

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 16, 2004

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 02-C-1617 - In the Matter of a Billing Dispute and
Complaint by Community Network Services Against
Verizon New York Inc., filed in C 26358.

ORDER RESOLVING BILLING DISPUTE

(Issued and Effective March 18, 2004)

BY THE COMMISSION:

INTRODUCTION

Brief History

In May 1994, Community Network Services (CNS) entered into a customer-specific pricing contract with Bell Atlantic-New York for Centrex service.¹ From the start, the contract and the customer's business dealings with Verizon did not go well. In February 1996, the reseller and the utility company agreed to settle various unpaid bills and service difficulties on their own without involving the Commission. However, in 1997, CNS realized that it would not be able to obtain the telephone facilities it wanted from Verizon. Also, by then, Verizon was unwilling to serve CNS without receiving full payment for the facilities it was providing. Consequently, Verizon embargoed CNS and the customer complained to the Commission.

¹ Bell Atlantic-New York is now known as Verizon New York Inc. The telephone utility company is referred to as Verizon throughout this order.

The Office of Consumer Services (OCS) sought to resolve this billing dispute by rendering initial decisions in mid-1998. On October 14, 1998, CNS obtained an informal hearing and the hearing officer upheld the mid-1998 decisions.

Next, CNS appealed the OCS results to the Commission, which rendered its determination in May 2002.² On August 30, 2002, CNS filed an Article 78 petition challenging the limits on the Commission's jurisdiction, and the Commission's decision remanding portions of the bill dispute for additional information. At first, the remanded proceedings were to be conducted by OCS; however, in November 2002, the Commission referred them to the Office of Hearings and Alternative Dispute Resolution for an evidentiary hearing.

In February 2003, CNS and Verizon filed attested initial pleadings stating the full scope of the matters on remand that they would have the Commission consider. CNS presented 10 claims for adjudication, all of which are addressed below. Also, in February 2003, the parties responded to each other's initial pleading.

Thereafter, CNS and Verizon conducted discovery and prefiled testimony in October and November 2003, respectively.³ Hearings were held on three consecutive days, beginning December 15, 2003. The parties filed post-hearing briefs in January 2004 and reply briefs in February 2004.

Amounts in Dispute

At the Administrative Law Judge's request, Verizon provided a statement of the amounts in dispute in this case and the intrastate portion that is subject to the Commission's jurisdiction.⁴ The total outstanding amount, excluding any interest, that Verizon claims and CNS disputes is \$566,634. Of

² Case 00-C-1248, Appeal by CNS of the OCS Informal Decision, Commission Determination (issued May 2, 2002).

³ The parties would have filed their testimony earlier had the threat of a labor strike not affected the dates for the filings.

⁴ Exhibit 5, Part 1.

this amount, \$120,648 is for interstate facilities provided pursuant to the Federal Communications Commission (FCC) tariff. Thus, \$445,986 of the disputed amount is before the Commission.

Nature of Proceedings

The Office of Consumer Services routinely handles a substantial volume of consumer billing dispute and complaint cases. Sometimes such cases reach the Commission on appeal but, only in the rarest of circumstances, are any set for formal evidentiary hearings. Such hearings were ordered in this case because, as a reseller of telecommunications services, CNS had experienced sufficient business-related service installation and operational problems to warrant the review it was afforded in this case. The facts established on the record here demonstrate that CNS's circumstances pertain only to the wholesale telecommunications market within which it operated. Our findings and rulings on this record have no intended application to any other types of utility services (electric, gas, and water) or to any retail customer service offerings.

THE ISSUES

Claims 1 and 10 - Automatic Route Selection
and Port Access Charges

As noted above, CNS entered into a customer-specific pricing contract for Centrex service in May 1994. The contract required it to purchase 2,475 Intellipath II lines for 38 months for which it agreed to pay \$23 per line. In May 2002, the Commission determined that Verizon had failed to provide the automatic route selection feature called for by the service agreement. Accordingly, it found that CNS was entitled to a \$1.50 per line monthly credit for this feature. In compliance with the Commission's decision, Verizon credited CNS \$90,685, including interest.

