

**Verizon New York Inc. v Choice One
Communications of N.Y., Inc.**

2010 NY Slip Op 33156(U)

November 3, 2010

Supreme Court, New York County

Docket Number: 603280/2006

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X

VERIZON NEW YORK INC.,

Plaintiff,

-against-

Index No.
603280/2006

CHOICE ONE COMMUNICATIONS OF NEW YORK, INC.,

Defendant.

-----X

Charles Edward Ramos, J.S.C.:

FINDINGS OF FACT

The Parties

1. Verizon New York Inc. ("Verizon") is a corporation organized under New York law, with its principal place of business at 140 West Street, New York, New York. Verizon's business includes the provision of communications services to business and residential customers in New York.

2. Choice One Communications of New York, Inc. ("Choice One") is a corporation organized under Delaware law, with its principal place of business at 100 Chestnut Street, Suite 600, Rochester, New York. Choice One provides communications services to business and residential customers in New York.

3. Verizon and Choice One were parties to an interconnection agreement ("Agreement") that had a termination date of April 1, 2003. See Pl. Exh. 17; Def. Exhs. A, B.

The Agreement

4. The Agreement provided that its "terms and conditions" "shall only continue in full force" after the termination date of April 1, 2003, "if [Choice One] request[ed] to renegotiate" the

terms of the contract and engaged in such negotiations, subject to an obligation to "true[] up" the amounts paid "to conform with [an Arbitration Decision of the New York Public Service Commission ('PSC')] back to the date of expiration of the Term," which an amendment extended to April 1, 2003. Pl. Exh. 17 (Agreement § 21.1; Second Am. ¶ 9).

5. The New York PSC issued an Arbitration Decision on September 23, 2005, accepting Choice One's proposal that the parties interconnect and exchange traffic going forward based on the rates, terms, and conditions of their respective state tariffs. See Order Resolving Arbitration, Case 05-C-0515 (N.Y. Pub. Serv. Comm'n Sept. 23, 2005).

6. This Court has previously held that the PSC's Arbitration Decision triggered the true-up provision in the Agreement. See *Verizon New York Inc. v Choice One Communications of New York, Inc.*, Index No. 603280/2006, slip op. at 9 (Feb. 5, 2010; entered Feb. 17, 2010).

7. Between April 1, 2003 and September 22, 2005, Choice One invoiced Verizon for nearly 4.5 billion minutes of traffic, while Verizon invoiced Choice One for just over 600 million minutes of traffic. The parties paid each other for those minutes at the rates in the Agreement. See Pl. Exh. 25.

The Terms To Be Used for the True-Up

8. The Agreement allowed Choice One to bill Verizon either \$0.0059 or \$0.0015 per minute for local traffic it received from Verizon. Choice One currently bills Verizon for local traffic at

either \$0.002893 (its tariffed rate) or \$0.0007 per minute, pursuant to a Federal Communications Commission ("FCC") order. See Bando Pre-Filed Test. ¶ 8; Pl. Exhs. 19, 22.

9. The Agreement allowed Choice One to bill Verizon the same per-minute rate of either \$0.0059 or \$0.0015 for transit traffic Verizon delivered to Choice One. Such a provision in a Verizon interconnection agreement is rare; normally, Verizon is not required to pay the terminating carrier (here, Choice One) for traffic that originates on a third-party carrier's network and transits Verizon's network en route to the terminating carrier. See Pigeon Amended Pre-Filed Test. Exh. C, at 4. Choice One is not permitted to charge Verizon anything for transit traffic under its tariff. See Bando Pre-Filed Test. ¶ 9; Trial Tr. 157:19-158:2; Pl. Exh. 19.

10. The Agreement used a 5.5:1 ratio to identify the local and transit traffic that Choice One could bill at the higher and lower rates in the Agreement. Choice One currently uses a 3:1 ratio for that purpose, which is found in both Choice One's tariff and the FCC order referenced above. See Bando Pre-Filed Test. ¶ 10; Pl. Exh. 19; Pl. Exh. 22.

