

TAX COURT OF NEW JERSEY

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Corrected Opinion Notice

Date: February 28, 2019

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From: Lynne E. Allsop

Re: Verizon New Jersey, Inc. v. Borough of Hopewell
Docket number: 012215-2009

The attached corrected opinion replaces the version released on January 28, 2019. The Opinion has been corrected as noted below:

Page 10, footnote 7 corrected to read 47 C.F.R. §9.3

This trial follows a 2012 Tax Court decision wherein the court determined that, pursuant to N.J.S.A. 54:4-1, Verizon is subject to a statutorily imposed tax on its business personal property located in Hopewell Borough (“Borough”) if it provides dial tone and access to 51% of the Hopewell Telephone Exchange. The court also found that the 51% test is to be performed annually as of the assessment date, which is January 1 of the preceding year. See Verizon New Jersey, Inc. v. Hopewell Borough, 26 N.J. Tax 400 (Tax 2012).

N.J.S.A. 54:4-1 does not define the term “local telephone exchange” and the parties disagree on both how to define the Hopewell Telephone Exchange, and how to calculate market share within a defined local telephone exchange. It is left to this court to provide a working definition of the statutory reference “local telephone exchange” and to then determine whether Verizon’s market share in the Hopewell Telephone Exchange was at least 51% as of January 1, 2008.

FACTS

As set forth in the court’s prior opinion, Verizon owns land and a building in the Borough that is used as a switching station for telecommunications. The building houses fiber optic cables and electronic equipment able to direct and switch telephone traffic. The cables and equipment located in the building are the subject of the personal property tax assessment at issue.

In addition to Verizon’s cable and equipment, the switching station also holds equipment that is the personal property of one of Verizon competitors. Verizon is required by federal law to house competitors’ equipment at its facilities due to an arrangement referred to as “collocation.” 47 U.S.C. §§ 251, 259; 47 C.F.R. §59.1.

N.J.S.A. 54:4-1 imposes on certain telecommunications carriers an annual local tax on specified property used in the business of “local exchange telephone.” The carriers responsible

for payment of the tax are those who were subject to Chapter 4 of the Franchise and Gross Receipts Tax, N.J.S.A. 54:30A-16 to -29 (“FGRT”), as of April 1, 1997. Verizon meets this threshold and consequently its property is subject to the tax. Verizon’s competitors’ personal property however is not subject to the tax.³

N.J.S.A. 54:4-1 defines the term “local exchange telephone company” as a telecommunications carrier providing dial tone and access to 51% of a local telephone exchange. The statute does not define the term “local telephone exchange.” If a telecommunications carrier provides less than 51% of the dial tone and access of the local telephone exchange, it is not subject to the tax.⁴

a. Relevant Terms, Phrases and Definitions

Although not defined in N.J.S.A. 54:4-1, the following phrases or terms are defined or explained in other sources, or have been stipulated by the parties.

As defined under 47 U.S.C. § 153, a “telecommunications carrier” is any provider of “telecommunications services,” which are defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

³ Also subject to FGRT are United Telephone Company of New Jersey and Warwick Telephone Company.

⁴ The parties brought to the court’s attention that there is an ambiguity and dispute as to whether a finding that Verizon provides less than 51% of dial tone and access of the local telephone exchange would forever discharge its liability for the tax. Or, conversely, whether the Borough can annually re-evaluate Verizon’s market share and impose the tax if Verizon once again exceeds 51% of the dial tone and access of the Hopewell Telephone Exchange. This issue however is not before the court at this time.

Based on Federal Communication Commission (“FCC”) guidance, “access” refers to use of the local exchange network over a telephone line or access line to connect to the Public Switched Telephone Network (“PSTN”). The PSTN refers to the global network of circuit-switched public telephone networks. PSTN is the interconnected set of telecommunications networks that use analog or Time Division Multiplexing format that transmit voice calls between end-user customers and the telecommunications network.

