched if he receives a benefit," and that adding to the property of another can constitute a benefit." *Community Care Ctrs. v. Sullivan,*701 N.E.2d 1234, 1240 (Ind. Ct. App. 1998) (citing Restatement of Restitution § 1 (1937)). Additionally, a finding that a wrongdoers' profits are "unreasonably high would assist in showing that 'the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.'" *Community Care Ctrs.,* 701 N.E.2d at 1241.

In this case, at no cost or risk, and at the sole expense of the Plaintiffs, the Sheriff and State have, separately, each banked millions of dollars of benefits under these contracts The defendants have been conferred these benefits without providing anything of value in return, except for access to a captive market, whose best interest they are charged with securing. They have executed this scheme without any specific statutory

authorization and in derogation of public policy concern. Moreover, they have created substantial hardship on both the plaintiff class and the inmate population. Equity is offended by those in powerful positions taking advantage of the powerless, and that is exactly what has been done in this case.

Where "one party is wrongfully enriched at the expense of another," a court will construct a remedy based upon unjust enrichment and "'where there is a wrong, the court will find a remedy'." *Indianapolis Raceway Park, Inc. v. Curtiss*, 386 N.E.2d 724,726 (Ind. Ct. App. 1979) (citations omitted). "An abuse of power and failure to exercise sound discretion accomplishes a wrong against and an injury to the parties, regardless of the good or bad faith of the officer, and, where the circumstances warrant, equity will afford relief in one case as well as the other." *Home Owners' Loan Corp. v. Braxtan*, 44 N.E.2d 989, 991 (Ind. 1942).

The Court should utilize the doctrine of unjust enrichment to strike down these inequitable contract provisions and return to the plaintiff classes the monies they have indirectly paid to the defendants.

Count VI: The Defendants Have Received Their Profits Under Such Inequitable Circumstances that they Should be Required to Return Them to the Plaintiffs Under the Doctrine of Money Had And Received

There can be no good faith dispute that the Defendants have profited greatly at the expense of the Plaintiffs. They have received vast sums of money, derived from the plaintiffs, without any consideration therefor. The Plaintiffs had this money, the Defendants received it, and under the equitable doctrine of Money Had And Received, the Defendants should be required to return these monies to the Plaintiffs. The common law claim of Money Had And Received consists of:

> An action for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself *or third persons*, under such circumstances that in equity and good conscience he ought not to retain the same, and which money *ex aequo et bono* belongs to the plaintiff, and where money has been received by mistake of facts or without consideration, or upon a consideration that has failed, it may be recovered back. Such an action rests upon an implied promise and may be maintained against the person who received money from the plaintiff under circumstances which in equity and good conscience he should not retain.

Shelby Eng'g Co., Inc. v. Action Steel Supply, Inc., 707 N.E.2d 1026, 1028 (Ind. Ct. App.1999) (emphasis supplied) (*quoting Chosnek v. Rolley*, 688 N.E.2d 202, 211 (Ind. Ct. App.1997).[4]

The Court of Appeals has also held that:

> In an action for money had and received, it is generally necessary for the plaintiff to prove only his right to the money and the defendant's possession, without showing that it has not been accounted for; and any facts, circumstances, or dealings from which it appears that the defendant has in his hands money of the plaintiff which he ought in justice and conscience to pay over to him, are competent evidence to support the action.

Watson v. Sears, 766 N.E.2d 784, 790 (Ind. Ct. App. 2002) (*quoting Pufahl v. Nat'l Bank of Logansport*, 154 N.E.2d 119, 120-21 (1958)).

The Plaintiffs had the money; the Defendants used the telephone companies as a conduit to obtain these funds, and, in equity and good conscious, these monies ought to be returne.

---

4 The Latin phrase “ex aequo et bono” means “according to what is equitable and good.” BLACK’S LAW DICTIONARY, 581 (7th ed. 1999).

