STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 08-C-0673 - Complaint of Sprint Communications Company, L.P. Against Verizon New York Inc. for Modification of Verizon New York Tariff PSC NY No. 8 to Establish Just and Reasonable Terms for Record Processing Charges and for Refund for Charges Improperly Collected.

RULING ON DISCOVERY

(Issued November 18, 2009)

RAFAEL A. EPSTEIN, Administrative Law Judge:

BACKGROUND AND PROCEDURAL HISTORY

This ruling addresses discovery requests in which Sprint Communications Company, L.P. (Sprint) seeks information from Verizon New York Inc. (Verizon-NY). The subject of the proceeding is a complaint by Sprint regarding a $0.0102 Record Processing Charge (RPC) which Verizon-NY imposes on Sprint for each call that is originated by Sprint and routed through a Verizon-NY tandem switch to a terminating carrier.[1] Sprint alleges, in essence, that:

(1) the RPC exceeds the cost of the record processing service (Tandem Records Service) under a total element long-run incremental cost (TELRIC) methodology and is unjust, unreasonable, and anticompetitive;

(2) Verizon-NY should not impose the RPC on an originating carrier;

(3) Verizon-NY should not impose the RPC on a terminating carrier unless that carrier

[1] Complaint dated June 13, 2008.

affirmatively requests the Tandem Record Service associated with the RPC; and

(4) regardless of whether the Commission lets Verizon-NY continue to impose the RPC on originating carriers, Verizon-NY should impose the RPC only for calls terminated by a competitive local exchange carrier (CLEC) or an independent telephone company (ITC) but not for calls terminated by a wireless carrier, i.e., a commercial mobile radio service (CMRS).

TVC Albany, Inc. d/b/a Tech Valley Communications (Tech Valley) supports two of Sprint's assertions, namely that the RPC exceeds the cost of Tandem Records Service and that the RPC should be imposed only on terminating carriers that request the service.[2]

Sprint's complaint was followed by a series of responses and replies.[3] Sprint then asked that the Commission assign this case to an administrative law judge.[4] Over Verizon-NY's opposition, which consisted largely of denials that any of the issues warrant an evidentiary hearing,[5] the request was granted. I thereupon informed the parties that "[t]here is no immediate plan for evidentiary hearings, but I will be supervising the discovery process."[6]

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[2] Letter dated July 16, 2008.

[3] Verizon-NY Response dated July 21, 2008; Sprint Response dated August 6, 2008; Verizon-NY Supplemental Response dated August 25, 2008.

[4] Sprint letter dated October 1, 2008.

[5] Verizon-NY Memorandum in Opposition dated October 10, 2008.

[6] E-mail March 17, 2009.

Meanwhile, Sprint had commenced discovery, serving Verizon-NY with seven document requests and 14 interrogatories.[7] Verizon-NY has objected to the requests and interrogatories, Sprint and Tech Valley have responded, and Verizon-NY has replied.[8]

DISCOVERY RULES

In determining whether discovery should be authorized in the face of an objection, one can start with 16 NYCRR 5.1(a), which broadly authorizes discovery not only of information "relevant and material to a proceeding" but even of information that is merely "likely to lead to" relevant and material information.[9] This criterion in turn assists in interpreting the provision, in Rule 5.8(a), that "[d]iscovery requests should be tailored to the particular proceeding and commensurate with the importance of the issues to which they relate."

Because discovery occurs in the preliminary stages before the requesting party presents its case, the claim that an interrogatory may lead to relevant and material information should be assessed by resolving any reasonable doubts in the requesting party's favor. That permissive approach is necessary to ensure that parties can exercise their right to pursue potentially productive lines of inquiry as authorized in Rule 5.1(a), as long as the proposed discovery is proportionate to the issues as Rule 5.8(a) requires. Conversely, a narrow construction of Rule 5.1(a) is unnecessary to exclude irrelevant or immaterial evidence if a case proceeds to hearings, because

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[7] February 20, 2009.

[8] Verizon-NY Objections dated March 3, 2009; Sprint Response dated March 23, 2009; Tech valley letter dated March 25, 2009; Verizon-NY letter dated April 6, 2009. Certain arguments recur throughout the pleadings, and therefore will not be cited specifically to one of these documents or another.

[9] This ruling presumes that Rule 5.1(a), like Rule 401 of the Federal Rules of Evidence, disregards the common law distinction between relevance and materiality.

other procedural rules are available and routinely invoked for that purpose.

Within Rule 5.1(a), the only language that might be read as a limitation on the broad range of permissible discovery is that the discovery rules in 16 NYCRR Part 5 "apply to formal proceedings." According to Verizon-NY, this purported restriction reflects the Commission's intent, when it adopted Rule 5.1, that the discovery rules would operate only in evidentiary proceedings. However, the Commission stated its intentions less categorically than Verizon-NY implies,[10] understandably so because the meaning of the term "formal proceedings" seems clear on its face. This is a formal proceeding, and therefore subject to Rule 5.1, because it has been initiated and docketed as a formal complaint. Moreover, this case illustrates not only that proceedings without evidentiary hearings may be formal but also that such proceedings may examine and determine factual issues with significant consequences.[11] As a result, the Commission's non-

[10] Case 91-M-1080, *16 NYCRR, Chapter I, Rules of Procedure – Proposed Amendments to Subchapter A,* Opinion No. 92-20 (issued July 17, 1992), p. 59. The Commission also declined to be drawn into a detailed discussion of the "formality" criterion (*ibid.*); and, of course, Rule 5.1 itself does not actually say that Part 5 is unavailable outside of formal proceedings.

