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

JOINT OPPOSITION OF AT&T, BAYRING COMMUNICATIONS AND ONE COMMUNICATIONS TO VERIZON'S MOTION FOR REHEARING AND/OR RECONSIDERATION

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On March 28, 2008, Verizon New Hampshire ("Verizon") filed a motion ("Motion") asking the New Hampshire Public Utilities Commission ("Commission") to reconsider or conduct a rehearing of its Order No. 24,837, issued on March 21, 2008, in this docket ("*Order*"). Freedom Ring Communications LLC d/b/a BayRing Communications ("BayRing"), One Communications ("One") and AT&T Corp. ("AT&T") (collectively "Competitive Carriers") oppose Verizon's Motion for the reasons set forth below.

Introduction

Verizon's attack on the Commission's *Order* is premised on a mistatement of the central issue raised and decided by the case, and raises a challenge to a decision the Commission did not even make. After almost two years of litigating the issue of whether Verizon may lawfully impose a carrier common line ("CCL") charge when its CCL is not involved in a call, Verizon now attempts to recharacterize the issue as "whether the tandem switching and local transport services provided to competitive carriers under the

Tariff constitute 'switched acess.'" Motion, at ¶ 6. Having thus attempted to misfocus the issue on tandem switching and local transport, Verizon then claims that the *Order* violated its constitutional rights by "confiscating" its right to collect charges when it provides those two services. Motion, at ¶¶ 21-26.

It is no wonder that Verizon wants to engage in some misdirection. After all, it is hard for Verizon to claim that its property has been "confiscated" when the only thing being determined by the Commission's decision is that Verizon is prohibited from charging for a service (CCL service) that it does not provide. Unable or unwilling to deal with that reality, Verizon instead invents a world in which, at least in its own mind if nowhere else, it is being prohibited from charging for services (tandem switching and local transport services) it ***does*** provide. But Verizon's invented world bears no relationship to reality. No party in the case disputed Verizon's right to be compensated for providing tandem switching and local transport functions. Indeed, the parties expressely recognized that Verizon provides those functions and should be compensated for them.

The only issue in this case – the issue Verizon attempts to sidestep in its appeal – is whether Verizon should be permitted to collect a carrier common line charge when a call does not traverse a Verizon common line. The Commission addressed this narrow issue with sound logic based on the law of New Hampshire and the undisputed facts regarding the structure of the telecommunications industry at the time the tariff was adopted. The Commission found that, because Verizon's common line was always used "in conjunction with" tandem switching and local transport in Verizon territory when Tariff 85 was adopted, the right to charge the CCL rate was based on that assumption,

i.e., conditioned on the involvement of a Verizon common line. In the absence of that condition, the Commission reasoned, the tariff provides no right to charge the CCL rate. Such reasoning is not only logically sound, it is also consistent with equity and common sense. Verizon was always free to update its tariff to accommodate situations not contemplated at the time the tariff was introduced. In the Commission's reasonable view, Verizon should not be allowed now to exploit its own failure to do so.[1]

Nothing in Verizon's Motion warrants a deviation from the Commission's finding -- certainly not the the mischaracterization of the issues and decision, and certainly not Verizon's rehashing of its unsuccesful tariff interpretation arguments. The Commission should deny Verizon's Motion out of hand.

Argument

I. STANDARD OF REVIEW

The Commission will not grant rehearing unless there is "good reason" to consider an order either unlawful or unreasonable. RSA 541:3, 541:4; *In re Investigation as to Whether Certain Calls Are Local,* DT 00-223, DT 00-054, Order Denying Verizon New Hampshire's Petition for Rehearing of Order Approving Agreements, Order No. 24,266, at 2 ((May 13, 2005); *In re Global NAPs — Petition for an Order Directing Verizon to Comply with Its Interconnection Agreement,* DT 01-127, Order Denying Motion for Reconsideration, Order No. 24,367, at 5 (Sept. 2, 2004). Good reason exists only where there is something the Commission either "overlooked or mistakenly conceived." *In re Verizon New Hampshire — Investigation of Verizon New Hampshire's*

[1] Indeed, it would be particularly unfair to allow Verizon to charge the CCL rate in situations not contemplated when Tariff 85 was adopted, where – as in the present case – had Verizon sought to change its Tariff 85 to give it the right to charge the CCL rate when its CCL service is not involved, the Commission would likely have denied it. The Commission appropriately does not now give to Verizon what Verizon could not have obtained had it sought the right explicitly.

