THE STATE OF NEW HAMPSHIRE
BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

BayRing Petition For Investigation Into Verizon New Hampshire's Practice Of Imposing Access Charges, Including Carrier Common Line (CCL) Access Charges, On Calls Which Originate On BayRing's Network And Terminate On Wireless and Other Non-Verizon Carriers' Networks	Docket No.06-067

AT&T POST-TRIAL BRIEF

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Introduction

This case at bottom is quite simple. It boils down to whether Verizon can charge for a service it does not provide. Specifically, the question is whether under its Tariff 85 Verizon can assess its "Carrier Common Line" charge, or "CCL" (the CCL is the Verizon line that connects Verizon's end-user customer to the Verizon network) on calls being routed over the common line facilities (or equivalent) of another carrier and ***not*** over Verizon's common line. The answer is clearly no, in large part because (1) nothing in Verizon's fifteen year old New Hamphsire access tariff – a tariff developed prior to the advent of New Hampshire local exchange competition – permits Verizon to assess the CCL in this circumstance, (2) Verizon did not assess the CCL in this fashion for the first ten years its Tariff 85 was in effect, (3) Verizon does not assess the CCL in this fashion in other states, and (4) Verizon does not assess the CCL in this fashion at the federal level, either, even though the CCL language in its New Hampshire and federal tariffs is virtually identical.

Indeed, as discussed below, Verizon's unique New Hampshire approach to the CCL turns on an equally unique interpretation of its New Hampshire tariff. Verizon contends that terms and conditions in one section of its tariff can be read to apply to services provided in an entirely separate separate section. As shown herein, Verizon's misguided tariff analysis does not survive close scrutiny.

The anticompetitive consequences of Verizon's novel tariff interpretation are extraordinary, far reaching, and, ultimately, detrimental to the interests of New Hampshire consumers. This is a classic case of a carrier wanting to have its cake and eat it, too. Verizon wants to collect its CCL subsidy, not only when the call is being routed over its common lines to its customers, *but even when the call is going over the common line facilities of a Verizon competitor*. While it easy to understand Verizon's motivation – what business wouldn't want tocontinue collecting revenue even when its customers leave for a competitor – Verizon's efforts to indemnify itself from competitive losses and insulate itself from the natural – and beneficial – effects of the market is at odds with both the law and this Commission's pro-competitive policies.

Background

This case arises from relatively recent changes in Verizon's interpretation of Tariff 85, under which it bills toll carriers for access services. Beginning in 2005 (August for BayRing; November for AT&T), AT&T and BayRing each separately noticed substantial increases in the CCL charges that Verizon was applying. Subsequent investigations showed that the sudden increase arose from Carrier Common Line charges that Verizon was applying to traffic that terminated to wireless carriers. Both AT&T and BayRing disputed those charges because calls that terminate to wireless carriers do not traverse a Verizon carrier common line. When Verizon contended that its tariff permits it to charge for the common line even when a Verizon common line is not involved in the call, this case ensued. After this case was filed, Verizon began applying carrier common line charges on other calls that do not involve a Verizon common line, specifically calls that originate from or terminate to the customers of competitive local exchange carriers ("CLECs") and independent telephone companies ("ITCs").

Verizon began applying this novel new interpretation to a tariff that had been in effect for more than thirteen years, *i.e.*, since the time intraLATA toll competition was first implemented in New Hampshire, and well prior to the introduction of local exchange competition occasioned by the federal Telecommunications Act of 1996. Tariff 85 was adopted in 1993 to establish rates, terms and conditions by which interexchange carriers ("IXCs" or "competitive toll providers") could deliver toll calls to and from Verizon's local service customers in competition with Verizon's toll services.

In such instances, Verizon provided a complete switched access service, that is, a continuous transmission path between the premises of the end-user making or receiving a call and the network of the toll provider carrying the toll portion of the call. *See,* Exhibit 8 (AT&T Initial Panel Testimony), at 14, lines 29-31. The continuous path of the complete service is made up of three distinct components. *See,* Exhibit 8, at 15. The two components that (for example on the terminating side of a call) bring the call from a toll carrier's network up to the common line of the destination end-user are provided in Section 6. They are: "local transport" which also includes Verizon's tandem switching function (described in Section 6.2.1); and "local switching" (described in Sections 6.2.2 and 6.2.3). The third component of the complete access service is the carrier common line service that is described in, and provided pursuant to, Section 5.[1] Verizon agrees that the two components provided in Section 6 and the component provided in Section 5 comprise the "complete" switched access service. Exhibit 17, BR-VZ 2-6.

During technical sessions prior to the formal phase of this docket, the parties and Staff developed a number of different call flow scenarios involving situations in which (i) the toll portion of a call is provided by an IXC and (ii) Verizon provides some type of access service pursuant to Tariff 85.[2] Call Flow #1 presents the basic situation that access service provided under Tariff 85 was intended to address.[3] In this situation, a Verizon local customer is making a toll call to another Verizon customer in New Hampshire, but a competitive toll provider such as AT&T is providing the toll portion of the call transmission. All parties agree that a Verizon CCL charge applies to each end of the call, because the call is originating over the commone line of one Verizon customer and terminating over the common line serving another Verizon end-user customer.

The arrangement described above facilitated the development of toll competition in New Hampshire, and worked reasonably well as long as Verizon was the only wireline local exchange carrier in its territory. *See,* Tr. 1 at 119. Once Congress passed the Telecommunications Act of 1996, however, the local exchange market was opened to competition and CLECs began offering local exchange service in Verizon service territories. Now calls would not only originate and terminate over Verizon's common line facilities, but would also originate and terminate over the common line facilities (or

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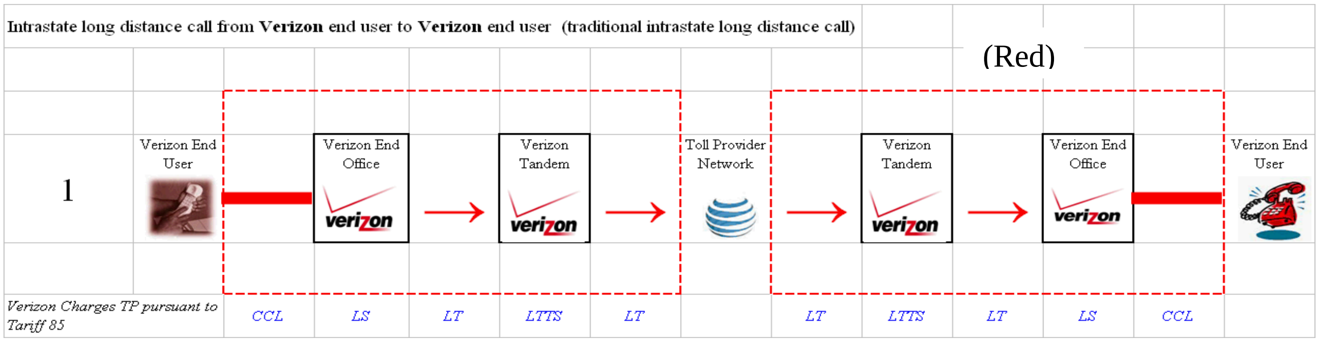
[1] The three components are clearly laid out in Tariff 85 in a graphical representation at Section 6.1.2, a copy of which is set forth in Appendix A, attached hereto:

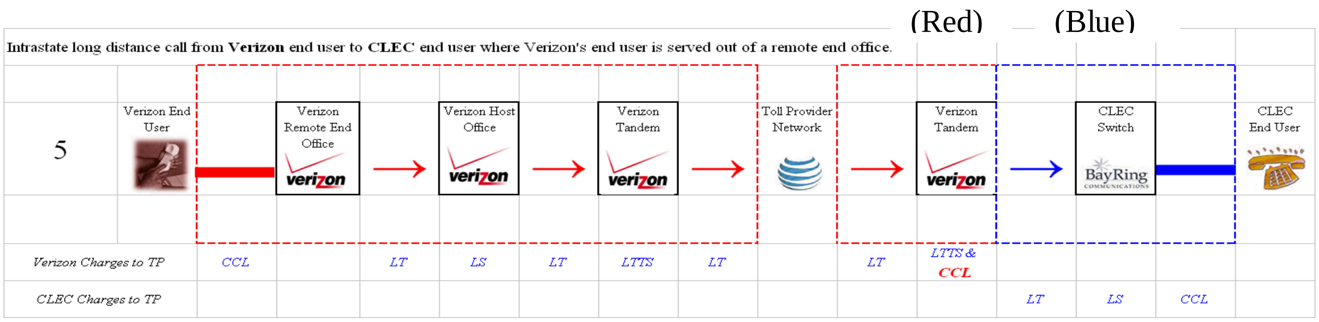
[2] A complete set of the 35 call flows is attached to AT&T's initial pre-filed panel testimony, filed on March 9, 2007. *See,* Attachment A-1 to Exhibit 8 in this docket.

[3] On July 11, 2007, in the hearings in this matter, AT&T Witness Penn Pfautz presented a simplified version of the same call flow *See,* Tr. 1, July 11, 2007 ("Tr. 1"), at.119, ln 12 and Exhibit 10, p. 1.

equivalent) of other competitive local exchange carriers, each of whom would be assessing their own charges for originating and terminating calls. Toll providers such as AT&T were continuing to compete with Verizon in the toll market, *id.*, except that now the toll traffic they carried was coming from, and going to, a number of local exchange carriers and not just Verizon. This led to the possibility of many different call flow scenarios, including, obviously, call flows that do not involve a call to or from a Verizon customer connected to Verizon's central office switch via a carrier common line. Call Flow #5 is one such scenario. *Id*.

Mr. Pfautz presented a simplified version of Call Flow #5 at the hearing. *See*, Tr. 1, at 122 ln 10, and Exhibit 10 at 2. In this situation, Verizon has no end-user involved and no common line involved in the termination of the call, because the call is bound for the end-user of another carrier, in this example, BayRing. In Call Flow #5, the call is completed over a BayRing local switch and carrier common line, shown in blue. A comparison of the terminating sides of Call Flow #1 and #5 illustrates the difference: The call traverses a Verizon carrier common line (red) in Call Flow #1 and traverses a BayRing carrier common line (blue) in Call Flow #5.





There is one other significant difference between the two call flows and it is this difference that causes the dispute. The access charges levied by the local exchange carriers, BayRing and Verizon, on the toll provider, AT&T, are shown in the lines below the call flow diagrams. Under Verizon's interpretation of Tariff 85, the competitive toll provider must now pay two times for the carrier common line, one to the CLEC whose common line is involved in the call, and one to Verizon whose common line is not involved. This is because, for Call Flow #5, Verizon seeks to charge a CCL rate *for the provision of **only** Section 6 local transport and local switching* components, even though the rates in Section 6 do not include a CCL charge and even though the call is traversing a BayRing common line such that Bay Ring is charging AT&T the CCL rate as well.

