

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications,
LLC d/b/a BayRing Communications Against
Verizon New Hampshire re: Access Charges

DT 06-067

ONE COMMUNICATIONS' POST-HEARING BRIEF

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The Commission should hold that the access charges at issue in this proceeding are improper and inappropriate. Verizon New Hampshire's (Verizon NH) access services tariff, NHPUC No. 85, does not permit the imposition of a per-minute usage charge for the carrier common line (CCL) when no Verizon NH common line is involved — that is, when the call is originated by or terminated to a CLEC or wireless carrier. In those circumstances, Verizon is not providing access to the end-user via a common line, and the CCL charge does not apply. Verizon's strained interpretation of its tariff, which it claims permits it to impose the CCL charge without also providing access via the common line, lacks merit, and the Commission should reject it. Further, access charges, including the carrier common line (CCL) charge, do not apply to calls from wireline carrier end-users to customers of wireless carriers that originate and terminate within New Hampshire, for under FCC definitions all such calls are considered "local."

Verizon NH's tariff is clear that it may not impose the CCL charge without providing CCL access to a Verizon NH end user. That should decide the matter, and no inquiry beyond the language of the tariff is required. If the Commission deems it appropriate to consider matters beyond the tariff language, however, the Commission should interpret Verizon NH's tariff in

light of its intent and the public interest. Verizon's access tariff was designed to foster competition, but competition in the intrastate toll market — at the time, the only market in which nascent competition existed. The tariff was not intended to apply in a competitive local exchange environment, where a carrier other than Verizon NH provides the common line serving the end user. Verizon's practice of imposing the CCL charge also has anti-competitive effects and potentially undermines the public switched telephone network.

For all these reasons, the Commission should reject “the extreme interpretation of the tariff that Verizon [NH] is propounding.” Hearing Transcript, Day 1, (“Day 1 Tr.”) at 117 (Witness Pfautz). The Commission should rule that Verizon NH's carrier common line access charge does not apply when Verizon NH does not provide common line access to an end user.

Background

The carrier common line access charge is a 2.649 cent per minute charge that Verizon NH claims is applicable to switched access services that it provides under Tariff No. 85. Freedom Ring Communications, d/b/a BayRing Communications (“BayRing”), AT&T Communications of New England, Inc. (“AT&T”), and One Communications Corp. (“One Communications”) dispute Verizon NH's claimed right to assess the CCL charge when Verizon NH is not providing access via a common line serving a Verizon NH end user.

The issue arose in approximately August 2005, when carriers began to notice greatly increased switched access charges on Verizon NH's access billing. Day 1 Tr. at 18 (Lebeck); *see id.* at 117-18 (Pfautz). Upon investigation, carriers determined that the number of minutes of use (MOU) on which Verizon NH was billing CCL access charges greatly exceeded the minutes of use for local switching. The increased CCL charges were attributable to a category of calls entitled “Cellular Tandem Switched.” Cellular Tandem Switched minutes terminate to a

wireless carrier, not a Verizon NH end user. Day 1 Tr. at 18. In the course of its investigation, BayRing discovered only a small number of minutes in which the CCL was billed for calls terminated to wireless carriers prior to August 2005. Day 1 Tr. at 104 (Lebeck).

Subsequently, in approximately September 2006, Verizon NH began billing the CCL charge on toll calls originated by a CLEC, carried by Verizon NH, and terminated to another CLEC or an independent telephone company (ITC). Prior to that date, a third-party vendor, New York Access Billing (NYAB), had handled Verizon NH's access billing for CLEC-to-CLEC or CLEC-to-ITC calls. For years, NYAB, acting as Verizon NH's agent, had not been billing the CCL charge on these calls. In approximately September 2006, Verizon NH discontinued use of NYAB and took the billing of CLEC-to-CLEC and CLEC-to-ITC calls in-house. That resulted in a substantial increase in CCL charges being billed. In BayRing's case, it increased the amount of disputed CCL charges by 400%. Day 1 Tr. at 20.

In early 2006, BayRing complained to the Commission concerning Verizon NH's practice of billing CCL access charges when no Verizon NH CCL was involved in the call. The Commission opened this docket and AT&T, One Communications, and other carriers intervened. The Commission Staff conducted a series of technical sessions, which resulted in the Staff's developing an extensive and detailed series of diagrams representing the flow of various categories of calls through the telephone network and the charges that the carriers involved in the calls typically impose upon one another. The Staff's call flow diagrams are attached as Exhibit B to the prefiled direct testimony of Darren Winslow on behalf of BayRing (Hearing Exhibit ("Ex.") 1). These call flow diagrams and the charges they depict are not in dispute.

What is in dispute is the applicability of the CCL charges when no Verizon NH common line is involved in the call, and the appropriateness of Verizon NH's imposition of such charges.

Verizon claims that Section 5 of Tariff No. 85 permits it to impose a “carrier common line access charge” on all intraLATA toll calls that traverse the Verizon NH network. According to Verizon NH, the introductory language to Section 5, as well as § 5.4.1.A, authorize it to impose a CCL charge even when no Verizon common line is used to provide the access service utilized in the call. The CCL charge is a per-minute charge; the rate is \$0.02649. Day 1 Tr. at 52 (Winslow).

Verizon NH so contends even though it is clear under the tariff that “carrier common line access” involves the use of Verizon NH common lines to provide access to Verizon NH end users. “Carrier common line access provides for the use of end users' Telephone Company provided common lines by customers for access to such end users to furnish intrastate communications.” Tariff No. 85, § 5.1.1A. Further, “Where the customer [the IXC or CLEC] is provided with switched access service under this tariff, the Telephone Company will provide the use of Telephone Company common lines by a customer for access to end user.” § 5.2.1.A. BayRing, AT&T, and One Communication dispute Verizon NH’s contention that it may impose a CCL charge when there is no Verizon NH end user, and therefore, no use of the Verizon NH common line.