[11] See Verizon-NY's October 10, 2008 letter, p. 4, n. 9, citing *National Fuel Gas Dist. Corp. v. PSC*, 8 Misc. 3d 584, 590 (Sup. Ct. Albany Co. 2005), numerous other cases, and 16 NYCRR 6.1.

evidentiary proceedings frequently rely on discovery to develop the facts.[12]

Sprint therefore need not show that this case will include what Verizon-NY calls a "formal evidentiary hearing,"[13] by which the company means a procedure involving appearances by witnesses and not merely paper pleadings. Alternatively, even if Verizon-NY's narrow definition of "formal proceedings" were valid, its theory that the use of that term in Rule 5.1(a) precludes Sprint's discovery would still be mistaken because the "formal proceedings" criterion must be read in the context of the sentence where it occurs in Rule 5.1(a). That sentence, after stating that the discovery rules apply to formal proceedings, goes on to say that the rules "do not limit any other authority of the commission or its staff to obtain information from a utility company, or other entity."

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[12] Case 02-M-1649, *URAC Corp. and KeySpan East Gas Corp.*, Declaratory Ruling (issued March 26, 2003) (authorizing discovery in informal hearings); Case 08-C-0916, *Broadview Networks, et al. – Reciprocal Compensation,* Ruling on Discovery (issued December 17, 2008), p. 8 (petition for declaratory ruling); Case 08-E-0077, *Entergy – Corporate Reorganization*, Order Establishing Further Procedures (issued May 23, 2008), p. 6 (petition for declaratory ruling); Case 07-M-0548, *Energy Efficiency Portfolio Standard*, Ruling on Scope and Schedule (issued June 15, 2007); Case 05-C-0616, *Intermodal Competition*, Procedural Ruling (issued July 13, 2005), p. 2 (comment proceeding based on Staff white paper); Case 03-C-0381, *DFT Local Service Corp. – Petition for Arbitration*; Case 97-C-0271, *N.Y. Tel. Co. – Sec. 251 and Sec. 272 Proceedings*, Ruling Establishing Procedures (issued April 19, 1999), pp. 1-2. Discovery also is commonly employed prior to any decision whether to hold evidentiary hearings. Case 06-E-0894, *Consolidated Edison Co. of N.Y., Inc. – Long Island City Outages*, Ruling on Procedure (issued September 6, 2006), pp. 1-2; Case 00-C-1945, *Cost Recovery by Verizon and Future Regulatory Framework,* Ruling on Scope and Schedule (issued February 27, 2001), pp. 5-6; Case 98-C-1079, *N.Y. Tel. Co. – Information Services*; Case 96-C-1158, *Area Codes 212 and 917*, Ruling on Scope and Procedures (issued April 16, 1997), p. 5; Cases 95-C-0657 *et al., Wholesale Provisioning, Etc.*

[13] March 3, 2009 letter, p. 2.

Thus, the "formal proceedings" provision serves not as a restriction on the scope of discovery by a party, but as an assurance that Rule 5.1 will not diminish what otherwise would be the Commission's and advisory staff's investigative powers in the absence of a formal proceeding or a complainant. Verizon-NY's argument, that Rule 5.1(a) forecloses Sprint from pursuit of discovery to support its complaint, would compel the incongruous conclusion that Sprint may not use discovery to gather and present the facts the Commission needs, and could obtain on its own initiative, to decide the complaint.

If a discovery request satisfies the relevance and materiality criteria explicit in Rule 5.1(a) and implicit in Rule 5.8(a), the inquiry turns to whether it complies with a second tier of other, more specific constraints in Rule 5.8. Among these, Verizon-NY invokes the prohibitions against discovery of material "already possessed by or readily available to" Sprint (Rule 5.8(a)(2)) or "conveniently available elsewhere" (Rule 5.8(a)(3)), "requests that are unduly broad" (Rule 5.8(a)), requests "to develop information or prepare a study" (Rule 5.8(c)), and requests for privileged information (Rule 5.8(d)). In some instances, these criteria must be applied by means of a balancing test in which the prejudice alleged by Verizon-NY is weighed against the materiality of the information request or the materiality of the issue to which it relates.

SPRINT'S DISCOVERY REQUESTS

In accordance with the above reasoning, Sprint's discovery requests and Verizon-NY's objections are resolved as follows.

Document Requests

Document Request No. 1 seeks all documents that describe or relate to Verizon-NY's procedures in providing the Tandem Records Service whose costs the RPC purports to recover.[14] Verizon-NY's objection is overruled.

