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July 24, 2003

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

030677-TP

Re: Docket No.
Verizon Florida Inc.'s Petition and Complaint Regarding Customer Transfer Charges Imposed by TCG South Florida

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen copies of Verizon Florida Inc.'s Petition and Complaint Regarding Customer Transfer Charges Imposed by TCG South Florida. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-1256.

Sincerely,

Richard A. Chapkis

Richard Chapkis

RC:tas
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Verizon Florida Inc.'s Petition and Complaint Regarding Customer Transfer Charges Imposed by TCG South Florida	))))	Docket No. Filed: July 24, 2003

PETITION AND COMPLAINT

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I. INTRODUCTION

On November 13, 2002, TCG South Florida (TCG) amended its Local Tariff to impose "Customer Transfer Charges" that apply when "a TCG local customer is transferred from TCG to an Incumbent Local Exchange Carrier (ILEC)" (or, in some cases, to another competitive local exchange carrier (CLEC)). Verizon Florida Inc. (Verizon) respectfully petitions the Florida Public Service Commission (Commission) pursuant to Florida Statutes, Sections 364.01(3), 364.01(4)(g), 364.03, 364.14(1) and 364.337(5),[1] to open a proceeding to investigate the Customer Transfer Charges.

Through these charges, TCG seeks to tax companies such as Verizon for competing successfully with TCG and winning its customers. Since the tariffed charges do not reflect work performed by TCG at the request of Verizon, they are anticompetitive

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[1] Section 364.01(3) provides that "the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure."

Section 364.01(4)(g) provides that "the Commission shall exercise its exclusive jurisdiction in order to: . . . (g) ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

Section 364.03 provides that "[a]ll rates, tolls, contracts, and charges of, and all rules and regulations of, telecommunications companies . . . shall be fair, just, reasonable, and sufficient . . ."

Section 364.14(1) provides that "[w]henever the commission finds, upon its own motion or complaint, that: (a) The rates, charges, tolls or rentals demanded, exacted, charged, or collected by any telecommunications company for services subject to s. 364.03, or the rules, regulations, or practices of any telecommunications company affecting such rates, charges, tolls, rentals, or service, are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law; . . . or (c) Such rates, charges, tolls, or rentals yield excessive compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order."

Section 364.337(5) provides that "[t]he commission shall have continuing regulatory oversight over the provision of basic local exchange telecommunications service provided by a certificated competitive local exchange telecommunications company or a certificated alternative access vendor for purposes of establishing reasonable service quality criteria, assuring resolution of service complaints, and ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace."

both in intent and in effect. Moreover, by placing unwarranted barriers in the path of end-user customers who wish to switch carriers, the charges are also anti-consumer.

Under Florida law, rates must be just and reasonable.[2] However, TCG has no conceivable justification for the charges at issue here.

TCG's basic $87.25 "Customer Transfer" charge is intended to mirror Verizon's current hot cut charge. However, TCG's charge does not mirror Verizon's hot cut charge for two reasons.

First, any appearance of symmetry and fairness that this "mirroring" might create is purely illusory. In a similar proceeding in New York, Verizon was advised by counsel to TCG that the Customer Transfer tariff is aimed primarily at customers served by TCG through its own switch and Verizon's UNE loops. When such a customer switches from Verizon to TCG, Verizon must perform a hot cut to establish a connection between the loop and TCG's POT bay. If the customer later switches back to Verizon, TCG would presumably release the loop and *Verizon* (not TCG) would need to perform a "reverse hot cut" to re-establish a connection between the loop and Verizon's own switch port.

Because Verizon does not serve its retail customers using TCG's network, Verizon neither uses TCG's facilities, nor requests a hot cut (or any other rearrangement of TCG's network) when it wins a TCG customer. There is simply no wholesale service that Verizon requests or that TCG performs for Verizon in connection with such a customer transfer. Thus, to the extent that there are any network or administrative costs that TCG incurs in connection with the loss of its retail customer, such costs are prop-

[2] Section 364.03.

erly assigned to its retail business, and do not provide an appropriate basis for a wholesale charge. Absent a cost-based connection with a legitimate wholesale function, TCG's Customer Transfer Charge is simply a bare tax on competition.

Second, Verizon does not charge $87.25 for a hot cut, and Verizon is unaware of how TCG arrived at this amount.

The $600 "Expedite Charge" set forth in the tariff is also outlandish, and clearly lacks any relationship to any costs that TCG bears at Verizon's request. Similar to the $87.25 "Customer Transfer Charge," TCG cannot justify the $600 "Expedite Charge" because it is not based on *any* Verizon rate.