Treatment of Yellow Pages Revenues, DT 02-165, Order on Motion for Rehearing and/or Reconsideration, Order No. 24,385, at 14 (Oct. 19, 2004).

The Commission will not grant rehearing merely so that a party may have a second chance to present material it could have presented earlier. *Investigation as to Whether Certain Calls Are Local,* Order No. 24,266, at 3. "A successful motion does not merely reassert prior arguments and request a different outcome." *In re Verizon New Hampshire — Wire Center Investigation,* DT 05-083, Order Denying Motions for Rehearing or Reconsideration, Order No. 24,629, at 7 (June 1, 2006); *Investigation of Verizon New Hampshire's Treatment of Yellow Pages Revenues* at 14.

Given that much of Verizon's Motion is devoted to rehashing its unsuccessful tariff interpretation arguments, the Motion must be denied. In addition, and for the reasons discussed below, to the extent that the Motion alleges that the Commission's Order is either unreasonable or unlawful, those arguments must fail.

II. VERIZON'S MOTION FAILS BECAUSE THERE IS NO INCONSISTENCY OR MISINTERPRETATION IN THE COMMISSION'S DECISION.

Verizon's argument hinges on the claim that the Commission committed a fundamental error when

> it concluded that "local transport, used independently without the benefit of Verizon's common line, does not constitute switched access service." *Id.* at 31

Motion at ¶ 10. *See also, id* at ¶ 2, and ¶ 21, n. 6. Verizon argues that this statement – which it quotes out of context – is incorrect as a matter of tariff interpretation and is "internally inconsistent" with the Commission's statement on page 30 of the *Order* that:

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

Motion at ¶ 10, quoting *Order* (emphasis added by Verizon). Contrary to Verizon's claim, however, there is nothing incorrect about the Commission's tariff interpretation of what constitutes switched access and nothing inconsistent about these two statements.

The correctness of the Commission's statement ("local transport, used independently without the benefit of Verizon's common line, does not constitute switched access service") becomes apparent when it is placed in the context of the Commission's *Order*. That statement follows an extended discussion of the evolution of the telecommunications industry that included, among other things, the fact that, when Verizon's switched access rate was first approved, Verizon's common line was always provided in conjunction with the Section 6 local transport and tandem switching elements, simply because at that time there were no other carriers providing local exchange service in competition with Verizon. *Order*, at 30. In that context, the Commission understood Section 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 charge.") to be predicated on the factual assumption that a Verizon common line would always be involved when a call flow involves Verizon's local transport or tandem switching elements (and thus charges for CCL would be appropriate).[2] Because Verizon never changed its tariff to accommodate the possibility that, once other competitors emerged in New Hampshire, Section 6 elements could be used without a Verizon common line, the Commission in its *Order* simply gives effect to the assumption upon which the tariff is

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[2] Indeed, that assumption was expressly stated, as the Commission noted, in Section 5.1.1.A.1 ("The Telephone Company will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6."). *See*, *Order*, at 30.

based and its unstated, but natural, corrollary by concluding that (a) the Section 5.4.1.A. right to charge the CCL rate on switched access is predicated on the factual assumption that the CCL is provided, and (b) when the predicate for charging the CCL rate is missing (*i.e.*, that CCL is not provided), Verizon does not have the right to charge for it. *See*, *Order*, at 27;[3] *see, also, id.*, at 31.[4]

Moreover, the structure of Verizon's tariff and the relationship between Section 5 and Section 6 support the Commission's interpretation. The Commission's statement that "local transport, used independently without the benefit of Verizon's common line, does not constitute switched access service" was – in context – referring to the *switched access service to which Section 5 refers.* The switched access service to which Section 5 refers (and to which the CCL charge in Section 5 applies) is the Section 6 switched access elements *that the Section 5 carrier common line is used in conjunction with. See*, Section 5.1.1.A.1. This result follows from the organization of the tariff. The terms and conditions applicable to Section 6 elements are, of course, in Section 6; not in Section 5. Clearly, Section 5 cannot dictate the terms of the Section 6 local transport service when a carrier orders Section 6 service without the Section 5 CCL service. Carriers using a Section 6 switched access element without using the Section 5 CCL service would have

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3 The Commission stated:

"Accordingly, the CCL charge is properly imposed when (1) Verizon provides the use of its common line and (2) it facilitates the transport of calls to a Verizon end user. It is also reasonable to conclude the inverse to be true, that is, when the use of Verizon's common line and the presence of a Verizon end user are lacking, the CCL charge may not be imposed."

