STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges	)	**Docket DT 06-067**

VERIZON NEW HAMPSHIRE'S MOTION FOR REHEARING AND/OR RECONSIDERATION OF COMMISSION ORDER 24,837

Verizon New Hampshire ("Verizon") hereby moves the Commission, pursuant to RSA 541:3, to reconsider or conduct a rehearing of Order No. 24,837 issued March 21, 2008. In support of this Motion, Verizon states as follows:

1. On March 21, 2008, the Commission issued Order No. 24,837 (the "Order") in response to a complaint filed by certain competitive carriers alleging that Verizon had imposed a carrier common line charge for the provision of switched access services in violation of Verizon Tariff 85 ("Tariff 85" or the "Tariff"). Despite the fact that Tariff 85 grants Verizon the right to impose carrier common line charges for *all* switched access, the Commission ordered Verizon to stop billing the charge for calls not involving a Verizon end user or a Verizon local loop. The Commission further ordered Verizon to pay restitution.

2. The Commission's order is unlawful and unreasonable because, despite clear language in the Tariff to the contrary, it concludes that while local transport is a component of switched access, it does not constitute switched access service when provided on a stand-alone basis. Having held that local transport is not switched access

in the absence of a Verizon-provided common line, the Commission then compounds its error by holding that Verizon cannot assess carrier common line charges to customers receiving switched access components, even though the plain language of the Tariff provides that all switched access provided to a customer will be subject to common carrier line access charges.

3. The Order also results in the confiscation of Verizon's property because the Commission concludes that Verizon is providing a service (local transport) to customers but is not entitled to be compensated for that service under Tariff 85. Once it concluded that stand-alone switched access services are nonetheless *not* switched access – thus determining that Verizon is not entitled to assess the associated carrier common line charge that switched access service triggers – the Commission's interpretation of Tariff 85 becomes even more untenable. If the stand-alone services Verizon provides and has provided for years are not switched access services available under Tariff 85, then Verizon has no right to charge for services the competitive carriers are in fact using. Despite having identified this issue in its October 23, 2006 Supplemental Order of Notice - "whether such services are more properly assessed under a different tariff provision" in the event they are not switched access – the Commission arbitrarily skipped over the matter, leaving Verizon with no mechanism to be compensated for the relevant services it continues to provide. As a result, Verizon's constitutional rights are violated when it is required to make the stand-alone services available to competitors in the absence of compensation under Tariff 85. Alternatively, the net effect of the Commission's Order is that Verizon has no legal obligation to make stand-alone service such as local transport available since it has no right to charge for it under Tariff 85. The Commission should

reconsider and rescind the Order because it is premised on multiple factual and legal errors and causes an absurd result.

I. APPLICABLE STANDARD.

4. Motions for rehearing and/or reconsideration of a Commission order are governed by RSA 541. RSA 541:3 provides that the Commission may grant a motion for rehearing if "good reason for the rehearing is stated in the motion." *See Connecticut Valley Electric Company Public Service Co. of New Hampshire,* DE 03-030, Order No. 24,189 dated July 3, 2003 at 2. As stated in *Dumais v. State,* 118 N.H. 309, 312, 386 A.2d 1269 (1978), the purpose of a rehearing is to provide consideration of matters that were either overlooked or "mistakenly conceived" in the original decision. *See also, Investigation as to Whether Certain Calls are Local,* DT 00-223/00-054, Order No. 24,218 dated October 17, 2003 at 8 ("Motions for rehearing direct attention to matters 'overlooked or mistakenly conceived' in the original decision and require an examination of the record already before the fact finder.").

5. In reviewing any motion for rehearing, the Commission thus analyzes each and every ground that is claimed to be unlawful or unreasonable to determine if there is a basis to grant the request, *i.e.*, if there is "good reason" shown. *In re Wilton Telephone Company and Hollis Telephone Company,* DT 00-294/DT 00-295, Order No. 23,790 dated September 28, 2001; *see also, Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996,* DT 97-171, Order No. 23,847 dated November 21, 2001 at 11-12.[1]

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[1] By way of illustration, the Commission has found good reason for rehearing when rulings were made without sufficient opportunity for an affected party to comment. *Verizon New Hampshire Tariff Filing Introducing Charges for Busy Line Verification*, DT 01-008, Order No. 23,676 dated April 12, 2001.

II. THE COMMISSION MISINTERPRETED THE PLAIN LANGUAGE OF THE TARIFF.

6. The primary question before the Commission in this docket is whether the tandem switching and local transport services provided to competitive carriers under the Tariff constitute "switched access." If so, Verizon is entitled to assess the common carrier line charge for those services based on the plain language of Section 5.4 of the Tariff.