It is notable that when TCG's affiliates, TCG Delaware Valley, Inc. and TCG Pittsburgh, Inc., filed a similar tariff in Pennsylvania, the filings were promptly suspended by the Pennsylvania Public Utility Commission, which concluded that the situations of the TCG companies and Verizon's affiliate were *not* symmetrical, and that the tariff "may result in a barrier to entry."[3]

Accordingly, the Commission should take the following actions:[4]

- Immediately institute a proceeding to review the validity of TCG's Customer Transfer Charges.
- Because of the strong *prima facie* evidence of the invalidity of the Customer Transfer Charges, and to avoid unfair prejudice to Verizon, the Commission should reduce those charges to zero on a temporary basis

[3] *See, e.g., Pennsylvania Public Utility Commission v. TCG Delaware Valley, Inc.*, Docket Number R-00027928, Order (December 19, 2002). The order gave TCG the option of withdrawing the tariff as an alternative to suspension and the commencement of an investigation. It is our understanding that TCG did withdraw the Pennsylvania tariffs following the issuance of the order.

[4] This Complaint is submitted without prejudice to, and Verizon specifically reserves, any claim it may have that the tariff at issue here, even if found valid by the Commission, may not be applied to Verizon under the provisions of its interconnection agreement with TCG.

pending the conclusion of the proceeding. Such action is well within the Commission's powers, and will mitigate the harm to Verizon resulting from the imposition of these unlawful rates.

II. DISCUSSION

A. Background: The Customer Transfer Tariff

On November 13, 2002, TCG filed an amendment to its Local Tariff to add a new Section 3.8.1, relating to "Customer Transfer Charges." These charges "apply when a TCG local customer is transferred from TCG to an Incumbent Local Exchange Carrier (ILEC) or to a Competitive Local Exchange Carrier (CLEC) that imposes charges similar to those imposed by the ILEC for activities related to customer migration between carriers." Payment of the charges "is the responsibility of the ILEC or CLEC, to which the customer's service is being migrated."[5]

The tariff repeatedly reaffirms TCG's intent to have the charges mirror ILEC charges. Thus, Section 5.12.a of the tariff states that "Customer Transfer Charges apply per each DS-0 and DS-1 facility, *and will be equal to the New Service Request special access or UNE-loop charges applied by the dominant LEC*" (emphasis supplied). Under Section 5.12.e, "Reciprocal Pricing, as specified below," and the cited Rates Section provides that "[n]otwithstanding any other provision of this tariff, rates and charges in this Section may be increased by [TCG] to an amount equal to the rate charged by the incumbent LEC for similar such activities."[6]

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[5] TCG Local Tariff ("Tariff"), Section 3.8.1.

[6] Tariff Section 5.12, Original Page 64.1.

Despite these mirroring provisions, the tariff also sets forth specific rate levels that "are applicable to each TCG local customer transfer, per service transferred."[7] The specified charge for "orders requesting the transfer of less than 100 telephone numbers or less than 100 DS-0 equivalents" is $87.25 per transferred DS0 facility where standard intervals are requested, and $600 per facility for "expedited" service.[8] The charge for transferring DS1-level service is $750 for the first facility, and $300 for each additional facility.[9]

This peculiar (and inconsistent) mixture of mirroring provisions and specific rates raises difficult tariff application questions. Do the mirroring provisions apply or the specified rates? If the mirroring provisions apply, what specific rates are to be mirrored? (For example, Verizon does not have any "customer transfer" charges as such, and Verizon does not charge $87.25 for a hot cut.) One resolution of those issues would be to strike the tariff simply on the grounds that as written, it is too vague to be applied. Indeed, the FCC has overturned tariffs on precisely this ground.[10]

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[7] *Id.* Section 5.12.

[8] *Id.* Expedite charges apply "in instances where TCG receives a request to reduce the migration interval to less than the standard, published TCG interval pertaining to expedites." (Section 3.8.1.c)

[9] *Id.* Although TCG apparently serves its end-user customers in at least three different ways — through the exclusive use of its own facilities, through UNE-L arrangements (combined with the use of its own switching facilities), and to a lesser extent through UNE-P —this tariff appears to be intended for application in UNE-L situations, a fact that would appear to be confirmed by the purported mirroring of Verizon's hot cut charge. Nevertheless, it is noteworthy that this purportedly cost-based tariff does not explicitly distinguish between the different types of arrangements that may be used to serve transferring customers, but rather is based solely on the number of telephone numbers or lines that are "transferred."

[10] *See Bell Atlantic – Delaware, Inc., et al. v. Global NAPs, Inc.*, File No. EB-00-MD-009, Memorandum Opinion and Order (rel. October 26, 2000), ¶¶ 22-25.