11. The Agreement allowed Verizon to bill Choice One \$0.0059 per minute for all of the local traffic Verizon received from Choice One. Verizon currently bills Choice One its tariffed rate of either \$0.002893 or \$0.001069 per minute for local traffic, depending on whether Choice One chooses to deliver that traffic to a tandem switch or an end-office switch on Verizon's

network. See Bando Pre-Filed Test. ¶ 11; Pl. Exh. 1.

The Net True-Up Amount Due to Verizon

12. Plaintiff's Exhibit 25 calculates the net true-up amount that Choice One owes to Verizon. See Bando Pre-Filed Test. ¶¶ 41-42, 45.

13. Plaintiff's Exhibit 25 is based on spreadsheets Verizon created in June and November 2005, with certain minor modifications, including to conform the data to figures in Verizon's Reciprocal Compensation Database Administration ("RCDA") system, as well as to reflect a stipulation among the parties at trial with regard to the number of minutes of transit traffic for which Choice One had billed Verizon from May 2003 through January 2005. See Bando Pre-Filed Test. ¶¶ 34-35, 38, 40, 42-43, 46; Trial Tr. 79:4-80:13.

14. The June and November 2005 spreadsheets were created, at least in part, for a business purpose: so that Verizon could determine the amount of money Choice One owed under the Agreement's true-up provision. See Pl. Exh. 6 (McMurtry Dep. Tr. 275:16-21; *id.* at 233:16-20).

15. The June and November 2005 spreadsheets were created by a Verizon employee, Sanford McMurtry, who used a document that was originally created and sent to Verizon by a Choice One employee, David Sakmyster, as confirmed by Mr. Sakmyster's testimony and the metadata in that document. See Pl. Exh. 8 (Sakmyster Dep. Tr. 38:22-39:2, 127:7-22, 129:7-13); Pl. Exh. 2.

16. RCDA is a system that Verizon uses in the ordinary

course of its business to track the reciprocal compensation invoices it receives, as well as the payments it makes on those invoices. See Bando Pre-Filed Test. ¶¶ 19, 34, 42.

17. Rows 5 and 22 of Exhibit 25 identify, respectively, the number of minutes on Choice One's invoices to Verizon and the amounts Verizon paid to Choice One for each invoice, as set forth in Verizon's RCDA system. See Bando Pre-Filed Test. ¶¶ 19, 34, 42; Pl. Exh. 4.

18. Rows 6 and 7 of Exhibit 25 divide the minutes on Choice One's invoices (in Row 5) into transit and non-transit minutes; Choice One's invoices did not separately bill for transit and non-transit traffic, because the Agreement provided that the same reciprocal compensation rates and terms applied to both types of traffic. See Bando Pre-Filed Test. ¶¶ 8-9. The parties stipulated at trial to the division between transit and non-transit minutes for the months from May 2003 through January 2005. See Trial Tr. 79:4-80:13.

Using the parties' stipulated data, 22.5 percent of the minutes on Choice One's invoices for the months from May 2003 through January 2005 were transit traffic minutes; that percentage is used to divide Choice One's invoiced minutes for the other months (April 2003 and February through September 2005).

This is a reasonable approach given the absence of any evidence that the actual division for any month would differ materially, as well as evidence that the parties previously

resolved another dispute using a weighted average to estimate transit traffic. See Pl. Exh. 20; Pl. Exh. 21; Pl. Exh. 16.

19. Rows 9 and 29 of Exhibit 25 identify the number of minutes of local traffic for which Choice One paid reciprocal compensation to Verizon during the true-up period. See Pl. Exh. 25. Choice One provided Verizon with the figures for all the months, except for April 2003, pursuant to an agreement between the parties to use Choice One's count of those minutes because Verizon's equipment was undercounting the number of minutes it received from Choice One. See Pl. Exh. 14; Pl. Exh. 20; see also Pl. Exh. 7 (Mowers Dep. Tr. 202:13-17).

For April 2003, Exhibit 25 contains an estimate, which is roughly equal to the average of the number of minutes Choice One sent to Verizon in the following two months. See Bando Pre-Filed Test. ¶ 39. This is a reasonable estimate, given the absence of any evidence, which only Choice One would possess, showing the actual number of minutes Choice One sent to Verizon during April 2003.

20. Rows 12 through 14 contain the ratio and the rates used to true-up the minutes on Choice One's invoices; those figures come from Choice One's tariff and an FCC order and are the ratio and rates Choice One has used to bill Verizon since the end of the true-up period. See Bando Pre-Filed Test. ¶ 10; Pl. Exh. 19; Pl. Exh. 22.