4 The Commission stated:

"The phrase 'subject to' is plainly meant to be conditional in the sense that a carrier will be "liable for" CCL charges when the condition of CCL service is precedent. Verizon's interpretation improperly nullifies the obvious conditional nature of Sections 5.1.1.A.1 and 5.4.1.A."

no reason to look at Section 5, so the provisions in Section 5 cannot apply to Section 6 services used without Verizon's common line.[5] *See*, Transcript I, at 194-195. Therefore, the Section 6 elements, standing alone, do not constitute the switched access service to which Section 5 applies.

Indeed, the Commission made clear that the tariff, when properly understood, conditions the application of the CCL charge to circumstances when the carrier common line was used in conjunction with the Section 6 switched access elements. That is precisely what is reflected in the following statement by the Commission:

> We interpret this section,, however to mean that a carrier will be "subject to" CCL charges *to the extent CCL service is provided in conjunction with switched access*.

Order at 31 (emphasis added).

When the Commission's statement is properly understood in context, it becomes evident that there is nothing inconsistent with the second statement cited by Verizon that "*[in] the calls at issue here*, Verizon *is providing a component of switched access service*...". Motion at ¶ 10, quoting *Order* at 30. Verizon can, and does, provide a component of switched access (local transport) for which it is entitled to charge under Section 6 when it transports a call over its facilities for delivery to another carrier.[6] In that circumstance, however, it is *not* providing the switched access to which Section 5 refers, because Section 5 is referring only to the switched access (*e.g.*, local transport)

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[5] Thus, in context, the Commission concluded that "local transport, used independently without the benefit of Verizon's common line, does not constitute [*a complete*] switched access service." *See*, 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.

[6] Section 6.2.1.A. describes local transport that is offered under the tariff, and Section 6.7.1. prescribes the manner in which Verizon is permitted to charge, and the carriers must pay, for local transport. The rates for local transport are set out in Sections 30.6.1 through 30.6.7. For a good description of how carriers can purchase local transport without purchasing carrier common line, *see* Transcript I, at 177-178.

used in conjunction with Section 5; it is not referring to the "local transport, used independently without the benefit of Verizon's common line." *Order*, at 31.

III. ASSUMING, *ARGUENDO,* THERE IS AN AMBIGUITY IN THE TARIFF, IT WAS CREATED BY VERIZON, AND THE COMMISSION WAS CORRECT TO RULE THAT VERIZON WILL NOT BE PERMITTED TO EXPLOIT IT TO ITS ADVANTAGE.

Verizon complains that the Commission goes beyond the "four corners of the Tariff" and ignores the plain meaning of the words in the tariff. Motion, at ¶¶ 7, 16-18. At the outset, Verizon's arguments concerning the appropriate interpretation of the tariff in the cited paragraphs of the Motion are mere restatements of arguments it has previously made. For example, Verizon's arguments in paragraphs 17-18, claiming that all components of switched access service bear the CCL charge regardless of whether a Verizon CCL is used in the call, restate the arguments of pages 4-6 of Verizon's September 2007 post-hearing brief. Likewise, the arguments in paragraph 20, concerning the effect of the admitted failure by Verizon's billing agent to bill the CCL for calls terminated to non-Verizon end-users, repeats pages 15-17 of Verizon's post-hearing brief. As described above in Section I, restatement of previous arguments does not constitute good cause to reconsider the *Order*.

It is also worth noting that the Commission is in good company, if the Commission ignored the so-called "plain meaning" that Verizon claims exists. This is because Verizon's own billing agent did so as well. For a period of ten years (from 1996 to 2006), the New York Access Billing Pool ("NYAB"), whose job was to understand and apply Verizon's Access Tariff 85 to call flows involving CLEC and ITC end-users, also failed to see the so-called "plain meaning" claimed by Verizon. Rather, for that ten

year period, the NYAB applied the tariff in accordance with the interpretation the Commission now finds is proper.