All of the other call flow scenarios in which AT&T is disputing the CCL charge reflect this same basic characteristic. In some cases, Verizon is seeking to impose a CCL charge on both the originating and the terminating side of a call when it has no end-user, and thus no common line, involved in the call at all.[4] In these situations, under Verizon's interpretation of the tariff, there are scenarios where AT&T may be paying *four* CCL charges when the call is traversing only *two* carrier common lines – and those two lines are provided by *other* carriers, not Verizon. *See, e.g.*, Exhibit 10, p. 3.

Verizon's misapplication of its CCL is having a substantial adverse impact on other carriers. Because, as explained below, the CCL charge represents *nine times* the magnitude of all local transport and local switching charges combined, Verizon's multiple unwarranted CCL charges are are a substantial and inappropriate financial drain on the carriers that are being forced to pay them.

<u>Argument</u>

I. THE LANGUAGE AND STRUCTURE OF VERIZON'S TARIFF 85 DOES NOT ALLOW VERIZON TO CHARGE FOR THE CARRIER COMMON LINE SERVICE WHEN IT DOES NOT PROVIDE IT.

In a stunning admission at the hearings, Verizon Witness Peter Shepherd acknowledged that Verizon's position is, in his words, illogical:

> We've heard from BayRing and AT&T in this proceeding . . . . attempting to apply a logical assessment to those complex technical details in order to make the case that the CCL charges should not apply to the disputed call types, because the traffic did not traverse a Verizon New Hampshire end office or a Verizon New Hampshire end-user loop.
>
> Such an assessment may have merit and be appropriate to a future proceeding to determine if the tariff warrants changes in the future. *But the logic has little relevance to the basis upon which the access charges were established and the intent, interpretation and lawful application of the existing Commission approved tariff.*

Tr. 2, at 8-9 (emphasis added). Making matters even worse, Verizon claims that this illogical interpretation was exactly what Verizon had in mind when it proposed the tariff

[4] There is no dispute that Verizon is not providing the CCL in circumstances where it is charging for it. Exhibit 17, ATT-VZ 1-2, 1-3, 1-4, 1-11, 1-12, 1-13; BR/ATT-VZ 1-5, 1-7, 1-8; Staff-VZ 1-3, 1-5, 1-6.

more than 15 years ago, and that the Commission endorsed Verizon's interpretation.[5] The plain fact is, however, that there is nothing in any Commission decision that endorses Verizon's interpretation of the tariff. Indeed, as explained below, Verizon's interpretation was rejected by the Commission when it rejected Verizon's proposal in docket No. 90-002.

AT&T, on the other hand, can, and will, demonstrate to the Commission that its interpretation of Tariff 85 is logically and legally sound. In this section, AT&T demonstrates, by careful analysis of Sections 5 and 6 of Tariff 85, that the structure and language of the tariff supports AT&T's position that Verizon may not assess a CCL on a call that does not traverse a Verizon common line. As discussed below, AT&T's analysis is based on the simple, self-evident and undisputed observation that Verizon has put the terms applicable to the provision of CCL service in Section 5, and put the terms applicable to the provision of local transport and switching services in Section 6. From that simple observation a result in favor of AT&T and the other competitive carriers in this proceeding necessarily follows.

A. WHERE VERIZON IS NOT PROVIDING A CCL SERVICE, VERIZON CANNOT RELY ON TERMS AND CONDITIONS IN ITS SECTION 5 CCL SERVICE TARIFF AS A BASIS FOR ASSESSING CHARGES UNDER ITS SEPARATE SECTION 6 LOCAL TRANSPORT OR LOCAL SWITCHING TARIFF.

1. Section 5 And Section 6 Provide Two Different And Distinct Sets of Services.

Exhibit 6.1.2-1 in Section 6.1.2 Service Structure provides a useful beginning point for an explanation of why Verizon cannot rely on provisions in one section of its tariff to assess charges from another. *See* Appendix A, attached. This exhibit shows

[5] Exhibit 15 (Shepherd March 9 Prefiled Testimony), at 20.

diagrammatically the three major components of what it describes as a "Complete Switched Access Service." Those three major components are: "local transport," "local switching," and "common line."[6] Section 6.1.2.B. identifies the three major rate categories which relate to the three major components respectively. Importantly, Section 6.1.2.B.3 expressly excludes Carrier Common Line Service as a service provided under Section 6. Carrier Common Line Service is set forth in Section 5. There is no dispute between the parties that Section 5 and Section 6 are two separate and distinct services. Indeed, it is clear to Verizon that the "in conjunction with language" in Section 5.1.1.A.1 demonstrates that Section 5 and Section 6 provide two different end services. *See,* Tr. 1 (July 10, 2007), at 86-88; *see especially, id.* at 88, ln 10-12.

2. The "In Conjunction With" Language In Section 5 Supports The Competitive Carriers' Position; While An IXC Cannot Purchase the CCL Without Also Purchasing Local Switching (i.e., CCL is purchased "in conjunction with" Local Switching), IXCs can, and do, use Verizon's Local Transport Without Using Verzion's Local Switching or CCL.

Verizon makes much of the "in conjunction with" language in Section 5.1.1.A.1. And, indeed, Verizon is right to do so, but an understanding of the purpose of that language supports the position of AT&T and the other competitive carirers, not that of Verizon.

Section 5.1.1. provides the basic description of what constitutes Carrier Common Line Access Service under Section 5:

> Carrier common line access provides for **the use of** end users' **Telephone Company provided** common lines by [IXC] customers for access to such end users to furnish intrastate communications.

[6] *See also*, Section 6.1.2.D. ("Local 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." (emphasis added)).

If a toll provider is using, and Verizon is providing the use of, the end users' common line, then the Section 5 terms and conditions apply. This is not disputed.

In addition, if a carrier does in fact use Section 5 CCL services, it *must* also use Section 6 services. The reason is simple. A Verizon common line connects a Verizon end-user customer to a Verizon switch. The only way a carrier can originate a call from a Verizon end-user, or terminate a call to a Verizon end-user, is by routing the call through the Verizon switch and over the Verizon common line. Thus, if a carrier does use Section 5 Common Line service, it also must use Section 6 Local Switching. This is precisely why the rest of the description of Section 5 services in Section 5.1.1.A, states (emphasis added):

> The Telephone Company will provide carrier common line access service to customers *in conjunction with* switched access service provided in Section 6.

Likewise, Section 5.2.1.A states expressly that Verizon's undertaking to provide use of the common line is conditioned upon a circumstance "where the customer [IXC] is provided with switched access service [Section 6] under this tariff." Verizon agrees with this reading of its tariff.[7]

Indeed, this reading of the tariff reflects fundamental network architecture. CCL service is a right to use Verizon's common line for a limited period – to rent minutes of use on the line – solely to complete a toll call to a Verizon end-user.[8] The toll provider can access the common line only where it is connected to Verizon's network, *i.e.*, at Verizon's local end office switch. Therefore, in order for the toll call to reach Verizon's

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[7] *See*, Exhibit 17, Staff-VZ 1-8 (Verizon states that its common lines are available to IXCs "where the customer is provided 'switched access service' (under Section 6).") (emphasis added).

[8] In this case, we use the terminating access in our example, but the discussion applies equally to originating access.

common line for termination, it must pass over Verizon's switching and transport facilities between the toll provider's network and the common line, that is, the toll provider must use Verizon's Section 6 local transport and switching services. Hence, use of the common line service necessarily means use of the Section 6 local transport and switching rate components.[9] As Mr. Nurse testifed:

> You cannot get a minute of loop on its own, floating out there. It doesn't work that way. You could get a UNE loop. You could buy the whole loop for the whole month and pay the UNE loop rate, and you could buy that, and you wouldn't need anything connected to it, and you would be billed for that whole loop, because you would have that copper pair all to yourself all month long.
>
> * * * * * * *
>
> But, if you want to get a minute of use on a telephone pair, and there's going to be other services using that pair at other times of the day and other days of the week and month, you need to (a) make sure you only have one user at a time, and you need to make sure that you measure how many minutes each guy used it, so that you can bill them out accordingly.
>
> So, the only way you can get carrier common line service is if that carrier common line is connected to a switch that's going to measure or meter how many minutes did one guy, like the local service provider, use that loop, use that line, how many minutes did an interstate or an intrastate toll carrier use that loop.

Tr. 1, at 150-151.[10]

Thus, there is no argument that Section 6 Transport and Local Switching terms and conditions always apply when a carrier is taking Section 5 CCL services, because Section 5 services cannot be used in isolation.

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[9] The CCL loop is only a dumb piece of copper wire, unable to measure minutes. Therefore, in order for Verizon to sell usage for a limited period of time, it must be connected to a switch in order to meter usage.

[10] The Section 5 CCL service's dependence upon Section 6 services is reflected in the tariff in a number of places. As noted above, the dependent relationship explains the "in conjunction with" in Section 5.1.1.A. But the dependent relationship also shows up in places like Section 5.1.2.B., which states, "Detail billing is not provided for carrier common line." This is because the detailed "per minute" billing needed to measure the duration of usage over the common line comes from the switch, provided in Section 6, which necessarily is used when the common line is used.

The converse, however, is not true. Carriers can, and often do, use Section 6 local transport and switching without utilizing Section 5 carrier common line services. *See*, Tr. 1, at 176-77 (Nurse). Here again, the reasons are fairly straightforward. In a number of circumstances, carriers use Verizon's transport service to route a call to a carrier other than Verizon. Indeed, that is the case in the call flows involving the disputed charge.

3. Verizon Errs in Relying On Terms And Conditions In Section 5 As A Basis For Assessing Charges To Section 6 Rate Components, Because the Carrier Has Not Requested Section 5 CCL Services And Verizon is Not Providing Them.

Verizon relies on language in several different subsections of Section 5 as the basis for its claimed right to charge the CCL even when its Section 5 CCL service is onto involved, *i.e.* when the call is not being routed over its common line. For example, Verizon cites to Section 5.4.1, which states, "Except as set forth herein, all switched access service provided to the customer will be subject to carrier common line access charges." Exhibit 15 (Initial Testimony of Peter Shepherd), at 17, lines 15-18. *See also, id*., at lines 12-14.

Verizon's reliance on Section 5 language, however, is misplaced, because in the disputed call flows a toll provider is not asking for, and Verizon is not providing, a Section 5 service, *i.e*., the CCL service. In the disputed call flows, toll providers are *not* using Verizon's common line. Tariff 85 is a large document and carriers are not expected to guess that provisions not included in the section that governs the common line might apply and which ones they may be. In the disputed call flows, carriers are using Verizon's local transport and local switching services in Section 6 and that is where carriers expect to find the terms and conditions that apply. Nothing in Section 6, however, authorizes Verizon to charge the CCL rate as a condition for providing Section

6 local transport and local switching servicees.[11] Indeed, Section 6 components must be used in order to be billed. Section 6.6.3.A.