7. In interpreting a tariff, the Commission applies principles of contract interpretation and statutory construction. *Re Public Serv. of N.H.*, 79 NH PUC 688 (1964). It is well established that absent ambiguity, the intent of the contracting parties should be determined based on plain meaning of language used in the contract, *see Robbins v. Salem Radiology*, 145 N.H. 415, 418 (2000), and that the contract must be read as a whole. *General Linen Servs. v. Franconia Inv. Assocs.*, 150 N.H. 595, 597 (2004). Similarly, "...no clause, sentence or word, shall be superfluous, void or insignificant." *Churchill Realty v. City of Dover Zoning Bd.* (N.H. 1-15-2008) at page 7. The Commission committed legal error in defining what constitutes "switched access" under the Tariff by failing to ascribe the plain meaning to words used in the Tariff, reading words out of the Tariff, and failing to interpret the Tariff as a whole.

8. Section 2.1.1.A sets forth the scope of Tariff 85 and provides that it:

> "contains regulations, rates and charges applicable to switched access services and other miscellaneous services ... provided by Verizon New England, Inc. ... to interexchange carriers and wireless carriers, including resellers or other entities engaged in the provision of public utility common carrier services which utilize the network of the Telephone Company...."

Section 6 of the Tariff, titled "Switched Access Service," provides that "[s]witched access service is ordered under the access order provisions set forth in Section 3 and

billed at the rates and charges set forth in Section 30." Section 6.1.1..A. Section 6.1.2.A, in turn, identifies the types of switched access services provided ("The switched access services provided under this tariff are: originating, terminating, or two way FGA, FGB, FGD and FG2A, and 800 database access"),[2] while Section 6.1.2.B sets forth the rate categories which apply to switched access service. Those rate categories include local transport, local switching and carrier common line. Section 6.1.2.D also separately identifies that "[l]ocal transport, local switching and carrier common line when combined to provide a complete switched access service is as illustrated in Exhibit 6.1.2-1."

9. When reading these provisions as a whole, it is evident that: switched access services are provided and billed under Tariff 85; switched access services include originating, terminating, or two way FGA, FGB, FGD and FG2A, and 800 database access; and there are three rate categories that apply to these services (local transport, local switching and carrier common line). Indeed, the Commission itself acknowledged that "the individual, billable elements of 'switched access' are local transport, local switching, and carrier common line." Order at 26.

10. Despite Tariff 85's detailed provisions describing what compromises "switched access," the Commission committed a fundamental error: it concluded that "local transport, used independently without the benefit of Verizon's common line, does not constitute switched access service." *Id.* at 31. The Commission's Order is internally inconsistent and contradictory because, at the same time, the Commission found that

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[2] Similarly, 47 U.S.C. § 153 (16) defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll service." Switched access is distinguishable from private line service ("furnishing facilities for communications between specified locations"). Verizon Tariff 83, Part B § 1.1.1.A; see also § 1.3.

"[i]n the calls at issue here, Verizon *is providing a component of switched access service..."* *Id.* at 30 (emphasis added).[3]

11. Yet there is not a single word in the Tariff that provides that switched access exists only when provided in combination with Verizon's common line. Switched access encompasses any use of Verizon's network for the provision of toll service, whether that use be of a singular component, such as a tandem switch (i.e., on an unbundled or stand-alone basis), or whether it uses that component in combination with transport and local switching.[4] Tr. Day II at 104-05. Switched access is not measured in degrees; once a component of the Verizon network constituting switched access is used by a carrier for the provision of intrastate toll service, the applicable "regulations, rates and charges" of Tariff 85 apply. *See, e.g.*, Tr. Day II at 104-105.

12. BayRing and AT&T conceded this point. For example, in its Pre-filed Direct Testimony, BayRing witness Darren Winslow provided the following definition of "switched access service:"

> "Switched access service" is a service that provides "access" to a telephone company's local exchange end user for the origination or termination of toll traffic . . . . As the term "access" indicates, Verizon's switched access service allows another carrier to reach *something* (i.e. Verizon's end use customers) over which Verizon has rights or control.

Pre-filed Direct Testimony of Darren Winslow at 22 (emphasis added). And on cross examination, Mr. Winslow conceded that a Verizon end-user was not the only "something" to which switched access service provides access:

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[3] The Commission concluded that the "petitioners and intervenors use tandem switching, and therefore, local transport for the calls that are the focus of the dispute." Order at 26.

