DOCKET NO. 09-049-37

ATTACHMENT TO MOTION FOR SUMMARY DETERMINATION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration	))))))	WC Docket No. 02-359

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 2003 **Released:** December 12, 2003

By the Chief, Wireline Competition Bureau:

Para.

cooperative testing program for analog service that shall perform the same functions as its cooperative testing program for digital loops, or (2) provide digital loops and cooperative testing for all Cavalier new loop installations at the identical recurring and non-recurring rates that apply to its provision of analog loops. If Verizon selects the foregoing option (2), Verizon may not impose additional or different charges for the provision of digital loops than for the provision of analog loops. Verizon may not charge Cavalier for its cooperative testing programs.

197. Insert at beginning of Exhibit A, Part VI. Unbundled Loops:

Consistent with Section 11.14, Verizon must either (1) provide a cooperative testing program for analog loops or (2) provide digital loops and cooperative testing for all Cavalier new loop installations at the identical recurring and non-recurring rates that apply to its provision of analog loops. If Verizon selects the foregoing option (2), Verizon may not impose additional or different charges for the provision of digital loops than for the provision of analog loops. Verizon may not charge Cavalier for its cooperative testing programs.

d. Winbacks

(i) Positions of the Parties

198. When Verizon delivers a loop to Cavalier in Virginia, it charges Cavalier $13.49 for installing the new loop, which is comprised of a $10.81 Service Order Connect charge and a $2.68 Installation charge.[645] Cavalier argues that when it turns a customer over to Verizon, Verizon should compensate it for performing corresponding and comparable "winback" functions to those for which Verizon charges it under the $13.49 charge. Cavalier bases its proposed winback charge upon Verizon's $13.49 loop installation charge, which, it argues, is a "reasonable and measured proposal."[646]

199. Cavalier argues that when it turns a customer over to Verizon, it performs almost the same services for Verizon as when Verizon turns a customer over to it, but it receives no compensation for these services.[647] Cavalier points out that, under cross-examination, the Verizon witness could not confirm what individual functions were included in the Service Order

[645] Verizon Reply Brief at 70; *see also* Verizon Answer/Response, Ex. C, Ex. A at Part VI, Unbundled Loops, 2-Wire Analog Loops (POTS Loops). We note that there is some discrepancy as to whether Verizon's installation charge is $2.88 or $2.68. $2.68 appears to be the correct number. *See* Verizon Answer/Response, Ex. C, Ex. A at Part VI; Tr. at 617-18.

[646] Cavalier Brief at 77 (citing Cavalier Direct Testimony of Clift at 23; Tr. at 612-13 (additional citations omitted)).

[647] *Id.* at 75.

Connect and Installation charges and was unfamiliar with any cost study that supported her assertion that Verizon would perform these functions free of charge.[648] Cavalier also notes that the Verizon witness did confirm that Cavalier also pays a disconnect charge when a Cavalier customer served via a Verizon-provided loop leaves Cavalier for Verizon.[649]

200. With respect to winbacks, Verizon contends that, when a customer moves from Cavalier to Verizon, Cavalier does not provide Verizon with the facility for the customer's line; instead, this is a Verizon facility.[650] Thus, when Verizon assesses service order processing and installation charges on Cavalier, it is providing Cavalier with a new UNE loop facility.[651] But, Verizon argues, it makes no sense to allow Cavalier to charge Verizon for what the latter characterizes as a "UNE installation charge," which is what Cavalier characterizes a "winback charge."[652] Verizon admits that both Parties perform "virtually the same functions" when either carrier moves a customer to the other.[653] Nevertheless, Verizon denies that it charges Cavalier for any of these functions.[654] Instead, Verizon contends, the $13.49 charge is for installation of a UNE loop, which, it asserts, is a service that Cavalier does not provide to Verizon.[655]

201. Moreover, Verizon argues, the "winback" services for which Cavalier proposes to charge Verizon, such as deleting switch translations, porting a number, and discontinuing customer billing are retail functions properly charged to an end-user.[656] Verizon says it does not charge Cavalier for these retail functions.[657] Verizon claims that Cavalier would have to perform

648 *Id.* at 77 (citing Tr. at 642-43).