Put simply, when carriers are taking Transport and Switching services from Section 6, the rates, terms and conditions in Section 6 apply. The only time the rates terms and conditions in Section 5 apply is when carriers are taking services from Section 5. Verizon's mix and match approach to tariff interpretation cannot withstand even cursory review.

4. Even Assuming *Arguendo* Section 5 Were To Apply -- And It Does Not -- Verizon Cannot Pick And Choose Which Of Its Provisions Apply.

Section 5.1.1. states (emphasis added), "The Telephone Company ***will provide*** carrier common line access service to customers in conjunction with switched access service provided in Section 6." *See*, Tr. 1, at171. This provision alone ensures that Verizon must provide the CCL service in order for its terms and conditions to apply. *See*,Exhibit 8 (AT&T March 8 Initial Prefiled Testimony), at 13.

In addition, Section 5 specifically states that its services are billed "to each switched access service . . . in accordance with the regulations setforth herein and in Section 4.1 and at the rates and charges contained in Section 30.5." These sections in

[11] During the development of the 35 call flow scenarios in the technical sessions, it became clear that Verizon's contention boils down to a claim that the CCL charge is a term and condition of obtaining Section 6 services. As part of those call flows, the parties and staff agreed to show the different types of access charges underneath the service or facility with which it is associated. Throughout the technical sessions, Verizon's disputed CCL rate was placed under the common line provided by another carrier. *See*, Tr. 1, at 125 ln 1-2 (Pfautz). This, of course, made no sense because Verizon was not claiming a right to the CCL charge based on the CLEC's provision of the common line. It was claiming a right to charge CCL based on its provision of a Section 6 local transport function. As a result, at the end of the technical sessions, Verizon requested that the disputed CCL charge be placed under the Verizon tandem, which is part of the Section 6 local transport service. *See, e.g.*, Exhibit 8, Attachment A-1 (Call Flow #5); *See also*, Exhibit 10, p. 2. Tr. 1, at 125 lines 3-5 (Pfautz). Unfortunately for Verizon placing the CCL rate under its tandem in a call flow does not make the CCL rate a charge applicable to the provision of Section 6 services. It is the terms in Section 6 that govern the provision of such services.

turn make clear that Verizon must *provide* a service in order to *bill* for it. Section 4.1 permits Verizon to bill only for services that had actually been *provided* during the billing period.[12] Section 30.5 establishes a per minute of use charge indicating that the right to charge is conditioned upon some duration of time in which the service is used. *See*, Tr. 2, at 96.

Verizon cannot pick and choose which terms in Section 5 apply and which do not. It cannot claim, for example, that Section 5.4.1 ("Except as set forth herein, all switched access services provided to the customer will be subject to carrier common line access charges.") applies and at the same time claim that Section 5.1.1.A.1 ("The Telephone Company will provide carrier common line access service. . . ") does not. Indeed, it is hard to argue that it has all the rights provided under Section 5 without the single most important obligation of providing the CCL service described and required to be provided in Section 5. As the Supreme Court has explained, "[r]ates . . . do not exist in isolation" but "have meaning only when one knows the services to which they are attached." *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). Accordingly, a carrier like Verizon can charge tariffed rates only when it provides the service to which the rate is "attached."

5. Verizon Misconstrues The Tariff Language On Which It Relies.

The language to which Verizon repeatedly refers in Section 5.4.1 and at the beginning of Section 5 regarding the application of carrier common line access charges to

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[12] Section 4.1.1.A requires that Verizon billing shall be issued only for "services *established* or *discontinued* or *provided* during the preceding billing period." *See* Section 4.1.1.A (emphasis added). It should go without saying that, if service is discontinued or established during the preceding billing period, it must have been provided during at least some portion of the period. Thus, this language means that Verizon must provide the CCL service during the preceding period in order to be able to bill for it.

switched access services must be understood in light of the asymmetric relationship between Section 5 and Section 6 services and, importantly, the circumstances under which the Verizon cited language will come into play. Because the Verizon cited language is in Section 5, it comes into play only when Verizon's carrier common line is involved, that is, only when Section 5 services are involved. And in those cases the language reflects the physical network requirement that, when Section 5 services are used and, thus, when the CCL applies, switched access services will also be used.

Because there is a statement that Verizon "will provide carrier common line access service to customers *in conjunction with* switched access service under Section 6," there is a need to clarify Verizon's right to charge for carrier common line services. Verizon is saying to its toll carrier access customers in effect, "When you order Section 5 CCL service, don't think that, just because we're obligated to provide you Section 5 CCL service *in conjunction with* Section 6 services, we must give you the CCL service as part of the price of the Section 6 services. We still get to charge you for it."

We know that the above interpretation is correct for a couple of reasons. First, it makes sense. The language upon which Verizon relies does, in fact, clarify certain rights to charge, but only when those rights are implicated, that is, only when Section 5 services are ordered. There are many provisions in Verizon's tariff that permit or require the application of charges, but those provisions only apply when the service is actually being used. In this case,Verizon is improperly seeking to use a clarification of a right to charge for a service that is, in fact, ordered and taken, as a basis for charging when only the other services are used. .

The second reason is even more compelling. The argument for Verizon's alternative explanation for the language is patently and demonstrably untrue. In Mr. Shepherd's March 9 testimony, he states under oath:

> [The CCL Rate Element] was, and still is, a rate element designated exclusively to provide a level of contribution targeted to an overall rate level and was set on a residual basis to obtain the targeted contribution levels upholding this important public policy objective. *That is why the tariff language explicitly and repeatedly spells out the requirement that* c*arrier common line charges apply to* ***all*** *switched access usage.*

Exhibit 15, at 20-21 (bold emphasis in original; other emphasis added). Later in his March 9 prefiled testimony, Mr. Shepherd claims that the unique circumstances in New Hampshire linking the CCL rate element to contribution distinguish it from the circumstances of the analogous federal tariff (Exhibit 15, at 25, lines 17-19), *and immediately states*:

> Specific language was included in the proposed [New Hampshire] switched access tariff which was also carried forward to the tariff ultimately approved by this Commission and its successorr tariffs, specifying that carrier common line applies to **all** switched access for a carrier's use of NET's (now Verizon NH's) local exchange switched network, supporting the rate design objectives [in New Hampshire].

See,Exhibit 25, at 25-26. *See also*, Tr.2 at 19, lines 15-18. In short, Mr. Shephard repeatedly claims that the language in Section 5 permitting it to apply the CCL rate element to all switched access was inserted into the New Hampshire tariff because the CCL rate element was a contribution element.

There is one huge and fatal flaw to this argument. The language upon which Verizon relies in the New Hampshire tariff already existed in the federal tariff at the time that Verizon proposed the New Hampshire language, and the federal tariff language was simply carried over from the federal jurisdiction. The federal tariff will be discussed at length below, but it is important to make clear here that the federal language *also* states that "***all*** Switched Access Service provided to the customer will be subject to Carrier Common Line Access chargres." *See,* Exhibit 20 (Section 3.5 in Verizon's F.C.C. No. 11), p. 1.[13] And, critically, Verizon concedes that the same language in the federal tariff does *not* permit it to charge the CCL to switched access services that do not also include the CCL service. Thus the language was not inserted into New Hampshire's tariff for any reason unique to New Hampshire. It is the same language used in the federal tariff in all material respects and must be given the same meaning.

* *

In summary, the structure and language of Sections 5 and 6, support the common sense notion that a carrier cannot charge for a service it does not provide. Verizon cannot take a charge applicable to a service it does not provide (Section 5) and make it a condition to providing other separate services (Section 6).

B. THE LANGUAGE AND STRUCTURE OF TARIFF 85, BY VERIZON'S DELIBERATE DESIGN, MIRRORS THAT OF VERIZON'S FEDERAL ACCESS TARIFF UNDER WHICH VERIZON CONCEDES IT MAY NOT CHARGE THE CCL IN THE DISPUTED CIRCUMSTANCES.

1. Simultaneously Interpreting the Same Language in Federal and State Tariffs Inconsistently Produces Irrational Results.

The language in Verizon's interstate access tariff for carrier common line access service bears a remarkable similarity to the analogous language for carrier common line access in Tariff 85. For example, Section 3.5 in Verizon's F.C.C. No. 11 tariff states:

[13] While Section 3.8.1 of Verizon's F.C.C. No. 11, uses the word "each" instead of "all", in the context of Section 3.8.1, it means the same. Moreover, to the extent that Verizon relies on its own quiet substitution of "each" for "all" in this section without any notice to the other parties in DE 90-002 that the difference in these two words was deliberately intended by Verizon to be given the extreme significance that Verizon now attributes to it, then Verizon should be stopped from relying on such disingenuous conduct.

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

See, Exhibit 20, p. 1. Apart from the capitaliztion of some letters, the language is identical to Tariff 85's Section 5.4.1.A., upon which Verizon relies for its right to charge CCL even when no common line is provided. Yet, Verizon concedes that the identical language in its F.C.C. No. 11 tariff gives it no right to CCL when its common line is not involved. Tr. 2, at 94-95.

Moreover, the above similarity in language between the two tariffs is not a fluke. In Section 3.8.1 of its F.C.C. No. 11, it states (emphasis added):

> Except for those services set forth in 3.5.3, 3.5.4, 3,5.5 and 3.5.6 preceding, *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* 2.4.12 (Involvement with RTU or TRS Services) preceding, 3.8.5 following (Determination of Premium and Non-Premium Charges) except as set forth in 2.4.11, 3.6.4 preceding (Resale) and 3.8.4 following (PIU).

Exhibit 20, at 2.[14] For purposes of application to CLEC originated or terminated calls, the core language (italicized above) is almost identical to Tariff 85, Section 5.1, which states in pertinent part:

> Carrier common line access service is billed to each switched access service provided under this tariff in accordance with the regulations as set forth . . . .

Yet, Verizon agrees that it cannot charge a CCL under its F.C.C. Tariff 11 when calls do not involve a Verizon common line (Tr. 2, at 94-95), for example when a call is originated from or terminated to a CLEC at the same time that it contends it can under the identical language in Tariff 85.

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[14] 3.5.3 refers to "Local Exchange Access and Enhanced Services Exemption"; 3.5.4 refers to Common Line Signalling Access Exemption, 3.5.5 refers to "Dedicated Link Exemption"; and 3.5.6 refers to Radio Telephone Utility (RTU) and Telecommunications Relay Service (TRS)Exemption."

This inconsistency creates some truly irrational results. Lebanon, NH, and White River Junction, VT, abut each other across the Connecticut River. Yet, if AT&T carried the toll call from Lebanon through a Verizon tandem to a CLEC local customer in Concord, NH, it would have to pay Verzion the CCL charge (in addition to paying the CLEC the same charge), whereas if the call orginated from White River Junction, passed through a Verizon tandem, and terminated to the same end-user, Verizon would not be entitled to charge the CCL. The calls are materially identical; the Verizon tandem swtiching service is identical, and the language of the tariffs applicable to the tandem switching service is identical in all material respects; yet, Verizon claims – under the same terms – it can charge AT&T for terminating access *nine times* the amount when the call originates from a New Hampshire end-user than when the call originates from a Vermont end-user.