21. Rows 18 through 20, 24, 37, and 39 apply the ratio and rates to the figures in the above-mentioned rows in order to

calculate the true-up amount due from Verizon to Choice One. See Pl. Exh. 25. There is no dispute as to accuracy of the formulas used for the calculations or the results of the calculations.

22. Rows 30 and 31 of Exhibit 25 divide the minutes of local traffic for which Choice One paid Verizon reciprocal compensation at the rate in the Agreement (in Row 29) into those minutes subject to Verizon's lower and higher tariffed rates, based on where on Verizon's network Choice One delivered the traffic (an end office or tandem, respectively); Verizon's invoices did not separately identify those minutes based on where Choice One delivered them, because the Agreement provided that the same reciprocal compensation rates and terms applied to without regard to where the traffic was delivered. See Bando Pre-Filed Test. ¶¶ 8-9.

Seventy-five percent of the minutes in each month are classified as minutes subject to the lower tariff rate, which is the same as the percentage of minutes subject to that lower rate on Verizon's 2006 invoices to Choice One. See *id.* ¶¶ 26-29, 43. The assumption that Choice One delivered 75 percent of the minutes during the true-up period to a Verizon end office (and subject under the true-up to the lower tariffed rate) is reasonable, given the absence of evidence of the exact number of minutes Choice One delivered to Verizon end offices during the true-up period (and only Choice One had an accurate count of all the minutes it sent to Verizon), as well as evidence that the percentage of minutes Choice One delivered to end offices was

increasing over time. See Bando Pre-Filed Test. ¶ 27; Pl. Exh. 6 (McMurtry Dep. Tr. 260:9-15).

Because the actual percentage of local traffic delivered to Verizon's end offices during the true-up period was likely lower than 75 percent, this estimate is also favorable to Choice One because the higher percentage decreases the net true-up due to Verizon.

23. Rows 34 and 35 of Exhibit 25 identify the tariffed rates Verizon currently charges for traffic Choice One delivers to a Verizon end office and tandem; these are the rates Verizon has used to bill Choice One since the end of the true-up period. See Pl. Exh. 1; Bando Pre-Filed Test. ¶ 44.

24. Row 37 of Exhibit 25 calculates the true-up amount due from Verizon to Choice One. There is no dispute as to accuracy of the formulas used for the calculations or the results of the calculations. See Pl. Exh. 25.

25. Row 39 of Exhibit 25 calculates the net true-up amount due from Choice One to Verizon, which totals \$12,245,206.94. See Pl. Exh. 25. There is no dispute as to accuracy of the formulas used for the calculations or the results of the calculations.

26. In June 2005, Choice One performed its own true-up calculation, using its own data, for the period from May 2003 through January 2005. Choice One calculated that it owed a net true-up amount for that period of \$8,855,877. See Pl. Exh. 12; Pl. Exh. 13; Pl. Exh. 8 (Sakmyster Dep. Tr. 135:16-25). In June 2005, Verizon had calculated that Choice One owed a slightly

lower net true-up amount for that same period of \$8,840,927.69. See Pl. Exh. 10.

27. Choice One did not proffer a calculation, using its own data, of the net true-up amount it owed for the entire true-up period.

28. Choice One had in its possession data sufficient to perform such a calculation, including data on the minutes on its invoices and Verizon's payments to Choice One (which Choice One reviewed as recently as April 2010); on the minutes of transit traffic Verizon sent to Choice One (from monthly data sets Verizon provided to Choice One); and on the minutes of traffic Choice One sent to Verizon. See Trial Tr. 148:11-23, 156:21-157:3; Pl. Exh. 14; Pl. Exh. 20; Pl. Exh. 7.

Choice One also knew the rates and ratio the parties have been using to bill each other since the New York PSC's Arbitration Decision.

29. In June 2005, Choice One reviewed Verizon's initial true-up calculation. Choice One understood where Verizon was getting its numbers from; concurred in the assumptions Verizon was making; and confirmed that Verizon was using data Choice One had provided to Verizon. See Pl. Exh. 7 (Mowers Dep. Tr. 206:22-207:25, 208:18-209:17); Pl. Exh. 8 (Sakmyster Dep. Tr. 38:22-39:2).