This is not one of the document requests to which Verizon-NY objects specifically by number. However, because Sprint's request seeks details about how Verizon-NY performs or provides Tandem Records Service, it could lead to information about the cost of service which in turn Sprint might seek to compare with the service's price, i.e., the level of the RPC. Thus, the request falls within the scope of Verizon-NY's general objection that discovery should not be allowed for the purpose of making a case that the Commission should conform the RPC to the cost of service on a TELRIC basis.[15]

Another potential objection is that, according to Verizon-NY, the Commission has determined that the Tandem Records Service function is an intrinsic component of Tandem Transit Service, and that the two services cannot and should not be unbundled from each other. Verizon-NY says the RPC therefore is not attributable to any distinct function but must be deemed part of a "blended" transit rate already approved by the Commission for Tandem Records Service and Tandem Transit Service combined. Thus, under Verizon-NY's reasoning, Sprint's attempted identification of Tandem Records Service costs separately from other transit-related costs cannot be a sufficiently "relevant and material" object of discovery.

As noted, however, Rule 5.1(a) provides a broad mandate that discovery should be allowed even in the pursuit of

[14] Each document request and interrogatory is summarized here as background. However, where this ruling directs compliance, the actual terms of the request or interrogatory are intended to be controlling, except as otherwise noted.

[15] Verizon-NY's March 3, 2009 letter, p. 3.

information that is neither material nor relevant, provided that it may lead to other, material and relevant information. Applying that expansive standard, this ruling rejects Verizon-NY's contention that Sprint may not properly pursue discovery for the purpose of showing that the RPC exceeds the unbundled cost of Tandem Records Service (a conclusion explained initially in connection with Document Request No. 3, below).

In addition, Verizon-NY's objections to Request No. 1 fail because they do not address Sprint's stated intention of pursuing another potentially material issue: whether Verizon-NY is applying the RPC to Sprint in an unjustly discriminatory manner. And, if there is discrimination not merely in how the RPC is applied but inherent in Sprint's interconnection agreement with Verizon-NY, another material issue would be whether the discrimination is unjustified and whether the agreement therefore is contrary to the public interest.

In litigating a claim of discrimination, an initial step for both parties inevitably would be to show whether Verizon-NY's tandem services provided to Sprint, including Tandem Records Service, impose on Verizon-NY the same operational burdens as the comparable services the company provides to other carriers. Thus, it would become necessary to identify what those operational requirements are, and Request No. 1 is relevant and material for that purpose.

Document Request No. 2 is the same as No. 1 except that it seeks information about the process of billing other carriers, rather than the process of providing Tandem Records Service. Verizon-NY's objection is overruled.

This is not one of the document requests to which Verizon-NY objects specifically by number. However, it implicates two of Verizon-NY's general objections. First, Verizon-NY claims that discovery in a Commission proceeding

cannot reach information regarding or in the possession of non-parties and non-jurisdictional entities with which Verizon-NY may do business. On the contrary, however, the Commission's authority to consider such information, where relevant to the operations of a jurisdictional firm such as Verizon-NY, is clearly established. A firm's jurisdictional status therefore cannot determine whether information about the firm is discoverable or whether it is relevant and material.[16]

Second, Verizon-NY denies the relevance of its dealings with other carriers on the ground that Sprint's complaint by Sprint pertains only to contractual agreements between Verizon-NY and Sprint. However, as in the case of Request No. 1, this objection is unavailing to the extent that Sprint may seek to show unjustly discriminatory differences between Verizon-NY's treatment of Sprint and its treatment of other carriers. Request No. 2 is relevant and material for that purpose.

Document Request No. 3 seeks all available studies and related documents pertaining to the cost of providing Tandem Records Service. Verizon-NY's objection is overruled.

Verizon-NY's objection to this request specifically, as distinguished from its general objections, is that the request is prohibited under Rule 5.8(c) because it would require that Verizon-NY perform a study on Sprint's behalf. As Sprint

[16] Verizon-NY's objection to discovery regarding non-jurisdictional entities is prompted partly by Sprint's Instruction 1 for document requests and interrogatories, which defines "Verizon-NY" to include affiliates. Verizon-NY objects to Instruction 1 on the further ground that it may demand information from individuals currently or formerly associated with Verizon-NY, and from other non-parties who, as such, are beyond the scope of Rules 5.1, 5.3, and 5.4 applicable to "parties." Verizon-NY's concerns are unwarranted because all Sprint's requests may reasonably be understood as seeking information only from Verizon-NY itself.

points out, this objection is unfounded because the request seeks only studies and materials, if any, already in existence. As Sprint says, a lack of existing cost studies would tend to show that the RPC is not cost-based.

Aside from the Rule 5.8(c) objection, the more general issue is whether the document request satisfies Rules 5.1(a) and 5.8(a). I conclude that it does, because information about the cost of Tandem Records Service may be relevant and material for purposes of this proceeding, or likely to lead to relevant and material information.

Sprint's and Verizon-NY's arguments center primarily on whether the Commission must use a TELRIC analysis when determining the cost of this service. Verizon-NY argues at length that the Federal Communications Commission has declined to impose a TELRIC requirement; and Sprint responds that the FCC's decisions cited by Verizon-NY, insofar as relevant, do require TELRIC pricing. Alternatively, Sprint says it should be allowed to establish through discovery that the RPC demonstrably exceeds the cost of service because (according to Sprint) Qwest Communications International, Inc. imposes a less onerous system of charges for comparable services, and Verizon-NY's affiliates charge no RPC at all in other jurisdictions.

