The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

ISSUED: April 26, 2006

D.T.E. 05-4

Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts concerning customer transfer charges imposed by Broadview Networks, Inc.

ORDER

APPEARANCES:

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FOR: VERIZON NEW ENGLAND, INC. d/b/a VERIZON MASSACHUSETTS
Petitioner

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FOR: BROADVIEW NETWORKS, INC.
Respondent

I. INTRODUCTION

On January 31, 2005, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed with the Department of Telecommunications and Energy ("Department") a complaint against Broadview Networks, Inc. ("Broadview") regarding the application of "Service Transfer Charges," as contained in § 9.1.1 of Broadview Access Services Tariff M.D.T.E. No. 2.[1] The charges applied are $1.02 for "Electronic Processing" and $15.39 for "Manual Processing" on a per-line basis. Verizon asks the Department to find that Broadview's Service Transfer Charges are unjust and unreasonable under G.L. c. 159, § 17 and enter an order, pursuant to G.L. c. 159, § 14, invalidating such charges as unlawful or reducing them to zero. On February 21, 2005, Broadview filed its answer, which also seeks an order requiring Verizon to pay all outstanding charges under this tariff, which became effective on September 22, 2003. This matter was docketed as D.T.E. 05-4.

Pursuant to notice duly issued, the Department conducted a public hearing on March 16, 2005. Level 3 Communications filed comments in support of the complaint but did not seek to intervene. In lieu of an evidentiary hearing, the Department granted the joint motion of Broadview and Verizon to mark and admit exhibits into evidence on June 30, 2005. The evidentiary record contains 25 exhibits. The parties filed briefs on July 11, 2005 and reply briefs on July 22, 2005.

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[1] Section 9.1 provides: "The Service Transfer Charge is assessed against a requesting local carrier when a customer disconnects local exchange service from the Company and switches to the requesting local exchange carrier. This charge is applied on a per-line basis for each Local Service Order Request received by the Company."

II. STANDARD OF REVIEW

Pursuant to G.L. c. 159, § 17, "[a]ll charges made, demanded or received by any common carrier for any service rendered or performed, or to be rendered or performed by it or in connection therewith in the conduct of its common carrier business . . . shall be just and reasonable, . . . and every unjust or unreasonable charge is hereby prohibited and declared unlawful . . . ." The rates, terms, and conditions contained in filed tariffs are "deemed prima facie lawful until changed or modified by the department . . . ." Id. The Department may determine and fix such rates:

> [w]henever the department shall be of opinion, after a hearing had upon its own motion or upon complaint, that any of the rates, fares or charges of any common carrier for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory, unduly preferential, in any wise in violation of any provision of law, or insufficient to yield reasonable compensation for the service rendered . . . .

G.L. c. 159, § 14. The interconnection or other wholesale rates of every carrier must either be agreed-to through negotiation, or be cost-justified. See 47 U.S.C. §§ 251(a)(1), 252.

To avoid a protracted investigation of their costs, CLECs may use Verizon's rates as a proxy. See Petition of Sprint Communications Company L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration of an Interconnection Agreement Between Sprint and Verizon-Massachusetts, D.T.E. 00-54 at 17-18 (2000) ("Sprint Arbitration"); D.T.E. 00-54-A at 23 (2001). In Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and

for Arbitration, WC Docket No. 02-359, Memorandum Opinion and Order, DA 03-3947, at ¶¶ 204, 205 n.679 (rel. Dec. 12, 2003) ("Cavalier Virginia"), the FCC permitted a CLEC to charge a "comparable rate charged by the incumbent" for the "same or similar services," when the CLEC demonstrated that work performed in connection with the service was "similar in purpose and scope" to the work performed by the incumbent. The same principle applies to rates tariffed in Massachusetts. If these elements are satisfied, Verizon's rates may be used as a proxy. See Cavalier Virginia at n.679. Otherwise, the CLEC must support such rates by filing the cost information on which its rates are based. D.T.E. 00-54, at 18; D.T.E. 00-54-A at 22. If a CLEC seeks to justify a higher rate, a cost study would be appropriate. Cavalier Virginia at n.679; cf. IntraLATA and Local Exchange Competition, D.T.E. 94-185, at 50 (1996) ("CLECs that intend to charge higher terminating access rates must file supporting documentation showing that their costs actually are higher than NYNEX's costs").

