

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on May 16, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca
Gregg C. Sayre

CASE 13-C-0145 - Tariff Filing by Verizon New York Inc. to add a
Municipal Construction Surcharge.

ORDER DENYING TARIFF FILING

(Issued and Effective May 16, 2013)

BY THE COMMISSION:

INTRODUCTION

Verizon New York Inc. (Verizon or the Company) filed tariff amendments to implement a monthly per line \$0.99 Municipal Construction Surcharge. The purpose of the surcharge is to recoup some of the costs to relocate facilities that are in public rights-of-way to accommodate street repairs, public construction projects, or other activities required for the public health or convenience. After review of the Company's filing, we find that a surcharge mechanism is unwarranted because relocation costs are costs of doing business that are recovered through increases in base rates. Verizon's request for approval is denied; and, Verizon is directed to cancel the proposed tariff pages.

VERIZON'S TARIFF FILING

On March 21, 2013, Verizon filed proposed tariff revisions to authorize a Municipal Construction Surcharge. The proposed \$0.99 surcharge would appear as a separate line item on customers' monthly bills and apply to all tariffed retail business and residential switched voice grade local exchange access lines. The surcharge would apply whether customers subscribe to voice grade access lines only, or their access lines are part of bundled service offerings. Access lines associated with Lifeline service would be excluded from the surcharge.¹

In its filing, Verizon says that utilities in New York are, in general, legally required to relocate, at their own cost, facilities that are in public rights-of-way, if such relocation is necessary to prevent interference with street repairs, public construction projects, or other activities required for the public health or convenience. The reason for its surcharge request, according to Verizon, is that these costs have increased substantially in recent years, as shown in the following table:

¹ The Company estimates that the Municipal Construction Surcharge would apply to a total of 3.2 million access lines and that the estimated revenue impact is \$38 million per year; this is below the 2.5% revenue threshold that would constitute a "major change" in rates (Public Service Law §92(2)(c)). A major change in rates requires a public hearing and suspension of the proposed tariff initially for up to four months, and, if necessary, for an additional six months.

Year	Total Relocation Cost (\$Million)	Access Lines	Cost/Line
2006	\$83.64	7,749,979	\$10.79
2007	\$76.04	7,010,657	\$10.85
2008	\$74.77	6,232,026	\$12.00
2009	\$66.18	5,562,449	\$11.90
2010	\$61.31	4,958,893	\$12.36
2011	\$74.17	4,430,069	\$16.74
2012	\$93.31	3,877,247	\$24.07
2013 (Est.)	\$106.43	3,432,197	\$31.01

The company emphasizes that its relocation costs have increased substantially on a per-line basis, which, it states, provides a more meaningful measure of Verizon's ability to recover them. Verizon maintains that implementation of the surcharge, which is equivalent to \$11.88 per line per year, would only partially offset the \$20.22 increase in annual per line municipal relocation costs that Verizon has experienced since 2006. Verizon asserts that the surcharge is reasonable and that customers have competitive alternatives that allow them to choose other providers if they are dissatisfied with the proposed increase.

Verizon makes a more general argument relating to its need for financial relief due to the robust competitive telecommunications environment that exists in this State. Verizon states that it is sustaining substantial net losses in the State, even while continuing to make significant capital investments in its network. Verizon points out that the Commission has recognized, on a number of occasions, that Verizon's financial challenges warrant increased flexibility to seek additional revenues, where feasible, through retail rate increases. These same policy considerations, Verizon submits,

justify the implementation of the Municipal Construction Surcharge.

As additional support, in a letter dated April 15, 2013,² Verizon states that it is mindful of regulatory concerns that surcharges could cause customer confusion, or be used to mislead customers as to the actual price they pay for services. But in this case, the Company argues, there is nothing misleading or confusing about implementing the Municipal Construction Surcharge. The surcharge informs customers that Verizon incurs substantial costs to relocate, protect, or rebuild its facilities at its own expense in order to accommodate public construction policies.

Verizon's letter points to a federal court decision that upheld the rights of utility companies to implement a separate line item bill charge. In a 2008 decision,³ the United States Court of Appeals for the Sixth Circuit overturned Kentucky statutory language that prohibited telecommunications providers from separately stating a 1.3% gross revenues tax on the providers' bill. Verizon adds that the court concluded that the ban on "separately stating" the tax attempted to regulate the content of the providers' speech, in violation of the First Amendment. Verizon believes that the Sixth Circuit Court's analysis of the constitutional issues concerning the use of separate line item on bills is directly applicable to its tariff filing.

² Letter from Joseph A. Post - Deputy General Counsel (New York) to Peter M. McGowan - General Counsel, dated April 15, 2013.

³ BellSouth Telecommunications, Inc. v. Farris, 542 F.3d 499 (6th Cir. 2008).