The Filed Rate Doctrine Does Not Preclude the Relief Requested

The Defendants characterize Plaintiffs' complaint as challenging the rates charged by telephone companies, and argue that because those rates were on file with the IURC, that Plaintiffs' claims are precluded by the Filed Rate Doctrine.

The Plaintiffs intentionally chose not to sue the telephone companies or challenge their rates, and instead limited their attack to the actions of the Defendants, which have proximately caused those rates to be higher than they otherwise would be. The law recognizes that there can be more than one proximate cause of an injury, and that differing actors can each be held liable for the resulting damages. *Board of Comm'rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992).

The Defendants are correct that the telephone companies file tariffs on their various services. Yet, Defendants ignore that the telecommunication industry has been substantially deregulated; that the rates referred to by the Defendants are set by the telephone companies and merely filed but normally not even reviewed by the IURC; that the IURC does not substantially review or approve those rates; and, that the rates can be changed at will by the telephone companies. Defendants' Admissions, Oral Arg. Tr. at 32-33; Sweet Aff. para. 44.

The Seventh Circuit in *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001) considered the filed rate doctrine's application to the federal claims asserted by the plaintiffs in that action. In discussing the filed rate defense, the Arsberry Court observed: "The plaintiffs deny that they are challenging tariffs. They say their objection is to the deals by which the correctional authorities in Illinois have granted exclusive rights to telephone companies in return for what the plaintiffs characterize as kickbacks.... Such an

attack does not seek to invalidate any tariff, but merely to create an environment in which the regulated firm is more likely to file a tariff that contains terms more favorable to customers.... [accordingly] the suit is not barred by filed rate doctrine." *Arsberry,* 244 F.3d at 562-63.

A similar result was reached by a District Court in New York last year:

> Unlike their claims against MCI, plaintiffs' claims against the state defendants concerning the sixty percent commission are not simply a challenge to the rates. They cannot be, for the rates are set by MCI, not by DOCS. Rather, plaintiffs' claims against the state defendants challenge the sixty percent commission that DOCS receives from MCI, which artificially inflates the rate in a manner unrelated to the service provided. These claims, therefore, are not properly dismissed under the filed rate doctrine as "such an attack does not seek to invalidate any tariff, but merely to create an environment in which the regulated firm is more likely to file a tariff that contains terms more favorable to customers." Arsberry, 244 F.3d at 563.

Byrd v. Goord, U.S.D.C. Southern District of New York, 2005 U.S. Dist. LEXIS 18544, at *25 (Aug. 29, 2005)

This Court does not need to resolve the issue of whether the filed rate doctrine should be considered as superseded or whether it is still good law, as the Court should agree with the courts in *Arsberry* and *Byrd* that the doctrine does not apply to a case such as this not directly challenging tariffs.

Counts VII-X: The Defendants Should be Required to Forfeit Their Profits Under Indiana's Antitrust Statutes

The Defendants claim that the decision in *Brownsburg Community School Corporation v. Natare Corporation,* 824 N.E.2d 336 (Ind. 2005), precludes them from liability under Indiana's antitrust statutes. Missing from defendants' analysis is that the Court, in *Brownsburg*, specifically limited its holding to the treble damages anti-trust

remedy, opining: "the Indiana Antitrust Act does not create a *civil treble damage remedy* against an arm of government." *Id*., at 337 (emphasis supplied). The rationale for the Court's decision was that treble damages are punitive in nature, and punitive damages are never available against a governmental entity. *Id*. The Defendants are arms of the government and, hence, Plaintiffs agree that under *Brownsburg* the Defendants cannot be held liable for treble damages.

But the *Brownsburg* Court did not rule on the question of whether an arm of the government was subject to equitable relief under Indiana's Antitrust Act—leaving that question open for consideration in cases such as this. *Id*., at 343, n. 7 ("Unlike the federal antitrust laws and those of most states, the Indiana Antitrust Act does not explicitly provide an injunctive remedy. Whether an injunctive remedy is available under the Indiana Antitrust Act, and if so whether it lies against a unit of local government are issues not presented in this case and we express no opinion on them.").