[4] Thus, where one CLEC transports a toll call from its end user to the end user of another CLEC, and Verizon provides only the transport switching function, Verizon nonetheless provides switched access service and the CCL charge applies on a minute of use basis, per the terms of Tariff 85.

Q: [W]hy did you use the word "something" when defining the term "access"?

A: In order to provide access, you have to provide access to something.

Q: Okay. And is Verizon's tandem switched access, local transport tandem switching, local transport termination, and/or local transport facilities something?

A: Yes, it is.

Q: And, does Verizon have rights or controls over its tandem switching equipment and facilities?

A: Yes, it does.

Tr. Day I at 97. "Tandem switched access," "local transport tandem switching," "local transport termination," and "local transport facilities" are "switched access service" explicitly defined in Tariff 85. *See* Tariff 85 §§ 6.2.1.B, G.

13. Furthermore, BayRing witness Trent Lebeck confirmed that BayRing presently purchases certain intermediary switched access components from Verizon for the purposes of furnishing intrastate toll services:

Q: Does Bay Ring purchase tandem switching with local transport from Verizon in the absence of a Verizon end-user presently?

A: Would you please state that again please.

Q: I'm asking you whether BayRing currently can and does purchase tandem switching and local transport, even in the absence of a Verizon end-user, presently?

A: Under the auspice that we are originating or terminating calls to an IXC [inter-exchange carrier].

Q: *A toll call?*

A: *Yes.*

Tr. Day 1 at 73 (emphasis added).

14. The AT&T panel of witnesses also acknowledged that switched access elements may be purchased on a stand-alone basis or in combination:

Q: Does the switched access tariff require that all of the elements be purchased if a carrier wishes to purchase only certain of the elements of switched access?

A: . . . [Y]ou can buy the Section 6 ["Switched Access Service"] tariff items, and you can buy those on a stand-alone basis.

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Q: So, when you say that you "can buy the Section 6 items on a stand-alone basis," those are the local transport tandem switching, local transport termination, local transport facilities, etcetera, as contained in Section 6.2 that we discussed earlier with BayRing?

A. (Nurse) Yes.

Tr. Day I at 177; *see also* Tr. Day I at 173 ("[Any of the items in Section 6 . . . can be provided on a stand-alone basis or in combination[.]"). In light of these unambiguous admissions, the Commission's conclusion that Verizon is not providing switched access governed by Tariff 85 is unfounded.

15. Based on its erroneous interpretation of what constitutes switched access, the Commission then committed further legal error in its interpretation of Section 5.4 of the Tariff. That Section unambiguously states that "[e]xcept as set forth herein, *all switched access service* provided to the customer *will be subject to common carrier line access charges*" (emphasis added). Yet the Commission concludes that Verizon has no right to assess the common carrier line charge because only a component of switched access is being provided, effectively eliminating from Section 5.4 the word "all," and thereby allowing for the recovery of the common carrier line charge in only a fraction of cases where switched access is provided.

16. In an unfounded effort to justify this conclusion, the Commission reads words into Section 5.4: "We interpret this section [5.4], however, to mean that a carrier will be 'subject to' CCL charges to the extent CCL service is provided in conjunction *with* switched access. The phrase 'subject to' is plainly meant to be conditional in the sense

that a carrier will be 'liable for' CCL charges when the condition of CCL is precedent." Order at 31 (emphasis added). The Commission grafts this condition precedent onto Section 5.4 despite its statement earlier in the Order that "we make our findings *based on the language within the four corners of the tariff.*" *Id.* at 27 (emphasis added).

17. There is no language in Section 5.4, Section 5.1.1 or anywhere else in Tariff 85 that creates such a condition precedent to the imposition of the carrier common line charge. Rather, the Commission arbitrarily concludes that the provisions in Section 5.4 only apply if all components of switched access service are provided, not if *any* element of switched access is provided on a stand-alone basis. But the Tariff does not require *all* components of switched access to be provided and in fact refers instead to the purchase of individual components of switched access on a stand-alone basis:

> The switched access service provided by [Verizon] includes the switched access service provided for both interstate and intrastate communications. The carrier common line access rates and charges *will be billed to each switched access service provided under this tariff* in accordance with Section 4.1 and Section 5.4.2.

Tariff 85 § 5.4.1.C (emphasis added).

18. By ignoring the plain and ordinary meaning of the words used in the Tariff – such as the word "each" in Section 5.4.1 and the word "all" in Section 5.4 – the Commission violates basic tenants of contract and statutory interpretation. *See supra, Robbins v. Salem Radiology*, 145 N.H. 415, 418 (2000); *Churchill Realty v. City of Dover Zoning Bd.* (N.H. 1-15-2008) at page 7. As a result, the Order is unreasonable and unlawful and should not be sustained on rehearing.