The call flow diagram for a “classic” intrastate toll call is depicted on page 6 of Mr. Winslow’s direct testimony (Ex. 2). In this scenario, involving Verizon NH end users on both ends of the call, Verizon NH common lines are used to access those end users on both ends. Verizon NH’s CCL charge is not contested in this scenario.

On the other hand, a call flow involving a disputed CCL charge is depicted on page 15 of Mr. Winslow’s testimony. There, a call originates with a BayRing end user and is terminated to a wireless carrier. No Verizon NH end user is involved in this call, and the call does not traverse a Verizon NH common line on either end. Accordingly, Verizon NH has not “provide[d] the use

of Telephone Company common lines by a customer for access to [an] end user.” Tariff No. 85, § 5.2.1.A. But, despite that no Verizon NH common line is used in the call, Verizon NH imposes one or more CCL charges on each minute of the call.

Similarly, in the case of an interexchange carrier like AT&T, Verizon NH attempts to impose a CCL access charge when the call is terminated to a CLEC customer. For example, when a Verizon NH end-user presubscribed to AT&T as its intrastate toll provider calls a BayRing end user, Verizon NH assesses a CCL charge to AT&T on both the originating and terminating sides of the call. There is no dispute about the CCL charge on the originating side, as in that case Verizon NH does provide the use of the common line to access the customer. On the other side, however, BayRing provides the common line, yet Verizon NH imposes a CCL charge upon AT&T to carry the call. Day 1 Tr. at 122-24 (Pfautz).¹

There is no question that for the calls in dispute in this case, Verizon NH does not provide the use of a Verizon NH common line, and Verizon NH has never claimed that its common line was being used. Day 1 Tr. at 42, 49-52 (Winslow). Other relevant facts also are not in dispute. These include the fact that the Verizon NH access charges at issue here apply (if at all) only to toll calls. Day 2 Tr. at 90 (Shepherd). In addition, there is no dispute that the entire State of New Hampshire is within the same statistical “Major Trading Area,” a fact that is germane to the appropriate intercarrier charges for calls that originate from or terminate to a wireless carrier in New Hampshire (see Part II below). Day 1 Tr. at 50 (Winslow).

¹ BayRing also imposes a CCL charge upon AT&T in that scenario. That charge is not in dispute, since BayRing does provide a common line to the end user. *Id.*

Discussion

I. **Verizon NH's Tariff Does Not Permit It to Impose a CCL Usage Charge When No Verizon NH Common Line is Involved.**

Verizon NH's claim that tariff No. 85 entitles it to impose a per-minute CCL usage charge regardless of whether it provides a Verizon NH common line is not supported by the language of the tariff. The opposite is true — the language and structure of the tariff do not permit the CCL charge when a Verizon NH common line is not used. Because the tariff does not authorize Verizon NH to impose the CCL charge when no Verizon NH common line is used, the Commission should rule in favor of Bayring, AT&T, and One Communications in this docket.

To interpret the tariff, the Commission should “apply the principles of contractual interpretation and statutory construction contained in common law.” *In re Public Service Company of New Hampshire*, 79 N.H. P.U.C. 688, 691 (Dec. 19, 1994). The Commission should ascribe the plain and ordinary meaning to the words used. *City of Rochester v. Corpening*, 153 N.H. 571, 573 (2006). The Commission should interpret tariff language in light of the tariff's overall scheme and not in isolation. *Id.* The Commission should examine any particular section together with all associated sections. *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511 (2006). The Commission also should interpret the tariff so as to produce a reasonable outcome, not an absurd one. *See id.* Stated another way, the Commission's interpretation should not lead to an illogical or an unjust result. *State v. Farrow*, 140 N.H. 473, 476 (1995).

A. **Tariff 85 Prohibits Verizon NH From Imposing a CCL Charge When It Does Not Provide Common Line Service.**

The starting point for the analysis of which charges apply at which times is section 6.1.2. Switched access service and its components are described in that section.

A. The switched access services provided under this tariff are: originating, terminating, or two way FGA, FGB, FGD, FG2A, and 800 database services.

