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COPIES:
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Honorable Janet Hand Deixler
Secretary
New York State
Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 00-C-(2049) - Complaint and Petition for Declaratory Judgment of Covad Communications Company and AT&T Communications of New York, Inc. Regarding Unjust and Unreasonable Collocation Power Charges in New York Telephone Company P.S.C. Tariff 914.

Dear Secretary Deixler:

Covad Communications Company and AT&T Communications of New York, Inc. hereby submit an original and five copies of the Reply to the Response of Verizon-New York to Petitioners' Complaint and Petition for Declaratory Judgment in the above-referenced proceeding.

Sincerely,

Harry M. Davidow

Attachment

Cc: Daniel Martin
Alan Bausback
Peter McGowan, Esq.
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Complaint and Petition for Declaratory Judgment of Covad Communications Company and AT&T Communications of New York, Inc. Regarding Unjust and Unreasonable Collocation Power Charges in New York Telephone Company P.S.C. Tariff 914.

Case 00-C____

REPLY OF COVAD AND AT&T TO VERIZON'S RESPONSE TO COMPLAINT

Covad Communications Company ("Covad") and AT&T Communications of New York, Inc. ("AT&T")(collectively "Petitioners") hereby submit this Reply to the Response of Verizon-New York to Petitioners' Complaint and Petition for Declaratory Judgment in the above-referenced proceeding.

Summary:

It is well to begin with what is not disputed. Petitioners demonstrated that, as Verizon interprets and implements its tariff, if a collocated CLEC requests 22 amps of power, if the equipment in its cage only uses 22 amps of power, if Verizon never provides more than 22 amps of power, Verizon will charge, each and every month, as if the CLEC has ordered and Verizon had delivered 80 amps of

power.[1] See Complaint, ¶ 14-16; Response, ¶ 14-16. That is what Verizon contends its tariff allows. That is what Verizon contends it is entitled to recover -- from each and every CLEC in each and every collocation facility each and every month.

There is also no dispute over the financial impact of Verizon's method for calculating power charges as measured against the method that Petitioners understand should apply. If Verizon is entitled to charge only for the power ordered, the effective annual rate for a collocation arrangement drawing only 22 amps of power per month would be $5,163. Using Verizon's method of calculating charges, the CLEC's payment for that same level of usage would be $18,778 per year, an overcharge of more than 200%.

Second, Verizon does not dispute that the tariff language that it filed in its compliance filing is different both from the language contained in its prior tariff and also from the language used in Appendix C to the Commission's Phase 3 Opinion and Order, which set the power

[1] In other words, Verizon fuses 22 amps at 40 (because 150% of 22 is 33, which is rounded up to the next highest increment of 10) and then doubles the amps to 80 to account for two feeds.

charges at issue here.[2] Both the Order and the prior tariff set collocation power rates on a "per amp per month" basis. Verizon's compliance tariff sets a rate "per amp fused, per feed [per month]."

It is not fully clear how many arguments Verizon is making to explain or justify its failure to track the language of the Order. Verizon appears to suggest that the Commission did not mean to compel Verizon to track precisely the language contained in Appendix C in its compliance filing, but that case is not fully made. More fundamentally, Verizon argues that the language "per amp per month" has exactly the same substantive meaning as "per amp fused, per feed [per month]." Hence, Verizon argues, adopting different language had no substantive effect on what Verizon had and has a right to charge for power.

Third, the nature of the substantive disagreement between Petitioners and Verizon is now completely clear. Petitioners claim that Verizon must deliver, or at least make available for delivery, the amount of DC power ordered, whether or not used. Verizon, in turn, makes a series of clear and unambiguous statements of what it contends both its prior tariff language and its current tariff language mean. Verizon is entitled, it claims

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[2] See Phase 3 Opinion and Order, Cases 95-C-0657, 94-C-0095 & 91-C-

repeatedly, to charge for the amount of power that its distribution network could deliver, totally without regard to whether the CLEC has equipment that could use it, the CLEC ordered it, or even that Verizon was in a position to deliver it from batteries in the power distribution network.[3] Thus, Verizon states:

> Verizon-NY would have continued to interpret the words "per amp" to mean each fused amp, per feed that the CLECs are able to draw from Verizon-NY's power plant. Response, p.2 (emphasis added).

And again:

> The CLECs have the ability to draw all of these amps provided by Verizon-NY. . . . Verizon-NY's policy of charging for all of the amps available to the CLECs is therefore reasonable. Id., at 2-3 (emphasis added).

