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.

REPLY OF AT&T CORP TO OBJECTION TO MOTIONS FOR REHEARING OR RECONSIDERATION

AT&T CORP.

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REPLY OF AT&T CORP. TO OBJECTION TO MOTIONS FOR REHEARING OR RECONSIDERATION

Pursuant to NH Sup. Ct. Rule 22 and this Court's June 5, 2009 Order, AT&T Corp. ("AT&T") submits this Reply to the Objection to Motions for Rehearing or Reconsideration ("Objection") filed on May 28, 2009 by Verizon New England, Inc. d/b/a Verizon New Hampshire ("Verizon") and Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") (collectively, "Verizon" or "Appellants").

Introduction

AT&T's Motion demonstrated that, contrary to the Court's May 7, 2009, Opinion ("Opinion"), Verizon's intrastate switched access tariff cannot possibly have a "plain meaning" when the Court interprets it one way yet Verizon applies it differently when it provides interstate access under a tariff containing the same language. Likewise, AT&T's Motion demonstrated that, under the Court's misinterpretation of Verizon's tariff, AT&T would be expected to pay for a service Verizon does not provide. Verizon's Objection sidesteps these most essential points and, in doing so, inadvertently underscore the significance and legitimacy of AT&T's Motion.

The Court also should reconsider its Opinion because it overlooked Section 5.4.2 of Verizon's access tariff, which – unlike Section 5.1.1.A.1 which the Court dismissed in its Opinion – does in fact and in law impose on Verizon the obligation to provide the carrier common line ("CCL") service when Section 5 applies in order for Verizon to enforce the right to charge for it. To give effect to the part of Section 5 that requires a customer to pay for a service without also giving effect to the part of Section 5 that requires the carrier to provide the service produces an unjust result and is inconsistent with the canons of statutory construction in New Hampshire.

Argument

A. THE COURT FAILED TO CONSIDER THAT VERIZON INTERPRETS THE SAME LANGUAGE IN ITS FEDERAL ACCESS TARIFF TO MEAN THE OPPOSITE OF THE "PLAIN MEANING" FOUND BY THIS COURT.

In its Motion for Rehearing, AT&T demonstrated that the Court's Opinion produces the anomalous result that the same language in Verizon's federal tariff has a different meaning than its "plain meaning" in a state tariff. This is because neither Verizon nor its predecessors ever charged a CCL charge under its near-identical interstate tariff in the call flows that are the subject of this case. Verizon did not and cannot refute this indisputable fact.[1]

AT&T's point must not be lost. It is this:

a. At the time that Verizon created Tariff 85, an access tariff for intrastate calls, it had an existing interstate access tariff;

b. The two tariffs were, and are, virtually identical because Verizon had modeled its then-new intrastate access tariff on its interstate tariff. See Trial Ex. 17 at 6-7, 29 (Vol. V, Doc. 88, p. 2284 et. seq. of Record);

c. Verizon's witness in this case agreed that Verizon did ***not*** charge a CCL under its interstate access tariff on ***the types of calls flows that are the subject of this case,*** even prior to the time the CCL charge was reduced to zero in Verizon's interstate tariff. See Trial Ex. 20 at 94-5 (Vol. XIII, Doc. 100, p. 4390 et. seq. of Record).

Moreover, the unrefuted record evidence, based on the testimony of a Verizon witness at the time Tariff 85 was adopted, shows that Verizon 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*

[1] In its Objection, Verizon attempts to deny this fact by pointing to other circumstances in which it had assessed a CCL Access Charge. Objection at 6, ¶ 10. Verizon's position is unavailing, as these assessments are irrelevant in that they relate to call flows not at issue in this case. AT&T's statement that Verizon quotes in its objection refers to "***the call flows that are the subject of this case.***" Obj. ¶ 10 (emphasis added). Verizon's "on the contrary" response refers to a different set of calls, *i.e.*, "calls that did not use a Verizon common line" by which it means (as clarified in its following sentence) the call flows that were the subject of the FCC's decision in *AT&T Corp. v. Bell Atlantic,* and not calls at issue in this case. Thus, even if Verizon's statements are accurate, they are irrelevant to AT&T's point.

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. seq. of Record).[2]

The Court can now rest assured that AT&T's statements on this issue *and their implication* are completely and precisely accurate, because Verizon has not contested either the statements themselves or their significance. Accordingly, the Court cannot reasonably conclude that words in Tariff 85 have a "plain meaning" opposite of the meaning that Verizon gives them in the document upon which Verizon modeled its Tariff 85.