In any event, any perceived ambiguity in the tariff arises because of Verizon's failure to adapt it to changed circumstances.[7] As the Commission noted in its *Order*, when the predecessor to Tariff 85 was initially adopted to permit toll competition, there was no local exchange competition. There was no doubt whose carrier common line would be used when a call originated and/or terminated in Verizon's territory; it would be Verizon's line. *Order*, at 30. ("In 1993, when Verizon's switched access rate was first approved, end users in Verizon's franchise territory were exclusively Verizon's.") As a result, it was reasonable for the Commission to conclude that Tariff 85 reflects the assumption that the Verizon loop would be used. Today, in the numerous situations where the Verizon loop is now no longer used, it would not be unreasonable if the Commission were to have concluded that it is simply not possible to apply Tariff 85 according to its strict terms.

The language in Section 5 is a good example. On the one hand, Verizon points to language in Section 5 to the effect that all switched access will be subject to a carrier common line charge and complains that the Commission cannot ignore the "plain meaning" of such language. *See, e.g.,* Section 5.4.1. On the other hand, Verizon wants the Commission to ignore the "plain meaning" of other language in Section 5: the requirement that Verizon provide carrier common line access service (Section 5.1.1.A.1) and the exceptions to the application of the CCL charge (Section 5.4.1.A). In such a

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[7] The Commission did not find that the tariff is ambiguous. The Commission's analysis merely assumed *arguendo* that an ambiguity exists. *Order*, at 28. When the relationship between Section 5 and Section 6 is properly understood, each word in the tariff may be given effect in accordance with its plain meaning and the structure of Tariff 85. *See*, AT&T Post-Trial Brief, at 7-17.

situation, Verizon's shibboleth of "plain meaning" hardly resolves the problem. Contrary to Verizon's contentions (Motion at ¶¶ 16-19), therefore, it would not have been unreasonable for the Commission to have considered extrinsic evidence to interpret the tariff.

Moreover, the extrinsic evidence fully supports the Commission's decision. In resolving the problem of interpreting the tariff when new call flows not contemplated by the tariff exist under which two different provisions required by the original tariff language could not both apply,[8] the Commission appropriately considered the historical reality and evolution of the industry, *i.e.*, the introduction of local exchange competition that eliminated Verizon's monopoly over the carrier common line. It would hardly be appropriate for the Commission to ignore the Section 5 requirement that Verizon provide a carrier common line service in order to charge for it when it was within Verizon's power, and indeed Verizon's responsibility under RSA 378:1 and 378:2, to modify its tariff to reflect changed circumstances. It would be perverse indeed to excuse Verizon from its Section 5 obligation to provide CCL while continuing to permit Verizon to charge for it for calls being routed to Verizon's competitors. The Commission appropriately determined that it should not read out of the tariff the requirement to provide the CCL when Verizon failed to change its tariff to reflect the fact that it no longer always provides it.[9]

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[8] At the risk of repetition, we note again that there is a way to interpret the existing language of the tariff, without reference to extrinsic evidence, to support the Commission's decision (see note 7, *supra.*); and, indeed, we read the Commission's reference to the tariff ambiguity as part of an "assuming *arguendo*" discussion.

[9] Verizon's "reasons" for not changing its tariff (that it did not believe that changed circumstances required it) defies credibility. First, as an objective matter, there are the patently clear issues pointed out in this pleading that arose from the – at the time, new –development of carrier common lines being provided by non-Verizon local exchange carriers in Verizon's service territory. But more importantly, as a subjective matter, Verizon *actually knew* that its tariff was not appropriate for such circumstances. Indeed,

Moreover, contrary to Verizon's claim (Motion, at ¶ 19), the extrinsic evidence of billing records did ***not*** support Verizon's contention that it had always billed the CCL charge even when its CCL service was not used. First, as noted at the outset of this section, for a ten year period from the beginning of local exchange competition until the year prior to the initiation of this case, the NYAB did not apply the CCL charge to calls that were originated from or terminated to CLECs or independent telephone companies and thus did not involve a Verizon common line. Second, there was undisputed, *affirmative* evidence in the record that not even Verizon itself applied the CCL charge to calls not involving a Verizon common line from the inception of local competition in 1996 to 2001.[10] In short, Verizon's claim that the Competitive Carriers failed to refute Verizon's extrinsic evidence of billing behavior is contradicted by the record.

IV. VERIZON'S CONFISCATION ARGUMENT MUST FAIL.

Verizon's confiscation claim is patently meritless. First and most damning, as noted above, Verizon assumes a decision that the Commission did not make. Second, compounding the error of basing its argument on a non-existent Commission decision, Verizon assumes a "confiscation" that has not happened and that there is no reason to believe will happen. Third, Verizon seeks to attribute to the government a (hypothetical) loss for which it, and not the government, is responsible. Fourth, even if all Verizon's hypotheticals, assumptions and predictions were certain to occur, Verizon applies the wrong standard for determining whether there has been a "government taking." Fifth, on a going forward basis, Verizon has no property to be "confiscated."