And again:

> Thus, if the CLECs request 60 load amps of DC power, Verizon-NY will provide a feed fused at (on average) approximately 90 amps - - all of which the CLECs have the ability to draw. Id., ¶ 2 (emphasis added).

And again,

> Moreover, the CLECs have the ability to draw on *all* of the amps fused (per feed), and Verizon-NY therefore charges for these amps. Id., ¶ 4 (underlining added, italics in original).

In short, Verizon does not charge for the amount of power used (it claims it cannot for lack of a

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1174 (February 22, 1999).

measurement system). It does not charge for the amount of power ordered although, as will be shown below, its explanation for not doing so is feeble and factually wrong. It charges for the amount of power that the distribution system (i.e., the fuses and feeds) could theoretically deliver when operating at, but not exceeding, the fuse's maximum rating.[4]

Given these facts, there are only two operative questions: First, did adding the language "fused per feed" to the Verizon tariff violate the Commission's Order to rate power on a "per amp per month" basis? Second, is Verizon's claim to the right to charge for the theoretical maximum power draw just and reasonable?

1. Verizon's Material Change In Its Tariff Failed To Comply With The Commission's Order.

As noted above, Verizon does not deny that the Commission's Phase 3 Order directed it to file a compliance tariff that was consistent with the Order generally and with the rates and rate provisions of Appendix C particularly. Verizon also does not deny that Appendix C

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[3] There is also serious concern, discussed in more detail below, that CLECs cannot draw more power than 66% of a fuse's maximum rating without running an untenable risk of blowing the fuse frequently.

[4] The use of the word "theoretically" is particularly appropriate because fuses generally cannot reliably handle more power than 66% of their maximum rating.

directed Verizon to establish a rate for DC power for less than 60 amps at "$19.64 per amp, per month" and, for greater than 60 amps, a rate of "19.56 per amp, per month." Verizon also acknowledges that it did not do this. Instead, it filed rates of $19.64 and $19.56 respectively "per amp fused, per feed [per month]."

Verizon's defense of its filing is essentially that the difference between the language in the Order's Appendix C and the language in the compliance filing resulted in no difference in meaning. According to Verizon, "per amp, per month" has, and always had, exactly the same rate application meaning as "per amp fused, per feed per month" because Verizon always "interpreted" "per amp, per month" to mean "per amp fused, per feed" per month. Response, p. 2. Hence, since the new language means exactly what the old language meant, no harm no foul and the new language allegedly complies with the substance of the Commission's Order.

It is, however, hornbook law that tariffs are read according to the plain meaning of their terms and are not subject to private interpretations. See American Telephone and Telegraph Co. v. Central Office Telephone Co., 514 U.S. 214, 222 (1988) ("even if a carrier intentionally misrepresents its rate and a customer relies

on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff").

Hence, Verizon may have had its private interpretation of the tariff, but that interpretation did not bind either CLECs or the Commission. And in the latter case, Verizon is therefore totally incorrect in arguing that the Commission's choice of tariff language "per amp, per month," Ordered in the Phase 3 Appendix, must have meant what Verizon privately interpreted it to mean: "per amp fused, per feed [per month]."

Verizon's argument is unsound not only as a matter of tariff interpretation, but also as a matter of language. Verizon (see Response, ¶ 7) justifies its interpretation of the new language as equivalent to the old as follows:

> Even if Verizon-NY had included the words "per amp" in its Phase 3 compliance filing, as suggested by complainants, Verizon-NY would have continued to interpret the words "per amp" to mean each fused amp, per feed, that the CLECs are able to draw from Verizon-NY's power plant.

Response at p.2 (emphasis added).

This is, of course, a misstatement of the issue. Verizon did not fail to "include" the words "per amp;" they are still present in the current tariff. What it did, as a matter of technical grammar, was to modify the words "per

amp" with two brand new adjectives: "fused" and "per feed." Verizon's argument, therefore, comes down to the conundrum that a tariff that did not include certain adjectives had the same meaning as a tariff that added the additional adjectives. We know of no such legal principle, no such principle of tariff interpretation and no such principle of grammar.