III. POSITIONS OF THE PARTIES

A. Verizon Massachusetts

Verizon argues that the Service Transfer Charges contained in Broadview's access tariff are not applicable to Verizon because Broadview's tariff is, by its own terms, applicable to "customers," and Verizon does not qualify as a customer, because it does not subscribe to any Broadview service (Verizon Brief at 3–4). Verizon claims that Broadview has included its Service Transfer Charges in its access tariff even though they are unrelated to access services, thus "concealing those charges from potentially affected entities" (id. at 5). Verizon argues that since Broadview is the party responsible for the ambiguous wording in the General

Regulations regarding the Service Transfer Charge provisions of the access tariff, the Department should construe the tariff against Broadview's interests (id.). Verizon argues that it should not be required to pay any outstanding bills for Broadview's Service Transfer Charges, because Broadview misrepresented its charges as "comparable" and "inappropriately included its Service Transfer Charges in an intrastate Access Tariff, to which Verizon is not subject" (Verizon Reply Brief at 8). In addition, Verizon claims that although Section 9.3 of the Interconnection Agreement requires that the billed party pay all undisputed amounts, the charges are in dispute, and Verizon has "invoked its rights under the Agreement to withhold payment of those charges" (id. at 9). Verizon also argues that it followed the dispute resolution provisions of its interconnection agreement by notifying Broadview of the dispute, withholding payment, and seeking Department resolution of the dispute via the instant complaint (id.).

In addition, Verizon argues that although Broadview's "Electronic Processing" and "Manual Processing" Service Transfer Charges mirror the rates for Verizon's Service Order Charge and Manual Intervention Surcharge, respectively, Broadview's charges are not comparable to Verizon's, because the circumstances in which Broadview applies its charges are different (Verizon Brief at 5–6). Verizon claims that it applies its Service Order Charge only when a CLEC orders wholesale service from Verizon, and that it applies its Manual Intervention Surcharge only when CLEC wholesale orders are not submitted through the standard electronic interfaces (id. at 6, citing Verizon M.D.T.E. No. 17, Part A, § 3.3.2; Verizon Exh. 1, at 13). In contrast, Verizon argues that Broadview imposes Service Transfer

Charges on Verizon whenever an end-user transfers its service from Broadview to Verizon, even though Verizon does not order any network facilities or services from Broadview (Verizon Brief at 7). Verizon also contends that its charges apply on a per-order basis, while Broadview assesses charges on a per-line basis (id. at 6 n.4). Verizon argues that because it only applies its charges in connection with a CLEC wholesale order, Broadview cannot impose the Service Transfer Charges on Verizon unless Broadview is also providing an unbundled loop, port or other network facility that Verizon needs to serve the end-user (id. at 6; Verizon Reply Brief at 5). Verizon further argues that if Broadview's charges were truly comparable to Verizon's, Broadview would not assess the Service Transfer Charge on Verizon, because Verizon does not impose service transfer charges on fully facilities-based CLECs (Verizon Brief at 7, 9).

Verizon argues that the FCC has determined that CLEC rates are presumptively reasonable where they do not exceed the "comparable" rate charged by the incumbent (Verizon Reply Brief at 6, citing Cavalier Virginia at ¶ 205 n.679). Verizon argues that Broadview's charges are not comparable to Verizon's, because Broadview does not provide any "comparable" network facilities to Verizon, and that it is therefore inconsistent with the principle articulated in Cavalier Virginia for Broadview to impose Service Transfer Charges on Verizon without the corresponding provision of network facilities (Verizon Brief at 18; Verizon Reply Brief at 6).