30. Telecommunications companies generally do not review switch records to resolve billing disputes and never review multiple months of switch records in order to resolve such

disputes. See Trial Tr. 74:25-75:5.

31. Both Verizon and Choice One acknowledge that billing between telecommunications carriers is not likely to be perfect, and each applies a threshold of 5 percent (or higher) in deciding whether a difference between the amount that two companies calculate is due is material. See Trial Tr. 87:18-23, 160:19-161:26.

Choice One's Bankruptcy

32. On October 5, 2004, Choice One filed for bankruptcy. See Def. Exh. G.

33. Prior to that bankruptcy filing, Verizon and Choice One discussed amounts outstanding between them. During those discussions, Verizon did not disclaim entitlement to any part of the true-up amount due under the Agreement. Instead, discussions among the parties, including in September 2004, were in the nature of settlement discussions. See Def. Exh. F. Those discussions did not result in a settlement. See Mowers Pre-Filed Test. ¶ 14.

34. Choice One was on notice that it was potentially liable to Verizon for a true-up payment before, during, and after its bankruptcy proceeding, by virtue of the terms of the Agreement.

35. Verizon also expressly put Choice One on notice of Verizon's intent to pursue its rights under the Agreement's true-up provision in an October 25, 2004 letter to Choice One's General Counsel, which stated that the Agreement "contains a 'true up' provision" and that it "may be in Choice One's best

financial interests to work with Verizon in promptly" entering a new agreement. Pl. Exh. 26.

36. Choice One received that letter and its General Counsel responded to it on November 3, 2004, but made no reference to the true-up. See Def. Exh. L.

37. On November 8, 2004, Verizon and Choice One signed a stipulation, which acknowledged that Verizon had "asserted prepetition claims against" Choice One and reaffirmed that "any . . . legal, equitable and/or contractual rights held by . . . Verizon . . . with respect to . . . [its] Claims . . . are expressly preserved and not affected by confirmation of the [Bankruptcy] Plan." Pl. Exh. 27. On November 9, 2004, the bankruptcy court approved and entered the stipulation. See *id.*

Choice One's May 2005 Offer

38. At some point in May 2005, Choice One made an offer to Verizon "to 'fix immediate recip[rocal] comp[ensation] issue,'" which "V[erizon] left . . . open for further consideration." Def. Exh. Q.

39. The pre-filed direct testimony of Choice One's witnesses regarding the terms of that offer is hearsay and is not credible. One of Choice One's witnesses, Rick Pigeon, admitted that he had only learned of the offer in April 2010. See Trial Tr. 158:11-16.

The other Choice One witness, Steven Mowers, sought to explain away his inability at his deposition to remember whether an offer was made, as well as what its terms were, by claiming

that he had been confused by the manner in which an internal Choice One document was presented at that deposition. See *id.* at 116:5-117:6. But Mr. Mowers admitted that he was shown at his deposition the same document attached to his pre-filed testimony. See *id.* at 116:17-21. Therefore, his protestations of confusion are not credible; instead, the more reasonable inference is that he, too, first learned about the offer shortly before the filing of his pre-filed direct testimony.

40. It is undisputed that whatever offer Choice One made to Verizon in May 2005 did not include any tender, in whole or in part, of the true-up amount due under the Agreement.

Interest Due on the True-Up Amount

41. Section 30.12(e) of the Agreement provides that interest "shall accrue" on "[a]ny amounts not paid when due" at a rate equal to "the lesser of (1) one and one-half percent (1 1/2%) per month or (2) the highest rate of interest that may be charged under applicable law." Pl. Exh. 17.

42. Choice One applied a 1.5 percent monthly rate in billing interest to Verizon on unpaid amounts under the Agreement, although Choice One billed a simple, not compound, interest rate. See Trial Tr. 160:13-15.

43. The standard rate at which telecommunications companies assess interest, or late-payment charges, on past-due amounts owed by other telecommunications companies is 1.5 percent per month, compounded. See Bando Pre-Filed Test. ¶ 48.

44. Applying a 1.5 percent per month, compounded, interest

rate, Choice One owes an additional \$16,365,628.35 in interest as of June 23, 2010.