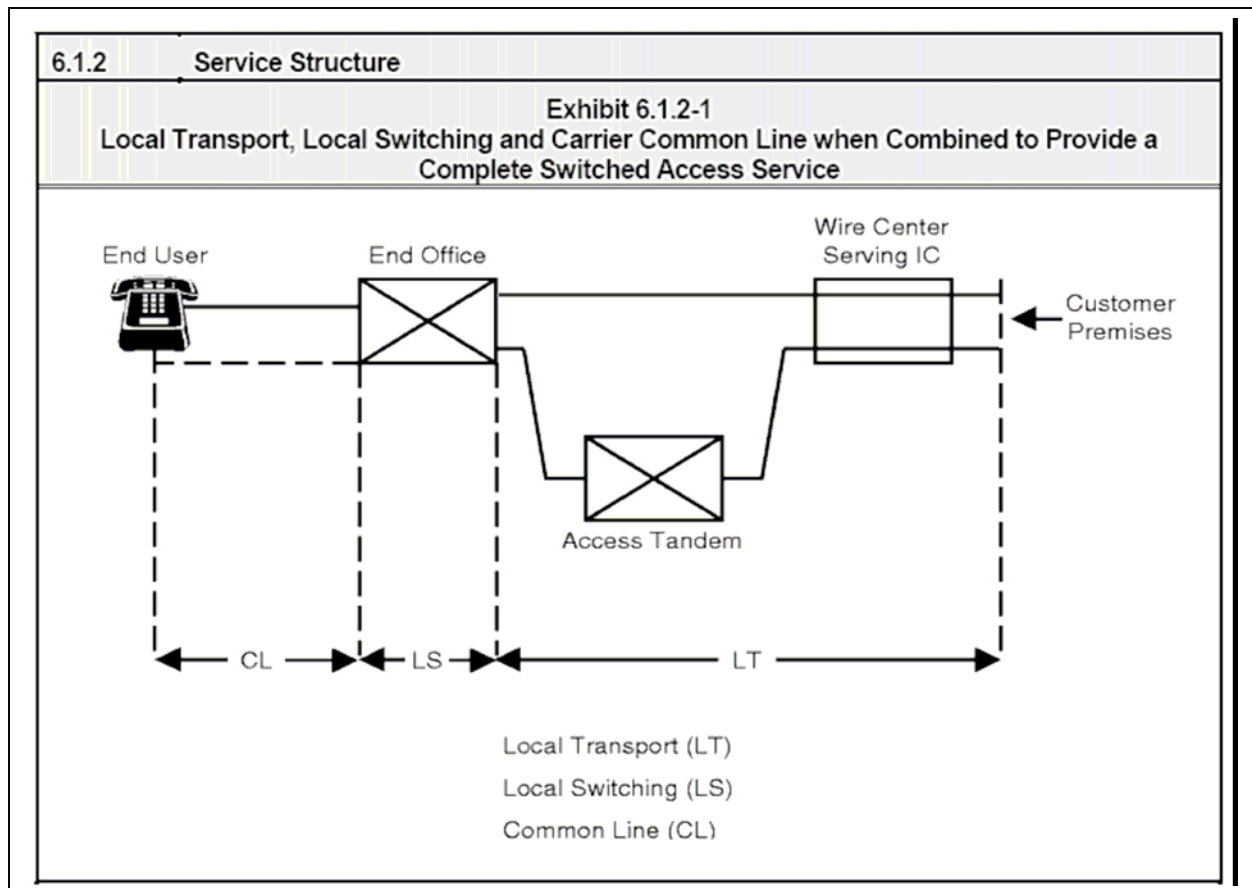
B. The rate categories which apply to switched access service are as follows.

1. Local transport (described in Section 6.2.1).
2. Local switching (described in Sections 6.2.2 and 6.2.3).
3. Carrier common line (described in Section 5).

.....

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.

Exhibit 6.1.2-1 is reproduced here.



According to Verizon NH's own definitions, switched access service may be provided in the originating and terminating directions as well as in various two-way feature group configurations. Further, as shown in the above figure from Tariff No. 85, a complete switched access service includes local transport, local switching, and common line. Local transport provides the transmission facilities between the CLEC's facilities and the Verizon NH end office where the traffic is switched to originate or terminate the communication, § 6.2.1.A, and may include tandem switching or other components, § 6.2.1.G.3. "Local switching provides for the use of common lines and the local end office switching and end user termination functions necessary to complete the transmission of switched access communications to the end users served by the local end office." § 6.2.2.A. Carrier common line access provides for the use of end users' Verizon NH-provided common lines for access to such end users. § 5.1.1.A.

A carrier is not required to purchase all three components. Carriers may purchase tandem switching and local transport independently of the Verizon NH common line. Day 1 Tr. at 73 (Lebeck). Indeed, most call flows from facilities-based CLECs with their own switches utilize Verizon NH local transport (including tandem switching), but not Verizon NH local switching or a Verizon NH common line. *Contrast, e.g.*, Call Flow 1 with Flow 3; Flow 8 with Flow 10. Thus, facilities-based CLECs generally use some of the services set forth in section 6, but none set forth in section 5.

On the other hand, a carrier cannot purchase common lines without also purchasing local switching. That is because under Verizon's usage-based (*i.e.*, per-minute) access rates for the common line, there is no way to measure and bill such usage other than through the switch. Contrast the situation of a UNE loop or special access channel termination, where the purchasing carrier has use of the full loop or channel during the entire month; then, it is easy to bill a flat rate

for the month. However, in the switched access situation, where the minutes of use of the loop are split among many uses, it is necessary to measure how many minutes each use of the loop took. The only way to collect carrier common line access charges is to connect the common line to a switch that will measure the minutes consumed by each use of the loop. Day 1 Tr. at 150-51 (Nurse). Tariff No. 85 specifically reflects this reality:

When access minutes are used to determine carrier common line access charges, they will be accumulated using call detail recorded by Telephone Company equipment.

The Telephone Company measuring and recording equipment *will be associated with end office or local tandem switching equipment* and will record originating access minutes and terminating access minutes where answer supervision is received.

Tariff No. 85, § 5.4.2.B and B.1 (emphasis supplied).

Accordingly, the tariff provides: “The Telephone Company [Verizon NH] will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6.” *Id.*, § 5.1.1.A.1. That is, Verizon NH will provide access to the common line only in conjunction with local switching and/or local transport, described in section 6. “So it makes sense to me that the tariff says, as a term and condition, that you can’t get carrier common line service on a stand-alone basis, you have to have the other . . . access services in order to get it, because that’s the way the network parts plug together.” Day 1 Tr. at 151 (Nurse).

The converse, however, is not true. There is no language in the tariff that states, “The Telephone Company will provide local switching and local transport in conjunction with common line access.” That is because, as noted previously, Verizon NH can and does provide local transport and tandem switching on a stand-alone basis, without also providing common line access. Day 1 Tr. at 177 (Nurse). But it does not provide stand-alone carrier common line

access. Thus, the asymmetry of the tariff language in sections 5 and 6 reflects the asymmetry in the way that carriers obtain the various rate components described in the tariff.

Verizon NH's tariff is clear that it may only charge for usage it actually provides. "Usage rates apply only when a specific rate element is used. They apply on a per access minute basis or a per call basis." *Id.* § 6.6.3.A. And, Verizon NH's per-minute CCL charge is a "usage rate." "Usage rates" generally refers to charges that vary with the use of the service, rather than on a flat, fixed fee. Harry Newton states, "Usage-Based refers to a rate or price for telephone service based on usage rather than a flat, fixed monthly fee." *Newton's Telecom Dictionary* at 953 (22nd Ed. 2006). In the telecommunications industry, as Mr. Newton notes, flat rates typically are charged on a monthly basis. By contrast, usage is typically charged on a per-minute basis. *See id.*; Day 1 Tr. at 182-84 (Nurse).