Verizon's novel interpretation is at odds with the interests of New Hampshire consumers. That is because, in addition to being irrational, it also raises the cost (and ultimately the price) of toll service provided to New Hampshire end-users seeking to make in-state toll calls.

2. Interpreting The Same Language in Federal and State Tariffs Differently Violates Basic Canons of Contract and Statutory Interpretation.

It is a well understood principle that identical, or nearly identical language, in tariffs or statutes is given the same meaning. In *Globalcom Inc. v. Illinois Commerce Comm'n*, 806 N.E.2d 1194, 1200-01 (Ill. App. Ct. 2004), for example, the appellate court reversed the PUC's determination that the ILEC's state access tariff did not impose early termination charges in certain circumstances. The ILEC's first argument on appeal was that its federal access tariff contained the same early termination language, and had been construed to impose early termination charges in the same circumstances, so that the PUC acted arbitrarily and capriciously when it "construe[d] the same language in the federal and state tariffs with different results." *Id*. 1200-1201. The court of appeals agreed with this argument. *Id.* at 1206.

In New Hampshire, the Commission applies principles of statutory construction to tariffs. *See In re Pub. Serv. Co. of New Hampshire*, 79 N.H. P.U.C. 688, 691 (Dec. 19, 1994) (since a tariff is "not only a contract between [the utility] and its customers, it also has the effect of law and [therefore] … it is appropriate to apply the principles of contractual interpretation and statutory construction contained in common law when interpreting [a] tariff.") It is therefore appropriate to look to principles of statutory construction for guidance here; and there is a plethora of case law in which courts have found that identical language in different portions of a statute or in multiple statutes is interpreted identically.[15] New Hampshire follows this well established principle. *See*, *In re Denton*, 786 A.2d 845, 847 (N.H. 2002) (emphasis added) (quoting *In re Conway*, 430 A.2d 154 (N.H. 1981).[16]

[15] See, e.*g.*, *Beedy v. State*, 194 S.W.2d 595, 601 (Tx. Ct. App. 2006) ("When the same or a similar term is used in the same connection in different statutes, the term will be given the same meaning in one as in the other, unless there was something to indicate that a different meaning was intended.") (internal quote marks deleted); *Tharp v. Psychiatric Security Review Bd.*, 110 P.3d 103, 107 (Or. 2005) ("When the legislature uses the identical phrase in related statutory provisions that were enacted as part of the same law, we interpret the phrase to have the same meaning in both sections."); *State v. Jade G*., 154 P.3d 659, 667 (N.M. 2007) ("[I]t is considered a normal rule of statutory construction to interpret identical words used in different parts of the same act [as having] the same meaning.") (internal quote marks deleted); *Discover Bank v. Vaden*, 489 F.3d 594, 605 (4th Cir. 2007) ("When Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts ordinarily should be interpreted the same way.") (internal quote marks deleted); *Textron Inc. v. Commissioner of Internal Revenue*, 336 F.3d 26, 33 (1st Cir. 2003) ("[T]he basic canon of statutory construction [is] that identical terms within an Act bear the same meaning.") (internal quote marks deleted).

[16] The standard New Hampshire formulation is: "*Words used with plain meaning in one part of a statute* are to be given the same meaning in other parts of the statute, unless a contrary intent is clearly shown." *In re Denton*, 786 A.2d 845, 847 (N.H. 2002) (emphasis added) (quoting *In re Conway*, 430 A.2d 154 (N.H. 1981). The italicized phrase, if taken at face value, indicates that the rule applies only when the statutory language at issue was used with plain meaning – precisely the situation where interpretation

3. Verizon Intended Similar Language In Tariff 85 And F.C.C. 11 To Have The Same Meaning.

Although sufficient, the Commission need not rely only on basic canons of tariff and statutory construction. The record of this case demonstrates that Verizon, as a factual matter, intended Tariff 85 to have the same meaning as its analgous interstate tariff, because it was designed that way; and critically, as we show below, Verizon expressly told the carriers who would be purchasing out of Tariff 85 that they could rely on their understanding of F.C.C. 11 to understand Tariff 85.

When Verizon developed Tariff 78, the predecessor to Tariff 85, it deliberately modeled the structure and design of its interstate access tariff. [17] The Verizon witnesses in DE 90-002, the docket in which the tariff was litigated and adopted, testified that the same structure and design was used because people working in the industry were familiar with Verizon's interstate access tariff structure and how the tariff worked.[18] Clearly, not only did Verizon intend the same words to have the same meaning in the two tariffs; Verizon actually intended the other carriers to understand the two tariffs that way. Such conduct may well rise to the level of promisory or judicial estoppal. Verizon should not, in any event, be permitted to apply a different interpretation to the same words when it deliberately led its customers to believe that the same interpretation would apply.

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should be least controversial. The cases suggest, however, that the New Hampshire courts do not attach great significance to the italicized phrase. In *Denton*, for example, the court applied the rule in holding that the word "award" had to be given the same meaning in one section of the Workers' Compensation Law as the court had previously given the word in another section of the same act, notwithstanding that there is no explicit statement in *Denton* or in the earlier case that that meaning was the "plain meaning." *See*, *Denton*, 786 A.2d at 847; *In re Rainville*, 732 A.2d 406, 410 (N.H. 1999).

[17] *See* Exhibit 17, AT&T-VZ 2-3 (Direct Testimony of Peter Shepherd, NH Docket DE 90-002), at 29, line 8; *See also*, Exhibit 15 (March 9 Testimony of Peter Shepherd), at 20, lines 3-7.

[18] *See* Exhibit 17, AT&T-VZ 2-3 (Direct Testimony of Peter Shepherd, NH Docket DE 90-002), at 6-7

II. VERIZON'S TARIFF LANGUAGE MUST BE CONSTRUED CONSISTENTLY WITH THE COMMISSION'S PROCOMPETITIVE INTENT IN ADOPTING IT.

A. THE COMMISSION ADOPTED TARIFF 85 AND ACCESS RATE LEVELS IN PARTICULAR FOR THE PURPOSE OF PROMOTING COMPETITION AND LOWERING RATES FOR TELECOMMUNICATIONS SERVICES.

New Hampshire telephone end-users making toll calls had no choice of a toll carrier prior to 1990. In Verizon's service territory, they were required to use New England Telephone (n/k/a Verizon). Tr. 2, at 102. In 1990, several competitive toll providers, including AT&T, sought the right to provide competing toll service within New Hampshire. *See, e.g.,* DE 90-002 (Order No. 20,040; Jan. 21, 1991), 1991 WL 494196, at *1. The Commission opened docket DE 90-002 to establish the terms upon which AT&T and other toll providers could obtain from Verizon access to Verizon's local customers in order to carry their toll calls. *Id.*

In 1993, after months of litigation and negotiation, the parties to DE 90-002 entered into a settlement agreement to resolve, among other things, "the fundamental issue of the level and structure of access charges for intrastate toll competition in New Hampshire." DE 90-002 (Order No. 20,864; June 10, 1993), 1993 WL 475294, at *1. Under that proposed settlement, Verizon would reduce its combined (originating and terminating) access rates from 20 cents per minute in 1993 to 12 cents per minute over a four year period. *Id.*, at *11.

In an unusual move, the Commission rejected the proposed settlement because the access rates proposed were too high to allow New Hampshire rate payers to enjoy the full benefits of robust competition. In its decision, the Commission left no doubt that it was endorsing competition as a means of reducing prices for New Hampshire rate payers and enhancing New Hampshire’s economy with a state-of-the-art telecommunications infrastructure. The Commission stated:

> We believe that the proposed reductions are insufficient. Access charges above interstate levels threaten to deprive New Hampshire ratepayers of the reduced toll prices which have characterized competition in the interstate jurisdiction. Access charges should also be set at levels which will enhance New Hampshire's ability to maintain a telecommunications infrastructure that will attract new businesses to the State and will encourage existing businesses to remain here.
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> * * * * * * * * *
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> In the information driven economy of the future, we anticipate that telecommunications costs will be a significant part of the overall expenses of running many businesses. * * * * Thus, the availability of low cost telecommunications services is crucial for New Hampshire's efforts to attract and retain industry and jobs. To the extent that carrier access charges are inordinately high, particularly in relation to other states, ratepayers are unlikely to benefit fully from toll competition and New Hampshire's efforts to expand its business base will be compromised.

Id., at *11-12. Later in the same decision, the Commission – anticipating the possibility that the parties would adopt a version of the settlement stipulation with further reduced access rates – reiterated its commitment to competition as a means of promoting the public good in New Hampshire. The Commission stated that “[t]he Stipulation represents an *important evolution in bringing the benefits of competition to New Hampshire and its ratepayers*.” *Id*., at *14 (emphasis added). The parties to DE 90-002 eventually did accept the Commission’s modifications including the substantially reduced access rates and on July 28, 1993, filed it for approval. *See,* Exhibit 25 (Modified Stipulation and Agreement).

It was the Commission’s focus on using competition as means of reducing costs and thus prices charged for telecommunications services that motivated its complete rejection of Verizon’s initial access rate proposal and its underlying concept. Verizon’s initial proposal had set access rates at a level that would have ensured that the access rates that Verizon's toll competitors would pay to Verizon for every toll call carried by the competitors would provide the same contribution to Verizon as the toll call would have provided if Verizon carried the call. [19] In other words, under Verizon's proposal, it would be insured against any losses as a result of the introduction of toll competition, even if Verizon's marketshare fell from 100% to 0%. Under Verizon's proposal, it would recover its losses from its competitors in the toll market, and those competitors in turn would seek to recover their payments to Verizon from their toll customers. The net result of Verizon's proposal would be essentially zero competitive risk to Verizon and essentially zero competitive benefit to New Hampshire's rate payers. Therefore, in rejecting Verizon's proposal, the Commission stated, " An effectively competitive marketplace is totally at odds with any notion that NET's total revenues can be 'guaranteed' to remain at any particular level." *Id*., at *7. In short, the Commission rejected access rates that required Verizon's competitors to make it whole for its losses in order for toll competition to reduce toll rates.

B. VERIZON'S INTERPRETATION OF TARIFF 85 IS ANTICOMPETITIVE AND ANTI-CONSUMER .

Under Verizon's interpretation of Tariff 85 in this case, Verizon's local exchange and toll competitors must indemnify it for any losses Verizon experiences as a result of its local competitors' success. Such an interpretation goes against the entire philosophy, purpose and reasoning underlying Tariff 85, which resulted from the Commission's rejection of an access tariff proposal that would have required Verizon's toll competitors to indemnify it against losses resulting from the toll competitors' success. It would make no sense to interpret Tariff 85 in a way that would undermine local competition and the

[19] Exhibit 15 (March 9 Testimony of Peter Shepherd), at 20, lines 7-11

benefits it produces, when the tariff's very purpose was to obtain the benefits of competition.