“Access lines” include all classifications of local exchange telephone service types, including, but not limited to, individual lines, party line access, private branch exchange (“PBX”) access, Centrex access, coin access, Foreign Exchange access, and wide area telephone service access. These lines do not include official/company circuits in the access line counts.

“Dial tone” is defined as “an audible tone sent from an automatic switching system to a customer to indicate the equipment is ready to receive dial signals.” A carrier provides access and dial tone only when it enables a customer to access the PSTN, thereby allowing the customer to make a land line telephone call.

Companies providing dial tone and access include Incumbent Local Exchange Carriers (“ILECs”), Competitive Local Exchange Carriers (“CLECs”), and interconnected Voice-Over Internet Protocol (“VoIP”) providers. Verizon, United Telephone Company of New Jersey and Warwick Telephone Company are ILECs. Verizon is the ILEC in 180 of the 209 New Jersey exchanges. Only ILECs are subject to the tax at issue.

According to Verizon’s tariff,⁵ an “exchange” is a unit established by [Verizon] for the administration of communication service in a specified area which usually embraces a city, town,

⁵ Verizon’s tariff, effective March 9, 1993 through July 2014, contains the rates, terms and conditions associated with Verizon’s services. The tariff was replaced in 2014 with a Verizon Product Guide.

or village and its environs. It consists of one or more central offices which may be located within or without the territorial boundaries of the exchange. Prior to deregulation, each exchange unit was mapped and routinely updated to show the territorial boundaries of the exchange area. The map for the telephone exchange in the Borough was last updated in May, 1974.

After deregulation, Verizon filed its tariff, which included the exchange maps, with the New Jersey Board of Public Utilities. The tariff states that “maps are contained in separate binders; “[t]hese binders contain a map for each exchange area”; and “the maps which are part of this section of this tariff show the territorial boundaries of each exchange area.”

Verizon’s Product Guide, adopted in 2014, also includes these same exchange maps and states “the maps which are part of this section of the product guide show the territorial boundaries of each exchange area”; “maps are contained in separate binders”; “[t]hese binders contain a map for each exchange area”; and “the maps which are part of this section of the product guide show the territorial boundaries of each exchange area.”

As defined in 47 U.S.C. §153 (54), “telephone exchange service” is a “service within a telephone exchange . . . or comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate telecommunications service.”

Local Access and Transport Areas (“LATAs”) are geographically defined areas within which specified telephone companies provide exchange and interexchange telecommunications and exchange access service. Section 153 of the Telecommunications Act of 1996, defines a LATA as follows:

[M]eans a contiguous geographic area—

(A) established before the date of enactment of the Telecommunications Act of 1996 [enacted February 8, 1996] by a

Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

[47 U.S.C. §153 (31)]

The significance of LATAs after divestiture was that the Baby Bells were not allowed to carry traffic over a LATA boundary – the Baby Bells kept the local exchanges and local toll calls, but only toll calls within a LATA.

Verizon’s product guide states that there are three LATAs in New Jersey “which encompass contiguous local exchange areas.” The Atlantic Coastal LATA encompasses eighteen exchange areas in the southeastern portion of the state. The Delaware Valley LATA encompasses fifty-three exchange areas in the southwestern and west-central portions of the state. The North Jersey LATA encompasses one hundred and nine exchange areas in the northern and east-central portions of the state. Verizon’s product guide also states that the “territorial boundaries of the exchange area are shown on exchange area maps” and that if you are in a certain exchange area then you are in a certain LATA.

b. Telephone number sequencing.

All telephone numbers in the United States are comprised of a ten digit code sequenced out as NPA-NXX-XXXX. The NPA in the code combination is the area code. The NXX is referred to as the prefix. The last four digits identified as XXXX, is unique to the customer within the NPA-NXX combination. All of the telephone numbers with the same NPA-NXX are assigned to a designated rate center, originally designed for the purpose of calculating the cost of the telephone call.