CONCLUSIONS OF LAW

1. All of the evidence underlying the net true-up calculation shown in Plaintiff's Exhibit 25 is admissible. In particular, Verizon's June and November 2005 spreadsheets are admissible for three independent reasons: first, in May 2009, the parties stipulated that all documents exchanged during discovery are both authentic and business records, which is both the plain meaning of the stipulation's terms and consistent with the parties' intent in entering into the stipulation; second, testimony from the Verizon employee responsible for performing the true-up calculation at the time shows that they were created for business purposes, see *People v Foster*, 27 NY 2d 47, 52, (1970); see also *Green v DeMarco*, 11 Misc. 3d 451, 462, (Sup. Ct. Monroe Cty. 2005); and, third, the figures on the spreadsheets with respect to minutes exchanged and amounts paid summarize voluminous admissible data to which Choice One had access, see *Ed Guth Realty, Inc. v Gingold*, 34 NY 2d 440, 452, (1974).

2. The records from Verizon's RCDA system that identify the number of minutes on Choice One's invoices to Verizon and the amounts Verizon paid to Choice One are also admissible as business records. They are not excludable based on the fact that they were not produced in discovery. Choice One did not need the information from RCDA to challenge Verizon's calculation or to perform its own calculation because Choice One, as late as April

2010, had access to the same data regarding the minutes of use on Choice One's invoices and Verizon's payments to Choice One.

In addition, Choice One learned of the RCDA system and Verizon's use of it to track reciprocal compensation invoices and payments at least as early as February 2009, but never moved to compel production of information from that system, even assuming such information was encompassed within a Choice One discovery request (which Verizon contests).

3. To the extent estimates have been used to calculate damages, they reflect "just and reasonable inference[s]" about the extent of damages, thereby satisfying Verizon's burden of proof, "even though the result is only an approximation." *Cristallina S.A. v Christie, Manson & Woods Int'l, Inc.*, 117 AD 2d 284, 295, (1st Dep't 1986) (internal quotation marks omitted); see also *Ashland Mgmt. Inc. v Janien*, 82 NY 2d 395, 403, (1993); 36 NY Jur. 2d *Damages* § 15 (2005).

4. Choice One's own June 2005 true-up calculation, done using its own data, further confirms the reasonableness of Verizon's estimates and of its damages calculation as a whole. Moreover, Choice One's failure to present a calculation of its own, using its own data, for the entire true-up period gives rise to an inference that its own data would support Verizon's calculation of the amount Choice One owes. See, e.g., *Ausch v St. Paul Fire & Marine Ins. Co.*, 125 AD 2d 43, 48, (2d Dep't 1987) ("An unfavorable inference may be drawn when, as in this case, a party fails to produce evidence which is within his

control and which he is naturally expected to produce.”).

5. Verizon was not required to use switch records to calculate damages, as that is not the practice in the industry, nor is it consistent with either the manner in which the parties resolved a prior dispute involving billing for transit traffic under the Agreement or the manner in which Choice One performed its own true-up calculation in June 2005. See Pl. Exh. 20; Pl. Exh. 21; Pl. Exh. 16; Trial Tr. 74:25-75:5. Nor did the Agreement require Verizon to preserve its switch records so that they could be used for this purpose. The Agreement only required the parties to preserve records used to bill for services under the Agreement; however, under the Agreement and the parties' practices, Verizon did not use the switch records at issue to bill Choice One.

6. Verizon is not estopped from recovering the true-up amount due for the months preceding Choice One's bankruptcy. To prevail on an estoppel defense, Choice One must show that it reasonably relied to its detriment on Verizon's statements or actions. See *E.F.S. Ventures Corp. v Foster*, 71 NY 2d 359, 368-69, (1988); *Roufaiel v Ithaca Coll.*, 241 AD 2d 865, 869, (3d Dep't 1997). Choice One has not met that burden.