There is no question that Verizon NH's CCL charge is a per-minute charge. Tariff No. 85, § 30.5.1; Day 1 Tr. at 93-94 (Winslow). As such, the CCL is a usage charge. Day 1 Tr. at 132 (Pfautz). Verizon NH's tariff is clear and explicit — usage is charged only on services that Verizon NH actually provides. Therefore, under the tariff, Verizon NH may not impose a CCL charge unless the call traverses a Verizon NH common line. *Id.*

B. Verizon's Claim That Section 5 Permits It to Impose a CCL Charge Without Providing Common Line Service Lacks Merit.

Verizon NH claims that the introductory language of section 5 permits it to require a carrier to pay a CCL access charge when the carrier uses any service under section 6 of the tariff, such as local transport or local switching, regardless of whether a section 5 service — the common line — is used. The Commission should reject this claim, as it ignores both the language and the structure of the tariff.

In making its claim, Verizon NH reads its tariff selectively and ignores the plain language of § 5.4.1.A: “Except as set forth herein, all switched access service provided to the customer will be subject to carrier common line access charges.” First, § 6.1.2 describes a “switched access service” as originating, terminating, or various feature groups. Local transport, local switching, and common line are described as “rate categories which apply to switched access service.” Further, a “complete switched access service” includes all three rate categories. What § 6.1.2 is saying, then, is that when all three rate categories are used to provide a complete switched access service, then CCL charges apply. That is logical; when the common line is used, a charge should apply.

Note, however, that § 6.1.2 does not say, “when any rate category of switched access service is provided to the customer, carrier common line access charges apply.” That is what Verizon NH *wishes* the language said. But, the tariff uses different language to refer to the service (originating, terminating, feature group D, etc.) and the rate category (local transport, local switching, common line). Accordingly, only when the complete access service, including access to a Verizon NH end user via a Verizon NH common line, is used do CCL charges apply.

Second, the introductory phrase “except as set forth herein” disproves any notion that the CCL charge applies whenever any component of switched access is used. A critical exception exists in § 6.6.3.A: “Usage rates apply only when a specific rate element is used.” As described above, the per-minute CCL charge is a usage rate. Therefore, the charge does not apply unless the CCL is used.

Third, the Commission must consider the tariff’s purpose and how it is likely to be used. The purpose of a tariff is to provide the public and customers of a public utility with a statement of “the rates, fares, charges and prices for any service rendered or to be rendered.” RSA 378:1.

A tariff must include “a full description of the rates and terms under which service shall be provided.” Puc 1603.02(m). This is so that the public and customers can know what they are buying from the utility.

The structure of Verizon NH’s tariff, including the detailed descriptions of local transport and local switching in section 6 and of carrier common line in section 5, reflects how a customer would approach the tariff to understand what it is buying. As described above, a carrier can purchase the local transport and local switching component of switched access without purchasing common line access. CLECs typically use the local transport component and provide their own local switching and common line. A carrier wishing to do so would consult section 6 for the service descriptions, terms, and conditions applicable to what it plans to use. Indeed, section 6.1.2 contains specific cross references to more detailed descriptions of local transport, local switching, and carrier common line. So, a carrier seeking to purchase only local transport — a typical CLEC — would turn to section 6.2.1 for more detailed information on the services it requires.

However, that carrier, which does not use the Verizon NH common line, would have no reason to look at section 5. Day 1 Tr. at 194-95 (Oyefusi). That carrier would have no notice of Verizon’s claimed ability to impose a CCL usage charge when only the local transport component is being used. Even though there is a cross-reference in section 6.1.2 to section 5, it is in section 6.1.2.B.3 — the item relating to the carrier common line, which the CLEC would have no cause to consult. Nothing in the cross-reference itself suggests that a charge under section 5 might apply to services described in section 6.

Under the circumstances, it is unfair and inappropriate for Verizon to impose a hidden CCL charge upon the unsuspecting carrier. Such hidden charges are antithetical to the purpose

of a tariff. The fair result would be for the Commission to rule that a carrier is not subject to any CCL charge when it does not use the CCL to access a Verizon NH end user.

For all these reasons, the tariff language fails to support Verizon NH's claim.

II. Calls Terminated to a Wireless Carrier Within New Hampshire Are Local.

Verizon's imposition of switched access charges, in particular the CCL, on calls originated by a wireline carrier and terminated to a wireless carrier, and on calls originated by a wireless carrier and terminated to a wireline carrier, is improper. Under FCC requirements, calls originated by or terminated to a wireless carrier in the same "Major Trading Area" (MTA) as the other party are deemed local, and subject to reciprocal compensation, not access charges.

The FCC examined this issue as long ago as the First Report and Order, and specifically determined that for purposes of intercarrier compensation, call to or from a wireless carrier within an MTA are not subject to access charges. The FCC ruled that for a wireless carrier, the local calling area governing what constitutes local traffic versus access traffic was the MTA. "Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, 11 FCC Rcd. 15,499, ¶ 1036 (Aug. 8, 1996) ("*First Report and Order*").

All of New Hampshire is included within one MTA. Day 1 Tr. at 50-51 (Winslow); Ex. 12, p. 199, Map 10. Therefore, calls to or from a wireless carrier that originate and terminate within New Hampshire, are not subject to intrastate access charges, regardless of how those calls would be treated if the originating and terminating carriers were both wireline carriers.