The effect on competition of Verizon's tariff interpretation is not subtle. It has a double effect. First, it insures Verizon against access charge losses resulting from competition. This is because "when Verizon loses a customer, they still get revenue for that loop for the carrier common line that they are no longer providing." Tr. 2, at 117. Carried to an extreme, "if they were to lose all their customers, but still supply tandem switching, they would [still] get loop revenue [associated with] all their [former] customers." *Id*. For Verizon, this is a good deal. It gets the same net access revenue associated with providing service to an end-user whether or not it provides that service. Obviously, someone else is paying, and the news is not good for New Hampshire rate payers.

The second effect relates to those who are paying for Verizon's good fortune. Since, under Verizon's interpretation, toll providers must now pay Verizon for the carrier common line it is *not* providing ***and*** pay the CLEC whose carrier common line is being used, Verizon's interpretation would impose on Verizon's competitors systematic, significant and artificial costs that ensure ultimately either their departure from the market or higher rates for New Hampshire consumers, or both.[20] And, indeed, the magnitude of these costs is substantial. Approximately 90% of the total access charge Verizon levies on a toll provider to originate calls from or terminate calls to Verizon end-users is in the CCL rate. Tr. 1, at 26, ln 21-24.

[20] Higher retail toll rates would result if Verizon prices its services at its competitors' rates after they have been driven to artifically high levels by Verizon's conduct Given the existing imputation and price floor requirements, it is likely that Verizon would charge higher rates. The efficacy of those requirements, however, are questionable now with the extensive bundling of local and long distance service into single pricing packages.

The competitive advantage created for Verizon by its self-serving interpretation of Tariff 85 is well illustrated in the March 9 pre-filed testimony of Darren Winslow, filed by BayRing. *See*, Exhibit 2. Mr. Winslow compares Call Flow #11 to Call Flow #13. We summarize that comparison here, but for ease of exposition, use specific names for the CLECs. In #11, a Verizon end-user is making a toll call to a local customer of BayRing. In #13, a One Communications end-user is making a toll call to the same BayRing local customer. Verizon's access costs to complete that call involve the payment of only one CCL charge, while One Communication's access costs to complete the same call require the payment of two CCL charges. And, because, the CCL charge constitutes 90% of the cost of a complete access service,[21] One Communications is essentially paying twice for one connection. Thus, despite the fact that call flow #s 11 and 13 involve comparable facilities, the costs to Verizon's competitor to complete the call are nearly double the costs to Verizon.[22] Moreover, Mr. Winslow showed that the same type of competitive disadvantage is created by Verizon's tariff interpretation when calls involve wireless end-users ITC end-users. Exhibit 2, at 14-20.

The foregoing anticompetitive effect occurs with regard to toll service and therefore affects stand alone toll providers, such as AT&T, in the same manner. But whether Verizon's competitor offers stand alone toll service or a bundled local and toll package, the effect is the same. It increases the costs of Verizon's competitors to provide

[21] A CLEC carrying a toll call that terminates to a Verizon end user (Call Flow #22, for example) pays 2.9745 cents per minute to Verizon for the complete access service to Verizon's end-user; whereas a CLEC carrying a toll call that terminates to another CLEC's end-user (Call Flow #13, for example) pays 2.6997 cents per minute. *See* Exhibit 2 (Winslow Pre-filed), at 13-14. *See also*, Exhibit 2 (Exhibit A to Winslow Prefiled Testimony).

[22] One Communications' cost is 5.6239 cents per minute compared to Verizon's cost of 2.6494 cents per minute.

a competitive service or bundle of services and, at the same time, produces a huge flow of unearned revenue into Verizon's coffers.

There are currently many competitors in New Hampshire's telecommunications market and, hopefully, many more to come. But such a future is doubtful if Verizon is given special entitlement to impose charges on competitors for services it does not provide. All competitors have "joint and common costs." Yet, no other telecommunications carrier in the market claims the same rights as Verizon does here to receive guaranteed revenues from its competitors.[23] Indeed, a competitive market is simply not sustainable when one carrier can tax its competitors as Verizon seeks to do here in New Hampshire.

C. IF VERIZON'S INTERPRETATION IS UPHELD, COMPETITORS CANNOT AVOID THE ANTICOMPETITIVE IMPACTS.

Verizon has insisted on several occasions during the litigation of this case that carriers who do not want to pay Verizon's CCL charges can find alternatives. In his April 20 prefiled rebuttal testimony, Mr. Shepherd stated:

> CLECs and IXCs also have the ability if they so choose to establish direct interconnection with other carries that would avoid using Verizon NH switched access and application of the disputed CCL charges.

Exhibit 15, at 23, lines 3-5. At the hearings, Mr. Shepherd again offered his "helpful" suggestion that the carriers "can provide their own transport directly to the terminating CLEC switch, if they so desire." Tr. 2, at 25, lines 7-10. As Mr. Shepherd well knows, however, carriers do not have the alternatives he describes. Carriers are not in this

[23] Contribution is used to recover, inter alia, "joint and common costs." Tr. 2, at lines 20-23.

expensive and lengthy litigation because they have an easy and readily available alternative.

Indeed, Mr. Shepherd's suggestion is at odds with Verizon's own policies. Verizon Wireless takes the position that wireless carriers are not obligated to connect directly with other carriers and are entitled to choose to connect indirectly through the ILEC's tandem if they so choose.[24] As a result, if a CLEC or IXC that originates large volumes of toll traffic for eventual termination to a wireless carrier asks the wireless carrier for direct connections for such termination, many wireless carriers, including Verizon Wireless, will take the position that they are under no obligation to agree. In any event, as Mr. Shepherd correctly acknowledged, the rates, terms, and conditions on which a wireless carrier will agree to interconnect directly are matters of business interest, or incentives. Tr. 2, at 88-89. Unfortunately for CLECs and IXCs, Verizon does not charge the wireless carriers the same inflated CCL charges for use of its tandem to exchange toll traffic with other carriers. Those charges are determined pursuant to interconnection agreements that Verizon has with wireless carriers, and those charges are significantly less than the CCL rate and much closer to the economic cost of the service that Verizon provides.[25] Moreover, wireless carriers have no incentive to negotiate numerous different direct connections with a variety of different carriers when they can utilize the "hub

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[24] *See,* Comments of Verizon Wireless, filed on September 8, 2006 in the FCC's docket *In the Matter of Petition for Interconnection of Neutral Tandem Inc, Pursuant to 47 USC § 201(a) and 332(c)(1)(B),* WC Docket 06-159. Although AT&T does not agree with this position, many, if not most, wireless carriers do. For example, the CTIA (wireless carrier association) agrees with Verizon.

[25] Because all calls that begin and end within New Hampshire are wholly within the same MTA and are, therefore, considered local calls for purposes of intercarrier compensation involving wireless carriers (Exhibit 17, Staff-VZ 1-25), Verizon has interconnection agreements with wireless carriers that use the reciprocal compensation rate (seven one hundredths of a cent per minute in New Hampshire) to charge for the exchange of traffic. Exhibit 2 (Winslow Prefiled Testimony, at 17); see also, Tr. 1, at 50-53.. Verizon's CCL rate, meanwhile, is approximate 2.7 cents per minute. Tr. 1, at 32, line 1.

arrangement" efficiencies of a Verizon tandem to interconnect with all other carriers in the same place.[26]

Indeed, in the case of Verizon Wireless, the incentives are perverse: they run in exactly the opposite direction. If Verizon Wireless were to agree to exchange toll traffic directly with AT&T, for example, it would deprive its parent company of the windfall revenues derived from CCL charges levied by Verizon NH for a CCL service that is not provided. Clearly, Verizon Wireless is a significant, if not dominant, player in the wireless market in New Hampshire and controls a large proportion of the toll traffic terminating to wireless carriers in the state. Even if AT&T could somehow persuade other wireless carriers to incur the cost of direct connections instead of relatively efficiently priced arrangements through a Verizon tandem under their ICAs, AT&T will never be able to persuade Verizon Wireless to do so. The shareholders of its parent company would not tolerate it.

Mr. Shepherd's "alternative" is no alternative at all. There is a reason why CLECs and IXCs have continued to pay what amounts to an uneconomic tax for the right to connect to other carriers through Verizon. They have to.

III. VERIZON'S DISCRIMINATORY APPLICATION OF ITS CCL CREATES A *DE FACTO* BARRIER TO ENTRY VIOLATIVE OF SECTION 253 OF THE TELECOMMUNICATIONS ACT OF 1996.

Verizon's application of its existing CCL, by which Verizon collects the charge even on traffic being routed to its competitors, is a *de facto* barrier to competitive entry

[26] If carriers were nonetheless able to reach agreement on multiple direct connections to avoid Verizon's non-cost-based CCL charge, it would be a classic example of uneconomic bypass, since hub arrangements are the most efficient. If, as has been the case, wireline carriers continue to be forced to exchange traffic with wireless carriers through Verizon's tandem, and if Verizon's tariff interpretation is not rejected, Verizon's CCL charge is a non-cost-based charge that allows Verizon to capture for itself the value to wireline carriers that the hubbing arrangement represents.

precluded under Section 253 of the Telecommunications Act of 1996. 47 U.S.C.A. § 253. That section, captioned *Removal of Barriers to Entry*, instructs that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or *have the effect of prohibiting* the ability of any entity to provide any interstate *or intrastate* telecommunications service." (emphasis supplied) There can be no serious debate that Verizon's imposition of its CCL even on traffic routed to its competitors has the effect of impeding intrastate competition. For one thing, if Verizon is permitted to apportion some of its loop costs to other carriers in ways that its local exchange competitors cannot, Verizon is being given an unwarranted cost advantage over those competitors that, plainly, is not permitted under the Act. *Puerto Rico Telephone Co. Inc. v. Municipality of Guayanilla*, D. Puerto Rico 2005, 354 F. Supp. 2d 106, aff'd. 450 F.3d 9. Moreover, because Verizon's CCL structure results in carriers facing higher costs to terminate calls to customers served by Verizon's competitors than they face when they terminate calls to Verizon, Verizon is creating incentives for carriers to give Verizon end-users preferential rates or treatment. Again, such discrimination has the effect of precluding competition and, thus, is banned under the federal Act. *Qwest Communications Corp. v City of Berkeley*, N.D. Cal. 2003, 255 F. Supp.2d 1116, aff'd. 433 F.3d 1253; *City of Portland, Or. v. Electric Lightwave*, Inc. D.Or. 2005, 452 F.Supp.2d 1049.

IV. VERIZON'S "CONTRIBUTION" ARGUMENT COLLAPSED IN THE FACE OF INCONTESTIBLE FACTS TO THE CONTRARY.

Verizon's case rests on two arguments.[27] First, it claims that language that governs the provision of Section 5 CCL Service applies when a carrier does not take Section 5 Service; and, second, it argues that it is entitled to CCL charge as "contribution." The prior sections of this brief have already shown that the language Verizon relies on relates to the provision of a service its customer is not taking and, thus, such language does not apply. Here, we address Verizon's second argument, and show that the incontestable facts do not support it – so much so that Verizon in the end has backed away from it and reduced it to a circular argument that proves nothing.