Verizon claims that Broadview's role in transferring a Broadview customer to Verizon's switching facilities is minimal and that all of the physical work is done entirely by Verizon on

Verizon's network, with Verizon responsible for the physical cut-over, dial tone availability, and number porting (Verizon Brief at 10). Verizon claims that the functions performed by Broadview when its customers transfer to Verizon are performed by Verizon at no charge when Verizon's customers transfer to a fully facilities-based CLEC (id. at 11).[2] Verizon claims that the costs identified by Broadview related to closing out its customer service records are either "absorbed by Verizon as a general cost of providing retail service" or recovered from the retail customer (Verizon Reply Brief at 3). Verizon states that it is unaware of any other CLEC assessing service transfer charges similar to Broadview's in Massachusetts or any other New England state (Verizon Brief at 13).

Verizon also claims that Broadview is violating the Telecommunications Act of 1996 ("Act") by billing carriers for costs related to providing number portability (id. at 11). Furthermore, Verizon claims that the FCC, not states, has exclusive jurisdiction over number portability costs (id.).

Verizon argues that the New York Public Service Commission ("NYPSC") recently rejected Broadview's assessment of Service Transfer Charges on Verizon in New York, finding that "the activities for which Verizon assesses service order charges and manual intervention surcharges are not entirely comparable to the tasks that Broadview performs when it loses a customer to Verizon" and that Verizon does not "charge other carriers in a similar

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[2] According to Verizon, these functions include performing switch line translation, releasing the telephone number through the Numbering Portability Administration Center ("NPAC") the day prior to customer migration, unlocking the E911 database to allow for updates on customer information, and removing the directory listings (Verizon Brief at 10-11).

situation" (id. at 14–15). Verizon contends that the NYPSC found that Broadview may incur some costs when a customer transfers service, but that Broadview is prohibited from imposing its Service Transfer Charges on Verizon until it proves its costs (id. at 15).

B. Broadview

Broadview maintains that pursuant to the terms of its access tariff, Broadview's charges are applicable to Verizon, because Verizon falls under the category of "requesting local exchange carrier" (Broadview Brief at 19, citing Broadview M.D.T.E. No. 2, § 9.1). Broadview argues that Verizon's arguments concerning ambiguity in the tariff do not arise out of a fair reading of the tariff (Broadview Reply Brief at 17). Broadview argues that Section 9.1 of its tariff M.D.T.E. No. 2 explicitly applies to "requesting local exchange carriers," and that the specificity in Section 9.1 should prevail over any alleged ambiguity on the title page and in the definition of "customer" (id.). Broadview contends that "the law does not recognize self-help as an acceptable alternative" for parties wishing to challenge tariffed rates and charges; parties must seek relief from the Department (Broadview Brief at 18). Broadview claims that Verizon's failure to pay any of the tariffed Service Transfer Charges assessed by Broadview constitutes an illegal form of self-help (id.). Broadview argues that the interconnection agreement dispute resolution provisions only allow for the dispute of erroneously assessed charges, not tariff rates (id. at 19–20). Broadview argues that tariffed rates bind participating parties with "the force of law" and "shall be deemed *prima facie* lawful until changed or modified by the Department" (id. at 18).

Broadview argues that the tasks for which it applies its Electronic Processing Service Transfer Charge are comparable to those associated with Verizon's Service Order Charge (id. at 9). Broadview claims that its comparable tasks include providing a customer service record ("CSR") at Verizon's request, reviewing and confirming Verizon's local service requests ("LSR"), placing inaccurate or incomplete LSRs in jeopardy and returning them to Verizon, and fielding inquiries from Verizon regarding LSR status (Broadview Reply Brief at 5). In addition, Broadview maintains that Verizon's Manual Intervention Surcharge and Broadview's Manual Processing Service Transfer Charge both apply when carriers neglect to use available mechanized interfaces but instead choose to submit information by fax or email (Broadview Brief at 12–13).