Potentially Verizon-NY's strongest argument against Request No. 3 is that the Commission has chosen to approve a tariff that sets no price (cost-based or otherwise) for Tandem Records Service standing alone. Instead, the Commission, in approving the present RPC under PSL §97(1), seems to have viewed Tandem Record Service as a necessary incident of Tandem Transit Service, rather than a distinct service that should be priced on the basis of its stand-alone cost.[17] If there were a presumption that the Commission will continue to maintain that perspective, the cost of Tandem Record Service on an unbundled basis could

[17] Case 01-C-0767, *Sprint PCS – Petition for Arbitration,* Arbitration Order (issued August 23, 2002).

only be an academic issue and therefore could not be a relevant and material object of discovery.

However, such a presumption would be improper, because the Commission always retains the authority to modify its determinations under §97(1), and parties accordingly are entitled to challenge those determinations whenever the Commission's procedures allow it. Moreover, should the Commission decide to reexamine the pricing of Tandem Records Service either as an element of Tandem Transit Service or separately, the relevance and materiality of the information Sprint seeks does not depend on whether the Commission may or must apply a TELRIC analysis. The document request calls for Verizon-NY's existing cost information, if any. Whether the information can be used consistently with the FCC's or this Commission's approved methodologies, or can be used at all, are issues that cannot be debated unless and until Verizon-NY produces the information and Sprint cites it in opposition to the existing RPC.

Request No. 3 also is subject to Verizon-NY's general objection to discovery of information about prices and services in other jurisdictions. The objection to Request No. 3 on this basis is unfounded. While variations among tariffed rates from one state to another would not directly support a claim of improper discrimination by Verizon-NY, Sprint is correct that they could lead to relevant and material information about the cost of service.

Document Request No. 4 seeks all documents pertaining to Verizon-NY's decision to charge Sprint the RPC for calls terminated by a CMRS. Verizon-NY's objection is overruled.

This is not one of the document requests to which Verizon-NY objects specifically by number. However, the request involves one of Verizon-NY's arguments in opposition to the complaint itself. Sprint claims that Verizon-NY may not impose the RPC for CMRS-terminated calls, because the tariff incorporated by reference in the interconnection agreement

between Verizon-NY and Sprint[18] does not expressly include CMRS-terminated calls among those subject to the RPC. Rather, the tariff expressly provides an RPC only for calls terminated by a CLEC or an ITC.

Verizon-NY responds that even if the tariff does not expressly provide an RPC for CMRS-terminated calls, the tariff does establish an RPC for tandem transit traffic in general, and the interconnection agreement--unlike the tariff--expressly defines tandem transit traffic as including CMRS calls. Thus, according to Verizon-NY, the agreement supersedes the tariff. To bolster that conclusion, Verizon-NY cites the Commission's decision that a CLEC may not rely on a tariff rate lower than the rate stated in the CLEC's interconnection agreement.[19]

However, as Sprint says, the parties could have negotiated an interconnection agreement overriding the tariff's limitations expressly and not merely by implication, if that had been their intent. Moreover, the case cited by Verizon-NY is distinguishable in a critical respect, namely that the agreement in that instance did not incorporate the tariff by reference. If the Commission were to examine whether Verizon-NY and Sprint intended that their interconnection agreement exclude CMRS calls from the RPC while including CLEC and ITC calls, conceivably the Commission might ultimately accept Verizon-NY's claim that the parties meant to treat all three types of call uniformly. At this stage of the case, however, that inference is not clear enough to foreclose Sprint from discovering information that could illuminate the parties' intent.

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[18] PSC No. 8, §6.3.3(D).

[19] Case 91-C-0864, *Choice One Communications of N.Y., Inc.*, Order on Petitions for Rehearing (issued March 7, 2002), pp. 11-12, cited in Verizon-NY's August 25, 2008 letter, p. 6, n. 17.

Document Request No. 5 seeks all documents pertaining to carriers' complaints or disputes over Verizon-NY's billing for Tandem Records Service. Verizon-NY's objection is overruled, except that the information request is hereby modified in response to Verizon-NY's objection regarding overbreadth.

The threshold question is relevance and materiality. Verizon-NY argues that the document request cannot legitimately be oriented toward ascertaining whether Sprint is subjected to discrimination, because Verizon-NY provides Tandem Records Service pursuant to hundreds of different interconnection agreements and must therefore be expected to treat various carriers differently. Such inevitable variations, Verizon-NY says, do not constitute improper discrimination and therefore cannot be material to Sprint's complaint.

Verizon-NY's argument is mistaken because it presumes that each agreement differs from Sprint's (or, in effect, that Sprint's agreement is unique) in material respects. That presumption is counterintuitive at best; and, in any event, Sprint cannot test it unless the document request is granted. Furthermore, among Verizon-NY's agreements with Sprint and other similarly situated carriers, not only similarities but also differences are reasonably likely to serve as, or lead to, information relevant to a claim of discrimination.

Aside from relevance and materiality, Verizon-NY is not entirely consistent in stating the bases of its objection: at one point Verizon-NY says it opposes Request No. 5 specifically on grounds of attorney-client privilege or an attorney work product exemption,[20] while elsewhere the company focuses on Request No. 5 as an example of overbreadth.[21] As

[20] March 3, 2009 letter, p. 7.

