THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2008 TERM

No. 2008-0645

Appeal of Verizon New England, Inc. d/b/a Verizon New Hampshire & a.

MOTION OF AT&T CORP. FOR REHEARING OR RECONSIDERATION

AT&T CORP.

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MOTION OF AT&T CORP FOR REHEARING OR RECONSIDERATION

Pursuant to NH Sup. Ct. Rule 22, AT&T Corp. ("AT&T") respectfully moves this Court for rehearing or reconsideration of its May 7, 2009, opinion in this case ("Opinion") on the ground that the Court misapprehended a point of law and, therefore, overlooked a point of fact.

Introduction

The issue in this case is whether Tariff No. 85 allows Verizon to impose a carrier common line access charge for calls that do not traverse Verizon's common line. In reversing the New Hampshire Public Utilities Commission ("Commission") and holding that Verizon can impose such charges, this Court erred when it interpreted language in Section 5 of Tariff 85 in isolation and out of context by giving it effect when it does not apply.

The Court's conclusion – that the "plain meaning" of Tariff 85 permits Verizon to impose a carrier common line charge when a carrier common line service is not requested, provided or used – cannot be squared with the uncontroverted facts of record that Verizon interprets substantively identical language in its parallel federal tariff as not permitting it to impose the charge in precisely the same circumstances. The Court's decision here produces the anomalous result that the same language in a federal tariff has a different meaning than its "plain meaning" in a state tariff – a result at odds with uncontroverted evidence that Verizon patterned Tariff 85 on its parallel federal tariff and expressly stated its intent that carriers understand it the same way.

Moreover, the Court overlooked record evidence that in the wake of the FCC decision referenced at page 5 of its Opinion (*AT&T Corp. v. Bell Atlantic – Pennsylvania*, 14 F.C.C. 556 (1998)) (the "FCC Decision"), wherein the FCC instructed Verizon to modify its tariff "as needed" to clarify that the CCL does not apply if there is no common line usage, Verizon made

no change to its interstate tariff language. Rather, Verizon concluded that its existing interstate tariff languge already was sufficiently broad to comply with the FCC's prohibition against charging for carrier common line service when it is not provided. This is significant because it is the same language that is the subject of dispute in this case. Verizon's inconsistent approach between substantively identical state and federal tariff languge cannot be squared with the conclusion in the Opinion that the language has a "plain meaning."

Argument

A. THE COURT OVERLOOKED AN IMPORTANT PRINCIPLE OF CONSTRUCTION WHEN IT CONCLUDED THAT TARIFF 85 PERMITS APPLICATION OF THE CCL CHARGE WHEN THE COMMON LINE IS NOT USED

AT&T respectfully submits that the Court reached an anomalous result – under which the same language in parallel federal and state tariffs are read to mean the opposite of one another – because it overlooked an important point of law. In reviewing the tariff, this Court "must not be guided by a single sentence'" but, rather, must "'look to the provisions of the whole [tariff]'". *Richmond v. New Hampshire Supreme Court Committee on Professional Conduct*, 542 F.3d 913, 917 (1st Cir. 2008) (citations omitted). The tariff interpretation must lead to a reasonable rather than an absurd result, and entail a review of a particular provision not in isolation, "but together with all associated sections." *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511 (2006). In its Opinion, the Court focused on a single provision of a complex tariff and reached the commercially unreasonable result that Verizon is permitted to charge for a service it does not provide.

The Court's decision properly identifies the issue as "whether Tariff No. 85 allows Verizon to impose a carrier common line access charge for calls that do not traverse Verizon's common line." Opinion, at 4. The Court's analysis, however, focused on a single set of provisions in Section 5 without considering the instrument as a whole – and most importantly –

the circumstances under which Section 5 of the tariff is applicable. The Court's analysis began *and ended* with an analysis of certain isolated language in Section 5. The substance of the analysis is a single paragraph in which the Court determined that the language Verizon called to its attention had a "plain meaning." Opinion, at 5. The Court erred, because the meaning of such language, plain or otherwise, is not determinative of the issue of whether Tariff 85 permits application of the CCL charge when no CCL service is used.