Broadview asserts that the FCC's decision in the Cavalier Virginia arbitration supports its claim that it may impose Service Transfer Charges on Verizon, because the FCC held that "[t]o the extent that Cavalier has demonstrated that it performs tasks comparable to those performed by Verizon, it would violate section 251(c)(2)(D) to allow Verizon to assess a charge on Cavalier but disallow a comparable charge by Cavalier on Verizon" (Broadview Reply Brief at 14-15, citing Cavalier Virginia at ¶¶ 189, 203–05). Broadview maintains that the FCC rejected Verizon's claims that Cavalier's services were "retail functions properly charged to an end user" rather than services provided for Verizon's benefit (Broadview Brief at 4, citing Cavalier Virginia at ¶ 201). Broadview argues that, accordingly, its Service Transfer Charges should be allowed, because they assess comparable rates for comparable services (id. at 3, citing Cavalier Virginia at ¶¶ 200, 204). In response to Verizon's claim that

Broadview's charges differ from Verizon's because Broadview applies its charge per line as opposed to per order, Broadview responds that it would be willing to modify its Service Order Charges to apply on a per-order basis (Broadview Reply Brief at 15 n.41).

In response to Verizon's claim that the FCC prohibits carriers from recovering through intrastate tariffs the costs incurred in releasing ported numbers, Broadview replies that its Service Transfer Charges do not recover the cost of releasing a ported number, but rather the costs of specific Verizon-requested tasks (Broadview Brief at 6 n.13).

According to Broadview, it is irrelevant that most of the physical work of transferring customers, such as physical cut-over, dial tone availability, and number porting is performed by Verizon on Verizon's network, because Broadview is not seeking to recover any costs associated with those activities (Broadview Reply Brief at 8). Broadview claims that its charges "recover the costs associated with the activities Verizon has acknowledged it asks Broadview to perform on its behalf" (id. at 8). Broadview argues that Verizon's linkage of its charges to CLEC wholesale orders is an artificial distinction designed to put CLECs at a competitive disadvantage by ensuring that Verizon can recover the costs it incurs providing services to CLECs, but that CLECs cannot recover the costs they incur providing services to Verizon (id. at 7). Broadview claims Verizon's argument that it "never applied [its Service Transfer Charge] on a stand-alone basis" is irrelevant, because Broadview should be allowed to recover its costs regardless of whether its services were "provided in conjunction with other services" (id. at 6, 7). Broadview argues that the costs are not properly recovered from retail customers because they are not based on "the customer's decision to cease using Broadview as

a service provider," but are incurred as a result of Verizon's requests (id. at 11). Broadview also states that it does not perform these tasks when a customer dies, moves, or disconnects service (id.).

Broadview argues that the NYPSC affirmed Broadview's right to impose Service Transfer Charges, finding that "there are a number of functions that [Broadview] must perform solely in conjunction with a Verizon [NY] 'win-back' that it does not perform when a customer simply disconnects service" (Broadview Brief at 5). Broadview contends that the NYPSC rejected Verizon's argument that service transfer costs should be recovered in retail rates (id. at 7).

IV. ANALYSIS AND FINDINGS

As stated above, when a CLEC performs work that is "similar in purpose and scope" to that performed by an ILEC in connection with providing wholesale services, the CLEC may use Verizon's rates as a proxy and charge a comparable rate. If, however, the CLEC is not providing a comparable wholesale service, or wishes to charge a higher rate for a comparable service, the CLEC must support its rates with a cost study if its rates are challenged. Broadview argues that it modeled its Service Transfer Charges on Verizon's Service Order Charge and Manual Intervention Surcharge, because "the costs recovered by these Verizon MA charges, as well as the activities associates with them, are comparable to those for which Broadview assesses its Service Transfer Charges" (Broadview Brief at 9). Using Verizon's rates as a proxy, Broadview's Electronic Processing Fee mirrors Verizon's $1.02 Service Order Charge, and Broadview's Manual Processing Service Transfer Charge mirrors Verizon's

Manual Intervention Surcharge of $15.39 (Verizon Brief at 6; Broadview Brief at 9). However, although Broadview's rates match Verizon's rates, the Department determines for the reasons below that the services are not comparable, and that it is therefore inappropriate for Broadview to rely on Verizon's Service Order Charge and Manual Intervention Surcharge as proxies for its own rates.