If the tariff is not struck down on these grounds, then its ambiguity raises questions as to whether the tariff as written should even be interpreted to apply to Verizon. In view of the fact that TCG itself drafted the tariff language, the standard *contra proferentum* rule (interpretation against the position advocated by the party who drafted the document) could be applied to interpret the specified rate levels as merely illustrative, and the mirroring provisions as primary. This interpretation of the tariff would raise the question of whether (to quote the language of the tariff) there are relevant "New Service Request special access or UNE-loop charges *applied* by" Verizon, and whether there are "rate[s] charged by the incumbent LEC *for similar such activities*." (Emphasis supplied.)

In Verizon's case, the answer to both of these questions is no. Verizon does not have "customer transfer" charges, and therefore there is nothing to mirror and no charge to apply to Verizon under TCG's tariff. Moreover, Verizon does not charge TCG for telephone number port-outs in connection with customer transfers.[11] Thus, if the tariff were interpreted primarily as a mirroring tariff, TCG could not impose a hot cut charge on Verizon because Verizon does not order a hot cut or a new loop from TCG when its wins back a customer.

The existence of these tariff interpretation and tariff application issues does not, however, moot the investigation that Verizon is asking the Commission to initiate. The ambiguity of the tariff, the fact that TCG has begun billing Verizon for customer transfer

[11] Of course, Verizon does have various charges, such as the hot cut charge, that may be applied when TCG uses Verizon's network to serve a TCG local exchange customer. But those charges apply only in specific circumstances that are not applicable here.

charges,[12] and the manifest illegality of the charges themselves, warrant a clear ruling by the Commission that the tariff is either unlawful *per se*, or that, at a minimum, it cannot lawfully be applied to Verizon.

This is particularly true given that the charges in question are not particularly germane to the subject matter of that tariff ("Dedicated Access Services"). By burying these controversial charges in an unrelated tariff, TCG made it far less likely that competitors would learn of the charges prior to the effective date of the tariff. Indeed, the tariff went into effect on November 14, 2002 on one-day's notice, the minimum required by law, but Verizon did *not* learn of the tariff until long after it became effective.

B. The Governing Legal Standard

Under Section 364.03, "[a]ll rates, tolls, contracts, and charges of . . . telecommunications companies . . . shall be fair, just, reasonable, and sufficient . . ." As shown below, TCG's Customer Transfer Charges cannot be deemed fair, just, and reasonable.

1. TCG Cannot Justify Its Customer Transfer Charge Merely On The Grounds That It Is Identical To A Verizon Charge

As noted above, TCG's tariff manifests an intention to "mirror" Verizon's rates in its own Customer Transfer Charges. The basic customer transfer charge set forth in the "Rates" section of the tariff is intended to be equal to the "hot cut" charge that Verizon would impose on TCG when a Verizon customer switches to TCG, and TCG chooses to serve the customer with an already-working unbundled Verizon loop. Although the tariff does distinguish between DS0- and DS1-level facilities, it does *not* dis-

[12] Verizon has received its first bill from TCG for April customer transfer charges in the amount of $350.65. Verizon is disputing this charge as unfair, unjust and unreasonable.

tinguish between the varying ways in which Verizon's wholesale services (UNE-L, UNE-P, etc.) may be used to serve the transferring customer.

All of these facts make it clear that the tariff is retaliatory rather than cost based. Thus, Verizon anticipates that the principal arguments that will be offered in support of the tariff will all boil down to the adage, "what's sauce for the goose is sauce for the gander." If so, TCG's culinary theories are fatally flawed. The charges at issue here cannot be justified simply by a showing that Verizon also imposes a hot cut charge in certain circumstances, since the circumstances underlying the application of Verizon's hot cut charge bear no relationship to those surrounding the transfer of a customer from TCG to Verizon.

Verizon performs a hot cut, and imposes the associated charge on a CLEC, *on request* (*i.e.*, in response to an LSR), generally when a Verizon end-user customer switches to a CLEC that intends to serve the customer through a UNE-L arrangement and elects to use an already-working local loop. The charge is, in effect, a non-recurring service provisioning charge that is incurred in connection with the CLEC's use of a Verizon network facility — an unbundled, two-wire analog loop. The underlying costs are incurred in order to connect the CLEC to the Verizon facilities that it wishes to use. If Verizon did not provide a hot cut service, TCG would not be able to serve its new customer: (a) with the same loop as was being used by Verizon, and (b) without a significant interruption in service.

Verizon, in contrast, does not seek to use TCG's network facilities to serve the customers that it wins from TCG. This fact creates a fundamental asymmetry between the situation that exists when a Verizon retail customer switches to TCG, and the one

that exists when a TCG retail customer switches to Verizon. The physical work of transferring the customer to Verizon's switching facilities is done entirely *by* Verizon, *on* Verizon's network. Verizon is not asking TCG to connect circuits, disconnect them, or rearrange its network in any way. Verizon, in short, is not utilizing TCG's network, and is not requesting (or receiving) any hot-cut service from TCG. There is thus no basis for imposing a hot cut charge.