649 Verizon charges Cavalier $5.98 for disconnecting the customer. This is made up of a $4.91 Service Order Disconnect charge and a $1.07 Installation Disconnect charge. Verizon Answer/Response, Ex. C, Ex. A at Part VI; *see also* Tr. at 597-98.

650 Verizon Reply Brief at 70.

651 Verizon Brief at 74. Verizon explains that the associated nonrecurring charge is intended to cover its one-time costs for provisioning the loop, such as dispatching a technician to rearrange facilities in order to make a loop available to Cavalier's customer, or to cross-connect the loop to Cavalier's collocation arrangement. *Id.*

652 *See* Verizon Reply Brief at 70.

653 *Id.* at 70.

654 *Id.* at 70 (citing Cavalier Brief at 76; Cavalier Direct Testimony of Ferrio at 3).

655 Verizon Brief at 74-75; Verizon Reply Brief at 70 (citing Cavalier Direct Testimony of Ferrio at 3).

656 Verizon Reply Brief at 70.

657 *Id.* at 72. In fact, Verizon denies charging Cavalier for any of the following functions, which Cavalier asserts are performed during a "winback": (1) Initiate Service Order; (2) Provide CSR upon request; (3) Service Order Confirmation; (4) Delete Switch Translations; (5) Install intercept as applicable; (6) Jump wire from Frame to Collo; (7) Update SOA; (8) Coordinate LNP; (9) Test/Trouble Shoot; (9) Expedite. Verizon Brief at 74 (citing Verizon Rebuttal Testimony of Albert Panel at 23).

these functions if its customer switched to a third carrier or discontinued its telephone service altogether.[658]

202. Further, Verizon contends, Cavalier "plucks" the $13.49 charge from Verizon's pricing schedule and attempts to apply it to Verizon but produces no evidence that its costs are the same as Verizon's; Verizon argues that the costs are not the same.[659] Verizon also attacks Cavalier's belated argument that the Verizon disconnect charge is a winback charge.[660] Verizon asserts that the disconnect charge was approved by the Virginia Commission to compensate Verizon for disconnecting a loop; it is not a winback charge.[661] Verizon assesses a disconnect charge whenever Cavalier stops providing service to a customer over a loop, not just when Cavalier returns a customer to Verizon.[662] Since Cavalier does not provide UNE loops to Verizon, it obviously does not disconnect them, so no such charge is appropriate. Moreover, Verizon argues, the $13.49 charge that Cavalier seeks to recover for winbacks is based upon Verizon's charge for installation of a UNE, not its disconnection, so the Bureau should not rely upon the disconnect charge.[663] Finally, Verizon also contends that allowing Cavalier to recover a "winback" charge from Verizon would be unduly discriminatory because no other carrier in Virginia compensates Cavalier for such a processing charge.[664] Accordingly, should Cavalier wish to recover this kind of a charge, it should be contained in a tariff applicable to all similarly situated carriers.

(ii) Discussion

203. We will permit Cavalier to impose a winback charge on Verizon for the tasks it performs when it migrates a customer to Verizon. Cavalier argues that Verizon's $10.81 Service Order Connect and $2.68 Installation charges covered tasks performed by Verizon that correspond to winback functions Cavalier performs for Verizon when a Cavalier customer served by UNE loops migrates to Verizon.[665] In rebuttal, Verizon's witness, who is a Senior Product Manager for xDSL Products and Line Sharing, testified that Verizon "does not charge Cavalier for any of" the activities specified by Cavalier, specifically initiating a service order, provisioning

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658 Verizon Reply Brief at 70-72.

659 Verizon Brief at 73.

660 *Id.* at 75; Verizon Reply Brief at 71 (citing Tr. at 683; Cavalier Brief at 77).