19. Even if one were to follow the Commission's suit and look outside the Tariff to determine its meaning, extrinsic evidence supports Verizon's interpretation. Verizon presented documentary evidence from its billing records of how Section 5.4 of the Tariff

was intended to operate, *i.e.*, undisputed evidence showing that it had assessed the charges consistent with the Tariff from as early as 2001. The Commission never addresses the fact that the Petitioners did not refute this evidence, even though they bear the burden of proof in this proceeding. N.H. Admin. Rules, Puc 203.25 ("Unless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden or proving the truth of any factual proposition by a preponderance of the evidence."). This is yet another instance of the Commission ignoring compelling record evidence that supports Verizon's position.

20. Further, that its third party billing agent erred and did not assess the charge does not absolve the competitive carriers from paying it. *See Guglielmo v. WorldCom, Inc.*, 148 N.H. 309, 313 (2002). Even BayRing conceded that it shared this understanding of the Tariff language when its representative testified that "[c]arrier common line is billed as part of a switched access call." Tr. Day 1 at 96. Yet the Commission ignores all of this evidence. In reductive fashion, the Commission claims that Verizon should have changed a Tariff provision that it reasonably believed covered the service being provided[5] and that had the unequivocal "force and effect of law." *See Pennichuck Water Works*, 120 N.H. 562, 566 (1980). This conclusion is unreasonable and unsupported by the evidence.

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[5] Specifically, the Commission stated that "[w]hen competition became a reality and multiple carriers were competing in the same franchise area, rather than constructing an interpretation of the tariff to charge customers for a service they did not receive, it was Verizon's responsibility to seek revisions to the tariff if it believed it was somehow not recovering its costs or if the tariff no longer fit changing market and technical conditions." Order at 30, n.5. Needless to say, Verizon never believed that it was necessary to change the Tariff because it has always understood that switched access included local transport and that as a result, the carrier common line charge must be charged to recipients of that service under its existing, legally effective Tariff.

III. THE ORDER RESULTS IN AN UNCONSTITUTIONAL TAKING OF VERIZON'S PROPERTY BECAUSE, UNDER THE COMMISSION'S CONSTRUCTION OF THE TARIFF, VERIZON IS REQUIRED TO PROVIDE STAND-ALONE ACCESS SERVICES FOR WHICH IT IS NOT AUTHORIZED TO CHARGE UNDER TARIFF 85'S ACCESS PROVISIONS.

21. Under the Commission's interpretation of the Tariff, Verizon's provision of local transport and local switching, independent of carrier common line services, do not constitute switched access services under Tariff 85. [6] At the same time, however, both the Commission and the competitive carriers admit that the carriers have been receiving those services from Verizon. *See* Order at 31 ("petitioners and intervenors use tandem switching, and therefore, local transport for the calls that are the focus of the dispute."). If the local transport that is being provided is not switched access under Tariff 85, what is it? The Commission identified this issue in its October 23, 2006 Supplemental Order of Notice as one to be considered in this docket – "whether such services are more properly assessed under a different tariff provision." Order at 25. However, the Commission failed to address it in its Order. In continuing to require Verizon to provide those services, while at the same time failing to determine the basis for Verizon's associated compensation, the Commission confiscates Verizon's property in violation of Part I, Article 12 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

22. Verizon presented unrefuted evidence that it supplies the use of its network, including transmission, transport and switching facility components, to competitive

[6] "[L]ocal transport, used independently without the benefit of Verizon's common line, does not constitute switched access service." Order at 31.

carriers so that they can provide toll service. Tr. Day II at 10, 11. Witnesses for the competitive carriers conceded that Verizon has been providing them services in the form of local transport tandem switching, local transport termination and local transport facilities. Tr. Day I at 78, 80-81. Even the Commission agreed that Verizon is providing service to the competitive carriers. *See* Order at 26 ("petitioners and intervenors use tandem switching, and therefore, local transport for the calls that are the focus of the dispute.").