AT&T strongly urges this Honorable Court to reconsider its conclusion that the words to which Verizon has drawn its attention have a "plain meaning" and to consider instead the abundant evidence found in Verizon's behavior and in industry practice and history that leads to the inescapable conclusion that Tariff 85, like its interstate model, does not permit CCL charges to be imposed on the call flows that are the subject of this case.[3]

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

[3] In its Objection, Verizon suggests that AT&T has waived this argument. Verizon's position lacks merit both legally and factually. As an initial matter, Verizon's citation to secondary authority for the simple proposition that an appellant must raise an issue for it to be considered by the Court ignores the different responsibilities of – and application of waiver principles to – the appellant and appellee. "The appellant has the burden of demonstrating that error has been committed." 5 Richard Wiebusch, New Hampshire Practice; Civil Practice and Procedure §62.53 (2d ed. 1997) (citing *State v. Staples*, 120 N.H. 278, 285 (1980)). It is an established tenet of appellate practice that "[an] appellee [is] not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds." *Independence Park Apts. v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-588 (3d Cir. 2007) ("Here . . . the defendants were the appellees in the previous appeal. As such, they were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds."); *Crocker v. Piedmont Aviation*, 49 F.3d 735, 740-741 (D.C. Cir. 1995) ("[F]orcing appellees to put forth every conceivable alternative ground for affirmance [in a cross appeal or otherwise] might increase the complexity and scope of appeals more than it would streamline the progress of the litigation. . . . Thus, full application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal.").

Moreover, AT&T argued throughout its brief that the decision of the Commission, based on the Commission's review and consideration of the underlying record, should be affirmed. An alternative basis for the Commission's decision -- raised by AT&T in its brief -- was its conclusion that the extrinsic evidence established that Verizon has taken positions inconsistent with its interpretation of Tariff 85. Furthermore, Verizon's inconsistent construction of its interstate tariff was part of the evidence presented to the Commission in the underlying hearing.

Given the substantial deference accorded to Commission findings of fact, the fact that this evidence forms part of the underlying record, and the fact that AT&T raised Verizon's inconsistent positions both before the Commission and before this Court, Verizon's inconsistent construction of the interstate tariff is properly before the Court, and has not been waived by AT&T.

B. VERIZON'S OBJECTION DOES NOT REFUTE AT&T'S ARGUMENT THAT, IF SECTION 5 APPLIES, VERIZON CANNOT IMPOSE A CCL CHARGE BECAUSE IT IS IN DEFAULT OF ITS RECIPROCAL OBLIGATION TO PROVIDE THE SECTION 5 CARRIER COMMON LINE SERVICE.

In its Motion for Rehearing, AT&T argues that if the CCL Access Charge applies under Sectiion 5, then Verizon would have a reciprocal obligation to provide the carrier common line service imposed by Section 5. In other words, Verizon cannot charge for the service unless it actually provides it. AT&T had cited in its Motion, as counsel for BayRing and One Communications did at oral argument for this proposition, to Section 5.2, entitled "Undertaking of the Telephone Company" and to the specific requirement in Section 5.2.1 that states: "Where the customer is provided with switched access service under this tariff, the Telephone Company will provide the use of Telephone Company common lines by a customer for access to end user."[4] AT&T sought to bring this provision to the Court's attention in its Motion for Rehearing because the Court had overlooked it in its Opinion, citing to – and dismissing – Section 5.1.1.A.1. Opinion, at 7.

In its Objection, however, Verizon erred by suggesting that AT&T had cited to Section 5.1.1.A.1 that this Court had already dismissed as a "reiterat[ion] that carrier common line access service is one of the types of switched access service that Verizon provides." Objection, at 3, ¶ 4, quoting Opinion, at 7. In fact, and in law, Section 5.2.1 is very different. It expressly and affirmatively states that the "Telephone Company" (*i.e.*, Verizon) is undertaking to provide the

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[4] At oral argument in this case, AT&T explained the asymmetrical relationship between Section 5 and Section 6 in the tariff. A toll provider cannot purchase Section 5 services (*i.e.*, the CCL) without also purchasing Section 6 services (*e.g.*, local transport). This is why the "undertaking of the Telephone company" to provide the Section 5 services in Section 5.2.1 is phrased in the conditional ("*Where* the customer is provided with switched access service [*i.e.*, Section 6 service] . . . "). But toll providers can, and do, use Verizon's Section 6 services without using Verizon's Section 5 services. Those are precisely the call flows that are the subject of this case. More generally, the asymmetrical relationship explains why it is appropriate to look to Section 6 when one is buying Section 5 services, but not appropriate to look to Section 5 when one is buying only Section 6 services. The carefully constructed relationship between Section 5 and Section 6 was discussed at length in the case before the Commission. *See, e.g.,* AT&T's September 10, 2007, Post-Trial Brief, at 8-17 (*App. to Appellees' Brief* at 63-72.)

carrier common line service. AT&T's basic point, therefore, remains unrefuted: the Court's Opinion would read Section 5.2.1 out of the tariff. It would selectively give effect to the toll providers' obligation to pay without giving effect to Verizon's obligation to provide.