CNS, however, now claims that the \$1.50 credit should have been greater. It believes the monthly credit should be either \$4.94 a line using a "bare-bones comparison" or \$7.33 a

line using an "option-subtraction" method.⁵ CNS arrived at its \$4.94 figure by subtracting various tariff-stated charges from the \$23 line charge that it agreed to pay. The "bare-bones" charge that CNS shows for Centrex service without automatic route selection is \$18.36.⁶

Verizon criticizes this approach for using tariff prices that were not available to customers in May 1994. In fact, Verizon maintains that the tariff prices CNS used were not available after 1989, when their use was grandfathered. Further, had such prices applied in 1994, Verizon asserts that CNS could not receive them because it did not satisfy the line commitments to qualify for any such rates.

CNS's "option-subtraction" method purports to eliminate from the \$23 line charge items that are comparable to the \$1.50 the Commission identified. By extending the Commission's approach, CNS claims credits for a 42-cent "monthly line charge" and a \$5.41 per line "port access charge."

In response to the "option-subtraction approach," Verizon points out that CNS was provided a 42¢ monthly credit for 50 lines when OCS processed this case. As to the "port access charge," Verizon claims that no such access is covered by the \$23 line charge or by the contract that CNS executed. Had such a charge been included in the contract price, Verizon insists that the Commission could not address it because access to the T-1 lines is an interstate matter within the FCC's jurisdiction.

Verizon also claims that the Commission's remand order does not permit CNS to present any new theories of liability like the one presented here for a port access charge refund. Further, it claims that the bulk of any such refund would be

⁵ Both approaches require a downward adjustment to account for the \$1.50 credit that Verizon has already provided at the Commission's direction.

⁶ \$10.95 per Centrex line for the amount of lines and the duration of CNS's commitment; \$5.80 FCC line charge; and, a \$1.61 access fee per CNS's February 11, 2003 Initial Statement. At various places in the parties' submissions the sum of these items has been stated as being \$18.06.

time barred by the six-year limit that the Commission routinely employs in cases like this one.

The Commission finds that CNS has not adequately demonstrated that the bill credits Verizon was ordered to provide by the May 2, 2002 Determination in Case 00-C-1248 were inadequate. The credits fully addressed the utility company's failure to provide to the reseller the automatic route selection feature on the Centrex lines it had ordered. Given the facts presented here and in Case 00-C-1248, we continue to find that the best means available to determine the portion of the \$23 monthly charge related to the automatic route selection feature has been to use the prices that Verizon quoted CNS for Centrex service in 1994 with and without "bypass."⁷ No other method has been adequately substantiated to support its use. Even though CNS has tried, there is no other way to establish this portion of the \$23 charge to which the parties agreed.

With respect to the so-called "bare-bones" Centrex charge that CNS has presented, the Commission finds that this approach suffers a serious and fatal flaw. It assumes that any amounts that cannot be attributed to a specific feature or service that CNS ordered should be assumed to relate either to automatic route selection or Verizon-facility bypass. However, CNS has not presented any basis for us to believe that the amount produced by this approach is in fact related to features that Verizon failed to provide to it. It is just as conceivable that any unaccounted for sum could pertain to items that are not the subject of the dispute presented here. Thus, the logic for the "bare-bones" approach is not compelling and were we to use this approach it could produce erroneous results.

Moreover, it is not possible, on the record presented here, to quantify the itemized amounts that should be used to calculate a "bare-bones" charge as CNS has endeavored to do. The tariff figures for 1989 that CNS used are not concurrent with the inception of the 1994 contract and their validity for

⁷ Case 00-C-1248, supra, Commission Determination at pp. 6-8.

the purposes to which CNS has put them is open to substantial doubt.

Turning to CNS's "option-subtraction" alternative, this calculation method follows the Commission's approach by seeking to identify specific features Verizon failed to provide and credit amounts the customer should receive for the omission. However, the Commission finds that CNS has not demonstrated a sufficient basis on the record for us to order any credits for a 42¢ monthly line charge or a \$5.41 port access charge. From our knowledge, as public utility regulators, of the Centrex service tariff structure and the authority Verizon has to enter into customer-specific contracts for this service offering, we find that the \$1.50 per line monthly credit that Verizon has provided CNS was sufficient to encompass any such monthly line charge and there is no adequate basis presented here to credit CNS an additional 42¢ per line. Similarly, from our knowledge of the applicable tariff and the scope of Verizon's authority to enter into customer-specific Centrex contracts, the \$1.50 per line monthly credit was sufficient to cover all local access charge components that are within our jurisdiction.⁸ Thus, we find no basis to require Verizon to provide CNS any bill credits for port access charges.