The Sheriff asserts that the Indiana antitrust statute's lack of a specific equitable relief provisions, when considered in light of such provisions in that statute's federal counterpart (the Sherman Antitrust Act) preclude the possibility of equitable relief in this case. Sheriff's SJ Brief at 12-13. But at least on court, sitting in the same conceptual position as this court has specifically awarded injunctive relief against a non-governmental entity under Indiana Code 24-1-2-1. *See Photovest Corp. v. Fotomat Corp.*, 1977 U.S. Dist. LEXIS 15832, 133-134 (D. Ind. 1977) ("Plaintiff also is entitled to an injunction under Counts . . ., III [Ind. Code 24-1-2-1]. . . to restrain Fotomat from cutting off pickup and delivery, chrome processing and customer service to plaintiff.")

An Indiana trial court's power to do equity is fact-dependent (given that the first rule of applying equity is a lack of remedy at law) and broad. As the Indiana Supreme Court has noted in a case where state competitive bidding case where its analysis revealed "no basis in either Indiana statutory or common law" for a rejected bidder's request that a city be enjoined from awarding the contract to its selected bidder: "We do note that courts have broad discretion in equity to grant injunctive relief. We are unable to say that this court would never approve a court, acting solely in its equitable discretion, granting an injunction at the request of an unsuccessful bidder under a competitive bidding statute." *Shook Heavy & Envtl. Constr. Group v. City of Kokomo*, 632 N.E.2d 355, 360 (Ind. 1994) (answering certified queston from United States District Court for the Southern District of Indiana).

Moreover, in this case, the Court of Appeals has specifically directed this Court, if it determines that the Defendants had no authority to reap the profits called for in the contracts, then "the trial court must fashion a remedy for the Class." *Alexander*, 801 N.E.2d at 661..

If *Brownsburg* were so broad as to eliminate equitable under the state's antitrust statute, as the Sheriff asserts, then there would be no reason for the Court to have reserved this question. The very fact that the question was reserved implies that, the government *may* be susceptible to equitable relief under the Act. This case presents the very circumstances why such relief should be granted. And, while *Brownsburg* certainly prohibits these defendants from incurring treble damage under the Act, it does not

preclude equitable relief such as a return of the plaintiffs' money, the equitable relief plaintiffs seek in this case.[3]

Plaintiffs are Entitled to Summary Judgment under Count VII, as Defendants' Combined with the Telephone Companies to Restrain Trade

Defendants' agreements with the various telephone companies were designed explicitly to restrain trade in the telecommunications industry for the benefit of the defendants and the contracting telephone companies, and to the detriment of the consumers of those services, as well as competitors to the telephone companies.

Indiana Code 24-1-2-1 provides, in relevant part:

> Every scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce, or to deny or refuse to any person participation, on equal terms with others, in any telegraphic service transmitting matter prepared or intended for public use, or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity, or to prevent competition in manufacturing, within or without this state, is illegal[.]

These contracts between the defendants and the telephone companies are schemes, contracts or combinations in restraint of trade.

---

[3] The fact that a court awards relief in monetary form does not preclude that relief from being equitable in character. For instance, under Title VII as originally enacted, compensatory damages (relief at law) was not available, but both monetary and non-monetary equitable relief in the form of back pay and reinstatement were. *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1031 (7th Cir. 2003) (citing *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998)) ("Under Title VII, as originally enacted, a plaintiff may recover equitable relief in the form of backpay and reinstatement, or front pay in lieu of reinstatement."); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) ("Thus, the 1991 Civil Rights Act addressed the disparity in treatment by providing additional remedies; it left undisturbed the equitable remedies available under Title VII. Indeed, Congress explicitly provided that the new remedy provisions did not subsume the old Title VII remedies. See 42 U.S.C. § 1981a(b)(2). Section 1981a (b)(2) states: 'Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.' 42 U.S.C. § 1981a (b)(2)").