C. THE COURT'S DECISION LEADS TO AN UNJUST AND ABSURD RESULT THAT IS INCONSISTENT WITH NEW HAMPSHIRE'S CANONS OF CONSTRUCTION.

It is the law of this state that the Court must construe "all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Appeal of Estate of Van Lunen*, 145 N.H. 82, 86 (2000). In its Motion for Rehearing, AT&T brought to this Court's attention the commercially unreasonable and unjust result of its Opinion – requiring toll providers to pay for a service they do not ask for and do not receive. In its Objection, the only reason Verizon could give for why this result is not absurd and unjust was rejected as factually untrue by the Commission in the proceeding below.

In its Objection, Verizon argued this Court's decision is not absurd or unjust because "the CCL Access Charge was designed to assure that all toll providers purchasing any switched access service from Verizon would contribute to the company's joint and common costs." Objection, at 5, ¶ 7. However, in its decision below, the Commission expressly found "[b]ased on the record" before it, "that the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line." *App. to Appeal*, at 31. Moreover, that record is robust and compelling. AT&T's Panel Rebuttal Testimony dated April 20, 2007 contains a detailed explanation of the development of the CCL charge, which shows that the Commission *rejected* Verizon's proposal to set the charge at a rate that recovers residual joint and common costs, and demonstrates that the CCL charge is tied to usage of the common line/ local loop. *See App. to Appellee's Brief* at 25-31.

At oral argument, counsel for Verizon explicitly acknowledged that the Commission's finding (that the CCL recovered a portion of the cost of the local loop and was not a contribution element) is not subject to *de novo* review by this Court. Now, Verizon may not use allegations of fact expressly rejected by the Commission as the only basis for rationalizing the absurd and unjust result produced by its interpretation of Tariff 85.

Because – as the Commission found as a matter of fact – the purpose of the CCL charge is "to recover . . . a portion of the costs of the local loop or common line," it is indisputably absurd and unjust to require toll providers to pay for a common line when they do not use it. To construe the tariff to reach such a result, especially when interpretations consistent with industry practice and Verizon behavior are available, violates the well established rules of statutory construction in New Hampshire.

D. VERIZON FAILED TO REFUTE AT&T'S CONTENTION THAT VERIZON ITSELF CONSIDERS THE SAME LANGUAGE IN ITS PARALLEL FEDERAL TARIFF SUFFICIENTLY ELASTIC TO SUPPORT TWO CONTRADICTORY INTERPRETATIONS.

In its Motion for Rehearing, AT&T had pointed out that this Court's reliance on *AT&T Corp. v. Bell Atlantic*, 14 FCC Rcd. 556 (1998) ("FCC Decision") was misplaced, because the FCC did not find that the language in the tariff had a "plain meaning." AT&T noted that, on the contrary, 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 (for the call flows at issue in that case), and that Verizon made *no change* to its interstate tariff language. In its Objection, Verizon concedes it made no change to the language of its tariff, but claims that it had no need to, since it reduced the CCL charge to zero. Objection, at 7-8, ¶ 12.

In its Objection, however, Verizon failed to mention the date when it reduced its CCL charge to zero. A review of Verizon's tariff filings that are a matter of public record shows that Verizon did not reduce its CCL charge to zero until more than six months after the FCC Decision

was issued.[5] By omitting this essential piece of information, Verizon fails to explain how it complied with the FCC's prohibition against charging the CCL charge prospectively on the call flows at issue in the FCC Decision. Since this Court may not assume without evidence that Verizon knowingly violated an FCC decision, it can only conclude that it ceased charging the CCL charge without changing its tariff language.

Although the call flows at issue in the FCC Decision were different from those at issue in this case, the tariff language is the same. Because the language was elastic enough to support two contradictory interpretations for the FCC Decision call flows, it can hardly have a "plain meaning" in the instant case.

Conclusion

AT&T requests that this Court set aside the Court's May 7, 2009 decision; and affirm – on the grounds set forth above and in its Motion for Rehearing or Reconsideration – the New Hampshire Public Utility Commission's March 21, 2008 conclusion 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.

[5] By transmittal number TR 1148, NYNEX filed a change to its FCC Tariff 11 on June 16, 1999, for effect on July 1, 1999, which finally reduced its interstate access charge to zero. This is a matter of public record on file with the FCC.

Respectfully submitted,

AT&T CORP.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2009, a copy of the foregoing REPLY OF AT&T CORP TO OBJECTION TO MOTIONS 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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