23. The record evidence is thus undisputed that Verizon supplies the use of its network, including transmission, transport and switching facility components, to competitive carriers such as Bay Ring and AT&T for the provision of their toll services.[7] Tr. Day II at 10, 11. This service is "switched access" and it is, essentially, wholesale toll service. *Id.* at 10; see also Tariff 85 § 6.2.1. Rather than pay the charges for switched access service prescribed by Tariff 85, however, BayRing instead took the position that Verizon must provide these "routing functions" for BayRing's use; that BayRing ought to be assessed some charge or fee for their use and is willing to pay such a charge or fee; that Verizon, nevertheless, is not authorized to charge for such use; and that until Tariff 85 is "updated," Verizon must continue to provide services but is not permitted to charge for them. *See* Pre-filed Direct Testimony of Darren Winslow at 12-13, 15-16; *see also* Tr. Day I at 78-82. This interpretation, which the Commission appears to have adopted in part, defies logic, is contrary to the plain language of Tariff 85 and violates New Hampshire law.[8]

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[7] In doing so, Verizon provides a service to which the carrier common line charge is subject. *See* Tariff 85 §§ 5.1.1.A.1, 5.2.1.

[8] RSA 378:14 prohibits the provision of any free service. Specifically, it states that "[n]o public utility shall grant **any** free service, nor charge or receive a greater or lesser or different compensation for any

24. Verizon is legally entitled to be fairly compensated for providing services that its Tariff expressly describes as switched services. A Commission order that concludes that "local transport, used independently without the benefit of Verizon's common line" – as Tariff 85 permits – "does not constitute switched access service" for which Verizon is to be compensated under Tariff 85, is pure confiscation of Verizon's property in violation of its constitutional rights. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 at 602 (1944); *see also Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 524-527 (2002) (while Telecommunications Act favors novel rate-setting to give competitors incentives to enter local telephone markets, such rates cannot confiscate the incumbent's property).

25. Tariff 85 has permitted carriers to purchase transmission, transport and switching facility components as switched access services, on an individual basis or in combination (Tr. Day II at 10), for years.[9] During that same time, Section 5.4 of the Tariff has provided that "*all switched access service* provided to the customer *will be subject to common carrier line access charges*" (emphasis added). Nothing has changed justifying an abandonment of a Tariff provision that has the continuing force and effect of law.

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service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered." (emphasis added). Because there is no dispute that Verizon has provided BayRing and AT&T services under Tariff 85, Verizon is legally obligated to charge – and the carriers are obligated to pay – for the services rendered. The use of and payment for these services under Tariff, in turn, triggers the application of the carrier common line charge.

[9] "[T]he individual, billable elements of 'switched access' are local transport, local switching, and carrier common line." Order at 26.

26. Furthermore, utilities are legally entitled to receive a just and reasonable rate for use of their property. That rate must fall into a zone of reasonableness "between the extremes of confiscating a utility's property at one end, and exploiting customers for the utility's benefit at the other." *Appeal of Public Serv. Co. of N.H.*, 130 N.H. 748, 750 (1988). As the United States Supreme Court has observed, "[i]t is not the theory, but the impact of the rate order which counts." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989); *see also Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 275 (1988) (investors constitutionally entitled to be compensated for the risk associated with their investment in utility property). As written, the effect of the Order is to require Verizon to provide free service, in violation of the law. *See* RSA 378:14. Thus, the Hobson's choice the Commission presents is either to have Verizon's rights violated or to have Verizon violate the law – no choice at all.

27. Alternatively, under the Commission's interpretation of Tariff 85, if the provision of tandem switching (or any other individual switched access component) does not constitute "switched access," Verizon has no legal obligation under the existing Tariff to provide the service it all. Verizon could cease providing tandem switching (or other switched access service components) at any time. Surely, this cannot be what the Commission or the competitive carriers desire.

28. Based on the reasons set forth above, the Commission's Order is unlawful and unreasonable. Verizon thus requests that the Commission reconsider its decision and allow for the assessment of the carrier common line charge to those carriers purchasing any component of switched access services.

WHEREFORE, Verizon respectfully requests that the Commission:

A. Grant this Motion for Rehearing and/or Reconsideration; and

B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

VERIZON NEW HAMPSHIRE

By its Attorneys,

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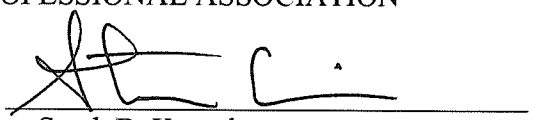
Date: March 28, 2008

By: 
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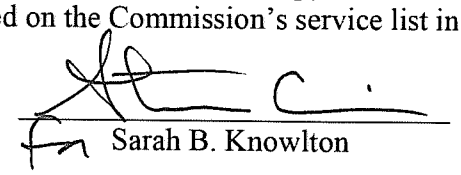
Certificate of Service

I hereby certify that on March 28, 2008, a copy of the foregoing Motion has been forwarded to the parties listed on the Commission's service list in this docket.



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