Verizon contended that the CCL rate in New Hampshire was set to provide the same amount of contribution to meet its revenue requirement as toll service. Indeed, in his March 9 prefiled testimony, Mr. Shepherd stated:

> The major difference in the New Hampshire intrastate tariff was the establishment of the carrier common line rate element as a vehicle to provide contribution **equivalent to the contribution obtained from toll rates and charge**s, rather than as a charge for the carrier's use of Verizon NH's common lines and associated costs – as in the interstate tariff.

Exhibit 15, at 20, lines 7-11 (emphasis in original). Mr. Shepherd then connected the above-stated purpose for the CCL rate to its adoption, by stating *in the next sentence* that

[27] In addition to these two arguments, Verizon also pointed to a New York case in which the Commission there had ruled that Verizon was entitled to charge the CCL rate on calls terminating to wireless carriers. Verizon has not, however, vigorously pressed this case as a basis for the Commission's decision here, and for good reason. First, it was decided on the basis of completely different tariff language that related only to wireless carriers. Second, the existence of the case is "the exception that proves the rule." Verizon was unable to point to a single other jurisdiction or case in which a regulatory authority had ruled that carriers may charge for a service they do not provide. *See*, Exhibit 17(AT&T-VZ 2-9). The competitive carriers noted, on the other hand, the almost universal rejection of such a principle. Exhibit 8 (AT&T March 9 Prefiled Testimony), at 19 (AT&T as an ILEC does not assess CCL when it does not provide the common line). *See also, id.* at 19-20 (repeated prohibitions of such a practice in the federal jurisdiction). *See also*, Tr. 1, at 22 (BayRing witness Lebeck has never seen access bills that impose charges for rate elements not provided).

the "intrastate CCL element was *adopted* . . . to promote the important public policy objective of retaining contribution for the support of services like basic residence exchange, which had traditionally been supported through toll rates." *Id.*, at 20, lines 11-15 (emphasis supplied).[28]

Even if true in the sense that Verizon intends (which it is not), it is not at first glance clear why the fact that the CCL rate is a "contribution element" is relevant to the Commission's interpretation of Tariff 85. Verizon's purpose in making this argument appears to be two-fold. First, it wants the Commission to believe that it is somehow entitled to CCL revenues without regard to circumstance, simply as a revenue source for "*the* Telephone Company" to recover its costs, sort of like a tax. Second, it wants the Commission to believe that the rate element was not intended to recover the cost of the loop, so that it can apply the CCL even when no CCL service is involved. As we show below, neither is true. In fact we show that the Commission affirmatively intended to transition intrastate access rates to interstate rates, which necessarily means both the same rate *level* and the same rate *application.*

A. THE COMMISSION'S DECISIONS CONTRADICT VERIZON'S POSITION.

In his March 9 prefiled testimony, Mr. Shepherd goes on at length quoting from the testimony of numerous Verizon's witnesses regarding Verizon's proposal presented to the Commission in Docket No. 90-002 fifteen years ago. Such evidence is puzzling

[28] Mr. Shepherd later claimed in cross-examination that he meant for his statement (that the CCL rate was intended to provide contribution equivalent to toll) to refer to *Verizon's initial* position in DE 90-002, not its ultimate position and not the Commission's. Tr. 2, at 65. Given that his entire testimony constantly referred to the "intent of the charge" or used language such as "it was the intent" without ever clarifying *whose* intent, there was a clear implication that Mr. Shepherd was referring to the Commission's intent. It is now clear that Mr. Shepherd was referring to Verizon's intent, but , as the Commission well knows, Verizon's intent is irrelevant. All that matters is what the Commission intended by its order, and, as shown in the section below, the Commission's decision did not adopt Verizon's position.

and irrelevant. Verizon's resuscitation of what its witnesses said fifteen years ago is not evidence of what the tariff means. Indeed, it is not even evidence of what the Commission's intent was when it accepted a settlement pursuant to which the tariff was adopted. Verizon's witnesses' assertions were simply the assertions of one of the parties to a case. While at the time of that case Verizon may have wished its position to be true, Verizon's wishes are not controlling. Rather, what matters is what the Commission decided. On that score, Verizon's position cannot stand. In Docket No. 90-002, the Commission never accepted Verizon's proposal and, in fact, rejected all the propositions on which it was based, as we explain in detail below. The Commission's own words and conclusions expressly support the position of AT&T and the other competitive carriers.

In order to understand Verizon's proposal in Docket 90-002 to recover "residual" costs through a "contribution" charge, it is necessary to understand the background, *i.e.*, what had happened in Docket 89-010. This is because it was the ruling of the Commission in Docket 89-010 that gave rise to certain costs (which Verizon calls a "residual" amount, or "joint and common costs," or simply costs for which "contribution" is required) that Verizon wanted to recover in its CCL rate proposal in Docket 90-002.

Docket 89-010 was a general rate case. In that case, Verizon had proposed to recover unseparated non-traffic sensitive costs (primarily loop costs) in basic exchange rates. The Commission, however, rejected Verizon's proposal. Docket 89-010, Order No. 20,082, 76 NH PUC 150, at *166. The Commission ruled that Verizon already recovers approximately 25% of non-traffic sensitive costs under its federal tariff and removed that amount from Verizon's allowed revenue requirement. *Id*. More importantly for the present case, it also ruled that a portion of the loop costs must be recovered in rates for other services, including toll services. *See, id.* The Commission also found that when a portion of the loop costs are recovered in the rates for toll and other services, basic exchange rates were compensatory. *Id.*, at *166-167.[29] Thus, because basic exchange service was compensatory, there was no need for support for universal service from "contribution". As a result, when the dust settled from Docket No. 89-010, the Commission had approved rates that produced Verizon's revenue requirement, and those rates included (a) toll rates that recovered a portion of the loop costs and (b) basic exchange rates the Commission found to be compensatory.

It is in the context of Docket No. 89-010 that the Commission's actions in DE 90-002 approving Tariff 85's predecessor can be understood. Docket No. 90-002 was opened to establish the conditions for introducing competition into the intraLATA toll market, including the rates that Verizon could charge to its new intraLATA toll competitors. Verizon's principal objective in that docket was to ensure that it would be able to continue to recover the same net revenues from toll related services (toll and access) that were allowed in Docket 89-010, even as it lost toll customers to its new intraLATA toll competitors. *See*, Shepherd Testimony, p. 21, lines 12-15. *See also*. Tr. 2, at 64-66. Accordingly, Verizon proposed a CCL charge that, if approved, would have produced the same net revenues from toll related services that Verizon would have enjoyed if it had maintained its single provider position in the intraLATA toll market.[30]

[29] *See also*, Docket No. 90-002, Order No. 20,864, 1993 WL 475294, at *3 ("When [non-traffic sensitive] costs were appropriately allocated among all services utilizing loop facilities, and therefore causing loop costs, including toll, it was clear that basic exchange services were not being subsidized by toll or any other service.")

[30] Verizon thus proposed the CCL rate to generate additional revenue needed to cover the shortfall in its revenue requirement created as a result unassigned loop cost. *See*, Tr. 2, at 64-65. The unassigned loop costs are thus what Mr. Shepherd now refers to as contribution.

Verizon's initial proposal was an end-to-end total access charge of 24 cents per minute. *See*, Tr. 2, at 75-76.

Moreover, a review of what the Commission actually said in its decisions makes clear that the CCL rate element was ***not*** set on the basis of Verizon's proposal. The Commission never accepted the proposal that Verizon continuously references in this case. After months of litigation, Verizon entered into a settlement stipulation under which it agreed to access rate elements that, when combined, produced a total end to end access rates per minute of about 12 cents, one-half the effective access rates in Verizon's discarded proposal. The Commission, however, rejected even that rate in the Stipulation and stated that it would accept a settlement only if Verizon reduces its access rates to interstate levels, approximately 8 cents per minute in total, over a four year transition period. Order No. 20,864, at *11. Verizon subsequently complied.

In rejecting Verizon's proposal to recover toll equivalent contribution from the CCL rate paid by Verizon's toll competitors, even as it lost toll customers to those competitors, the Commission ruled that it is not appropriate to set rates in a competitive marketplace to guarantee revenues at any particular level.[31] Although Mr. Shepherd in the present case claims that the purpose of this "contribution" rate element was to "support" basic exchange service with toll related rates designed to maintain that support after the introduction of toll competition, the Commission had ruled that basic exchange revenues were compensatory. Docket 89-010, Order No. 20,082, 76 NH PUC 150, at *166-167. As a result, whatever Verizon's hopes may have been in proposing a 24 cent per minute end to end access charge, the Commission did not consider it as guaranteed

[31] *See*, Order No. 20,864, at *7 ("An effectively competitive marketplace is totally at odds with any notion that NET's total revenues can be 'guaranteed' to remain at any particular level.").

contribution towards the cost of basic exchange service. Otherwise, it would not have required a transition to the then interstate rate of eight cents per minute.

The foregoing explanation of the Commission's decisions and actions makes clear three points. First, it shows the Commission never intended that Verizon should receive CCL revenues at a level designed to recover a specific, predetermined amount of money, regardless of whether or not it provides service. Second it shows that the CCL rate, to the extent it does recover costs, is recovering a portion of the cost of the common line, thus establishing a nexus between the payment of the CCL rate and the provision of the common line. Third, it shows that the Commission intended the CCL rate to result in access rates that produce the same level of revenues as those produced by interstate access rates. This necessarily means that the Commission intended the CCL to be applied in the same fashion as the interstate CCL rate, because "[r]ates…do not exist in isolation" but "have meaning only when one knows the services to which they are attached," *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 223(1998).

B. THE COMMISSION'S DECISIONS SHOW THAT THE CCL WAS NOT SET AT A LEVEL DESIGNED TO RECOVER ANY SPECIFIC COSTS – JOINT AND COMMON OR OTHERWISE – AND THAT THE COMMISSION DID NOT ENDORSE VERIZON'S"METHODOLOGY" FOR SETTING THE CCL.