[21] April 6, 2009 letter, pp. 3-4.

Sprint observes, however, there is no reason to presume that documents communicating complaints to Verizon-NY from other parties would be privileged. Thus, Verizon-NY's blanket claim of privilege, for documents that have yet to be identified, cannot properly be considered and decided at this stage consistently with the process prescribed for claims of privilege in Rule 5.8(d).

As for overbreadth, the request for "all documents" (emphasis added) concerning Tandem Records Service billing complaints or disputes, if construed literally, could be overbroad and indeed would likely encompass privileged documents such as Verizon-NY's internal legal communications. Instead, Verizon-NY may reasonably interpret Request No. 5 as seeking only documents concerning "all complaints or disputes" (emphasis added) about Tandem Records Service billing. Verizon-NY's compliance with the request, thus modified, will enable Sprint to seek additional documentation only insofar as it can do so without violating the prohibition in Rule 5.8(a) against "unduly broad requests."

Document Request No. 6 seeks all documents setting forth agreements or understandings whereby Verizon-NY provides Tandem Transit Service to a carrier but provides that carrier no Tandem Records Service. Verizon-NY's objection is overruled.

According to Verizon-NY, the requested information cannot be relevant or material, because it pertains to Verizon-NY's dealings with carriers other than Sprint. This seems to be a variant of Verizon-NY's argument against Request No. 5 and, as such, is incorrect for the reasons stated above regarding the relevance and materiality of Request No. 5.

Additionally, Verizon-NY objects to Request No. 6 insofar as it seeks copies of interconnection agreements on file with the Commission. Verizon-NY reasons that such material is "readily available" or "available elsewhere" than through

discovery, and thus beyond the scope of discovery according to Rules 5.8(a)(2) and (3), above. However, based on my understanding of how such agreements are filed at the Commission, the salient consideration for purposes of Rules 5.8(a)(2) and (3) is that Verizon-NY is more likely than the Commission to maintain the agreements organized for business purposes according to the criteria stated in Request No. 6.[22]

As a result, it would be unrealistic to disallow the request on the ground that the information is "readily available" to Sprint. Such disallowance would require that Sprint undertake a labor intensive project that Verizon-NY probably could perform almost effortlessly; and the end product would be a relatively unreliable survey of filed agreements compiled by Sprint, whereas a compilation by Verizon-NY in the first instance would avoid time-consuming factual disagreements which ultimately would have to resolved on the basis of Verizon's own records anyway.

Finally, as Verizon-NY implicitly recognizes, Request No. 6 seeks not only copies of filed agreements but also all other "agreements, contracts, settlements or understandings" regarding the subject in question. Thus, Request No. 6 also is valid to the extent that it seeks material other than filed interconnection agreements.

Document Request No. 7, the converse of Request No. 6, seeks agreements whereby Verizon-NY provides Tandem Records Service without Tandem Transit Service. Verizon-NY's objection is overruled for the reasons cited in connection with Request No. 6.

[22] Admittedly, this assumption is based on speculation. The parties should request a conference with me to review the facts if the accompanying discussion does not accurately assess the parties' relative burdens in searching for filed agreements.

Interrogatories

Interrogatory No. 1 requests the date on which Verizon-NY, rather than the New York Intrastate Access Settlement Pool, "began invoicing Sprint" for Tandem Records Service. Verizon-NY's objection is overruled.

The company's objection, citing Rules 5.8(a)(2) and (3), above, alleges that the cut-over date should be discernible from Sprint's own records. Sprint responds that it cannot ascertain the date except through Verizon-NY's records. These conflicting claims cannot be determined with certainty on the basis of the present filings. Nevertheless, for discovery purposes, the more reasonable course is to resolve them in Sprint's favor because the information must be at least as readily available to Verizon-NY as to Sprint (an inference Verizon-NY does not deny) and because use of Verizon-NY's own information will avert potential litigation about the reliability of whatever date Verizon-NY specifies.

Interrogatory No. 2 requests a detailed description of the procedures Verizon-NY uses to provide Tandem Records Service. Verizon-NY's objection is overruled, for the reasons discussed at greater length in connection with Document Request No. 1. That is, Interrogatory No. 2 is legitimate because the Commission has the authority to consider whether the RPC is cost based and whether an unbundled Tandem Records Service could be provided and priced as an offering distinct from Tandem Transit Service. Additionally, the information sought could be relevant to a material issue whether the services Verizon-NY performs for Sprint resemble, in relevant respects, the services Verizon-NY performs for similarly situated carriers and, if so, whether Verizon-NY charges Sprint in an improperly discriminatory manner.

Interrogatory No. 3 requests a detailed description of the procedures Verizon-NY uses to bill other carriers for Tandem Records Service. Verizon-NY's objection is overruled. The information sought is potentially relevant and material for the reasons noted in connection with Interrogatory No. 2.

Interrogatory No. 4 asks Verizon-NY to identify any CMRS carriers to which it provides Tandem Records Service for calls that the CMRS carrier originates, and to state whether Verizon-NY provides the service under contract or under tariff. Verizon-NY's objection is overruled.