The Section 5 language upon which the Court relies indeed suggests that a carrier common line charge applies to switched access service. But in the call flows at issue in this case, carriers are not asking for and Verizon is not providing a Section 5 service. The terms and conditions of Section 5 simply have no application. *Only when Section 5 services are taken are the terms and conditions of Section 5 applicable.*

The answer that the Court gives to this argument begs the question. *The Court relies on language* ***in Section 5*** *as the basis for concluding that it should be applied when Section 5 services are* ***not*** *taken.* Opinion, at 7. That reasoning is not sound. It is improper to give effect to terms applicable to a service that is not taken, *i.e.*, a service that is not part of the transaction in which the parties are engaged. The language on which Verizon relies appears in a section of the tariff that expressly applies to the *undertaking* of the telephone company to provide carrier common line service. Section 5.2, expressly labeled "Undertaking of the Telephone Company," states in subpart A:

> Where the customer is provided with switched access service under this tariff, the Telephone Company [Verizon] will provide the use of Telephone Company [Verizon] common lines by a customer for access to end user.

Section 5.2.1.A., *App. to Appeal*, at 139.[1] Because Appellees are not asking for or receiving the carrier common line service under Section 5, there is no reason to expect the terms therein to apply. Indeed, there are many terms and conditions spread throughout this complex tariff to which carriers do not look if those terms apply to services the carriers do not take. In any event, if Section 5 were to apply, then Verizon would be in default of its reciprocal obligation to provide the carrier common line service for which it is being paid. Indeed, the Court – in assuming without analysis that Section 5 applies and focusing exclusively on isolated provisions in Section 5 permitting Verizon to apply a CCL charge – never explains why the reciprocal obligation of Verizon in Section 5 to provide the common line service does not also apply.

In construing certain Section 5 language in isolation and where it does not apply, the Court overlooked a basic principle of construction. If the Court considers the transaction at issue and the tariff as a whole, rather than focusing on a single set of provisions in isolation and without regard to the transaction, it will conclude that Tariff 85 does not permit application of the CCL charge in the circumstances of this case. *Richmond v. New Hampshire Supreme Court Committee on Professional Conduct*, 542 F.3d 913, 917 (1st Cir. 2008).

B. THE COURT'S RELIANCE ON THE FCC DECISION IS MISPLACED

The record in *this* case shows that Verizon did not change the tariff that was the subject of the FCC Decision in order to comply with the FCC prohibition against charging CCL for the call flows at issue in that case, evidently concluding that the language was also consistent with not charging a CCL in such circumstances.

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[1] See also, Section 5.1.1.A, *App. to Appeal*, at 138 (describing carrier common line service as "provid[ing] for the use of end user's Telephone Company [Verizon] provided common lines").

Verizon's current federal (interstate) access tariff applicable to calls with an origination or destination in New Hampshire was an important part of the record of this case. See Trial Ex. 20 (Vol. XIII, Doc. 91, p. 3886 et. seq. of Record).[2] Section 3.5 states:

> Except as set forth herein, all Switched Access Service provided to the customer will be subject to Carrier Common Line Access charges.

Section 3.8.1 states:

> Except for those services set forth in [provisions not relevant hereto], Carrier Common Line charges will be billed to each Switched Access Service provided under this tariff in accordance with the regulations as set forth in [provisions not relevant hereto]

This language is the same as the language that appeared in Verizon's interstate tariff at the time of the FCC Decision.[3] It is thus clear that Verizon concluded that the language appearing in its tariff, which the FCC concluded was broad enough to permit Verizon to charge a CCL for the call flows at issue in that case, was also broad enough – and indeed, ambiguous enough – to comply with an FCC requirement not to charge for the CCL in the call flows of that case. This is hardly language that has a "plain meaning."

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[2] The tariff was introduced as Exhibit 20 on July 11, 2007 at Tr. p. 95 (Vol. XIII, Doc. 100, p. 4390 et. seq. of Record)