In the *First Report and Order*, the FCC expressly treated wireline and wireless carriers differently for purposes of determining the type of intercarrier compensation that would be applicable. While the FCC for the most part preserved state commissions' authority to determine what constitutes a "local" call for purposes of intercarrier compensation, it expressly excepted calls to or from a CMRS provider from such state commission determination. "*With the exception of traffic to or from a CMRS network*, state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5)" *First Report and Order*, ¶ 1035. As stated above, in the case of calls to or from a wireless carrier, the FCC has specified that the MTA is the local calling area for purposes of reciprocal compensation.

Verizon NH is well aware of this rule. When a Verizon NH local customer makes a call to a wireless carrier, the carriers treat it as a local call for purposes of intercarrier compensation. Verizon NH pays reciprocal compensation to the wireless carrier. No access charges are involved. Day 1 Tr. at 52 (Winslow); Call Flow No. 23. As discussed in further detail below, this arrangement gives a substantial competitive advantage to Verizon NH.²

Recent court decisions have confirmed that intra-MTA calls to or from a wireless carrier are not subject to access charges. In *Atlas Telephone Company v. Oklahoma Corporations Commission*, 400 F.3d 1256 (10th Cir. 2005), the Court of Appeals rejected a claim by a local exchange carrier that access charges should apply to calls between a LEC and a CMRS carrier that were transmitted through an intermediate IXC. The Court noted that the FCC had specified different intercarrier compensation obligations applicable to LECs and CMRS providers. The Court noted that the FCC had determined that reciprocal compensation would apply to calls

originating and terminating within a local area, but that reciprocal compensation would not apply to interstate or intrastate interexchange traffic. “In describing the traffic at issue, it is clear that the FCC had in mind the traditional setting of landline-to-landline calls.” However, the FCC had specifically set different rules for calls to and from wireless carriers: calls to or from a wireless carrier that originate and terminate within the same MTA are subject to reciprocal compensation, rather than interstate or intrastate access. “We will not ignore the clear distinction drawn by the agency.” *Id.* at 1266.

More recently, the Eighth Circuit reached the same result in *Alma Communications Company v. Missouri Public Service Commission*, No. 06-2401, 2007 WL 1661962 (8th Cir. June 11, 2007). The Court “h[e]ld that calls from a land line to a cell phone placed and received within the same major trading area are local calls.” *Id.* at *7.

This leads to one result — that Verizon’s access charges should not apply to calls to or from a wireless carrier that originate and terminate within New Hampshire. Verizon NH agreed that the charges in dispute in this proceeding apply only in the case of a toll, *i.e.*, non-local, call. Charges governing local traffic were not addressed in Docket No. 90-002 proceeding, which led to Tariff No. 85. Local traffic was addressed later, in other proceedings and tariffs. Day 2 Tr. at 90-91 (Shepherd). Since the FCC has determined that intra-MTA calls are “local” for purposes of intercarrier compensation, access charges do not apply.

III. The CCL Charge Was Not Intended to Apply When A LEC Other Than Verizon NH Serves the End User.

To support its interpretation of the tariff, Verizon claims that it is allowed to charge a per-minute CCL usage charge even when no Verizon NH CCL is involved because the

² Since it is not subject to (or required to impute) the access charges, including the CCL, that it imposes on CLECs, its costs are substantially lower. This potentially allows it to lower its retail price so as to attract more retail

Commission's decision in Docket No. DE 90-002 authorized Verizon NH to recover all residual contribution from intraLATA toll revenues through the CCL. The Commission should disregard Verizon's arguments, which lack merit.

At the outset, because the tariff language is clear that Verizon NH is not allowed to impose the CCL charge when no Verizon common line is used to access a Verizon NH end user, there is no need to resort to examination of the tariff's intent. If the Commission deems it appropriate to investigate the intent of the tariff, however, the result is the same, for several reasons.

First, the Commission never adopted the rationale that Verizon posits. Second, even if Verizon's assertion were true, the access rate structure that resulted from Docket 90-002 simply was not intended to apply when a competitive LEC or a wireless carrier — and hence, no Verizon common line — is involved.

Third, imposing a charge for a rate element that is not used to provide the service is contrary to industry practice, as reflected, among other places, in Verizon's tariffs in other jurisdictions and, indeed, in the actions of Verizon NH's billing agent in New Hampshire.

Fourth, Verizon NH's contention is undermined by its own behavior. Verizon NH failed to collect large amount of CCL charges for a substantial number of years. Obviously, the CCL charges were not very important to Verizon NH, and Verizon NH's alleged intent in imposing the charge — to provide contribution for lost toll revenue — cannot be true.

A. The Commission Did Not Adopt Verizon NH's Proffered Rationale for the CCL Usage Charge.

As AT&T's witnesses demonstrated, the Commission did not adopt Verizon's rationale for the access rate structure that it proposed in Docket 90-002. In that docket, 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. AT&T Panel Rebuttal at 7. The access rate initially proposed by Verizon NH was about twenty cents. Day 1 Tr. at 156 (Nurse).

The Commission did not adopt Verizon's proposal. After months of litigation, Verizon entered into a settlement stipulation under which it agreed to access rate elements that, when combined, produced a total access rates per minute of about 12 cents after a four-year transition period, considerably below the rates that Verizon proposed. The Commission, however, rejected even that rate in the Stipulation and ordered Verizon to reduce its access rates even further, to approximately 8 cents per minute, over a four year period. AT&T Panel Rebuttal at 8 (citing Order No. 20,864 at 11).

In Docket No. 90-002, the Commission ruled that it is not appropriate to set rates in a competitive marketplace to guarantee revenues at any particular level. "An effectively competitive marketplace is totally at odds with any notion that [Verizon NH]'s total revenues can be 'guaranteed' to remain at any particular level." Order No. 20,864 at 7; AT&T Panel Rebuttal at 8.

It is important to keep in mind that this entire discussion related to competition in the *toll* marketplace. The Commission's statement that in a competitive marketplace, Verizon could not be guaranteed any level of revenues, applies with greater force when competition in two markets — toll and local — are at issue.