As further support for its central argument that "per amp, per month" always meant "per amp fused, per feed [per month]," Verizon cites the language in Section 5.17(B)(2) of its tariff, which was not changed in the compliance filing. The cited section states: "power is assessed per amp provided, and will be based on the total power provisioned to the multiplexing node." (Emphasis added). Verizon asserts that this language shows that it "clearly charged for each amp provided to the CLEC - on a fused basis and per feed - prior to the Phase 3 litigation." Response, ¶7. This language, of course, says nothing of the kind, as it does not use either the words "fused" or "per feed ." Indeed, the language supports the opposite conclusion. The language speaks only of assessing power "per amp," not "per amp fused, per feed."

More generally, Verizon apparently believes that the use of the words "provisioned" and "provided" in the

tariff clarify its right to charge for each amp that "[t]he CLECs have the ability to draw." See Response, p. 2 (emphasis added). This is nonsense or, in any event, bad English. Both "provided" and "provisioned" as used in the tariff are past tense verbs: that is, "a verb form used to express an action or condition *that occurred* in or during the past." American Heritage Dictionary, Second College Edition, p. 909 (italics added). "Provided" is the past tense of "provide," which means "to furnish or supply," (id., at 997); hence, "furnished or supplied." The dictionary defines "provisioned" as "something that is provided." Id., at 998 (emphasis added). Petitioners are entirely comfortable with the dictionary definitions of the tariff's terms, as Verizon is not and cannot be. Petitioners here concede that they are obligated under the terms of this tariff to pay for power that is provided or that was furnished or supplied in the past (i.e., last month). They are not, however, obligated to pay for power that is capable of being supplied but never is, in fact, provided because it was never asked for, cannot be used or (as will be discussed below) even received, and was never delivered. In short, Petitioners are not obligated to pay for something that is not "provisioned." That is not only

common sense, that is what the words of Verizon's tariff say, notwithstanding Verizon's private "interpretation."

2. *It is Neither Just Nor Reasonable For Verizon To Charge For Power Not Ordered, Not Delivered and Not Used.*

As noted above, Verizon has finally articulated a clear position statement on what it is that CLECs should pay for when they pay the monthly recurring charges for power. Perhaps the best example, because it purports to be a syllogism and to assert a justification, is the following:

> [T]he CLECs have the ability to draw on *all* of the amps fused (per feed), and Verizon NY therefore charges for these amps.

Response, ¶4 (italics in original).

As argument, this leaves much to be desired. Most fundamentally, its factual premise is false. First, a CLEC does not have the ability to draw on all the power that will pass through a fuse and a feed at their respective rated capacities because, were it to try to do so, it would blow the fuse. It is worth noting here that these are monthly recurring charges that presuppose a persistent level of use over time. Hence, Verizon attempts to charge CLECs as if they were drawing power at the full fused rate every minute of every day when, in fact, they

could not draw power at that rate any minute of any day. If a CLEC were to draw power at the fused rate for even one minute, it would blow the fuse because the fuse is designed to fail when the power drain equals the fuse's maximum power rating. Hence, Verizon is simply incorrect when it states that the fuse capacity defines the level of power that the "CLECs have the ability to draw."

Indeed, as noted in the Complaint (at n. 3) and not challenged by Verizon, engineers believe that fuses are susceptible to being triggered whenever the power drain exceeds 66% of the maximum rated capacity. This is a substantial reason why fuses are routinely chosen at a 150% multiple of the expected power drain. Hence, charging on what Verizon calls an "amp fused" basis is charging for a level that CLECs do not have "the ability to draw."

Verizon's repeated mantra that it is charging for what CLECs have "the ability to draw" is simply wrong for a second reason. There are a variety of factors that constrain or define the scope of a CLEC's ability to draw DC power. The size of Verizon's power source is a constraint. As Verizon acknowledges, the rated capacities of power feeds and fuses also define and constrain the CLEC's "ability to draw." Also, however, one other major factor defines and constrains a CLEC's ability to draw

power; that is, the power needs of the equipment located in the CLEC's collocation arrangement. As Verizon knows full well, equipment simply cannot drain more power than it has been designed to drain. It doesn't matter how much power is made available, the equipment will not draw it. Hence, in the example used here, if a CLEC has a piece of equipment that draws 22 amps of power, and it orders two feeds each fused at 40 amps, the maximum power that the CLEC "has the ability to draw" remains 22 amps. Indeed, put a 150 amp fuse on the feed and the equipment still cannot draw more than 22 amps of power. There simply is no difference between the constraint on power usage caused by the receiving equipment and other constraints such as fuse capacity. Each defines and delimits the amount of power the CLEC has "the ability to draw."