661 Verizon Brief at 75; Verizon Reply Brief at 71 (citing *Bell Atlantic-Virginia, Inc.*, Case No. PUC970005, Order, Ex Parte: To determine prices Bell Atlantic-Virginia, Inc. is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996 and applicable State law, at 24 (Va. Comm'n Apr. 15, 1999)).

662 Verizon Brief at 75; Verizon Reply Brief at 71.

663 *See* Verizon Brief at 75 (citing Cavalier Direct Testimony of Ferrio at 3).

664 *Id.* at 75-76 (citing Tr. at 636).

665 *See* Cavalier Direct Testimony of Ferrio at 2-3.

the Customer Service Record (CSR), confirming the service order, deleting switch translations, installing an intercept, installing a jump wire from the frame to the collocation, updating the Service Order Administration (SOA) database, testing/trouble shooting, or expediting a service order.[666] Under cross-examination by Cavalier's counsel and Commission staff, however, the witness admitted that Verizon does perform many of these functions although she was not familiar with all of them.[667] She also admitted that she did not know whether costs associated with particular functions were recovered through the Service Order Connect and Installation charges,[668] or whether some costs "were buried in OSS-type costs or not."[669] Although the Verizon witness testified originally that Verizon did not charge for "winbacks" it became clear under examination that she meant that Verizon does not include a service called "winbacks" in the charges it lists on its proposed Schedule A, rather than meaning that Verizon does not recover the costs of some or all of the services identified by Cavalier under its proposed winback charge.[670]

204. Verizon argues that it is inappropriate to allow Cavalier to impose a winback charge on Verizon because, when Cavalier turns the loop over to Verizon, it does not provide the same functionality as Verizon does when it performs the loop installation provisioning tasks that are the basis for the Service Order Connect and Installation charges. We disagree. The Verizon witness testified that Cavalier is responsible for effecting certain key functions for the benefit of Verizon in the course of transferring customers from Cavalier to Verizon.[671] In particular, when Verizon submits a local service request to Cavalier to move a customer Cavalier serves over a UNE loop to Verizon, Cavalier is required to initiate a loop disconnect with Verizon.[672] That is, Cavalier is required to order and coordinate a date for the customer's loop to be switched from Cavalier to Verizon.[673] Further, Cavalier is required to pay Verizon to effect the switch because, although Verizon performs the actual disconnect task, it is Cavalier's responsibility to arrange for

[666] Verizon Direct Testimony of Albert Panel at 2; Verizon Rebuttal Testimony of Albert Panel at 23 (citing Cavalier Direct Testimony of Ferrio at 3). Verizon's witness also stated that Verizon does not charge Cavalier to update the E911 database or to port the customer's telephone number to Verizon, which are two other activities performed in the winback process. *See* Verizon Direct Testimony of Albert Panel at 30; *see also* Verizon Rebuttal Testimony of Albert Panel at 22.

[667] *See* Tr. at 590-595.

[668] *See id.* at 607-08.

[669] *Id.* at 593-94.

[670] *Compare* Tr. at 640 *with id.* at 592-95, 607-08. We also note that although the Verizon witness originally testified that Verizon does not impose a disconnect charge, she later modified that testimony to indicate that Verizon does impose a charge for disconnection of an unbundled loop. *See id.* at 597-98, 606-07.

[671] Tr. at 640-42.

[672] *Id.* at 596-98, 606-07, 640-42; *see also id.* at 636-37.

[673] *Id.* at 636-39.

the necessary physical work to move the customer from Cavalier to Verizon.[674] Thus, the move from Cavalier to Verizon cannot be conducted unilaterally by Verizon, and, contrary to Verizon's allegations, the work Cavalier performs in connection with the Verizon winback is not solely for the benefit of Cavalier's internal records.[675] In fact, we find that Cavalier's work in connection with a Verizon winback is similar in purpose and scope to the work that Verizon is responsible for performing when Cavalier submits a local service request to Verizon to move a customer from Verizon to Cavalier.