B. Verizon's Proffered Rate Design Does Not Apply and Was Not Intended to Apply to a Competitive Local Exchange Environment

Docket No. 90-002, from which Tariff No. 85 evolved, was designed to look at the question of intraLATA toll competition. "The genesis of the docket was to determine the terms

and conditions, and, in particular, the access charge structure that would underlie the opening of the intra-LATA toll market, at least initially to a two-year competitive trial.” Day 2 Tr. at 90 (Shepherd). At the time the Commission decided the issues in Docket No. 90-002, there were no competitive local exchange carriers in New Hampshire. Day 1 Tr. at 133-34 (Nurse). IXC’s like AT&T were not permitted to carry local traffic. *Id.* at 142-43 (Oyefusi). Such IXC’s could access end users only through use of Verizon NH common lines (and those of Independents in Independent service areas). *Id.* at 143-44. Further (leaving aside calls to or from Independent telephone company end users), an intrastate toll call necessarily had to travel over Verizon NH common lines at the beginning or end of the call. *Id.* at 144-45. “CLEC’s didn’t exist, and they weren’t contemplated.” *Id.* at 153 (Nurse).

That Tariff No. 85 was not intended to govern a competitive local exchange environment is reflected in the fact that neither it nor its predecessor, Tariff No. 78, contains provisions relating to CLEC’s. Day 1 Tr. at 134 (Nurse). Likewise, in the diagram contained at § 6.1.2 of Tariff No. 85 (reproduced above in Part I.A), there is nothing that relates to competitive local exchange carriers. *Id.* at 135.

Verizon NH itself stated in testimony in Docket No. 90-002 that the emergence of local competition would force reexamination of the conclusions of Docket No. 90-002. Verizon NH’s witness Michael McCluskey stated that the issues in Docket No. 90-002 did not include “issues of separate competing networks or multiple exchange carriers in the same franchise territory.” AT&T Rebuttal Testimony at 12 (quoting McCluskey Testimony at 3). “Verizon’s testimony from Mr. McCluskey was express on this point, that this doesn’t apply to a multi-LEC environment.” Day 1 Tr. at 153 (Nurse).

Local calls were addressed at a later time, in other proceedings and tariffs. Day 2 Tr. at 91 (Shepherd). This is because at the time of Docket No. 90-002, the Telecommunications Act had not yet been enacted. Day 1 Tr. at 153. Local exchange franchises were exclusive in New Hampshire. At the time, “you didn’t have the necessary conditions [for local competition].” Day 1 Tr. at 153. Not until the 1995 enactment of RSA 374:22-f, at the earliest, did nonexclusive local exchange franchises become lawful in the state. Stat. 1995, Ch. 147:3 (eff. July 23, 1995). But, while there have been multiple Commission proceedings addressing local competition, Tariff No. 85 has not been changed to reflect the emergence of CLECs and their participation in the local exchange market. Day 2 Tr. at 46-47 (Shepherd).

Further evidence that the CCL charge was not intended to apply in a competitive local exchange environment is shown by the absurdity of the results that obtain when Verizon NH applies the charge without providing the accompanying access to the common line. Mr. Pfautz, AT&T’s witness, gave a cogent example why the Commission could not have intended the result that exists today.

We believe that, if you apply this, you get crazy results that it’s hard for us to believe the Commission or any Commission would intend. So that, when Verizon loses a customer, they still get revenue for that loop for the carrier common line that they are no longer providing. So, you know, to extrapolate that, if they were to lose all their customers, but still supply tandem switching, they would get loop revenue from all their customers. And, of course, that loop or CCL component is really, by far, the biggest component of the access charges that we pay, about 90 percent I think is the figure.

Day 1 Tr. at 117. As noted previously, the Commission should interpret the tariff so as to avoid ridiculous results. *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. at 511. To avoid absurd results like those described by Mr. Pfautz, the Commission should rule that Verizon NH may not impose a CCL access charge when no Verizon NH common line is involved on that side of the call.

C. Verizon's Practice is Contrary to Industry Norms.

The Commission should interpret the tariff to reach a reasonable result. Industry standard practice shows the unreasonableness of Verizon NH's imposition of CCL access charges when no CCL is used.

A leading industry reference text states that a carrier common line charge is designed to pay for use of the local loop, or common line, facility. The excerpt from Newton's Telecom Dictionary introduced by the Staff defines "Carrier Common Line Charge" as

The charge which IXCs (InterExchange Carriers) pay to LECs (Local Exchange Carriers[]) for the privilege of connecting to the end user through the LEC local loop facilities. The CCL is a charge to cover a portion of the costs associated with the local loop, which is used for origination of local, intraLATA long distance...and interLATA long distance calls.

Ex. 21 (*Newton's Telecom Dictionary*, pp. 152-153). The implication of Newton's definition is that the industry considers the CCL charge to go hand-in-hand with use of the loop, and, conversely, that there should be no CCL charge when no loop is used.

That view is shared by AT&T, needless to say another major ILEC. AT&T was clear that it considers it inappropriate to impose a charge for use of the CCL when the CCL is not used, and it does not impose a CCL charge in such instances. "Our position is that people should pay for what they use and we should only charge for what we provide." Day 1 Tr. at 154 (Pfautz).

Additionally, Verizon NH's imposition of CCL charges in these circumstances is anomalous even by its own standards. If a Verizon common line is not used to access a Verizon end user, Verizon does not impose the CCL charge in all or most other jurisdictions. In no other New England state does Verizon impose a CCL charge when no CCL is involved. Day 2 Tr. at

43 (Shepherd). Under its federal tariff, Verizon NH does not impose a CCL charge when no common line is used. *Id.* at 94-95 (Shepherd).