Verizon tries to make something of the claim that an unspecified "number of CLECs have blown fuses in their collocation arrangements," but this proves little. Verizon doesn't specify how many CLECs, which CLECs, how often these events occurred or, most importantly, why these events happened. Far and away the most likely reason for a fuse to blow is a failure in the equipment, power source or feeds. The anomalous event of a power surge or equipment failure teaches us nothing about the routine, day-to-day

patterns of power consumption. For Verizon to justify its claimed right to charge CLECs as if they were drawing power at the level of their fuses all day, every day, Verizon would need to show that blown fuses are endemic. But in that case, one would still have to wonder why CLECs would risk blowing fuses so cavalierly, when the cost of a network outage could be phenomenal.

In sum, notwithstanding its numerous repetitions of the phrase, Verizon doesn't actually mean that it only wishes to charge CLECS for the power that "CLECs have the ability to draw." Nor does the tariff, as Verizon interprets it, actually apply this standard. What Verizon actually is attempting to implement is a standard that makes CLECs liable to pay for all the power that Verizon is theoretically able to send, even when the CLEC lacks the ability to draw it.

Verizon offers only one even marginally coherent argument to justify charging CLECs on the basis of the power Verizon can send, independent of the power the CLEC can draw. Verizon contends that, perhaps somewhere out there, there is some CLEC that is (or might be) stealing its power (that is, drawing more power than ordered). Verizon states this really only once (Response, ¶ 6 (emphasis added)):

> The Complainants do not dispute that Verizon-NY should fuse amps at higher than the load amp requested (per feed requested) - they just do not want to pay for it.[5] Verizon NY further disagrees with the Complainants' assertion that this amount is more than CLECs' equipment actually can or will use. As noted above, in Verizon's experience, CLECs typically install equipment over time - equipment that may have the ability to draw more power than the amount of load amps requested by the CLEC to that collocation arrangement.

This is the argument then, and the only argument that Verizon makes in support of charging for the theoretical maximum capacity of the delivery system as against the actual drawing capacity of the receiving equipment. It is totally without merit.

Note first that the argument tacitly concedes the central point here; that an identified piece of equipment cannot draw more than its drain rate. Instead of disputing the point, Verizon's Reply elides around it, speaking instead about the possible installation of additional equipment, presumably without Verizon's knowledge. But the theory that the risk that equipment will surreptitiously be sneaked into Verizon's buildings is so great that Verizon

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[5] This dig is, of course, entirely false. CLECs are prepared to pay the difference in the nonrecurring costs between a 30 amp fuse and a 40 amp fuse. That cost is trivial. What CLECs object to is paying for 40 amps of DC power on a recurring basis when their equipment draws only 30 amps, not because they secretly intend to increase their power drain, but because installing a 30 amp fuse to support a 30 amp load would be bad engineering and would lead to frequent network outages.

must protect itself by overcharging all of its customers is preposterous.

Obviously, this argument ignores the fact that CLECs are obligated to provide Verizon with advance notice of each piece of equipment that they install, and to specify the power needs of that equipment. The equipment, in turn, is limited to equipment that Verizon approves as compliant with the Network Equipment Building Standards. This process occurs both when CLECs order the collocation arrangement initially and each time they introduce a new piece of equipment. Indeed, the work associated with the introduction of any new equipment is necessarily fully revealed to Verizon's engineers. And, of course, CLECs have every incentive to give Verizon full information on equipment changes that may affect power, fusing or feed requirements because, absent such disclosure, there is far too great a likelihood that the new equipment (or even the old equipment) will fail. It is worth using some common sense here. CLECs are not in the business of going about concocting schemes to steal Verizon power for no reason. Nor are they in the business of designing and operating systems so that they will repeatedly blow fuses. They are in the business of using telecommunications equipment (and the power to operate it) to provide telephone and data

service, and their first and only interest is in making sure that the equipment on which their livelihood depends works in a reliable manner.

Second, even if Verizon felt some need for further information or notice requirements to ensure that it was properly collecting for all the power "provided" or "provisioned," the solution would be to institute such notice requirements, not to triple charge its customers. An example illustrates the point. Verizon states:

> Verizon NY agrees that CLECS typically order two feeds, but has no basis to know whether the CLECS are using one of these feeds solely for backup or redundancy purposes.

Response, ¶4.