205. In its direct testimony, Cavalier specifically identified the services for which it proposed to charge Verizon as the same or similar to services covered by Verizon's Service Order Connect and Installation charges.[676] To rebut this testimony, Verizon should have produced a witness who was familiar with its cost studies and could testify as to exactly what functions and associated costs are recovered in Verizon's $10.81 Service Order Connect and $2.68 Installation charges. Verizon's witness admitted both that in the loop installation process Verizon performs similar functions to those that Cavalier performs in the winback process, and that the associated costs might be recovered in these charges. Accordingly, the written testimony that Verizon "does not charge Cavalier for any of" the other activities specified by Cavalier[677] can only mean that individual charges for these activities do not appear in the Pricing Schedule, rather than that the charges contained in the schedule do not subsume these activities.[678] Based on the evidence presented, we conclude that Verizon does perform similar functions to those performed by Cavalier in the winback process, and that the associated costs may be recovered in Verizon's $10.81 Service Order Connect and $2.68 Installation charges.[679] In any event, Verizon

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674 *Id.* at 640-42. Although Verizon performs the physical disconnect, Cavalier pays Verizon to perform that task. *Id.*

675 *Id.* at 636-42. *Cf.* Verizon Reply Brief at 70-72.

676 *See* Cavalier Direct Testimony of Ferrio at 2-3.

677 *See* Verizon Rebuttal Testimony of Albert Panel at 23.

678 *See* Tr. at 592-95; 607-08. If that is not what the Verizon witness meant by this testimony, her written testimony was inconsistent with her oral testimony. In light of this, we find incredible her assertion that Verizon "does not charge Cavalier for *any* of" the other activities specified by Cavalier, particularly since Verizon admits that both Parties perform virtually the same functions when either carrier moves a customer to the other. *See* Verizon Reply Brief at 70. We also disagree with Verizon that these charges must be the subject of a Cavalier tariff filed with the Virginia Commission. *See* Verizon Brief at 76. In this instance, Cavalier seeks to recover from Verizon for functions for which Verizon charges it. To the extent that Cavalier intends to charge other carriers for similar services, that should be the subject of an agreement between those carriers.

679 We believe that it is reasonable to permit Cavalier to charge Verizon the rate Verizon charges it for the same or similar services. Generally, rates charged by competitors are presumed reasonable as long as they do not exceed the comparable rate charged by the incumbent. *See generally Local Competition First Report and Order*, 11 FCC Rcd 16040-42, paras. 1085-89. To the extent that Cavalier sought to justify a higher rate, we agree with Verizon that a cost study would be appropriate. *See id.* at 16042, para. 1089. Because, however, Cavalier seeks only to charge Verizon what Verizon charges it, we disagree that a cost study is necessary. To the extent that Verizon's charges for comparable services are reduced in the future, Cavalier should also reduce its charges to the same level.

has failed to establish any other method through which the costs are recovered. Accordingly, we allow Cavalier to recover these charges when it migrates a UNE-loop customer to Verizon.

(iii) Arbitrator's Adopted Contract Language

206. The Arbitrator adopts the following language:

IV. UNE-Related Functions Performed by Cavalier

WINBACKS

Winbacks – Service Order
Recurring Charges – N/A
Non Recurring Charges – $10.81

Winbacks – Installation
Recurring Charges – N/A
Non Recurring Charges – $2.68

Total
Recurring – N/A
Non Recurring Charges - $13.49

V. Cavalier Collocation Services

Intrastate collocation –Under the same rates, terms, and conditions as applicable per Verizon – VA SCC Tariff No. 218, as amended from time to time.

VI. Cavalier Operation Support Systems

Under the same rates, terms, and conditions specified in this Exhibit A for analogous Verizon operation support systems functions

VII. All Other Cavalier Services Available to Verizon for Purposes of Effectuating Local Exchange Competition

Available at rates comparable to Verizon charges or at Cavalier's tariffed rates or generally available rates.