Finally, the failure of NYAB to bill CCL charges for many years speaks volumes about the industry's view of the reasonableness of imposing CCL charges when no CCL was involved. NYAB specializes in billing access charges for telecommunications carriers. Lebeck Dir. at 9. Its expertise presumably was the reason Verizon NH hired it to perform billing services. NYAB's expertise with industry billing practices undoubtedly led it to conclude that no CCL charge should apply when a common line is not used to provide access.

D. Verizon's Failure to Bill CCL Charges Undermines Verizon NH's Claim That They were an Important Revenue Source.

Verizon NH's claim that CCL charges were an important source of contribution to it is undermined by the fact that it failed to collect substantial portions of this revenue for long periods of time.

The issue that gave rise to this case was not apparent until approximately August 2005. At that time, CLECs began to notice substantial increases in the amount of intrastate access charges on bills from Verizon NH. These substantially increased charges resulted from the imposition of CCL charges on CLEC-originated calls terminated to wireless carriers. Day 1 Tr. at 17-19 (Lebeck). Then, after BayRing filed its complaint in this action, Verizon began assessing the CCL charge on calls that BayRing originated and terminated to ITCs and other CLECs. Day 1 Tr. at 19-20. AT&T's experience was similar. It noticed substantially increased intraLATA access charges in the fall of 2005. Day 1 Tr. at 117 (Pfautz).

Actions speak louder than words. Verizon NH's behavior is an important indicator of how the tariff should be interpreted. If the supposed contribution from the CCL charge was important to Verizon NH, it should have been diligent about billing it. But, apparently, Verizon

NH did not miss the money. Verizon NH's actions put to rest its claim that the carrier common line charge was an important source of contribution to the company, and therefore should be collected regardless of whether the underlying service is provided.

IV. Imposing a CCL Charge When No Verizon Common Line Is Used Is Contrary to the Public Interest.

Verizon NH's proffered interpretation of Tariff No. 85 is contrary to the public interest. It has anticompetitive results and potentially undermines the public switched telephone network. Therefore, the Commission should reject Verizon's interpretation, which leads to unjust results. *State v. Farrow*, 140 N.H. at 476.

A. Verizon NH's CCL Charges Have Anticompetitive Effects.

Verizon's imposition of a CCL charge creates a competitive advantage for Verizon NH and Verizon Wireless, while posing a competitive disadvantage for competitors like BayRing and One Communications. Because calls within New Hampshire between Verizon NH and Verizon Wireless or another wireless carrier are not subject to the CCL or other Verizon access charges, those carriers enjoy a marked cost advantage over CLECs. To the extent that Verizon NH and Verizon Wireless can translate such lower costs into lower retail prices, they gain an advantage not available to BayRing and One Communications. But this advantage results not from superior efficiency, better management, more innovative products, or other internal qualities; it results from artificially higher costs that CLECs must pay to Verizon NH — specifically, the CCL charge, which Verizon NH imposes without providing the corresponding CCL service.

This cost advantage results from the fact that Verizon NH traffic terminated to a wireless carrier anywhere in the state is considered local, and not subject to access charges. Winslow Dir.

at 34; *see* Part II above. As Mr. Winslow explained, when a BayRing customer in Manchester calls a wireless subscriber in North Conway, Verizon imposes a CCL charge upon BayRing (even though no Verizon NH CCL is involved on either end). That charge is 2.649 cents per minute. Day 1 Tr. at 52 (Winslow). On the other hand, when a Verizon NH caller in Manchester, say, the next-door neighbor of the aforementioned BayRing customer, calls the same wireless subscriber in North Conway, Verizon NH pays reciprocal compensation of only seven one-hundredths of a cent to the wireless carrier. *Id.* Thus, Verizon NH forces BayRing to pay it a CCL charge that is *more than three hundred seventy-eight times* what Verizon NH pays the wireless carrier to transport and terminate the call.³

Verizon NH's imposition of the CCL charge upon BayRing gives Verizon NH a marked cost advantage in the example above. Lower costs can allow Verizon NH to lower its retail prices, providing an incentive for retail customers to switch to or remain with Verizon NH instead of using BayRing, One Communications, or other CLECs for their services.

Similarly, Verizon NH's CCL charge has an adverse impact on toll competition. Verizon's inappropriate CCL billing puts IXCs to a competitive disadvantage in New Hampshire, where Verizon NH is the biggest toll competitor. AT&T Panel Direct Testimony at 25. When an IXC like AT&T carries an intrastate toll call between two Verizon NH end users, AT&T pays two CCL charges, reflecting the fact that Verizon NH is providing access to its end users on both ends of the call. Day 1 Tr. at 120-22 (Pfautz). When a CLEC is the local exchange carrier on one end of the call, the IXC pays a CCL charge to the CLEC for access via the CLEC common line, and another CCL charge to Verizon NH — even though a Verizon CCL is not involved on that side of the call. *Id.* at 122-24. Further along the logical continuum, when

³ Mr. Winslow estimated that Verizon NH's additional, internal costs to carry the call might raise Verizon NH's total cost to 2/10 of a cent. Tr. 52-53. Even if so, Verizon NH's total costs would be less than one-tenth what

CLECs provide the local exchange service on both ends, but AT&T or another IXC is the toll provider, the IXC will pay four CCL charges, one to the originating CLEC, one to Verizon NH on the originating side, one to Verizon NH on the terminating side, and one to the terminating CLEC. *Id.* at 126-27. These additional costs to the IXC disadvantage it relative to Verizon NH. Since Verizon NH is not paying multiple charges for use of common lines, it has an inherent cost advantage. AT&T Panel Direct Testimony at 25.

Toll consumers suffer as well. The inflated cost structure imposed by Verizon NH requires toll providers to raise retail rates to cover those costs. And if competitors are forced to charge higher rates, Verizon NH is relieved of competitive pressure to lower its own retail toll rates. *Id.*

One Communications does not suggest that Verizon NH should not be able to compete on price or in any other legitimate way. To the contrary, One Communications welcomes fair competition with Verizon NH or any other provider. A problem exists, however, when Verizon NH charges One Communications for a service Verizon NH does not provide, and that charge results in a cost disadvantage for One Communications as compared with Verizon NH. That sort of “competition” is not on a fair footing.