While it is unclear why Sprint has limited its question to CMRS carriers, one may reasonably suppose the interrogatory seeks information about the material issue whether Verizon-NY's practice regarding calls originated by Sprint is unjustly discriminatory as compared with Verizon-NY's treatment of calls originated by its own CMRS affiliate. In any event, the second of the four elements of Sprint's complaint as summarized above is the applicability of Tandem Records Service to originating carriers regardless of whether they be CLECs, ITCs, or CMRS providers. For that reason as well, the information requested is relevant and material.

Interrogatory No. 5 seeks the details of the compensation that Verizon-NY obtains from the originating CMRS providers identified in response to Interrogatory No. 4. Verizon-NY's objection is overruled because the requested information is relevant and material for the reasons cited in connection with Interrogatory No. 4.

Interrogatory No. 6 requests a description of all circumstances in which Verizon-NY provides Tandem Transit Service without Tandem Records Service. Verizon-NY's objection

is overruled, for reasons similar to those cited in connection with Document Request No. 1 and No. 2 and Interrogatory No. 2. That is, Interrogatory No. 6 might elicit information relevant to the cost of Tandem Records Service, its separability from Tandem Transit Service, and whether Verizon-NY unjustly discriminates against Sprint when requiring that Sprint take Tandem Records Service.

Interrogatory No. 7 asks Verizon-NY to describe any instances where it provides Tandem Records Service without collecting the RPC. Verizon-NY's objection is overruled, consistently with the above determination allowing discovery of analogous subject matter through Document Request No. 6.

The ruling on Document Request No. 6, in turn, cites the ruling on Document Request No. 5 for the principle that the circumstances in which Verizon-NY levies no RPC could lead to information relevant to a material issue whether Verizon-NY discriminates against Sprint in comparable circumstances, and the same reasoning justifies the discovery sought here in Interrogatory No. 7. While the ruling on Document Request No. 6 overrules Verizon-NY's objection to providing publicly available agreements, that objection is only indirectly applicable here (and Verizon-NY has not raised it) because Interrogatory No. 7 seeks primarily an explanation of Verizon-NY's forbearance, if any, and not merely underlying documents.

Interrogatory No. 8 requests the rates that Verizon-NY charges for Tandem Transit Service in any situations identified in response to Interrogatory No. 7. Verizon-NY's objection is overruled.

This is not one of the interrogatories to which Verizon-NY objects specifically by number. Presumably it is subject to one or more of Verizon-NY's general objections

discussed above, such as the alleged irrelevance of the relation between the RPC and the cost of Tandem Records Service. However, those matters may be relevant and material should the Commission decide to reexamine the level of the RPC or the separability of Tandem records Service, as discussed above in connection with Document Request No. 1 and No. 2 and Interrogatory No. 2 and No. 6.

To the extent that Verizon-NY's objection may be based on the alleged irrelevance of the company's transactions with other carriers, such information is discoverable because it could help establish whether some carriers escape the RPC only by paying for Tandem Records Service through transit charges instead of through an RPC. If that is the case, such arrangements might tend to validate Verizon-NY's argument that the RPC is part of a blended rate for all elements of tandem traffic service collectively. On the other hand, if the charges incurred by Sprint are not incurred by other carriers in any form, that would tend to support Sprint's claim of discrimination. Under either scenario, the information sought in Interrogatory No. 8 is relevant and material.

Interrogatory No. 9 requests an itemization of the RPCs paid by Sprint since January 1, 2003, identifying the carrier that terminated the traffic to which the RPC was related and whether the terminating carrier was a CLEC, an ITC, or a CMRS provider. Verizon-NY's objection is sustained in part, and the interrogatory is hereby modified accordingly.

For reasons discussed in connection with Document Request No. 4, information about RPCs assessed by Verizon-NY for CMRS-terminated calls is relevant to a potentially material issue whether such billing is permissible. Thus, the interrogatory satisfies the threshold requirements of

Rules 5.1(a) and 5.8(a) notwithstanding any general objections that Verizon-NY might deem applicable.

In addition, however, Verizon-NY objects that Interrogatory No. 9 is overbroad, contrary to Rule 5.8(a); and is unduly burdensome and would require a special study, contrary to Rule 5.8(c). Verizon-NY's claim of overbreadth involves three concerns. First, although separate identification of CMRS-related RPCs may provide information relevant to the propriety of RPCs for CMRS-terminated traffic (a material issue, as discussed in connection with Request No. 4), the relevance of the distinction between CLEC- and ITC-terminated traffic is not self-evident and Sprint has not explained it. Therefore, Verizon-NY may construe the interrogatory as seeking only a breakdown between CMRS- and non-CMRS-related RPCs, and may disregard Sprint's further request for quantification of CLEC- and ITC-related RPCs separately from each other.

Second, Verizon-NY says its objection based on overbreadth is prompted primarily by the interrogatory's attempt to reach back to January 1, 2003. Verizon-NY probably is alluding to its general objection that the filed rate doctrine bars Sprint from recoupment of RPCs collected in the past for CMRS traffic, and that Sprint's challenge to those RPCs therefore raises no material issue suitable for discovery.