Broadview's Service Transfer Charges are not comparable to Verizon's because Broadview imposes its surcharges whenever a customer transfers to a different carrier, whereas Verizon imposes its charges only when a CLEC orders wholesale facilities or services from Verizon. Verizon's Service Order Charge and Manual Intervention Surcharge are not transfer charges, because Verizon's charges are not triggered by the customer's transfer of service per se, but by the CLEC's order for wholesale facilities or services from Verizon, and apply whenever a wholesale order is placed regardless of whether the end-user customer is a new customer or is transferring from Verizon.

Although Broadview may be providing wholesale services at the request of, and for the benefit of, Verizon in order to facilitate the migration of a Broadview customer to Verizon, the wholesale services provided by Broadview are not comparable to those provided by Verizon, because Broadview's services are not provided in the context of an order for wholesale network elements or facilities. As a fully facilities-based carrier, Verizon uses its own facilities to serve its customers and does not order wholesale network elements or facilities from Broadview when serving a former Broadview customer; therefore, if Broadview wishes to use Verizon's rates as a proxy, the relevant rates are those for services performed solely in

facilitation of a service transfer. Broadview's service transfer-related tasks include providing a CSR at Verizon's request, reviewing and confirming Verizon's LSRs, placing inaccurate or incomplete LSRs in jeopardy and returning them to Verizon, and fielding inquiries from Verizon regarding LSR status (Broadview Reply Brief at 5). Verizon performs these same service transfer-related tasks at no charge (Verizon Brief at 11). Therefore, the relevant Verizon proxy rate is zero.

Broadview's $1.02 Service Transfer Charge and $15.39 Manual Processing Charge are higher than the zero rate charged by Verizon for the same service transfer-related tasks, and as Broadview did not support its rates with a cost study, the Department finds that Broadview's Service Transfer Charges are unreasonable. Broadview is directed to remove the Service Transfer Charges from its tariff within 20 days of the date of this Order.[3]

With respect to Broadview's argument that Verizon engaged in impermissible "self-help" by withholding payment of the Service Transfer Charges, Broadview argues that parties wishing to dispute tariffed charges cannot resort to self-help, but must seek relief from

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[3] In recently considering a similar complaint brought against Broadview in New York, the NYPSC determined that although Broadview is entitled to recover the costs associated with customer transfers, Broadview was not permitted to use Verizon's Service Order Charge and Manual Intervention Surcharges as proxies because the activities for which Verizon assesses its charges "are not entirely comparable to the tasks that Broadview performs when it loses a customer to Verizon." Complaint and Petition of Verizon New York, Inc. Concerning Service Transfer Charges Imposed by Broadview Networks, Inc., Case 05-C-0066, Order Granting, In Part, Complaint and Petition at 7 (N.Y.P.S.C. June 29, 2005). The NYPSC ordered Broadview to remove the Service Transfer Charges from its tariff and required that Broadview submit detailed cost data if it seeks to introduce wholesale Service Transfer Charges in the future. Id. at 7-8.

the Department (Broadview Brief at 18). The Department finds, however, that Verizon has followed the dispute resolution procedures prescribed under the parties' interconnection agreement by bringing the instant complaint to the Department.

The Department's determination that the services provided by Verizon and Broadview are not comparable does not preclude Broadview from recovering the costs of any such services and does not place Broadview at a competitive disadvantage. Although the Department has determined that Broadview chose the wrong Verizon rates to serve as a proxy, Broadview is free to support higher rates with a cost study. Until Broadview submits such a cost study for the Department's review, Broadview may not impose the Service Transfer Charges.

V. ORDER

Therefore, after notice and consideration, it is

ORDERED: That Broadview shall withdraw its tariff for Service Transfer Charges within 20 days of the issuance if this Order; and it is

FURTHER ORDERED: That Verizon shall not be obligated to pay Broadview for any previously billed Service Transfer Charges.

By Order of the Department,

/s/
Judith F. Judson, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Paul G. Afonso, Commissioner

/s/
Brian Paul Golden, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.