There are two problems with this statement. First, as noted above, Verizon does know how CLECs configure their equipment to draw power. The specifications for collocated equipment, which usually include specifications for redundant power feeds, are well known to Verizon's engineers and Verizon's application requires the CLEC to specify the power drain of each piece of equipment installed. Second, if Verizon does not know everything it needs to know about how CLECs use their feeds, why not? There may be occasions, for example, when a CLEC wants multiple power feeds of, say 20 amps, each

with independent and discrete power supplies, and other occasions when the CLEC wants 20 amps, distributed in the first instance equally over two feeds and, only in the event one feed fails, distributed entirely over the other feed. In the former case, the CLEC should pay for 40 amps of power but in the latter case, the CLEC should pay for only 20 amps because it is not ordering and cannot use 40 amps. Verizon's claimed right to charge in both cases for 40 amps is based solely on the argument that it can't tell which the CLEC wants. Of course it can; it need merely ask for such specification in its application papers. Perhaps Verizon needs to modify its application forms to help CLECs specify clearly which they want and are prepared to pay for, but it cannot willfully blind itself to available facts and then use its self-imposed ignorance to justify overcharging for power.

In sum, the "power thief" argument is wholly specious. There may be issues regarding disclosure of power requirements that still need to be worked out, but they are not remotely a basis for the kind of trebled power charges that Verizon tries to justify solely on this basis.

The insignificance of the risk of power theft is further highlighted by the fact that, faced with litigation or the threat of litigation challenging comparable tariff

provisions in other states, Verizon has agreed in Pennsylvania and Delaware to amend its tariffs to charge CLECs for collocation power based upon the amps ordered, regardless of the size of the fuse. In the process, Verizon has not sought either a change in rate or additional protection against the theft of power. This is strong evidence that the power theft argument - which is the only substantive argument that Verizon has raised to justify charging for the theoretical maximum power the "CLEC is able to draw" - is bogus.

Finally, but perhaps most fundamentally, Verizon's new tariff language and its interpretation of that language is inconsistent with and therefore violates the Commission's Phase 3 Order because it is inconsistent with the cost studies and methodologies from which the Order derives. Under its interpretation of the tariff language, Verizon over-recovers collocation power costs in at least two ways: (1) it over-recovers for power by charging as if it had designed a system to supply power far beyond that which demand forecasts supported; and (2) it over-recovers for costs associated with back-up power feeds.

First and most basically, Verizon's power rates set forth in Appendix C to the Phase 3 Order are based upon

TELRIC studies evaluated in Phase 3 of Cases 95-C-0657, et al. Consistent with FCC rules, Verizon's studies calculated the cost per unit of power (*i.e.*, an amp) given the total increment of demand for that power. *See* 47 C.F.R. § 51.511(a).[6] In fact, Verizon's studies used an estimate of the total demand for amps that parties would actually use (*i.e.*, drain) to develop the capacity of the power equipment in the prototypical forward-looking central office.[7] To come up with a per unit cost for amps, Verizon then divided the total number of amps required by the total cost of building the power equipment necessary to meet that level of demand. This produced the rate. If that rate were charged against the number of amps forecast, Verizon would recover the forward looking incremental cost of its power system, which is all that the law permits.

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[6] The text of the rule states on this point:

> The forward-looking *economic cost per unit* of an element equals the forward-looking economic cost of the element, as defined in § 51.505, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.

47 C.F.R. § 51.511(a) (emphasis added).

[7] The alternative that would have supported these rates, designing a power system based on a demand forecast calculated on the amount of power that fuses would pass independent of customer interest in or use, would not have passed the Commission's scrutiny. In fact, Verizon did not offer such a study, which is the point here.

Verizon is now, however, *not* charging that rate against the level of actual demand. Under its amps fused per feed theory, it is charging the rate at 1.5 to 3 times the actual level of demand. And, in that process, it is recovering 1.5 to 3 times the actual cost of its power systems as defined in the cost case.

For the "per amp fused" rates to be accurate, Verizon would have to have applied to its demand assumptions the same multipliers that the tariff applies for fusing and back-up power feeds.[8] When Verizon fails to do that, as it attempts here, over-recovery occurs. Consequently, when one of the Petitioners orders 22 amps of drained power, Verizon recovers charges for facilities sufficient to provide 80 amps of power, even though its cost studies assumed that it built only enough facilities to provide 22 amps. That is over-recovery, and the Commission should put an end to it.