Finally, with respect to CNS's tenth claim in this case, that it has paid Verizon twice for port access, we do not find sufficient evidence of record to substantiate this charge or any basis to provide CNS any bill credits on this claim.

Claim 2 - Billing Record and Account Information Tapes

CNS not only contracted with Verizon for Centrex service, it also ordered data tapes that provided it calling details for the telephone lines it used and billing records for its accounts. Because it did not receive the automatic route selection feature it ordered, CNS contends that it should not

⁸ Consistent with the May 2, 2002 Commission Determination in Case 00-C-1248, we do not reach or attempt to resolve any issue here concerning the interstate charges that Verizon billed CNS pursuant to the FCC's tariffs.

have to pay for any data tapes that did not provide it useful information, which it asserts with respect to the tapes it received during two periods. CNS seeks a bill credit of \$37,614 for tapes provided before December 1994, and \$18,700 for tapes provided between October 1996 and October 1997.

For both these periods, Verizon states that CNS ordered, received and could use the tapes. Verizon claims that CNS could have stopped receiving the tapes at any time without incurring cancellation charges. However, the utility company states that it received no such requests for the periods listed above.

Verizon also insists that the tapes provided to CNS contained information that was useful to the customer beyond the context of the automatic route selection (ARS) feature. In addition, Verizon points to the requirements of the filed rate doctrine and insists that CNS should pay for the tapes that it received.

If CNS's assertion were correct--that the tapes could only have been used in conjunction with the automatic route selection feature it ordered but did not receive--its claim for these bill credits might be persuasive. However, the points the parties have presented do not support the provision of the bill credits that CNS seeks.

With respect to the period from October 1996 to October 1997, it is reasonable to infer that the customer obtained the tapes and likely used them for multiple purposes and not exclusively for ARS-related purposes.⁹ This period is long after the inception of the May 1994 customer-specific pricing contract and late in its term. This leads us to conclude that the tapes for the 1996-97 period were ordered and

⁹ Verizon's tariff lists the telephone call details that a customer such as CNS receives on the tapes it obtains. In addition to the Centrex line number in use, the records include the called telephone number; the date, time and duration of the call; the type of facility used for routing the call; and, the toll charges for directly dialed toll calls. See, Verizon New York Inc. tariff, PSC NY No. 1 (Communications) Section 4, Original Page 128.

used for purposes other than automatic route selection. This being the case, the Commission finds that CNS is not entitled to any bill credits for this period.

Similarly, with respect to the tapes CNS received before December 1994, it is not clear that the tapes CNS received were only sought by it exclusively for ARS-related purposes. Therefore, we do not find that a basis exists to require Verizon to provide the customer any billing credits for this period.

Claim 3 - Network Interface Charges

At the start of this proceeding, CNS sought refunds for the network interface charges it had incurred. However, by the time of the hearing in December 2003, CNS had decided to drop this claim.¹⁰ No longer is CNS seeking any bill credits for the amounts incurred to interconnect its customers' premises to the telephone network. Thus, no Commission resolution of this matter is required.

Claims 4 and 9 - Installation and Recurring Charges for 64 BRI ISDN Lines

In November 1996, Verizon began to bill CNS for 64 BRI ISDN lines.¹¹ According to Verizon, the 64 lines originally provided plain, old telephone (POTS) service to various locations in Manhattan. However, at CNS's request, they were provisioned for customer use in connection with Centrex service. There are also indications that the 64 lines were intended by CNS to be used to provide video telecommunications but it was never able to use them for this purpose.¹² Billings for the 64 lines continued to 1998.

¹⁰ Tr. 382.

¹¹ Integrated Services Digital Network (ISDN) lines are digital telephone lines that can carry voice, data and video transmissions. The 64 ISDN lines that CNS ordered provided it a Basic Rate Interface (BRI).

¹² Tr. 192.