However, Sprint has effectively rebutted Verizon-NY's invocation of the filed rate doctrine. Sprint points out that, under Verizon-NY's own theory of the case, the rationale for applying the RPC to CMRS traffic is that the interconnection agreement between Verizon-NY and Sprint defines Tandem Transit Service to include CMRS-terminated traffic, and the agreement therefore overrides the tariff which addresses only ITC- and CLEC-terminated traffic. If, as Verizon-NY claims, its authority to impose an RPC is based on a contract rather than a tariff, then Sprint is correct that the filed rate doctrine

presents no obstacle to Sprint's recoupment of past RPCs because the doctrine is only a rule of tariff interpretation; or, at least, the applicability of the filed rate doctrine would be a material issue for the Commission's consideration should Sprint pursue its complaint.

The third and final question of overbreadth involves the interrogatory's use of January 1, 2003 as the starting date for the records requested. Sprint appears to have chosen it to represent the cut-over date when Verizon-NY assumed the RPC billing function previously performed by the Settlement Pool, as discussed above in connection with Interrogatory No. 1. However, because Verizon-NY has yet to specify the cut-over date in response to that interrogatory, Interrogatory No. 9 should be construed as requesting the RPC records starting from the cut-over date as identified in Verizon-NY's response to Interrogatory No. 1. As discussed in connection with that interrogatory, Verizon-NY can readily specify the cut-over date; and it should do so, to avert the disagreements that might arise if the date were specified by Sprint, a less directly knowledgeable party.

In addition to alleging overbreadth, Verizon-NY objects that Interrogatory No. 9 is unduly burdensome and would require Verizon-NY to perform a study on Sprint's behalf. However, it is unlikely that compliance with the interrogatory will be burdensome either in an absolute sense or (under the Rule 5.8(a) criterion) relative to the importance of the material issue whether Sprint has paid unjustifiable amounts for RPCs. Factors all tending to establish the reasonableness of the interrogatory are that there are disputed allegations as to whether and to whom Verizon-NY provides the records for which it collects the RPC, a matter uniquely within Verizon-NY's knowledge; it was Verizon-NY that generated and billed the RPCs in question; the interrogatory seems to require only a

compilation of Verizon-NY's RPCs charged to Sprint on account of CMRS traffic as compared with total Verizon-NY RPCs charged to Sprint; and the amount of CMRS-related RPCs is the main factual issue raised by Sprint's complaint regarding those RPCs.

Interrogatory No. 10 asks Verizon-NY to specify and explain to what extent the terminating carriers identified in Interrogatory No. 9 received records corresponding to Sprint's RPC payments. Verizon-NY's objections are overruled.

Here as in the case of Interrogatory No. 9, the requested information is relevant to a potentially material issue whether Sprint may properly be required to pay RPCs associated with CMRS-terminated traffic despite the lack of such authorization in the tariff. If the Commission were asked to consider the merits of Sprint's opposition to such RPCs, the related traffic would have to be quantified. As discussed in connection with Document Request No. 1 and No. 2 and Interrogatory No. 2 and No. 6, the Commission is at liberty to reconsider whether Tandem Records Service is an intrinsic element of Tandem Transit Service and need not be provided as an unbundled offering. Consequently, the RPC's cost justification could be a material issue, which could be illuminated by information as to whether carriers receive the records, pay for them through the RPC, and demand or waive them. Furthermore, the Commission could reconsider its determination that the RPC, like other charges for elements of Tandem Transit Service, may properly be billed to the originating carrier.[23] Thus, Sprint could choose to pursue that issue, and therefore it is potentially relevant and material whether Verizon-NY provides the records to originating carriers exclusively or at all.

[23] Case 01-C-0767, *supra*, Arbitration Order (issued August 23, 2002).

Given that Interrogatory No. 10 is directed toward relevant and material information and therefore is not overbroad, the remaining issue is Verizon-NY's objection that the interrogatory would require a burdensome study. Here as in the case of Interrogatory No. 9, the objection is unwarranted because a central issue is the extent to which Verizon-NY performs the services for which Sprint pays RPCs, and because it reasonably can be assumed that Verizon-NY is familiar with its own practices in this respect and routinely maintains the type of records sought in the interrogatory.

Interrogatory No. 11 seeks details as to (a) whether Verizon-NY's affiliated incumbent local exchange carriers in other states impose RPCs, (b) whether such RPCs (if any) are imposed by tariff or by contract, (c) citations to any such tariffs, (d) the tariffed level (if any) of the RPCs, (e) citations and descriptions of any such contracts, and (f) the contractual level (if any) of the RPCs. Verizon-NY objects on grounds of overbreadth and lack of relevance and materiality. Verizon-NY's objection is overruled.

Despite the multitude of subparts, the information ultimately requested in the interrogatory is basically the level of any RPCs charged by Verizon-NY affiliates. Sprint says its objective in issuing the interrogatory is to confirm its suspicion that, among Verizon affiliates, Verizon-NY is unique in imposing an RPC. According to Sprint, if Verizon does not charge RPCs in other jurisdictions, this would be evidence that the RPC in New York is not just and reasonable. (The same inference could be drawn if Verizon does charge RPCs elsewhere but at a lower level than Verizon-NY's.) The RPC's reasonableness is a relevant and material issue, assuming again that the Commission might choose to examine whether the RPC is justified by the cost of Tandem Records Service considered

independently of other elements of Tandem Transit Service. Similarly, a comparison between Verizon-NY's RPCs and those charged outside New York, if any, would be relevant in examining a claim that Sprint is subject to unjust discrimination.