Second, as noted above, collocators typically request a back-up power feed with each primary feed serving their equipment. As also noted above, when Verizon receives a request for power and for back up feeds, it

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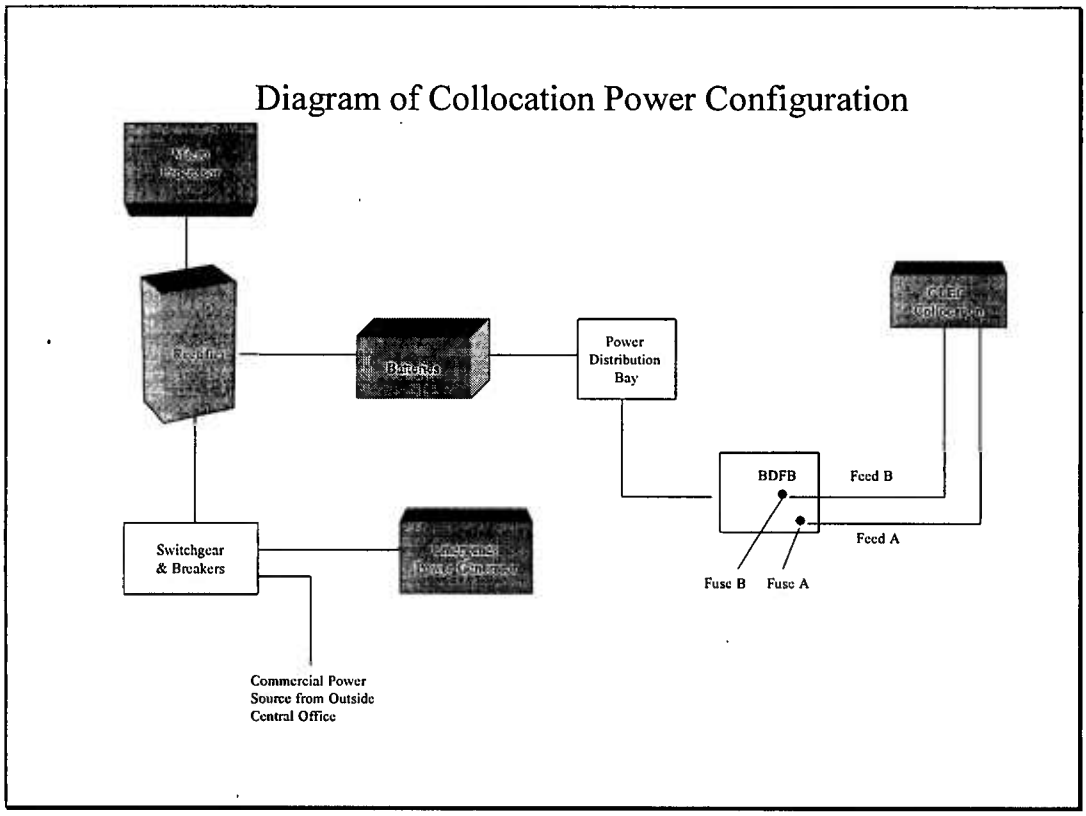
[8] As Petitioners have noted throughout this proceeding, Verizon multiplies the number of drained amps ordered by 1.5 (which includes rounding to the next highest increment of ten amps) and then doubles the result to come up with the number of amps that are charged to the collocator.

assumes that the collocator consumes double the requested number of amps allegedly in order to recover the cost of the redundant power feed. This charging practice is patently unreasonable.

The back-up power feed is not, however, truly redundant. The following is a diagram of a typical power configuration arrangement serving a CLEC collocation site.



The diagram illustrates that the primary feed (labeled "Feed A") and the back-up feed (labeled "Feed B") are redundant only starting at the Battery Distribution Fuse Bay (labeled "BDFB"). There is no redundancy for any of the equipment that appears closer to the power source

(labeled as "Commercial Power Source"), which accounts for the majority of the power costs. In fact, there is back-up power provided via an emergency generator even if the collocator orders only one feed, and Verizon's rates already include the cost of that generator in every feed ordered.

The point of having a back-up feed in such a configuration is (as, notwithstanding its representation to the contrary, Verizon knows full well) merely to ensure the continuous flow of power if a fuse blows at the Battery Distribution Fuse Bay. Plainly, collocators should not pay double the recurring power charges (though they should pay for a second fuse) simply because they have an additional feed travelling from the Battery Distribution Fuse Bay to their collocation arrangement (and consequently make *no* additional use of the other elements in the configuration, such as the power plant distribution bay, the emergency generator, the rectifier, the microprocessor, or the switchgear). For these reasons, Verizon's back-up power charges as created by its tariff interpretation are not based upon the cost of providing the service, as the Act requires. *See* 47 U.S.C. § 252(d)(1)(A).