There is a dearth of authority under Indiana's Antitrust Act, as a result of which federal decisions under the Sherman Antitrust Act are studied for guidance. *Brownsburg,* 824 N.E.2d at 348. The Defendants' arrangements with the various telephone companies for exclusive access to a captive market, upon which the telephone companies may prey by charging whatever rates they wish, unconstrained by competitive or regulatory pressures, is the very type of evil that the antitrust statutes were designed to prevent, and which preclude the type of cost-increasing provisions inserted into the Defendants' contracts.

As the Indiana Court of Appeals has stated, the "purpose of the antitrust act is to ". . . . prevent fraud and collusion in the letting of contracts and to protect trade and commerce against unlawful restraints and monopolies." *Auburn ex rel. Board of Public Works & Safety v. Mavis,* 468 N.E.2d 584, 586 (Ind. Ct. App. 1984). There are three elements to such a cause of action: 1) a violation of the statute, 2) injury to a person's business or property proximately caused by the violation, and 3) actual damages. *Mavis,* 468 N.E.2d at 585.

The provisions of defendants' contracts under review in this case violate Section 1 of the Antitrust statute because under that act "Every …scheme [and] contract, … to create or carry out restrictions in trade or commerce, or to deny or refuse to any person participation, on equal terms with others, in any telegraphic service transmitting matter prepared or intended for public use, …, is illegal[.]"

The defendants' contracts in this case are illegal because they restrict trade and commerce in the telephone industry by limiting the class members to one telephone carrier to receive telephone calls from all incarcerated offenders. There are no security

concerns which require such monopolistic arrangements, and certainly no requirements that such substantial kickbacks be required. Sweet Aff. ¶ 51 c.

Plaintiffs are Entitled to Summary Judgment under Count VIII, as Defendants' Combined with the Telephone Companies to Carry out Restrictions on Trade

Indiana Code 24-1-2-1 also states, in pertinent part, that "Every scheme, contract, or combination … to create or carry out restrictions in trade or commerce … is illegal[.]" The contracts entered into between the Defendants and the telephone companies are schemes, contracts or combinations created to carry out restrictions in trade or commerce and are thus illegal under the Antitrust Act.

The same evidence that these contracts violate the immediately proceeding section of the Antitrust Act also proves that these contracts violate this specific provision. It is axiomatic that a contract with a single carrier to provide these services rather than with multiple carriers carries out "restrictions" on trade and commerce. The reasons Defendants do not do so is not based on security or penological concerns, but rather, their own pecuniary interests. This type of massive money grab at the expense of the ultimate consumer is the very type of economic harm the Antitrust statutes were designed to prevent.

Plaintiffs are Entitled to Summary Judgment under Count IX, as Defendants' Combined with the Telephone Companies to Deny Participation in the Prisoner Telephone Market to Other Carriers on Equal Terms

Indiana Code 24-1-2-1 states, in part, that "Every scheme, contract … to deny or refuse to any person participation, on equal terms with others, in any telegraphic service

transmitting matter prepared or intended for public use … is illegal[.]" The defendants' contracts deny and refuse participation, on equal terms with others, in telegraphic service transmitting matter prepared or intended for public use, and hence are illegal under the Antitrust Act.

The same evidence and arguments advanced in the immediately preceding two sections apply equally to this argument, and plaintiffs incorporate them herein, rather than repeat them.

Plaintiffs are Entitled to Summary Judgment under Count X, as Defendants' Combined with the Telephone Companies to Increase Prices in the Prisoner Telephone Market

The provisions of defendants' contracts under review in this case also violate Section 1 of the Antitrust statute because under that Act "Every …scheme [and] contract, … to increase … the price of …any commodity, … is illegal[.]" I.C. 24-1-2-1.