CNS concedes that it ordered the 64 lines; however, it asserts that they were never used. CNS was leery of them from the start and it asked Verizon to install a "test line" to monitor their operation. Verizon never provided any such line nor did it ever understand why such a line was needed.

The utility company points out that there is no dispute that the 64 lines were installed and provisioned. It also claims that they worked and were functional. As to CNS's request for a test line, Verizon notes that the request came well after CNS ordered the 64 lines. Verizon also observes that it was not the company's standard practice, at the time, to provide any such facilities. Thus, the utility company believes it is entitled to collect the tariff-stated charges for the 64 lines for the entire period they were available for CNS to use. Verizon asserts that CNS could have cancelled the lines at any time if it wanted to avoid the charges but it did not do so. Verizon also notes that CNS paid for the 64 lines from November 1996 to February 1997 and only stopped paying for them thereafter.

According to CNS, the 64 lines were to be part of a "new network" that Verizon began to install when it determined that the utility company could not provide it the automatic route selection feature it wanted. Inasmuch as the "new network" was never perfected or completed, CNS believes that it should neither pay the installation or the recurring charges for any of the components Verizon provided. From CNS's perspective, the provision of a working "test line" was necessary for it to accept delivery.

Verizon denies that it ever agreed to provide CNS a "new network." It points out that CNS did not enter into any written contract with the utility company for any such thing. Verizon also considers the CNS billing dispute on the 64 lines to be tantamount to a claim for damages for which the Commission has no jurisdiction.

As to CNS's evidence establishing that it never put the 64 lines to any use, Verizon believes it is irrelevant because CNS could have had the 64 lines disconnected. While

Verizon did not present any evidence to controvert CNS's position that the 64 BRI ISDN lines were never used, it nonetheless questions the veracity of CNS's pleadings and testimony. Having claimed to have converted the 64 lines from POTS to Centrex, Verizon speculates that the end users could have continued to place the kinds of telephone calls they were making before the lines were converted. In these circumstances, Verizon believes that the tariff charges apply and CNS should not receive any free service or reduced price.

The Commission finds that CNS ordered the 64 BRI ISDN lines and, having done so, is responsible for the installation charges that it paid Verizon. Turning to the recurring charges for the 64 lines during the period that CNS made payments for the lines, it appears that the payments were consistent with the parties' mutual understanding and expectations at the time.

We recognize that the record provides no clear indications as to the parties' full understanding and expectations concerning the 64 BRI ISDN lines. For example, there is no written contract, agreement or arrangement between them for the provision of these lines or a "new network" from which we can begin to glean the true nature of the parties' transactions. Nonetheless, CNS's payments for the 64 lines evidences its performance in return for the efforts Verizon was making to deliver the 64 lines to satisfy the customer's requirements. Accordingly, we find that CNS's actual payments made for the 64 lines should not be returned to it.

However, the record indicates that CNS decided when no "test line" or "new network" could be provided to it to terminate the 64 ISDN lines that it never used. While it did not present Verizon with any stop service order, it changed its business plans sufficiently to evidence its intention to cancel the facilities. Moreover, Verizon became aware that the ISDN lines CNS had ordered were experiencing problems and, ultimately, could not be put to use by CNS.¹³ Absent any evidence that the lines were used by CNS for its business

¹³ Tr. 481.

purposes, the Commission finds that CNS is not responsible for any bills outstanding for the 64 ISDN lines subsequent to the last bill actually paid.

Claims 5 and 6 - 12 PRI ISDN Circuits and Post-Embargo Charges

In addition to ordering 64 BRI ISDN lines, CNS also ordered 12 PRI ISDN circuits for which Verizon began to charge in February 1997.¹⁴ CNS states that it paid about \$41,115 of the total amount billed for these circuits. According to Verizon, CNS still owes it \$191,305 for the 12 circuits.

On November 25, 1997, Verizon embargoed CNS's telephone service, including the use of the 12 circuits, due to the customer's failure to remain current on its bills. While CNS's existing business and traffic was allowed to continue, it was unable to place any new orders or to initiate any new facilities or additional services.