In sum, everything in this case, including the express language of the Commission's Order, which Verizon undisputedly did not implement, the plain meaning of the tariff words - both past and present words - as measured against Verizon's interpretation of those words, the weakness of Verizon's justification for charging for power that cannot be received or used, and the inconsistency between Verizon's tariff interpretation now as against if cost methodology in the cost case, all demonstrate that Verizon is in violation of the Order's language and its meaning.

4. This Complaint is Properly Before the Commission, Which Has the Power Both to Order Verizon to Amend Its Tariff And To Refund Overcharges.

Verizon's claims that this Complaint and Petition for Declaratory Judgment is procedurally defective are without merit. First, Verizon alleges that Petitioners have no right to bring this complaint because they did not follow the dispute resolution procedures set forth in the tariff and because they inappropriately delayed bringing their complaint for quite some time. Second, Verizon contends that it need not refund over-charges under the Filed Rate Doctrine. Neither of these arguments has merit.

A. Petitioners Did Not Delay Filing Their Complaint and Are Not Bound to Follow the Dispute Resolution Procedures of the Tariff

First, Verizon's claim that Petitioner's unreasonably delayed filing this complaint is both false and irrelevant. It is false because, as Verizon knows full well, Petitioner's did not know how Verizon would interpret its tariff until May, 2000. It was then that Verizon submitted to Petitioners bills backdated 14 months to March, 1999, just the time the new tariff provision became effective. It is irrelevant because the Public Service Act has no limitation on the time period during which parties can complain that a rate is unjust, unreasonable and in violation of law or a Commission Order.

Verizon's attempts to use its tariff mediation provisions to bar this complaint are equally without merit. Petitioner's right to file a complaint with the Commission is a right derived directly from State law 5 PSL, Sections 96, 91 and the Commission's Rules. It cannot be limited or denied by <u>any</u> tariff provision.[9] Hence, if Verizon claims that all customers are prohibited from filing claims that

[9] The origin of this forced mediation provision is itself somewhat mysterious, a mystery increased by the fact that the tariff provisions purport to bind not only carriers but the Commission itself. We are curious when and how the Commission agreed to undertake the various commitments that the tariff provisions apparently bind it to do, and when the Commission gave interested parties notice and an opportunity to comment on rule changes that would delay or deprive injured parties' rights to file complaints under state law.

Verizon's rates are unjust, unreasonable, in violation of Commission orders or otherwise violate state laws, those tariff provisions are void ab initio.

B. Petitioners Are Entitled to A Refund of Over-Charges under the Filed Rate Doctrine

Verizon also asserts that, even if its tariff provision is found to have violated the Commission's Order and to be unjust and unreasonable, Verizon cannot be forced to disgorge its excessive and unlawful profits because Petitioners are barred from obtaining a refund of collocation power rates by the Filed Rate Doctrine.

Verizon contends that "under the 'filed rate doctrine,' the Commission cannot order retroactive changes to Verizon NY's tariff, or order Verizon NY to refund monies to the CLECs." Response, p. 14. Verizon's defense of its unlawfully accumulated revenues is misplaced. The Filed Rate Doctrine does not prevent the Commission from granting CLECs a refund of excessive collocation power charges in this instance. The Filed Rate Doctrine holds that Verizon may charge nothing less or more than the lawfully filed rate. See American Telephone and Telegraph, 514 U.S. at 222("Ignorance or misquotation of [filed] rates is not an excuse for paying or charging either less or more than the rate filed.") (quoting Louisville & Nashville R.

Co. v. Maxwell, 237 U.S. 94, 97 (1915)). If Verizon charges more than the filed rate, the Commission is well within its rights, indeed it is obligated, to order Verizon to refund the overcharge. Here, notwithstanding its efforts to the contrary, Verizon did just that.

As Petitioners have shown already, the Commission ordered Verizon to charge $19.64 for 60 amps or less (and $19.56 for greater than 60 amps) "per amp per month." Verizon claims to have tariffed those rates, but in different words ("per amp fused, per feed") and to different effect. While Verizon certainly *attempted* to tariff different rates than the Commission set, it in fact blundered, and its language "per amp fused" does not support its claimed right to bill at the "fused rate."