Defendants' contractual provisions in which they take for themselves 53 and 40 percent of gross revenues and provide nothing of value save for access to a captive market is a scheme and contract which necessarily has the effect to increase the price of the commodity of telephone services. Hence plaintiffs satisfy this element of a cause of action under Ind. Code 24-1-2-1.

With respect to damages, under all of the above provisions of the Antitrust statute, a plaintiff must prove an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . . would be likely to cause.'" *Auburn*, N.E.2d at 586 (citations omitted).

The injuries suffered by the plaintiffs, high end charges for telephone services, are the very type of injuries made possible by and, indeed, necessitated under the defendants' contracts, and the very type of injuries that would likely occur when a correctional authority traffics a captive market to a single telecommunications provider. With deregulation of the telecommunications industry, the higher costs to the telephone companies of providing these services, essentially a kickback to the correctional authorities, can be and has been easily passed on to the Plaintiffs in the form of higher telephone rates upon the simple filing of ever increasing tariffs. Jackson,: *Ex-Communication,* at 263; Sweet Aff. ¶ 14; Guess Aff. ¶ 5; Defendants' Admission from Oral Argument Tr. at 13-14.

The actual harm to the Plaintiff class members can be calculated by the amount of the impermissible commissions and bonuses, collected for and paid to the defendants by the telephone companies. The resulting higher rates have caused the Plaintiffs to choose between maintaining contact with their loved ones and forgoing other necessities of life, such as food, medicine. While a precise accounting of these damages can await a ruling on liability, the Court's order should make clear that the damages the class is entitled to is the amount received by the Sheriff and State under these impermissible contractual provisions.

On appeal from the initial dismissal of this action, Defendants conceded that: "The measure of [the Plaintiffs'] damages is the difference between what they were actually charged and what should have been charged." Brief of Appellees at 10. This difference is exactly the amount of the defendants' signing bonuses and commissions, as the Sheriff's contract specifically provides that the telephone companies "shall install,

operate, and maintain inmate telephones at no charge to the agent [sheriff]." Complaint, Ex. B, p. 2, ¶ IV ("Compensation"), and the State's contract provides that "all costs and expenses … [are] borne by Contractor." Exhibit A to Plaintiff's Third Amended Complaint at 9.

Again, the Defendants concede, and the evidence establishes, that the contract charges they exact are in essence revenue generating charges used for their operations which are passed onto the plaintiffs in the form of higher rates. Defendants' Admissions, Oral Arg. Tr. at 13-14. The defendants add nothing of value to the plaintiffs or to the telephone companies, but instead are merely exploiting their positions of authority over prisoners to indirectly extract monies from the plaintiffs.

CONCLUSION

The Defendants have taken advantage of the Plaintiffs by requiring telephone companies to pay bonuses and commissions for inmate telephone charges to the Defendants. These charges have been passed on to and paid for by the Plaintiffs, who, as a group, are invisible, poor and powerless. There was no statutory authority for the Defendants to have demanded such payments. Because these charges were not authorized, the Defendants had no right to receive them. In response to the Court of Appeals directive, this Court should hold that the charges were not authorized and fashion a remedy for the return of these monies to the members of each Class.

Respectfully submitted,

Dated: May 8, 2006

_____
Richard A. Waples, Att. No. 2132-49
Lawrence M. Reuben, Att. No. 6032-49
Stephen Laudig, Att. No. 8802-49

Attorneys for the Plaintiff Classes

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served by first class mail, postage prepaid, upon the following counsel of record on May 8, 2006:

Elizabeth M. Karlson and Barbara Nardi
Deputy Attorneys General
Government Litigation
302 West Washington Street
IGCS 5th Floor

Kevin C. Shirferl and Melanie D. Margolin
LOCKE REYNOLDS LLP
201 North Illinois Street, Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

James B. Osborn
Special Assistant Corporation Counsel
200 East Washington Street, Suite 1601
Indianapolis, Indiana 46204

_____
Richard A. Waples
Attorney for Plaintiff Classes