Choice One's self-identified best evidence for its estoppel argument – a September 2004 conversation and e-mail – was created for purposes of settlement and was limited to amounts that one party had previously invoiced to the other, but that the other had not paid. Choice One could not have reasonably relied on

that conversation and e-mail to conclude that Verizon had abandoned any claim to the true-up amount due under the plain language of the Agreement. Moreover, in a letter dated October 25, 2004, Verizon made clear that it was not abandoning its true-up rights, reminding Choice One of the true-up provision and noting Choice One's financial interests in entering an new agreement promptly, to end the true-up period. Choice One responded to the letter on November 3, 2004, but made no reference to the true-up. Instead, on November 8, 2004, Choice One and Verizon entered into a stipulation reaffirming that Choice One's bankruptcy would not affect the claims Verizon had asserted against Choice One, including under the Agreement.

7. Verizon is not prevented from receiving the true-up amounts due for May through September 2005 based on an offer Choice One made in May 2005, about which the record contains little evidence regarding its terms. Verizon was not required to accept the offer on pain of losing its contractual right to a true-up. See *Webster v Di Trapano*, 114 AD 2d 698, 699, (3d Dep't 1985). Verizon also made reasonable efforts to mitigate the effect of the true-up provision on Choice One when it reminded Choice One in October 2004 about the true-up provision and urged it to move promptly to end the true-up period by entering a new agreement.

8. The transit traffic for which Verizon paid Choice One is subject to the true-up provision under the plain language of the Agreement; Choice One makes no claim to the contrary. Choice

One's equitable or quasi-equitable defenses to applying the true-up provision to transit traffic fail. There is no evidence that Verizon recovered from third parties the amounts it paid to Choice One for transit traffic; therefore, applying the true-up to transit traffic would not allow Verizon a double recovery, as Choice One claims. Moreover, if Verizon did receive such payments, those third-party carriers will presumably be entitled to a return of those amounts. That is, the equitable result is to unwind any third-party transactions, not to allow Choice One to keep the amounts Verizon paid for transit traffic, at the expense of either Verizon or the third-party carriers. Furthermore, Choice One knew (or should have known) both that the payments it was receiving from Verizon for transit traffic after April 2003 were made subject to a later true-up and that the true-up would likely require Choice One to return those payments.

Therefore, Choice One had ample reason, starting in April 2003, to act to protect itself from the likely consequences of the true-up by making alternative arrangements, so that it could be paid directly for transit traffic by third-party carriers. If Choice One failed to protect itself in this manner, it cannot claim a right to keep amounts that Verizon had paid for that traffic, which always were subject to a later true-up.

9. The true-up period begins on April 1, 2003, which is the expiration of the Term, as set forth in the Agreement.

10. To the extent any provisions of the Agreement – other

than those pertaining to the parties' exchange of local and transit traffic - are also subject to true-up, Choice One has failed to identify any such provisions. Moreover, Choice One has made no showing that applying the true-up provision to those other provisions would reduce the net amount it owed Verizon.

11. Verizon is entitled to interest on the net true-up amount under § 30.12(e) of the Agreement, from September 23, 2005, the date the true-up provision was triggered. Section 30.12(e) sets a rate of 1.5 percent per month compound interest, because it provides that interest "shall accrue" on "[a]ny amounts not paid when due," which includes both the unpaid principal and any previously accrued - but unpaid - interest. See, e.g., *Marine Mgmt., Inc. v Seco Mgmt., Inc.*, 176 AD 2d 252, 253, (2d Dep't 1991), *aff'd*, 80 NY 2d 886, (1992); *Tower Funding, Ltd. v David Berry Realty, Inc.*, 302 AD 2d 513, 514, (2d Dep't 2003).

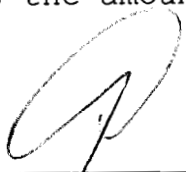
This interpretation of the Agreement is consistent with industry practice and, in part, with Choice One's own use of a 1.5 percent per month interest rate in billing Verizon for disputed amounts. Although Choice One billed Verizon using a simple interest rate, Verizon is not bound by Choice One's misinterpretation of the Agreement. Choice One owes Verizon an additional \$16,365,628.35 in interest as of June 23, 2010.

ACCORDINGLY,

Judgment shall be entered in the amount of Choice One's total liability to Verizon as of June 23, 2010: \$28,610,835.30.

Post-judgment interest shall accrue at the statutory rate from the date judgment is entered until such time as the amount due is paid.

Dated: November 3, 2010



J.S.C.
CHARLES E. RAMOS