A rate center is a specific geographic point within an exchange that is generally defined by vertical and horizontal (“V&H”) coordinates, and is used to calculate mileage and to determine applicable long distance charges for calls between telephone exchanges. There are no physical properties associated with a rate center.

The rate centers in New Jersey (one in each exchange) were established prior to deregulation. The V&H coordinates for the Hopewell Rate Center are located within the geographic boundaries of the Hopewell Telephone Exchange as depicted on Verizon’s tariff and product guide maps. The NPA (area code) associated with the Hopewell Rate Center is 609, and in 2008, the NXX (prefix) codes associated with the Hopewell Rate Center were 274, 309, 333, 466, 527, 564, 639, 644, 925, and 979.

Historically, and during the time period in question, Verizon determined the cost of placing a telephone call based on whether the call was a “local” call or a “toll” call. The categorization of a telephone call as “local” or “toll” is a function of the telephone number of the caller and the telephone number of the recipient. Calls between two telephone numbers within the same local service area, or within the same exchange were deemed local calls.

c. Listings versus Lines

The issuance of a NPA-NXX-XXXX (telephone number or listing) to a customer does not automatically equate to a telephone line with dial tone and access. While residential listings historically held a one to one ratio, commercial businesses generally revert to a formula based on size and need when deciding how many lines with dial tone and access to purchase from a telecommunications carrier.

For example, although there may be 500 telephone numbers assigned to an office building with 500 telephones, realistically, all of those telephone lines may not need to be in use at the same

time. The commercial establishment would therefore work with a telecommunications carrier of their choice to negotiate an agreement that would fit their needs. The ratio of listings to telephone lines might be two to one or five to one, etc. This lack of an automatic one to one ratio in the business community results in the inability to calculate telephone lines with dial tone and access simply by counting the number of telephone listings in a given NPA-NXX zone.

d. E911 System

E911 is a capability that enables 911 emergency response systems to automatically receive the telephone number and originating geographical location of incoming 911 calls. E911 databases are maintained to associate a telephone number with a specific location in order to dispatch the appropriate response resources (police, fire, emergency medical) in the event a caller is unable to relay their location information in a timely fashion. The E911 database, known as the Automatic Location Identification (“ALI”) database, is also used to route the call to the appropriate Public Safety Answering Point, where the call is answered by a trained official. At all relevant times, Verizon has been the administrator of the New Jersey E911 database.

Standards governing the administration of the E911 databases are developed and adopted by the National Emergency Number Association (“NENA”). NENA’s data standards for local exchange carriers, ALI service providers, and 911 jurisdictions set forth the standards which all providers of dial tone and access must comply, regardless of whether the service provider is the database administrator.

NENA’s data standards specifically state that each service provider is responsible for ensuring that their customer records are transmitted to the database administrator within one business day of a change in service. NENA’s standards require that the administrator must process these changes received from service providers within one day of receipt. When a telephone

number is disconnected, NENA's standards require that the number be deleted from the database. All providers of dial tone and access are responsible for ensuring that the E911 database is accurate at all times.

For public safety reasons and privacy concerns, the E911 database is strictly confidential, and the information contained within it is accessible only to the administrator.⁶ For this reason, Verizon is the only entity in New Jersey that can determine at any given point in time the number of NPA-NXX listings in the system and apply their own data to determine what percentage of those listings are from Verizon. Verizon competitors do not have access to the E911 information, nor does the Borough, other municipalities, or the other two ILECs.

On February 18, 2015, the court issued a protective order allowing the parties to access the E911 data for use in analysis in this matter. Verizon did not produce the confidential E911 information in discovery until June 29, 2016, over one year later. The protected discovery provided relates to data from July 2015, and Verizon maintains that it is not able to retrieve the E911 data for dates prior.