As Petitioners noted in their initial complaint, "per amp fused" is not a term of art in this industry. Verizon responded disingenuously to that argument by claiming that all carriers recognized that DC power requires fuses. We concur, but that misses the point. As a measure of usage or of charges, "per amp fused" is unclear and ambiguous. When a CLEC orders 20 amps of power, standard practice calls for the installation of a 30 amp fuse to protect the circuit. In that case, the number

of amps "fused" is 20, while the size of the fuse is 30.[10] Hence, the rate of $19.60 per all 20 "amps fused" (at a 30 amp fuse level) is squarely within the ordinary meaning of Verizon's own language. The same logic and language analysis applies to "per feed." When a CLEC orders 20 amps of power distributed over two feeds, and specifies that the 20 amps be the total drained delivery and that it be delivered randomly over the two feeds, the "amps per feed" equal 20 amps, not 40. Again, both engineering practice and standard English compel this interpretation.

Further evidence of the existence of ambiguities both in the original tariff language and in Verizon's choice of replacement comes from Verizon's own filing. Verizon justifies its altered language as necessary to clear up ambiguities in the "per amp, per month" language. Verizon states: "Verizon NY, however, specified its policy in more detail in its compliance filing because several small carriers were confused by the existing tariff language." (Response, ¶ 11.)

However, it is one of the most fundamental principles of tariff construction that if words in a tariff

[10] Had Verizon wanted to write a tariff to achieve its intended objective here, it would have required carriers to pay at a rate based upon the fuse capacity. "Amps fused," however, simply doesn't mean what Verizon wants it to mean.

are susceptible to two reasonable interpretations, they are ambiguous. See Time Warner Entertainment Co. v. Brustowsky, 221 A.D.2d 268 (1995); Around the Clock Delicatessen, Inc. v. Larkin, 232 A.D.2d 514, 515 (1996). Ambiguities in tariff language are always interpreted against the "interpretation" of the drafter. Halprin, Temple, Goodman & Sugrue v. MCI, 13 FCC Rcd 22568 (1998), aff'd, 14 FCC Rcd 21092, ¶ 19, n. 50 (1999) ("it is well established that any ambiguity in a tariff is interpreted against the party filing the tariff") (citing The Associated Press Request for Declaratory Ruling, 72 FCC 2d 760, 764-65) (quoting Commodity News Services, Inc. v. Western Union, 29 FCC 1208, 1213, aff'd, 29 FCC 1205 (1960)); see Black Radio Network, Inc. v. Public Service Commission, 253 A.D.2d 22 (1999). Since it was Verizon that decided to change the words "per amp per month" to "per amp fused, per feed," to argue that the former phrase was ambiguous but meant all the power a CLEC was able to draw, and that the new language means the same thing as the old language despite its different words, Verizon as the drafter must yield its interpretation to that of Petitioners if the words will support either interpretation. In this case, the Petitioner's interpretation may not be what Verizon intended, but it is

what the words more clearly say than what Verizon tries to make them say. This is all the more the case here, where the interpretation that Petitioners support is the interpretation that the Commission intended Verizon to implement it the Phase 3 Order. It is, of course, Verizon's own argument that "per amp fused" means the same as "per amp." We agree that this is true, but the controlling meaning is "per amp." Hence, interpreting the tariff in a manner that is consistent with the tariff's words, that is consistent with the Commission's intent and that forces Verizon to disgorge unlawfully obtained revenues is both permissible and necessary. See Black Radio Network ("there can be little question of the PSC's authority to interpret a tariff in such a way as to prevent egregious abuses").

Verizon's interpretation of the tariff has resulted in an overcharge, as compared to the filed rate when read properly. Hence, Verizon can and should be directed to refund to CLECs, pursuant to the Filed Rate Doctrine, the difference between what it charged under its erroneous and unlawful rate interpretation and what it should have charged had it implemented the Commission's Order as written.

For the reasons set forth in Petitioners' Complaint and Petition for Declaratory Judgment, the Commission should (1) declare that Verizon has failed to comply with the Phase 3 Order; (2) direct Verizon to modify its tariff to comport with the language of Appendix C and to apply that language to charge for amps ordered on a going forward basis; and (3) direct Verizon to work with all requesting CLECs to recalculate charges dating from March, 1999 to the present and to refund to each such CLEC the difference between the billed rates and the charges that would apply based upon the power ordered.

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