Interrogatory No. 12 requests a breakdown, by affiliate and year, of all RPCs or other payments that Verizon-NY has collected from its affiliates pursuant to tariff for Tandem Records Service from 2003 through 2008, and a similar breakdown of the underlying traffic volumes. Verizon-NY's objection is overruled.

The requested information is relevant to a material issue whether Verizon-NY's implementation of the RPC or similar charges unjustly discriminates against Sprint, an unaffiliated carrier served under an interconnection agreement, as compared with Verizon affiliates served under tariff. Verizon-NY objects that the interrogatory is overbroad insofar as it seeks six years' worth of data, and that it would require a burdensome study. As Sprint says, however, all the requested information falls within the scope of the records Verizon-NY should be expected to maintain for the purpose of ensuring that its rates and practices are reasonable and nondiscriminatory. Indeed, the interrogatory seeks only information that would be created and maintained in the ordinary course of business if Verizon-NY conducts its affiliate transactions at arms' length and with reasonable documentation.

Interrogatory No. 13 requests "the date of each cost study performed by Verizon-NY related to the Tandem Records Service and/or the [RPC]." Verizon-NY's objection is overruled. The request is not at all burdensome, and is clearly relevant to the potentially material issue of cost justification.

Interrogatory No. 14 requests "the amounts collected by Verizon-NY from all carriers" through the RPC for each year 2003 through 2008. (It resembles Interrogatory No. 9, except that Interrogatory No. 14 includes RPC collections from carriers other than Sprint and does not seek a breakdown by type of terminating carrier.) Verizon-NY's objection is overruled.

A comparison between total RPC revenues and the total cost of Tandem Record Service might provide information pertaining to whether the RPC is cost justified. In addition, the relation between RPC revenues and the volume of tandem traffic for all carriers, as compared with the analogous relation for Sprint alone, could provide evidence of whether Verizon-NY applies the RPC to Sprint in a discriminatory manner. Sprint also argues that the yearly data would help establish the cut-over date when Verizon-NY took over administration of the RPC, but that fact is obtainable more simply and directly through Interrogatory No. 1.

Aside from the alleged lack of relevance, Verizon-NY objects that Interrogatory No. 14 is unduly burdensome and would require a study. However, here as in the case of Interrogatory No. 9 and No. 10, it relates to a material issue, and it seeks only a relatively simple item of information likely to be maintained routinely as part of Verizon-NY's billing records.

SPRINT'S "INSTRUCTIONS AND DEFINITIONS"

Verizon-NY objects to Sprint's recital, in preambles to the document requests and interrogatories, that responses should comply with, *inter alia*, the Civil Practice Law and Rules. The recital is harmless because the CPLR will not be invoked except to the extent legally applicable.

As discussed initially in connection with Document Request No. 2, Verizon-NY objects to discovery regarding non-jurisdictional entities. The objection, overruled above, was prompted partly by Sprint's Instruction 1 for document requests

and interrogatories, which defines "Verizon-NY" to include affiliates. Verizon-NY further objects to Instruction 1 for document requests and interrogatories, and Instruction 9 for interrogatories, on the ground that the instructions may demand information from individuals currently or formerly associated with Verizon—NY, and from other non-parties who, as such, are beyond the scope of Rules 5.1, 5.3, and 5.4 applicable to "parties." Verizon-NY's concerns are unwarranted because all Sprint's requests can reasonably be interpreted as seeking information only from Verizon-NY itself.

Verizon-NY objects to Instruction 2 for document requests and interrogatories, because the instruction defines "Sprint" to include predecessor and successor firms and associated individuals. Similarly, Instruction 9 for interrogatories and Instruction 13 for document requests define "person" to include natural and legal persons. It is not apparent how these apparently routine provisions could prejudice Verizon-NY.

Instruction 11 for document requests and Instruction 7 for interrogatories state that Verizon-NY should supplement its responses insofar as necessary to complete or correct them. This demand, to which Verizon-NY objects, is not materially different from Rule 5.7, which requires that a party amend its discovery responses insofar as necessary to correct errors or reflect material changes that occur over time. The objection therefore is overruled.

Finally, Verizon-NY criticizes Instructions 10 through 12 for interrogatories, and 15 through 17 for document requests, as vague, ambiguous, and overbroad. These instructions are merely rules of construction which, if they come into play at all, will tend to resolve ambiguities.

CONCLUSION

To the extent that today's ruling overrules Verizon—NY's objections to discovery, Rule 5.4(d) allows the company

five days from the date of the ruling to provide the required responses. However, this case is not yet subject to any prescribed procedural schedule, and no other formal activity is currently underway. As a result, the parties may not have anticipated that discovery responses would be required immediately. Furthermore, some document requests and interrogatories approved herein call for extensive responses.

Pursuant to Rule 3.3(e), the five day deadline therefore is extended to 15 days, or such other period as the parties may agree upon after they confer on the extent of the efforts Verizon-NY must make to compile the requested information. Within that overall deadline, Verizon-NY should provide its responses on a piecemeal basis as promptly as feasible.

(SIGNED) RAFAEL A. EPSTEIN