

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0645

**Verizon New England Inc.
d/b/a Verizon New Hampshire
Northern New England Telephone Operations LLC
d/b/a FairPoint Communications-NNE**

Appeal From Final Order of New Hampshire Public Utilities Commission

REPLY BRIEF OF PETITIONERS-APPELLANTS

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To Be Argued By: Henry Weissmann, Frederick J. Coolbroth

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I. **ARGUMENT**

The core issue in this appeal is whether Tariff 85 provides for the imposition of the carrier common line (“CCL”) access charge when local transport is provided. Appellees BayRing Communications, One Communications, and AT&T (collectively, the “Toll Providers”) admit that it does: “Section 5 also contains wording that would allow Verizon to charge for the carrier common line when the Section 6 local switching and local transport components are provided” Appellees’ Brief at 22. None of the Toll Providers’ arguments can overcome this fatal concession. The crux of the Toll Providers’ argument is that another condition for the imposition of the CCL Access Charge should be interpolated into the tariff—the use of the common line. The tariff, however, does not establish such a condition; on the contrary, as the Toll Providers acknowledge, the tariff plainly states that the charge applies when *any* switched access service is provided.

A. **Under The Plain Language of Tariff 85, the CCL Access Charge is Properly Billed to Each Switched Access Service**

Section 5.1 of Tariff 85 states: “Carrier common line access service is billed to each switched access service provided under this tariff in accordance with the regulations as set forth therein and in Section 4.1, and at the rates and charges contained in Section 30.5.” Appendix to Appeal by Petition (“Appeal App.”) at 138. Section 5.4.1 of Tariff 85 states: “Except as set forth herein, all switched access service provided to the [toll provider] will be subject to carrier common line access charges” and that “carrier common line access rates and charges will be

billed to each switched access service provided under this tariff in accordance with Section 4.1 and Section 5.4.2.” *Id.* at 141.¹

Because there is no dispute that the Toll Providers used Verizon’s local transport, and local transport is a switched access service, the tariff requires the Toll Providers to pay the CCL Access Charge. Appellants’ Opening Brief at 17-18. Although the New Hampshire Public Utilities Commission (“the Commission”) initially reasoned that the CCL Access Charge does not apply to the calls at issue because local transport provided a la carte does not constitute “switched access service,” Appeal App. at 31, the Toll Providers do not even attempt to defend that reasoning. Nor could they, for the Commission acknowledged in its decision denying rehearing that “switched access includes local transport.” *Id.* at 125.

Instead, the Toll Providers rely principally on Section 5.1.1.A of Tariff 85, which describes carrier common line access service: “Carrier common line access provides for the use of end users’ [Verizon-]provided common lines by [toll providers] for access to such end users to furnish intrastate communications.” The Toll Providers claim that because the tariff defines carrier common line access service, it does not permit the imposition of the CCL Access Charge unless that service is provided. Appellees’ Brief at 14. The Toll Providers’ argument is mistaken for two reasons.

First, the tariff does not state that the CCL Access Charge applies only when carrier common line access service is provided. On the contrary, Sections 5.1 and 5.4.1 state that the CCL Access Charge applies to “each” and “all” switched access services—i.e., it applies whether or not carrier common line access service is provided. In other words, the definition of what the carrier common line access service consists of is distinct from the condition that requires the

¹ For the Court’s convenience, Appellants attach as an appendix to this Reply Brief the relevant tariff provisions, all of which are in the record.

imposition of the CCL Access Charge. Billing of the CCL Access Charge is triggered by the provision of any switched access service, including local transport.

The Toll Providers concede this dispositive point when they say: “*Section 5 also contains wording that would allow Verizon to charge for the carrier common line when the Section 6 local switching and local transport components are provided*, obviously on the factual assumption that the carrier common line is being provided by Verizon in conjunction with the Section 6 local transport and switching components.” Appellees’ Brief at 22 (emphasis added). The Toll Providers thus admit that the plain language of Section 5—what they call the “wording”—requires the application of the CCL Access Charge when local transport is provided. It may have been “assum[ed]” that carrier common line access service also would be provided, but nothing in the language of the tariff conditions the imposition of the CCL Access Charge on the provision of that additional service.