Verizon's own witness stated that the issues before the Commission in Docket 90-002 did not include "issues of separate competing networks or multiple exchange carriers in the same franchise territory." *See*, McCluskey Testimony, at 3, in Docket 90-002 (Attachment 2-20(a) to Verizon's response to AT&T 2-20), quoted in Exhibit 9 (Panel Rebuttal Testimony of AT&T), at 12.

[10] *See*, AT&T Post-Trial Brief, at 39-40, and the detailed citations to the record contained therein.

A. THE COMMISSION DID NOT MAKE THE DECISION VERIZON CLAIMS TOOK ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

As we noted in our introduction, Verizon's attack on the Commission's *Order* is premised on a mistatement of the issue raised by the case, and based on a decision the Commission did not make. As we noted above, Verizon now attempts to recharacterize the issue as "whether the tandem switching and local transport services provided to competitive carriers under the Tariff constitute 'switched acess.'" Motion, at ¶ 6. Verizon then claims that the *Order* violated its consitutional rights by "confiscating" its right to collect charges when it provides those two services. Motion, at ¶¶ 21-26.

This claim can easily be laid to rest. The Commission did not say that Verizon cannot collect its tariffed rates for tandem switching and local transport services when it provides the service, only that Verizon could not charge its CCL when a call does not traverse a Verizon common line. Indeed, the Commission's ordering clause expressly states: "ORDERED, that Verizon cease the billing of carrier common line charges for calls that do not involve a Verizon end user or a Verizon-provided local loop." *Order* at 33. Moreover, under the procedural orders in this case, and pursuant to the *Order*, Phase 2 of this case will address reparation of CCL charges, not charges for tandem switching or local transport services. *Id.* Only the CCL charge was at issue in the Commission's decision.

B. THE "CONFISCATION" ABOUT WHICH VERIZON COMPLAINS IS ENTIRELY HYPOTHETICAL AND SPECULATIVE.

No party has claimed that it is not responsible to pay for the tandem switching or local transport services it receives, nor has any party stated an intention not to pay for such functions in the future, nor has any party asked the Commission to preclude Verizon from collecting compensation when Verizon provides those services. Indeed, the record

evidence is to the contrary.[11] Most importantly, Verizon's right to impose those charges was simply not litigated in the case.

Verizon seeks to fabricate an issue here, where there is none, based on a mistatement of the issue in the case and a mischaracterization of the Commission's decision. Verizon takes the Commission's statement *construing Section 5* (that local transport used independently of Verizon's common line is not switched access to which the CCL charge applies) and deliberately misinterprets it to mean that, *under Section 6*, Verizon cannot charge for local transport when used independently of the loop.[12] Such an interpretation of the Commission's *Order* is pure fantasy. First, the Commission did not say that ***no*** charge applies to tandem switching or local transport. Second, if it had reached such a conclusion, it would have had to address the many provisions in the tariff that provide for the offer, use and payment for many services or service components that do not constitute a complete switched access service. As described in Section II, *supra*, Section 6 of Tariff 85 permits Verizon to charge for local transport when used independently of the loop. *See*, Sections 6.2.1.A, and 6.7.1. Lest there be any doubt, AT&T witnesses at the hearing in this case described the process for doing so. *See*, Transcript 1, at 177-179; *see also*, *id.*, at 194, lines 12-20. Finally, Tariff 85 on its face

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[11] It is not relevant, for purposes of Verizon's confiscation claim, that BayRing argued at certain points in the case that the disputed call flows are not subject to Tariff 85 on the ground that they are not "switched access." BayRing has never taken the position that it is not required to pay Verizon for actual use of Verizon's network. Indeed, BayRing, like the other Competitive Carriers in this case, has expressly acknowledged its obligation to pay Verizon for use of its network. *See, e.g.*, Transcript I, at 78-79 (BayRing witness Winslow agrees that Verizon should be compensated for services Verizon provides, including the local transport and tandem switching services that Verizon provides in the disputed call flows.); *see also, id.*, at 82-83.