Mr. Shepherd finally admitted at the hearings that the Commission did not accept Verizon's proposal for setting the CCL rate. *See,* Tr. 2, at 78-79. Still, he continued to assert that, even though the Commission had rejected Verizon's proposal, it had somehow accepted Verizon's "methodology" when the Commission approved the settlement. *See,* Tr. 2, at 67-69. Leaving aside for the moment the curious assertion that the Commission's acceptance of an uncontested settlement could somehow constitute its affirmative approval of the intent or "methodology" of one of the parties to the settlement,[32] it is not clear what Verizon "methodology" the Commission could possibly have accepted. When Mr. Shepherd admitted that the Commission did not accept Verizon's CCL rate proposal, he also admitted that the settlement stipulation that the Commission did accept broke the link between Verizon's costs and revenue requirements, on the one hand, and CCL rate determination on the other. *See,* Tr. 2, pp. 79-80. In other words, Mr. Shepherd admitted that the CCL rate has no relationship to any cost level or revenue requirement Verizon may have. That left Mr. Shepherd stating a simple tautology: the CCL rate was set at a level (we'll call it the target rate level) that would produce the revenues that would be produced by the "target" level of rates. *See*, Tr. 2, at 47. Given this circular logic, it is not at all clear what "methodology" Verizon is claiming the Commission accepted when it ultimately accepted the second settlement stipulation. In fact, there was no "methodology" at all, merely the acceptance of a settlement that included CCL rates established at a level designed to make New Hampshire's intrastate access charges equivalent to the interstate access charge level within a few years.

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[32] It is a well established principle of administrative law that an agency acceptance of uncontested settlements is not precedent for anything. See, *Office of Consumers' Counsel v FERC*, 783 F2d 206, 235 (DC Cir. 1986) (court found that the Commission abused its discretion to rely on a settlement agreement to determine a remedy because "the Commission itself has stressed that a settlement is confined to the single proceeding in which it is adopted ... [and] approval of a settlement agreement will not establish principles or precedent or control future proceedings or otherwise settle issues." (internal quote marks omitted)); see also *Wisconsin Public Power Co v FERC*, 2007 WL 2067024, at * 14 (DC Cir Apr 20, 2007) (court found the Commission's conclusion unreasonable because it was based in part on an approval of a settlement agreement, which "does not constitute approval of, or precedent regarding, any principle or issue in [a] proceeding. And this court has already held that neither FERC nor challengers may rely on an uncontested settlement as precedent." (Internal citation omitted)). This principle is also alive and well in New Hampshire. *See, Re Connecticut Valley Electric Co. Inc*., 69 N.H. P.U.C. 319 (Jun. 18, 1984) (although finding that its rate determination was preempted by a FERC approval, the NH PUC noted that FERC approval of a settlement "does not establish principle or precedent" (id. at 324)); *see also, Re Granite State Elec. Co*., 83 N.H. P.U.C. 532 (Oct. 7, 1998) (NH PUC noted that approval of a settlement is not precedent, in electric restructuring context.).

C. TO THE EXTENT THAT THE CCL RATE IN FACT RECOVERS COSTS, THOSE COSTS ARE THE COSTS OF VERIZON'S LOOP USED TO PROVIDE CCL SERVICE.

Although the CCL rate was not set to recover any specific, predetermined level of costs, the only Verizon costs left that were not already recovered by other rates at the time the Commission approved the settlement with the CCL rate were the loop costs assigned to toll in Docket 89-010. As we explain below, the effect is that, to the extent that the CCL rate produces revenues that Verizon uses to recover its costs, those costs are in fact loop costs that the Commission assigned to toll.[33]

The Commission's actions in Dockets 89-010 and 90-002 show that the costs that Verizon's so called "guaranteed contribution" rate recovers are actually the portion of loop costs allocated to toll related services rather than basic exchange rates. As explained above, in Docket 89-010, Verizon had been ordered to recover a portion of its loop costs from toll service, among others, and Verizon was allowed to adjust its toll rates accordingly. Thus, Verizon's proposal in Docket 90-002 to maintain its net toll related revenues in access rates through use of the CCL was actually a proposal to recover the portion of loop costs assigned to toll related services.[34] While the Commission did not permit Verizon to charge the full amount it sought, it is apparent that the CCL, to the

[33] Verizon claims the CCL rate is for "contribution" and, therefore, somehow not for the recovery of common line costs. This is nonsense. There is nothing mutually exclusive between "contribution" and loop costs. Contribution is the difference between price and incremental costs. Tr. 1 at 164 (Nurse). Since the cost of a loop is not an incremental cost incurred to carry any one call (*i.e.*, it is "traffic insensitive"), the cost of a loop is necessarily recovered in "contribution."

[34] The basis of Verizon's CCL rate development in Docket 90-002 is the toll rate that was set in Docket 89-010. See, Exhibit 17, VZ-AT&T 2-3 (Workpaper 1 to Workpaper 7). In that exhibit, Verizon developed the CCL as follows: Verizon, 1) calculates a differential between the costs of access and toll service; 2) subtracts that cost differential from the tariffed retail rate of toll services (i.e. Retail MTS rate) - the result is an End-to-End access target; 3) subtract local switching and local transport - the result equals total common line. Therefore, to the extent the Commission allocated loop cost to toll rates in Docket 89-010, that cost was included (through the Retail MTS rate) in the development of CCL as described above. *See also*, Tr. 1, at 190 (Oyefusi); and Tr. 2, at 72-76, especially at 76, ln 7-11 (Shepherd).

extent that it recovers "contribution" is, in fact, recovering the portion of loop costs allocated to toll related services.[35] Thus, contrary to Verizon's claim, the CCL is, in fact, linked to the recovery of loop costs and, therefore, is to be assessed only on calls that traverse the Verizon loop. Conversely, the CCL should not be assessed, and is not applicable to, calls that do not traverse the Verizon loop.

V. VERIZON'S BEHAVIOR IS INCONSISTENT WITH ITS NEW INTERPRETATION OF TARIFF 85.

A. VERIZON'S BILLING ACTIONS ARE NOT CONSISTENT WITH ITS TARIFF INTERPRETATION.

Tariff 85 was adopted in 1993. Wireless carriers were already operating at that time, and CLECs began operating in New Hampshire shortly after adoption of the Telecommunications Act of 1996. Yet, as we explain below, Verizon did not begin billing CCL on traffic originated from or terminated to non-Verizon carriers until years later. Verizon's sudden reinterpretation of its tariff to generate new revenues for itself and impose substantial costs on its competitors, however, is inconsistent with the settled meaning of Tariff 85 established not only by its language, but also by Verizon's behavior and that of its billing agent and all other market participants.

Wireless carriers have been operating since the early 1980s, and by 1993, when Tariff 85 was adopted, wireless subscribership was growing rapidly. Yet, Verizon has provided no evidence that it billed CCL on wireless terminated calls for at least eight years after the adoption of Tariff 85. Verizon has produced a few bills which it claims shows that it billed CCL on wireless terminated calls in 2001 and the years following, and attributes its inability to produce earlier such bills to the unavailability of billing

[35] *See* Exhibit 25 (Modified Stipulation, and Attachment 7 thereto (July 7, 1993 Del Vecchio letter to Commission)).

records prior to 2001. Although a "convenient" excuse, unfortunately for Verizon, Verizon's own records demonstrate affirmatively that Verizon did ***not*** bill CCL on wireless terminated calls until *after June, 2001*.

Based on Verizon's Third Supplement to Staff 1-19, which the Commission allowed into the record on August 20, 2007, as part of Exhibit 17, it is apparent that Verizon did not even begin billing CCL on wireless terminated traffic until after June 2001. That exhibit, a report from a Verizon financial system, shows billed MOUs for Local Switching and Carrier Common Line for the month of June for the year 2001, 2002, 2003, and 2004. While the data for 2002-2004 indeed show more MOUs billed for CCL than for Local Switching (sometimes "LS"), [36] it is significant that the LS and CCL MOUs for June 2001 are essentially the same for AT&T, and exactly the same for BayRing. *See*, Exhibit 17, Staff-VZ 1-19 (Attachment 11). Thus, by Verizon's own logic it appears that Verizon did not bill the CCL charge for calls terminated to wireless users until after mid-2001. The clear import is that, contrary to its assertion that it has always interpreted Tariff 85 as mandating CCL charges for any minutes that transit its network even where no Verizon loop is involved, Verizon did not bill the CCL charge in these circumstances at all for eight years following the introduction of Tariff 85, and then – until 2005 – in such small quantities that no carrier noticed.[37]

[36] All parties agree that excess CCL MOUs over LS MOUs represent CCL charges on MOUs that originated from or terminated to non-Verizon carriers, *i.e*., the disputed CCL charges.

[37] On its bills, Verizon did not clearly identify the traffic to which it was applying the CCL charge as traffic terminating to non-Verizon carriers. Tr. 1, at 104, lines 7-10. Thus it was not apparent to Verizon's carrier customers that it was misapplying the charge to non-Verizon terminated traffic until the difference between CCL MOUs and LS MOUs became substantial, following August 2005. Tr. 1, at 17 and 117-118. Subsequent investigation revealed that Verizon had indeed been billing the CCL on small amounts of wireless terminated traffic beginning in 2001. Tr. 1, at 104, lines 21-23.

Verizon's "Johnny-come-lately" behavior is even more glaring with respect to traffic originated from or terminated to CLECs and ITCs. As noted above, CLECs began operating in New Hampshire shortly after adoption of the Telecommunications Act of 1996. Yet, Verizon did not begin billing the CCL charge on traffic terminated to or originated from CLECs and ITCs until the fall of 2006, *ten years later*. Prior to the fall of 2006, the New York Access Billing Pool ("NYAB") had handled Verizon's access billing for CLEC-to-CLEC and CLEC-to-ITC calls. Tr. 1, at 19-20. From the beginning, NYAB, as Verizon's agent, had not billed the CCL charge on these calls. *Id.* In approximately September 2006, Verizon discontinued use of NYAB and took the billing of CLEC-to-CLEC and CLEC-to-ITC calls in-house. *Id.* Suddenly, Verizon deemed the NYAB's decision not to bill CCL charges on such calls in accordance with its interpretation of Tariff 85 a mistake. *See*, Tr. 1, at 20, lines 17-20. That abrupt change in the application of Tariff 85 resulted in a substantial increase in CCL charges being billed. In BayRing's case, it increased the amount of disputed CCL charges by 400%. Tr.1, at 20.

As Verizon's agent for billing access, the NYAB's actions are attributable to and binding upon Verizon with respect to matters within the NYAB's responsibility. *Boucouvalas v. John Hancock Mutual Life Ins. Co*., 90 N.H. 175, 5 A.2d 721 (absent fraud, principal is chargeable with knowledge of agent regarding all matters within scope of agency). Furthermore, *ten years* of acquiescence in the NYAB's interpretation of Tariff 85 makes any claim by Verizon that this was a mere "mistake" incredulous to say the least. Beyond basic legal principles, moreover, the NYAB's interpretation of Tariff 85 fundamentally undermines Verizon's self-serving "after-the-fact" interpretation. The

NYAB's sole function is to act as a billing agent for local carriers. It is an independent, disinterested expert in applying tariffs for billing purposes. Clearly, its expert and unbiased interpretation of Tariff 85 for ten years provides guidance for this Commission on how disinterested parties understand the meaning of Tariff 85. The proof is clear: Verizon's interpretation is fundamentally inconsistent with that of a reasonable, unbiased expert.

B. VERIZON'S BEHAVIOR IS NOT CONSISTENT WITH ITS CLAIM THAT THE CCL CHARGE IS "CONTRIBUTION" NECESSARY TO COVER ITS "JOINT AND COMMON" COSTS.