The Toll Providers’ contention that the CCL Access Charge cannot be applied unless carrier common line service is provided contradicts not only the plain language of Section 5 of the tariff, but also the separate definition of “complete switched access service.” As Appellees acknowledge, the tariff uses “complete switched access service” to describe the provision of carrier common line access service together with local switching and local transport. *See Appeal App.* at 143; Appellees’ Brief at 6-7. Had the CCL Access Charge applied only when these services are provided together, the tariff would have stated that the charge applies to “complete switched access service.” Instead, the tariff states that the CCL Access Charge applies more broadly, to “each switched access service.” Where a statute or contract uses a specific term in one provision and omits it from another, the omission is presumed to be intentional. *See Cowan v. Tyrolean Ski Area, Inc.*, 127 N.H. 397, 402-03 (1985).

Second, although the tariff does not require Verizon or FairPoint to provide carrier common line access service in order to impose the charge, they do provide this service whenever they make the local loop available for the Toll Providers' use. *See* Appellants' Opening Brief at 21. Section 5.2.1.A explains that "[w]here the customer is provided with switched access service under this tariff, [Verizon] will provide the use of [Verizon] common lines by a customer for access to end user[s]." Appeal App. at 139. As Verizon explained in its post-hearing brief, this is an availability requirement: by permitting appellees "to use" its common lines to "access [] end user[s]," Verizon "provides" carrier common line access service, regardless of whether the Toll Providers choose to take advantage of that capability. The Toll Providers' claim that certain calls cannot traverse Verizon common lines because they do not connect to Verizon end users, Appellees' Brief at 16, is irrelevant. Verizon (and now FairPoint) provide carrier common line access service by providing the service of access to their facilities.

The Toll Providers' other attempts to avoid the plain language of Section 5 of the tariff are equally unavailing. As noted, Section 5 states that the CCL Access Charge is billed to each switched access service "in accordance with the regulations as set forth herein and in Section 4.1, and at the rates and charges contained in Section 30.5." Appeal App. at 138. The Toll Providers suggest that Sections 4.1 and 30.5 prevent billing the CCL Access Charge unless carrier common line access service is provided. Appellees' Brief at 16. These provisions do not support the Toll Providers' argument. Section 4.1 states that Verizon "shall bill on a current basis all charges incurred by and credits due to the customer under this tariff attributable to services established or discontinued or provided during the preceding billing period." Supplemental Appendix to Appellants' Brief at 1. The CCL Access Charge is attributable not merely to carrier common line service but to "each switched access service provided under this tariff," including local

transport. Tariff 85, § 5.1, Appeal App. at 138. Verizon therefore properly billed the charge in accordance with Section 4.1 to toll providers who purchased local transport service. Section 30.5 establishes a per-minute rate for the CCL Access Charge, but it does not purport to define the services to which the charge applies, much less limit its application to circumstances in which carrier common line service is provided. *See* Appeal App. at 176.

The Commission rightly ignored the Toll Providers' alternative argument that by ordering services described in Section 6, they could ignore the additional provisions contained in Section 5. *See* Appellees' Brief at 18-19. As the Toll Providers elsewhere argue, *id.* at 14, written instruments should be read "as a whole." *Churchill Realty Trust v. City of Dover Zoning Bd. of Adjustment*, 156 N.H. 668, 674 (2008). Section 5 states that the CCL Access Charge applies "to each switched access service provided *under this tariff*." Appeal App. at 138 (emphasis added); *see also id.* at 141. Hence, the charge applies not only to services described in Section 5, but also to switched access service that are described in Section 6.

B. Uncontroverted Evidence Shows That the CCL Access Charge Was Designed as a Contribution Element

Because the tariff's language is clear, the Court need not reach the Commission's unsubstantiated conclusions regarding the development of the CCL Access Charge. But if the tariff were deemed ambiguous, the uncontroverted extrinsic evidence shows that the CCL Access Charge was designed to assure that toll service contributed to the recovery of the company's joint and common costs, which explains why that charge is not limited to compensation for the cost of using the common line.

As an initial matter, the Toll Providers err in suggesting that the Commission's factual findings are insulated from review. RSA 541:13 provides that these findings are *prima facie* lawful and reasonable, which means that an appellant can rebut the presumption of lawfulness by