[12] See, Motion at ¶ 24 ("A Commission order that concludes that 'local transport, used independently without the benefit of Verizon's common line' – as Tariff 85 permits – 'does not constitute switched access service' for which Verizon is to be compensated under Tariff 85 is pure confiscation of Verizon's property in violation of its constitutional rights.")

expressly purports to apply to "switched access services *and other miscellaneous services*[.]" Section 2.1.1.A. (emphasis added)

Because the issue of whether Verizon can charge for local transport or tandem switching was never litigated, because it was never decided, and because the logic of the Commission's *Order* cannot be read to create a Verizon obligation to provide the tandem switching and local transport functions without compensation, the confiscation about which Verizon claims is hypothetical, speculative and no grounds for a cognizable claim.

C. EVEN IF VERIZON WERE TO SUFFER A LOSS, THE LOSS IS CAUSED BY VERIZON, NOT BY THE COMMISSION'S DECISION.

As noted above, even if somehow an issue not litigated or decided were nevertheless resolved, with the result that Tariff 85 does not require carriers to pay for local transport and tandem switching under Section 6 when the call does not involve a Verizon carrier common line, such a government decision would still not constitute a "government taking." In such a hypothetical scenario, the Commission would merely be interpreting a poorly drafted tariff against the drafter. In other words, in Verizon's fantasy interpretation of the Commission's decision, the reason for Verizon's inability to collect local transport and tandem switching charges would be Verizon's filing of a tariff that, when fairly interpreted, did not allow it to recover for certain functions.

Moreover, Verizon could easily remedy its would-be inability to charge for services provided – it need only file a clear tariff. If it were to do so, the Commission would certainly approve a provision that provides Verizon a fair opportunity to recover for services it does provide. But the Commission cannot approve such a tariff unless and until Verizon proposes it.

In short, even if all the hypotheticals and parade of horribles were to come true in the future, they would still not constitute the basis for a confiscation claim.

D. EVEN IF THE COMMISSION WERE TO FIND THAT VERIZON IS NOT ALLOWED TO CHARGE FOR LOCAL TRANSPORT OR TANDEM SWITCHING --WHICH IT DID NOT-- THERE WOULD BE NO UNLAWFUL "CONFISCATION" OF VERIZON'S PROPERTY ARISING FROM SUCH A FINDING.

Aside from the most obvious shortcoming in Verizon's argument – that the Commission found that Verizon could not charge for Local Transport or Tandem Switching, a finding the Commission did not make, Verizon's confiscation argument also attempts to apply a ratemaking concept designed for general rate cases to an issue to which it is not germane. Verizon's argument has no application to a case involving a single rate, and certainly no application to a case involving the interpretation of how an existing and approved tariff applies a specific rate.

1. Verizon's Confiscation Argument Has No Application To A Complaint Regarding The Rate For A Particular Service.

All the cases addressing the confiscation issue that Verizon cites concern themselves with rate-setting – the establishment of rates that a company is permitted to charge to recover its overall costs of service (including capital costs) necessary to provide the services it offers. Moreover, the cases address issues that affect the utility's overall rate of return resulting from the revenues from all services and the costs of providing them.[13] As a result, none of the cases cited by Verizon concerns the situation at issue

[13] An examination of Verizon's authorities shows the overarching nature of allegedly confiscatory regulation. *Appeal of Public Service Company of New Hampshire,* 130 N.H. 748 (1988), related to the cost of capital that the Commission determined should be applied in setting PSNH's rates. *Petition of Public Service Company of New Hampshire,* 130 N.H. 265 (1988), concerned the impact of the elimination of tens or hundreds of millions of dollars of construction costs from PSNH's rate base by the application of the anti-construction work in progress statute, RSA 378:30-a. *Duquesne Light Company v. Barasch,* 488 U.S. 299 (1989) also involved a similar prohibition against inclusion in the rate base of any facility until used and useful in public service. *Verizon Communications Inc. v. FCC,* 535 U.S. 467 (2002) concerned the

here — the particular rate that a utility is allowed to charge for an individual service. Thus, the legal authorities that Verizon cites do not support its claim that a constitutionally cognizable confiscation results from the *Order*'s alleged prohibition against recovery of any charges for switched access services.