[3] Verizon's current interstate access tariff at the time of the FCC Decision was called NYNEX Tariff F.C.C. NO.1, which was one of the tariffs that were the subject of the FCC Decision. FCC Decision, at n. 210. On or about August 14, 1997, NYNEX was merged into and became a part of Bell Atlantic. 12 FCC Rcd 19985 (FCC 1997) (approving NYNEX / Bell Atlantic merger). After NYNEX merged into Bell Atlantic, Bell Atlantic reissued NYNEX Tariff No. 1 as Bell Atlantic Tariff No. 11. See 16 FCC Rcd 5502 (FCC 2001). Bell Atlantic eventually changed its name to Verizon, and Bell Atlantic Tariff No. 11 was then reissued as Verizon Tariff No. 11. See 16 FCC Rcd 12967 (FCC 2001). Hence, the NYNEX Tariff F.C.C. No. 1 referenced in the FCC Decision is the same tariff as the Verizon Tariff F.C.C. No. 11 that is Exhibit 20 in the record of this case. The language in Sections 3.5 and 3.8.1 in Exhibit 20 (Verizon's current FCC Tariff No. 11) is identical -- down to the last word -- to the language in the same sections in NYNEX FCC No. 1, which is a matter of public record. Although the FCC doesn't quote from the specific parallel provision of the NYNEX tariff, it does quote as an example from the specific parallel provision of the Bell South tariff. See FCC Decision at ¶ 84, and n. 207. A comparison of Section 3.5 in NYNEX Tariff F.C.C. No. 1 and the quote from Bell South Tariff F.C.C. No. 1 set forth in the FCC Decision, at ¶ 84, shows that they are virtually identical. (This is not a surprise given that all of the regional bell operating companies following the break up of AT&T adopted virtually identical access tariffs pursuant to instruction from the FCC.)

C. THE RECORD EVIDENCE IN THIS CASE DEMONSTRATES THAT VERIZON INTERPRETS ITS SUBSTANTIVELY IDENTICAL FEDERAL ACCESS TARIFF IN A MANNER OPPOSITE TO ITS POSITION IN THIS CASE, AND OPPOSITE TO THE FINDINGS OF THIS COURT.

As demonstrated above in Section A. above, the language in Tariff 85, Section 5, upon which Verizon relies does not apply. Thus, even if such language were clear and unambiguous within the scope of its application, this Court may take into account the substantial extrinsic evidence in this case. And, indeed, the Court's conclusion in its Opinion that Verizon may impose a CCL on the facts of this case is contrary to repeated instances of Verizon's own interpretation of this same language, including language in Verizon's parallel federal access tariff. The record in this case shows that Verizon did not charge the CCL under under its federal access tariff on the call flows that are the subject of this case and – critically – that Verizon intended its carrier customers to understand that its state access tariff should be interpreted in the same way as its federal access tariff.[4]

The record evidence in this case shows that neither Verizon nor its predecessors ever charged a CCL under its near-identical interstate tariff in the call flows that that are the subject of this case. Verizon's witness in this case agreed that, at the interstate level, and therefore under the interstate tariff language, Verizon applied no CCL charge in the call flows at issue in this case. See Trial Ex. 20 at 94-5 (Vol. XIII, Doc. 100, p. 4390 et. seq. of Record). Moreover, Verizon affirmatively represented to the New Hampshire Public Service Commission and its carrier customers in the docket in which (the predecessor of) Tariff 85 was approved *that they should look to the parallel interstate tariff to understand the meaning of the billing of charges and payment provisions of Tariff 85*. See Trial Ex. 17 at 6-7, 29 (Vol. V, Doc. 88, p. 2284 et.

[4] Appellees raised and argued this issue before the Commission, but did not do so in response to Verizon's appeal because Verizon had not raised it in its appeal and the Commission had not relied on it in its decision.

seq. of Record).[5] As a matter of law and fact, Tariff 85 cannot permit Verizon to charge a CCL in circumstances not permitted under the same language in the interstate tariff, when Verizon itself represented in the docket in which Tariff 85 was approved that the two tariffs should be understood the same way.

Conclusion

AT&T requests that this Court set aside the Court's May 7, 2009 decision and affirm – on the grounds set forth above – the New Hampshire Public Utility Commission's March 21, 2008 ruling that Tariff 85 does not permit Verizon to charge a carrier common line charge when on calls that do not use a Verizon carrier common line.

Respectfully submitted,

AT&T CORP.

Dated: May 18, 2009

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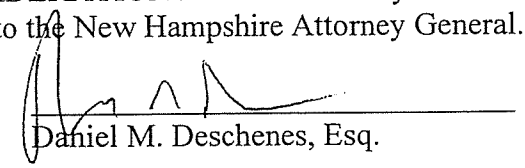
[5] See also Trial Ex. 15 at 20 (Vol. IV, Doc. 86, p. 1641 et. seq. of Record).

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2009, copies of the foregoing MOTION OF AT&T CORP. FOR REHEARING OR RECONSIDERATION have been sent by first class mail, postage prepaid to the parties of record and to the New Hampshire Attorney General.



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