Perhaps most outrageous of all is Verizon's claim that it needs the disputed CCL revenues to recover its joint and common costs, while at the same time sitting on its hands for ten years while its billing agent failed to collect them. Indeed, when Verizon agreed to the stipulation that resulted in Tariff 85's predecessor, Verizon noted the Commission's reference to "uncertainties" regarding the "impact of competition on NET's revenues" and made very clear in a July 7, 1993, letter from Verizon counsel Del Vecchio to the Commission that it was reserving its rights to seek reconsideration of the "accelerated access charge reductions." Exhibit 25 (Modified Stipulation, Attachment 7 thereto). Despite the right to do so, Verizon has not once sought formal review of the adequacy of its rates to provide it a fair rate of return.

Given Verizon's demonstrated satisfaction with its revenues for more than fourteen years, it is disingenuous for Verizon to now claim that it needs the disputed revenue to recover its joint and common costs.

C. A RULING IN VERIZON'S FAVOR WOULD REWARD ITS BAD BEHAVIOR.

Given the agreed upon interpretation materially identical language in the Federal tariff (no right to charge CCL when loop is not provided), the corresponding practice in other states, at the FCC, and indeed in New Hampshire until recently, carriers naturally understood Tariff 85 the same way. If the Commission were to determine that an isolated sentence in one section of a tariff could be the basis for charges on services offered under an entirely different section, particularly given industry billing practices to the contrary, it would encourage utilities to plant such "bombs" in unrelated sections or otherwise draft ambiguous tariffs.

Even worse, a ruling in Verizon's favor would encourage utilities to undertake a comprehensive review of their existing tariffs in the hope of finding current tariff language that is susceptible to reinterpretation. Such an effort could produce significant benefits for a utility finding suitably ambiguous language. In addition to a new revenue stream going forward, it would create the opportunity to bill previously unbilled charges. In such circumstances the utility would benefit from its inaction because end-users would not have had the opportunity to react to price signals to avoid the charges.

Indeed, in the present case, Staff identified another ambiguity in Verizon's access tariff from which Verizon could profit if the Commission provides it a favorable precedent in this case. In cross examination, Verizon witness Shepherd testified that (i) end office switching, (ii) tandem switched transport, (iii) tandem switched transport local transport facility, and (iv) tandem switched transport local transport termination each constituted a switched access service. *See,* Tr. 2, at 103-104. Staff then pointed to Section 5.4.1.A which states (with important exceptions) that "all switched access service . . . will be subject to [CCL] charges" and asked why Verizon cannot, under its tariff, bill a CCL charge for each of the four "services" (as Verizon understands that word) mentioned above. *See,* Tr. 2, at 104. Mr. Shepherd's answer was inconclusive at best.

If Verizon were permitted to reinterpret arguably ambiguous provisions of its tariff and were to do so regarding Section 5.4.1.A,, the liability exposure of competitive carriers created by such a claim would dwarf the numbers at issue in this case, because the disputed charges would relate (multiple times) to all traffic, not just traffic terminated to non-Verizon end-users.

In summary, the Commission should rule in favor of the competitive carriers in this case. Otherwise, it will reward Verizon's bad behavior and encourage more of the same.

VI. VERIZON'S ESTIMATE OF "FINANCIAL IMPACT" IS IRRELEVANT AND WRONG.

From the outset of this proceeding, Verizon has made not so veiled threats that, if the Commission does not permit it to tax its competitors in order to generate guaranteed revenues whether it provides a service or not, it may need to raise local exchange rates. Indeed, Verizon has been shameless in its willingness to use whatever political "hot button" issue it can to persuade the Commission of its "need" for these revenues. It even claimed that it needed these CCL revenues in order to subsidize its broadband deployment – at least until Commissioner Below forced it to admit that broadband deployment will be financed (appropriately) with revenues from providing broadband service. Tr. 2, at. 12, ln 19; and Tr. 2, at 123, lines 22-24.

A. THE COMMISSION SHOULD NOT BASE ITS DECISION ON VERIZON'S ESTIMATE OF FINANCIAL IMPACT.

Verizon is encouraging a "results-oriented" decision, rather than one based on facts and the law. A results oriented approach provides no guidance. Such an approach begs the question of what result is desirable. Is it desirable, for example, for the Commission to rule in Verizon's favor, with the effect of transferring into Verizon's accounts uncontested funds of millions of dollars in disputed charges? Such a transfer will not benefit ratepayers and will extract "tribute" from Verizon's competitors at a time when they, not Verizon, may well be the phone companies operating in New Hampshire in the future. Such a decision may well have the effect of transferring the money related to past charges out of state.

Of course, Verizon would like the Commission to believe that it will need to raise local exchange rates going forward if the Commission does not rule in its favor. Such bluster is hardly a threat, however. Verizon did not collect these revenues for ten years and during that time never sought a basic exchange rate increase. Presumably, Verizon felt that its intrastate rates taken as a whole have been compensatory. Hence, there is little reason for Verizon to raise local rates if it continues as it did until 2005 – not collecting the disputed charges. Moreover, Verizon operates within a competitive market today. If Verizon raises its rates, New Hampshire end-users are free to choose other carriers. In today's environment, it is not the Commission that determines Verizon's rates; it is Verizon's competition that does so.

B. VERIZON'S ESTIMATE OVERSTATES PROSPECTIVE FINANCIAL IMPACT AND VASTLY UNDERSTATES POTENTIAL "PAST DAMAGES."

If, despite AT&T's position that financial impact is irrelevant, the Commission rules otherwise, the Commission should understand that the numbers Verizon presented are not accurate on a going forward basis and downright misleading on retroactive basis. On a going forward basis, the estimated revenues that Verizon would receive from AT&T are substantially less than what Verizon estimated. *See*, Exhibit 11. Tr. 1, at 128-131. But Verizon's estimate of "back damages" is most misleading.

In its November 29, 2006, Procedural Order (Order No. 24,705) in this docket, the Commission determined that the "magnitude of the potential financial impact" is relevant to its consideration of the issues here. However, when the Commission asked the parties to provide information, it asked for information related to "disputed charges" and "individual calculations of the charges at issue which have been billed[.]" DT 06-067, Order No. 24,705 (Nov. 29, 2006), at 6-7. And this is what the parties provided in their February 8, 2007, response for "disputed charges." As we explain below, however, this number potentially understates by a huge order of magnitude the amount of "damages" Verizon will seek if the Commission rules in its favor.

Charges can only be disputed if they have been billed. *See,* Tr. 2, at 121, lines 18-19. And it is obvious from the record in this case that Verizon and/or its billing agent were not billing the disputed charge for most of the period since the tariff was put into effect.[38] As a result, the estimates of "disputed charges" that the Commission received are just the tip of the iceberg. If the Commission rules in Verizon's favor, it is likely that Verizon will immediately issue "backbills" for years of non-Verizon terminated access traffic. In the hearings, Verizon refused to rule out such a possibility (Tr. 2, at 122, ln 1-2), and a quick glance at its "Industry Letter" website for backbilling letters issued over the last two years indicates a frequency of backbilling that rises to the level of routine practice, and often goes back years. [39]

[38] As noted above, Verizon suddenly started billing significant amounts of wireless terminated traffic in the fall of 2005, and began billing CLEC originated or terminated traffic in the fall of 2006. Its tariff has been in effect since 1993.

[39] *See,* http://www22.verizon.com/wholesale/library/local/industryletters/1,,east-wholesale-resources-2007_industry_letters-clec-industry_letters_clec_sep_2007,00.html Verizon's "Industry Letters" with the following dates each identify another Verizon effort to backbill: 2/27/07, 3/1/07, 3/2/07, 3/30/07, 4/12/07, 4/13/07, 5/14/07, 5/25/07, 7/16/07, 7/20/07, and 8/20/07.

Although neither AT&T nor – to AT&T's knowledge – any other competitive carrier concedes that Verizon would have such backbilling rights, the potential magnitude of such a Verizon action has already caused AT&T to consider qualifiers to its financial statements. It will likely have similar effects on other carriers. The Commission should not allow Verizon to put its competitors in such an untenable position while at the same time reaping a huge windfall reward for its failure to bill for so long. (If Verizon had timely billed in accordance with its current interpretation, its carrier customers would have challenged the interpretation much sooner.) The Commission should rule in favor of the competitive carriers.

VII. A RULING IN FAVOR OF THE COMPETITIVE CARRIERS IS AN ADMINISTRATIVELY EFFICIENT MEANS OF PRODUCING THE RESULT THAT RATIONAL REGULATORY POLICY REQUIRES.

Verizon has admitted that its position cannot be supported by logic. Tr. 2, at 8-9. Moreover, it is clear that Verizon's position is fundamentally inconsistent with the procompetitive purposes of Tariff 85 and fundamentally inconsistent with the procompetitive policies of the Commission going forward. Indeed, even Verizon suggests that a "logical assessment" of the tariff would not result in a tariff with the interpretation Verizon seeks to give it. According to Verizon, the Commission should nevertheless rule in Verizon's favor and only then open a proceeding to correct the damage done by Verizon's interpretation. *See, id.*

Clearly, there is no doubt that rational regulatory policy does not permit one carrier to tax its competitors in order to ensure that such a carrier makes the same revenue even as it loses customers to its competitors. For that reason, even Verizon tacitly admits that the tariff should not be given that effect going forward. AT&T submits that, for the very same reason, the tariff should not be given that effect retroactively; it should not be interpreted to produce such an irrational result. Moreover, if the Commission rules in favor the competitive carriers in this case, there will be no need to open a future proceeding to correct the damage going forward that would be caused by a ruling in Verizon's favor.

Conclusion

A Commission decision in this case in Verizon's favor would have dramatic and adverse effects relating to both past "damages" and future competition resulting in fewer competitive choices and higher prices for New Hampshire consumers. With respect to past "damages," such a decision would create a huge contingent liability for all competitive carriers. Those carriers have developed networks, costs, and business plans on the basis of a reasonable interpretation of Verizon's tariff, apparently shared by Verizon based on Verizon's own billing practices. Now, suddenly, they would find themselves exposed to a Verizon claim for, not only the currently disputed charges, but also for as yet unbilled CCL charges on non-Verizon originated or terminated traffic going back to 1993.

With respect to the future, a decision in Verizon's favor would impose systematic, signficant and artificial costs that will either drive Verizon's competitors from the market, or increase rates for New Hampshire consumers, or both. As we explained above, a competitive market is simply not sustainable when one of the competitors is able to tax all others without regard to whether a service is offered, merely as a condition of their operating in the state. Even Verizon acknowledges that such an economic arrangement makes no sense and would warrant changing immediately upon a determination in Verizon's favor.

For the foregoing reasons, and because the tariff is carefully structured to ensure that Verizon is able to bill for the CCL service only when it provides that service, the Commission should rule in favor of the competitive carriers.

Respectfully Submitted,

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