demonstrating that the findings are not supported by the record. Accordingly, the Court may vacate determinations where “no evidence was presented in the record to sustain” the finding. *Appeal of Granite State Elec. Co.*, 121 N.H. 787, 791 (1981). In this case, Verizon presented uncontroverted evidence that the CCL Access Charge was designed “solely as a contribution element,” Appendix to Appellants’ Brief at 10—i.e., as a means of recovering its joint and common costs generally, including loop costs. *See* Appellants’ Opening Brief at 22. In response, the Commission found that “the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line.” Appeal App. at 31. The Commission cites no record support for this finding, which in any case does not support the Commission’s conclusion that the charge “may be applied only when Verizon provides the use of its common line.” *Id.* The Commission made no finding that the CCL Access Charge was *limited* to the recovery of loop costs. On the contrary, the uncontroverted evidence demonstrated that the charge was computed residually—i.e., based on the difference between Verizon’s overall switched access rate set by the Commission and the incremental costs of local switching and local transport. Appendix to Appellants’ Brief at 14. As such, the tariff was designed to ensure that all toll providers (and their customers) using Verizon’s network would contribute to the recovery of all of the local phone company’s joint and common costs—including, but by no means limited to, loop costs. *Id.* at 9-11, 22. To the extent the CCL Access Charge contributes to the recovery of the costs of the loop, that is because loop costs are one species of joint costs; the purpose of the CCL Access Charge was to ensure that toll providers purchasing any switched access service from Verizon would contribute to the recovery of all types of joint costs, just as Verizon’s retail toll customers traditionally had done.

The Toll Providers are also mistaken in their assertion that AT&T's Rebuttal Testimony refutes the argument that the CCL Access Charge provides contribution to the recovery of joint and common costs. On the contrary, this testimony concedes that "Verizon proposed the CCL Charge as a 'contribution' rate element." Appendix to Brief of Appellees ("Appellees' App.") at 27; *see also id.* at 26. Numerous witnesses testified in the 1993 tariff proceeding that the CCL Access Charge helped assure that toll service continued to contribute to Verizon's joint and common costs and was similar to the approach adopted at the time in other New England states. See Appellants' Opening Brief at 8-10; Appeal App. at 10-12. AT&T's own witness in that 1993 proceeding testified that the CCL Access Charge was described "in terms of a contribution element as opposed to anything geared to the local loop" and that because it was calculated on a residual basis "one could think of it as a contribution element." Supplemental Appendix to Appellants' Brief at 2-4. In the present proceeding, AT&T's rebuttal witnesses noted that the *amount* of contribution that Verizon received in the final negotiated settlement was less than it had originally requested. *See Appellees' App.* at 27-28. But the fact remains that the *purpose* of the CCL Access Charge was to reflect contribution to the recovery of the company's joint and common costs (albeit in a smaller amount than Verizon had sought), and that witnesses from both sides made this fact clear to the Commission when it approved the tariff. Nothing in Order 20,864 or elsewhere in the record suggests otherwise.

II. CONCLUSION

The Court should reverse Order 24,837 in its entirety.

Respectfully submitted,

VERIZON NEW ENGLAND INC.,
D/B/A VERIZON NEW HAMPSHIRE

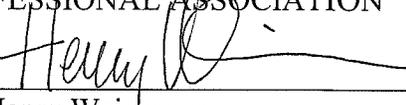
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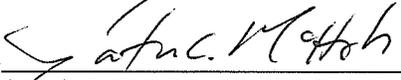
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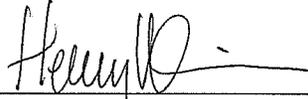
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Certificate of Service

I hereby certify that I have this 20th day of March 2009 forwarded two copies of the foregoing Reply Brief of Petitioners-Appellants by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.



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Verizon New England Inc.

5. Carrier Common Line Access Service
5.1 General

Carrier common line access service is billed to each switched access service provided under this tariff in accordance with the regulations as set forth herein and in Section 4.1, and at the rates and charges contained in Section 30.5.

5.1.1 Description	
A.	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. Carrier common line access also provides for the use of switched access service terminating in 800 database access line service.
1.	The Telephone Company will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6.
B.	The CCSA STP link termination and STP port, as set forth in Section 6, are not subject to a carrier common line charge.

5.1.2 Limitations	
A.	A telephone number is not provided with carrier common line access.
B.	Detail billing is not provided for carrier common line access.
C.	Directory listings are not included in the rates and charges for carrier common line access.
D.	Intercept arrangements are not included in the rates and charges for carrier common line access.
E.	All trunkside connections provided in the same access group will be limited to the same features and operating characteristics.
F.	All lineside connections provided in the same access group will be limited to the same features and operating characteristics.

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5. Carrier Common Line Access Service
 5.2 Undertaking of the Telephone Company

5.2.1 Scope	
A.	Where the customer is provided with switched access service under this tariff, the Telephone Company will provide the use of Telephone Company common lines by a customer for access to end user.
B.	When the customer reports interstate and intrastate use of switched access service, the associated carrier common line access used by the customer for both interstate and intrastate will be apportioned as set forth in Section 5.4.2C.