Indeed, the tariff does not purport to identify *any* service that TCG is providing to Verizon. The charges are triggered simply "when a [TCG] local customer is transferred from [TCG] to an Incumbent Local Exchange Carrier (ILEC)." But the transfer of a customer is an event, not a service. Verizon's charge is not a charge for a "customer transfer," it is a charge for a hot cut. TCG provides no such service to Verizon.

Absent a linkage to a requested wholesale service, there is no basis for the imposition of *any* charge on Verizon. The TCG costs at issue here — whatever their magnitude — are simply costs associated with the gain and loss of customers. In short, these are classic retail costs, which should be recovered, if at all, through retail charges. In a very real sense, then, the magnitude of TCG's costs is irrelevant to the validity of this tariff, because whatever those costs are, they are not properly chargeable to Verizon. TCG's "Customer Transfer" tariff has no more validity than would a tariff that imposes a charge on Verizon whenever it rains, or whenever TCG's revenues decline. What the tariff purports to create is nothing more and nothing less than a tax on successful competition— a tax that at best is contrary to the Commission's pro-competitive policies, and at worst is unlawful.

2. The Actions That TCG Takes to Release the End User's Ported Number Cannot Justify the Charges at Issue Here

TCG is required to carry out some minor — and purely ministerial — administrative tasks when one of its customers transfers to Verizon. For a variety of reasons, however, these tasks cannot justify the Customer Transfer Charge.

Primarily, TCG would be expected to provide a Customer Service Record (where requested by Verizon), to confirm the due date of the LSR that must be submitted by Verizon, to release the customer's telephone number in the Number Portability Administration Center (if the number is to be ported), to send Verizon an LSR releasing the unbundled loop that was used to serve the customer, and to send a confirmation notice to Verizon.

All of these, of course, are simple operational tasks requiring the receipt, confirmation, and issuance of certain orders and instructions — highly automated processes with minimal costs. The magnitude of the costs associated with these processes could not possibly justify a $87.25/line charge, much less a $600 "expedite" charge, essentially just to port a telephone number.

Moreover, *no* intrastate customer transfer charge can be justified on the basis of TCG's release of the ported number. To the extent that TCG sought to justify the charge in terms of the costs it incurs in releasing a ported number, the FCC has made it clear that such costs are properly classified as "customer-specific costs directly related to providing number portability," and that the FCC has exclusive regulatory jurisdiction

over rates set to recover such costs. Thus, such costs may not be recovered through tariffed intrastate charges such as those at issue here.[13]

III. SUMMARY AND CONCLUSION

TCG cannot justify the "customer transfer" charges at issue here because there is no allowable charge that can be imposed by TCG for the bare act of "customer migration." To the extent that TCG does claim to provide legitimate *wholesale* services to Verizon in connection with customer migrations, it has made absolutely no showing of the existence and nature of those services or of the magnitude of the associated costs. TCG's Customer Transfer Charges thus violate the fair, just and reasonable standard of Section 364.03.

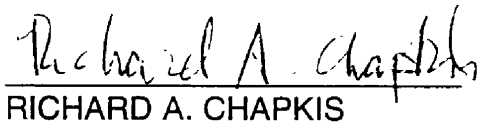
Under Section 364.14, "[w]henever the commission finds, upon its own motion or complaint, that: (a) The rates, charges, tolls or rentals demanded, exacted, charged, or collected by any telecommunications company for services subject to s. 364.03, or the rules, regulations, or practices of any telecommunications company affecting such rates, charges, tolls, rentals, or service, are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law; . . . or (c) Such rates, charges, tolls, or rentals yield excessive compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order." Such an order should be issued in

[13] *See Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701 (rel. May 12, 1998), ¶¶ 28, 29, 38, 72; *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 (rel. February 15, 2002), ¶¶ 9-12.

this proceeding. Specifically, the rates in question should be eliminated, or "determined" to be zero.

Moreover, the Commission should *immediately* reduce the charges to zero on a temporary basis. The establishment of a temporary rate of zero is warranted here because of Verizon's strong *prima facie* showing that the rates in question are unlawful, unjust, unreasonable, and contrary to public policy.[14]

Respectfully submitted,



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July 24, 2003

[14] A less desirable alternative would be for the Commission to leave the charges at their current levels pending the conclusion of the proceeding, but to make them temporary, so that a refund will be available to Verizon once the charges are ruled invalid.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Petition and Complaint Regarding Customer Transfer Charges Imposed by TCG South Florida were sent via overnight mail(*) on July 23, 2003 and U.S. mail(**) on July 24, 2003 to:

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