DISCUSSION

We recognize that Verizon is operating in a robust competitive environment, and that the resultant financial challenges to Verizon warrant increased flexibility to seek additional revenues, where feasible, through targeted retail rate increases. Nevertheless, we are not persuaded that the Company's proposed use of a surcharge mechanism to recover the costs of municipal construction work is warranted.

Use of a surcharge mechanism⁴ is a departure from traditional ratemaking by singling out a specific cost from a Company's base rates and allowing separate recovery of that cost from ratepayers. We narrowly apply this mechanism in case-by-case situations that are considered largely beyond a company's control, cannot accurately be forecasted and are large enough to potentially impact a utility's financial health.⁵ For example, capital investments for plant additions or replacing aging infrastructure do not constitute unpredictable, volatile costs sufficient to justify the use of a surcharge mechanism. Rather, these costs are typically recovered through base rate increases after a utility's costs are carefully audited.

Verizon has not adequately explained why recovery through base rate increases is not reasonable and why a surcharge only on local access lines is the best vehicle to recover these costs. The Company has not explained why it is proper to single out municipal construction work as the basis for a special sanctioned surcharge.

⁴ On November 6, 2006 we issued an Advisory Notice regarding the application of telecommunications taxes and surcharges in Case 05-C-1455, Proceeding on Motion of the Commission to Examine the Application of Taxes and Surcharges to Customer Bills by Telecommunications Carriers.

⁵ The revenue impact of the proposed change is less than 1% (.77%) of Verizon's total unaudited 2011 Operating Revenues.

Verizon, as well as other utilities, operate in public rights-of-way, in part, because they received municipal authority to occupy public rights-of-way. Municipal construction work is an integral part of a telephone company's cost of doing business; and, this expense is no different than the cost of fuel, electricity, equipment, or health care.

We note that we have already granted Verizon considerable pricing flexibility for many services, under which it is authorized to increase its revenues, if it so chooses. For example, in the Competition III Order,⁶ Verizon was given unlimited pricing flexibility for nearly all non-basic residential services. Subsequent to that Order, Verizon was afforded additional pricing flexibility in its offerings of packages, promotional offers and discount plans. Additionally, through various Orders, the Commission granted Verizon varying amounts of pricing flexibility for business services, including: 1) a one-time 10% increase to business services that do not already have flexibility⁷; 2) individual case billing arrangements; 3) 5% percent annual increases on business local services; 4) 25% annual flexibility for high capacity and interoffice private line services; and 5) the ability to flexibly price all of its business packages. Taken together, Verizon is authorized to increase many and various business and residential rates to raise revenue. Should Verizon believe that its pricing flexibility is insufficient, it is free to request

⁶ Case 05-C-0616, Transition to Intermodal Competition, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (issued April 11, 2006)(Competition III Order).

⁷ Case 06-C-0897 and Case 07-C-0610, Verizon New York Inc. - Pricing Flexibility, Order Denying Request for 25% Pricing Flexibility and Allowing for a 10% Increase to Certain Business Rates (issued January 17, 2008).

other forms of base rate relief for future Commission consideration.

Verizon's argument that denying its request to use a surcharge mechanism is an unconstitutional attempt to regulate the content of a utility providers' speech is misplaced. While the Kentucky Court's preclusion of any statement about the tax was an unjustified content-based regulation of commercial speech, the decision did not overturn the Kentucky statute insofar as it precluded direct collection of the tax from customers. The Sixth Circuit found the prohibition of direct collection was a regulation of conduct, not speech. Assuming Verizon requests and is granted additional base rate increases related to municipal construction work, Verizon would be free to state in its bills what portion of the charges in a specific municipal area were due to municipal construction costs imposed in that area. The Kentucky decision does not limit the Commission ability to set rates, as opposed to limiting Commission regulation of what utilities say about rate setting.

CONCLUSION

We find that Verizon's proposed Municipal Construction Surcharge is an unwarranted rate mechanism to recover costs for relocation of its facilities. Therefore, the Company is ordered to cancel the tariff amendments listed in Appendix A, on or before May 17, 2013.

The Commission orders:

1. Verizon New York Inc. shall cancel the tariff pages listed in Appendix A by filing pages that supersede the pending tariff pages on or before May 17, 2013, to be effective on one-day's notice, in order to remove the proposed Municipal

Surcharge Mechanism, in accordance with the discussion in the body of this Order.

2. The case is closed, pending compliance with Ordering Clause #1.

By the Commission,

(SIGNED)

JEFFREY C. COHEN
Acting Secretary

ADMINISTRATIVE DETAILS

Filing by: Verizon New York Inc.

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Issued: March 21, 2013

Effective: May 18, 2013