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5. Carrier Common Line Access Service

5.4 Rate Regulations

5.4.1 Application of Rates and Charges	
A.	General—Except as set forth herein, all switched access service provided to the customer will be subject to carrier common line access charges.
B.	When access to the local exchange is required to provide a customer service (e.g., MTS type, Telex, Data, etc.) that uses resold IC's private line service, switched access service rates and regulations as set forth in Section 6 will apply except when such access to the local exchange is required for the provision of an enhanced service. Carrier common line access rates and charges apply.
C.	The switched access service provided by the Telephone Company includes the switched access service provided for both interstate and intrastate communications. The carrier common line access rates and charges will be billed to each switched access service provided under this tariff in accordance with Section 4.1 and Section 5.4.2.
D.	Where switched access services connect with private line type services at Telephone Company designated WSOs for provision of WATS or WATS type services, switched access service minutes which are carried on that end of the service (i.e., originating minutes for outward WATS and WATS type services) will be assessed carrier common line access per minute charges.

5.4.2 Determination of Charges	
A.	When carrier common line access is provided in association with FGA or FGB switched access service in Telephone Company offices that are not equipped for measurement capabilities, assumed average intrastate access minutes will be used to determine carrier common line access charges. The assumed access minutes are as set forth in Section 6.4.4.
B.	When access minutes are used to determine carrier common line access charges, they will be accumulated using call detail recorded by Telephone Company equipment. <ol style="list-style-type: none"> 1. 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. 2. The accumulated access minutes will be summed on a line by line basis, by line group or end office, whichever type of account is used by the Telephone Company, for each customer and then rounded to the nearest minute.
C.	When the customer reports interstate and intrastate use of switched access service, the carrier common line access minutes developed by the Telephone Company, will be multiplied by percentages reported by the customer (refer to Section 2.5.10). The result will then be used to determine the carrier common line charges. The charges for the involved customer account will be determined as follows. <ol style="list-style-type: none"> 1. The access minutes for all switched access service subject to carrier common line charges will be multiplied by the per minute rate.

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5. Carrier Common Line Access Service
5.4 Rate Regulations

5.4.2 Determination of Charges	
C. (Continued)	
2.	The terminating switched access per minute charge applies to all non 800 access terminating access minutes of use. The terminating switched access per minute charge also applies to all terminating 800 access minutes of use which terminate on a common line. The number of such minutes will be obtained from reports furnished by the customer (refer to Section 2.5.10).
3.	The terminating 800 database access service per minute charge applies to all 800 terminating usage which terminates in a WAL service as provided from Bell Atlantic Telephone Companies Tariff FCC No. 11. The number of such minutes will be obtained from reports furnished by the customer (refer to Section 2.5.10).
4.	The originating switched access per minute charge applies to all non 800 originating access minutes of use less those originating access minutes of use associated with FGA access services where the off hook supervisory signaling is forwarded by the customer's equipment when the called party answers.
5.	The originating 800 database access specific per minute charge applies to all originating access minutes of use associated with calls placed to 800 numbers. The originating 800 specific access per minute charge also applies to all originating usage which terminates in a WAL service as provided from Bell Atlantic Telephone Companies Tariff FCC No. 11. The number of such minutes will be obtained from reports furnished by the customer (refer to Section 2.5.10).

5.4.3 One Time Credit	
A.	The Telephone Company will provide a one time credit based on applying a credit amount to each customer's carrier common line usage from April 15, 1997 through full billing periods beginning October 15, 1997 through November 14, 1997.

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6. Switched Access Service
6.1 General

6.1.1 Reference to Tariff Provisions	
A.	Switched access service is ordered under the access order provisions set forth in Section 3 and billed at the rates and charges set forth in Section 30. In addition to regulations which are contained within this tariff, other regulations pertinent to these services are specified in Bell Atlantic Telephone Companies Tariff FCC No. 11, Section 6 apply as appropriate (unless otherwise stated in this tariff) for the services specified in Section 6.1.2 of this tariff.

6.1.2 Service Structure	
A.	The switched access services provided under this tariff are: originating, terminating, or two way FGA, FGB, FGD and FG2A, and 800 database access.
B.	The rate categories which apply to switched access service are as follows. <ol style="list-style-type: none"> 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).
C.	WAL service is a type of special access service that is provided for use with FGB and/or FGD. WAL service connects an end user premises with a WATS or WSO. This service is ordered and provisioned under Bell Atlantic Telephone Companies Tariff FCC No. 11, Section 7.
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.

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6. Switched Access Service
6.1 General