The harmful effects upon competition that would result from applying the CCL charge to CLEC-to-wireless and CLEC-to-CLEC calls, *i.e.*, where Verizon was not providing access to a common line but still was charging for it, did not become apparent until the advent of local competition. In 1993, the wireless phone industry was in its infancy and CLECs did not yet exist. Since then, CLECs has come into being and wireless use has exploded. The result has been an unanticipated and unjustified windfall for Verizon NH.

Looking for the moment only at wireless usage, it has increased dramatically since 1993. Available statistics from the FCC show that the number of wireless subscribers (the number of handsets, Day 1 Tr. at 139 (Nurse)) has more than tripled between 1999 and 2005 (from 280,508 to 989,443). Ex. 12, p. 97, Table 2; Day 1 Tr. at 139 (Nurse). In the same time period, the average minutes of use of a wireless subscriber also more than tripled, from 185 to 740. Ex. 12, p. 106, Table 10.⁴ Accordingly, aggregate minutes of use in New Hampshire in 2005 (subscribers times average MOU) were more than *nine times* what they were in 1999. And, while the number of wireless subscribers in 1993 is not available in the FCC report, the FCC did state that wireless average monthly minutes of use were 140, approximately 76% of average MOU in 1999. Not only was this situation unanticipated in 1993, it is evident that if even a fraction of this wireless traffic is subject to Verizon NH CCL charges, Verizon has enjoyed a spectacular and ever-growing windfall likely amounting to millions of dollars annually.⁵ By the same token, the carriers that finance that windfall by paying for a CCL the use of which they do not receive, are placed at a competitive disadvantage through increased costs.

B. Verizon NH's CCL Charges Potentially Undermine the Public Switched Telephone Network.

Another potential result is that end-users simply take themselves out of the system, and use cellphones or VOIP providers to make the call from Manchester to the wireless subscriber in

⁴ While the figure for average minutes of use is a nationwide average, there is no reason to doubt that at least approximately, these figures represent the trend in New Hampshire. Day 1 Tr. at 140-141 (Nurse).

⁵ An example based on these figures illustrates the size of the Verizon NH windfall. Using December 1999 figures, aggregate monthly wireless MOU in New Hampshire is calculated at 51,893,980 (280,508 subscribers times 185 average monthly MOU). The aggregate monthly MOU using December 2005 figures is 732,187,820 (989,443 subscribers times 740 average monthly MOU). The increase from December 1999 to December 2005, therefore, is 680,293,840 per month.

If even 10% of these additional wireless MOU are improperly subject to Verizon NH's CCL access charge (because they are CLEC-to-wireless or wireless-to-CLEC calls), at \$0.026 per minute, Verizon's revenue windfall would be over \$21 million annually (680,293,840 aggregate monthly minutes times 10% = 68,029,384, times \$0.026 = \$1,768,763.98 per month, times 12 = \$21,225,167.81 per year). In other words, Verizon NH may realize over

North Conway. In such case, the CLEC loses, and Verizon NH may lose as well in that it receives no compensation for carrying the call. Further, one must seriously question the wisdom of Verizon's CCL usage charge if it drives end-users off the PSTN — substantially owned by Verizon — and onto cellular or VOIP networks.

On the other hand, “Though this be madness, yet there is method in ’t.” *Hamlet*, Act II, Sc. 2. This apparent harm to Verizon NH's self-interest is substantially mitigated when the Manchester customer uses a cellphone to call North Conway. Indeed, Verizon affirmatively benefits. One of the principal beneficiaries of increased cellphone use is Verizon. Verizon Wireless is the second-largest wireless carrier in the country, and it is not far behind the leader. Ex. 12, p. 102, Table 4. It is not a stretch to infer that Verizon Wireless carries a substantial part of the cellphone MOU that substitute for CLEC-to-wireless calls in the circumstances just described. To the extent that increased usage causes cellphone subscribers to obtain wireless calling plans with larger buckets of minutes to accommodate the increased usage, the revenues of Verizon Wireless, and Verizon Communications itself, increase. Similarly, to the extent that the customer uses a VOIP service provided over Verizon DSL (whether by Verizon's own service or by an “over-the-top” VOIP provider like Vonage riding on a Verizon DSL loop), Verizon benefits. At the same time, CLECs like BayRing and One Communications suffer through loss of usage, revenues, and possibly customers.

Further, Verizon's announced plans to sell its landline operations in New Hampshire to FairPoint provides it with all the more incentive to drive customers off the PSTN and onto wireless networks. *See Winslow Dir.* at 35. Customers that have acquired the habit of using their cellphones to make intrastate toll calls are likely to continue that practice after the sale.

\$21 million in charges for a service it does not provide. And, of course, this calculation only takes into account wireless usage, and not CLEC-to-CLEC calls, where Verizon NH also does not provide the CCL.

Verizon thus would retain the intrastate traffic of its Verizon Wireless customers, but that traffic will be lost to FairPoint, CLECs like BayRing and One Communications, and IXC's like AT&T.

Conclusion

Verizon NH's CCL access charge, if imposed when no Verizon NH common line is used to reach a Verizon NH end user, is not authorized by Tariff No. 85. The access rate structure of Tariff 85 was not intended to apply when a local exchange carrier other than Verizon NH is involved. Moreover, Tariff No. 85 does not apply to local calls, and for purposes of intercarrier compensation all calls to or from wireless subscribers that originate and terminate within New Hampshire are local. In addition, Verizon NH's CCL charge is anticompetitive and may undermine the PSTN.

For all these reasons, the Commission should rule that Verizon NH is not authorized to impose a CCL access charge when no Verizon NH common line is involved in providing the access service.

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Respectfully Submitted,



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