According to CNS, the 64 BRI ISDN lines it ordered were to connect to the 12 circuits but CNS was never able to confirm that the lines and circuits could transport its traffic because Verizon did not provide it the "test line" it wanted. CNS also claims that it discovered, during the course of this proceeding, that the 12 circuits were never set up to route CNS's traffic as it intended. CNS states that it recently learned that there were no completed connection facilities to the 12 circuits. For these reasons, it contends that the bills for the 12 circuits should be dropped and the payments made should be returned.

Verizon claims that the Commission should dismiss CNS's claims concerning the 12 circuits for the same reasons it should deny the claims concerning the 64 BRI lines. Verizon states that it provided functioning lines as requested and CNS should pay the tariff-stated charges for the entire time the

¹⁴ ISDN Primary Rate Interface (PRI) circuits are T-1 lines that are used to provide high-speed digital connections between central office facilities and customer premises equipment. In this case, they were ordered in conjunction with the 64 BRI ISDN lines discussed above.

facilities were available for the customer to use. As with the 64 BRI lines, Verizon denies that a "test line" was ever needed for CNS to use these circuits and the utility company states that it has no record of CNS having ordered a "new network." In these circumstances, Verizon believes that CNS should not receive any refunds for the 12 circuits whether or not CNS ever put them to use. Having ordered the lines, Verizon claims that the tariff charges fully pertain until the customer orders them to be disconnected.

As noted above with respect to the 64 BRI ISDN lines, neither CNS nor Verizon have provided on the record a cogent explanation of the parties' comprehensive business dealings from the period that CNS first sought Centrex services to the time of its requests for various ISDN lines from Verizon. Absent a full explanation and a complete understanding of the parties' business dealings, the Commission's consideration of these matters is limited to the facts that have been adduced.

The Commission finds that CNS ordered the 12 PRI ISDN circuits and is thus responsible for their installation. We also find that any actual, recurring payments CNS made to Verizon for the 12 circuits would have been consistent with the business relationship that the parties established at the time of their dealings and, accordingly, there is no basis for Verizon to return to CNS any such payments. As to the amounts that Verizon billed CNS for the 12 circuits that CNS has refused to pay, the Commission finds that CNS changed its business plans sufficiently when neither a "test line" or a "new network" could be installed to evidence its intention to cancel the facilities. And, as noted above, Verizon became sufficiently aware of the problems associated with these facilities to know that they could not be put to their intended use by CNS. Consequently, CNS is not responsible to Verizon for any outstanding sums related to the 12 PRI ISDN circuits other than the amounts it has already paid.

By similar reasoning, the Commission finds that the CNS is not responsible to pay Verizon any charges for either the 64 BRI ISDN lines or the 12 PRI ISDN circuits that pertain to

the post-embargo period during which CNS was not permitted to put the facilities to any new use or purpose.

Claim 7 - The 1996 Settlement

Before they brought their billing dispute and complaints to the Commission, the parties resolved their earlier difficulties by themselves. In 1996, CNS agreed to pay half its outstanding bill for the Centrex lines it had ordered. According to Verizon, in February 1996, the total outstanding amount for Centrex lines was \$144,000.¹⁵ Verizon used account number 212 W34-5042683 to record CNS's payments applied to the \$77,000 that it agreed to pay.¹⁶ In its final bill statement, Verizon shows that CNS paid all but \$3,553 related to this account.¹⁷

In its initial pleading, dated February 11, 2003, CNS requests that Verizon return to it all payments made for Centrex lines that were not installed. By its calculation, CNS believes that it paid up to \$189,000 for such Centrex lines.¹⁸ According to CNS, this amount should be returned because Verizon did not live up to its contract requirements. In addition to claiming that the company did not install Centrex lines timely, CNS claims that POTS line conversions to Centrex service were also a major problem.¹⁹

In response, Verizon asserts that CNS should neither be allowed to avoid the requirements of the 1994 customer-specific Centrex contract or the terms of the parties' 1996 settlement. Verizon points out that the contract expressly allows it to charge CNS for Centrex line commitments. Verizon also denies that it did anything to frustrate CNS's line orders.

¹⁵ Verizon's Initial Pleading (dated February 11, 2003) p. 15.

¹⁶ Tr. 292-93. This account was also used to record outstanding Carrier Access Billing Service (CABS) amounts also due to Verizon from CNS.