That is because, as the New Hampshire Supreme Court pointed out in a case that Verizon cites, the constitution requires only a rational process that – overall – produces rates that yield "a rate of return 'commensurate with returns on investments in other enterprises having corresponding risks.'" *Petition of PSNH,* 130 N.H. at 274 (quoting *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S.591, 603 (1944)). The New Hampshire Supreme Court's formulation of the confiscation test essentially follows that in *Hope Natural Gas,* the seminal U.S. Supreme Court case on the constitutional requirements for the rates of an entire enterprise. That case stands for the proposition that a rate-setting authority may not constitutionally set rates at a level that does not permit the enterprise as a whole the opportunity to recover its costs and earn a rate of return "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Hope Natural Gas*, at 603. Like all of its progeny, *Hope* provides no constitutional test for the level at which a single rate must be set, or whether a rate is to be applied at all.

To be clear, these constitutional standards are inapposite here. They have no meaning when applied in the context of the particular rate for an individual service. It makes no sense to suggest that a too-low rate for one particular service would not allow Verizon to operate successfully, maintain its financial integrity, attract capital, or

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FCC's TELRIC ratesetting methodology for unbundled network elements. *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944), concerned use of the "present fair value" versus "actual legitimate cost" methodologies for determining the rate base.

appropriately compensate its investors. A too-low rate for one service may be balanced by generous rates for other services. It is the overall levels of rates, revenues, and costs that determine a company's financial integrity and attractiveness to investors.

The U.S. Supreme Court later amplified this point, explaining the matter as follows:

> Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.

Duquesne Light Company v. Barasch, 488 U.S. 299, 314 (1989). Thus, even if Verizon were correct that the Commission's *Order* results in a too-low rate for switched access services -- which it does not -- that is of no constitutional concern in the absence of evidence regarding Verizon's overall rates and costs. Indeed, the foregoing principle underlies the Commission's traditional disdain for "single-issue ratemaking." *Re Statewide Low-Income Electric Assistance Program*, DE 02-034, *Order* No. 23,980 (May 30, 2002) (Commission refused to implement a bad debt offset on the ground that any offsetting adjustment would constitute single-issue rate making.).

In the absence of a consideration of the adequacy of Verizon's overall rate levels, Verizon cannot state a cognizable constitutional claim for confiscation.

2. Verizon's Confiscation Argument Has No Application To A Tariff Interpretation Case.

In any event, this case does not involve a Commission rejection of a Verizon request to set rates at any particular level. Even if the Commission had determined that Verizon cannot apply the local transport and tandem switching rates to the disputed call flows (which, as demonstrated above, is patently false), the Commission would have

simply determined that the existing tariff does not permit existing rates to be applied in the manner that Verizon contends. If Verizon or any other utility regulated by this Commission believes that a Commission tariff interpretation drives earnings below authorized levels, the utility is always free to propose other tariff changes to cure that concern.

E. ON A GOING FORWARD BASIS, VERIZON HAS NO PROPERTY TO BE "CONFISCATED."

The *Order* operates both retrospectively and prospectively. It prohibits Verizon from imposing CCL charges on calls to non-Verizon end users in the future, and orders restitution for such charges improperly imposed in the past. Verizon clearly rests part of its confiscation claim on the prospective aspect of the *Order*:

> In continuing to require Verizon to provide those [switched access] services, while at the same time failing to determine the basis for Verizon's associated compensation, the Commission confiscates Verizon's property in violation of Part I, Article 12 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

Motion at ¶ 21.

Even if Verizon were correct that the *Order*'s alleged prohibition against any charges for switched access services formed the basis of a constitutional confiscation claim -- which is most assuredly not the case -- the prospective aspect of that claim necessarily fails for the simple reason that Verizon has sold its New Hampshire operations to FairPoint. *In re Verizon New England Inc. et al. — Petition for Authority to Transfer Assets and Franchise,* DT 07-11, Order Approving Settlement Agreement with Conditions, Order No. 24,823 (Feb. 25, 2008). Therefore, the Commission no longer can "continue[] to require Verizon to provide those services." Likewise, Verizon no longer

has any expectation of revenues from the provision of those services. In short, Verizon has no "property" for the Commission to confiscate.

Accordingly, even if any aspect of Verizon's confiscation claim had merit, there is no basis to sustain such a claim with respect to the future provision of access services.

Conclusion

For the foregoing reasons, the Commission should reject Verizon's Motion as meritless.

Respectfully Submitted,

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By its attorney,

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Dated: April 9, 2008

Certificate of Service

I hereby certify that a copy of the foregoing Joint Opposition has on this 9th day of April, 2008 been sent either by first class postage prepaid or by electronic mail to the parties named on the Service List in the above-captioned matter.

Susan S. Geiger

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