¹⁷ Exhibit 5, Part 1.

¹⁸ Tr. 208.

¹⁹ Tr. 209.

Verizon asserts that there is no evidence demonstrating that it did not complete CNS line orders in a timely and successful manner.

Verizon also questions whether the CNS payments made to account 212 W34-5042683 were for Centrex lines. According to it, CNS should have provided bill statements to support its request that the payments be returned. In their absence, Verizon asserts that the payments to this account may just as well have been made for interstate facilities provided to CNS pursuant to an FCC tariff. In support of this theory, Verizon points to assertions CNS made in Case 00-C-1248 claiming that its payments to this account were for T-1 lines.

The Commission finds that the parties' letter dated March 7, 1996, indicates that account 212 W34-5042683 was used to record amounts overdue for Centrex lines.²⁰ It also establishes that the portion of the account attributable to Centrex lines was \$77,000. It also appears possible that the account was used for overdue CABS charges over which the Commission has no jurisdiction.

In the facts and circumstances known in this case, we find that the parties made earnest efforts early in 1996 to resolve their service difficulties. Their efforts led to Verizon's elimination of the entire amount of CABS charges and half the outstanding charges for Centrex lines pursuant to the customer-specific contract that CNS executed. On its face, this result appears to be a reasonable accord of the difficulties encountered at the time and we find no basis to disturb the results of the settlement that the parties executed other than for the ARS credits that we have required Verizon to make. Accordingly, CNS's request for bill credits and refunds pursuant to its seventh claim are denied.

Consistent with our decision denying CNS's seventh claim, we also find no basis for Verizon to have included in its final statement of billed amounts (Exhibit 5, Part 1) any debit adjustments attributable to the 1996 settlement that it executed

²⁰ Exhibits 4 (JK-7-B) and 5 (Part 4).

with CNS. Fairness requires that neither party be permitted to walk away from their good faith efforts to resolve the difficulties encountered with the provision of the Centrex service and other facilities. Absent any allegation and proof of fraudulent business practices, we find that the terms of the accord reached in 1996 should be upheld to the extent stated above.²¹ Consequently, Verizon should not have included in the final bill amounts either its \$112,008 CABS debit adjustment for Account 212 M56-0436736 or the \$82,690 Centrex debit adjustment shown for Account 212 W34-5042683. Had the final bill amounts been properly stated, the grand total shown should have only been \$371,936.²²

Claim 8 - Lines Not Disconnected Upon Request

CNS alleges that, at various times, Verizon did not disconnect lines as requested and line charges continued longer than they should have. At the December 2003 hearing, CNS continued to claim that Verizon improperly charged it for lines that should have been disconnected and it quantified the amount of such charges to be about \$43,370.²³

Throughout the remanded proceedings, Verizon has asserted that this matter was properly addressed in the Case 00-C-1248 informal proceedings that preceded the remand and that CNS has not presented any new or additional information to support its claim.²⁴

In its post-hearing brief, CNS has limited its claim to 39 disconnect requests made on four dates: May 10, 1994 (2 lines), July 8, 1994 (30 lines), October 31, 1995 (4 lines),

²¹ See, Cases 93-C-0636 and 94-C-0158, Appeal by Supertech, et al. of an Informal Decision in Favor of the New York Telephone Company, Commission Determination (issued August 28, 1996) pp. 20-21.

²² PSC Jurisdiction \$363,296; FCC Jurisdiction \$8,640.

²³ Tr. 221.

²⁴ Tr. 295 and 296.

and January 1, 1996 (3 lines).²⁵ However, with respect to these lines, CNS has not provided any new or detailed information for the Commission to consider. Instead, CNS has merely stated a general unwillingness to accept the determinations made in Case 00-C-1248. For this reason, CNS's claim concerning line disconnections is denied.

The Commission orders:

1. The Community Network Services billing dispute and complaint matters remanded for additional information by the Commission's May 2, 2002 Determination in Case 00-C-1248 are resolved as stated in the body of this order.

2. This case is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

²⁵ On brief, CNS has dropped its claims concerning July 25, 1994 (6 lines) and August 30, 1995 (2 lines) and has thus reduced the amount of its claim from \$43,370 to \$36,194.