Although much effort went into obtaining the confidential E911 information, neither party attempted to obtain 2007 or 2008 listing or dial tone and access information directly from Verizon's competitors.

e. Verizon's Competitors

Verizon, as the successor to New Jersey Bell Telephone Company, inherited the physical infrastructure and business model of its ancestor AT&T. As competitor companies entered the telecommunications market, they brought with them new technology and updated systems. As a

⁶ As required under Section 222 of Communications Act of 1934, 47 U.S.C. § 222, the customer proprietary network information is strictly protected.

result, competitors conducted business differently than Verizon and notably were not bound to the Verizon system. Rate centers, local service areas, and exchanges were less important to competitor companies and their business models were structured in their own unique way.

In addition, ILECs are carriers of last resort, meaning they have to serve each and every customer who wishes to have telephone service. CLECs, however, are able to cherry pick their customers based on expectations of profitability. As CLEC's entered the market, they streamlined their efforts to obtain a customer base by focusing on large commercial customers. The CLEC's were able to offer these commercial customers new technologies that allowed the assignment of more telephone numbers with fewer dial tone and access lines. When VoIP emerged, it enabled users to obtain dial tone and access over the Internet.⁷

Prior to deregulation, all aspects of the telecommunications system were controlled by AT&T, including the assignment of NPA numbers and NXX numbers. After deregulation, the assignment of NPA-NXX numbers was contracted out to New Star, a division of Lockheed Martin. Although no longer responsible for the issuance of the NPA-NXX numbers, Verizon continued to maintain their system by coordinating the assignment of telephone numbers to the same designated rate center and exchange map. The same has not been true for the CLECs, and so in totality, the coordinated system of including all NPA-NXX listings in the same geographic location as depicted on the Verizon tariff maps and product guide has eroded with time.

⁷ To make a telephone call on a VoIP system, a telephone is connected to a network cable, rather than a telephone line, or a call is made over a computer. As defined in 47 C.P.R. §9.3, VoIP services permit users to receive calls that originate on the PSTN and to terminate calls to the PSTN. VoIP providers are also subject to the same E911 requirements as are ILECs and CLECs.

f. The Merrill Lynch Complex

By 2008, Merrill Lynch had built and occupied a large commercial complex, which was located within the geographic boundaries of the Pennington Telephone Exchange as represented on Verizon's maps. Merrill Lynch chose a Verizon competitor as its telecommunications carrier and requested an entire 10,000 block of prefixed telephone numbers. The competitor contacted New Star and was given the NPA-NXX numbers 609-274. New Star then assigned 609-274 to the Hopewell Rate Center. Although the entire block of 10,000 listings was dedicated to Merrill Lynch, there are only approximately 5,600 employees working at this commercial complex.

Verizon learned of the addition of the 609-274 block of numbers by virtue of being the administrator for the New Jersey E911 data base. Verizon also knew that these listings were not Verizon listings, and that this block of NPA-NXX numbers was assigned to the Hopewell Rate Center. This information led Verizon to believe that it no longer had 51% of the dial tone and access in the Hopewell Telephone Exchange. At the time Verizon notified the Borough that it was not going to pay the tax, Verizon was unaware that the entire block of 609-274 numbers had been obtained by a single competitor to service a single customer that was geographically located outside the boundaries of the tariff exchange map associated with the Hopewell Rate Center.

The Borough disputed Verizon's claim that it no longer had 51% of the dial tone and access in the Hopewell Telephone Exchange. As a consequence of the dispute, both parties became aware that there was a need to define the term "local telephone exchange." Verizon defined the term according to the NPA-NXX numbers assigned to the rate center in the exchange. The Borough defined the term based on the geographic parameters of the tariff exchange maps.

Regardless of which definition of a local telephone exchange is adopted, both parties agree that all telephone listings do not provide dial tone and access. Once the parameters of the local

telephone exchange are established, in order to calculate market share, an analysis must be conducted to adjust listings into lines providing dial tone and access. Although the parties' experts disagree in the methodology to be used to convert listings into dial tone and access lines, all of the parties' experts acknowledge that if the Merrill Lynch 609-274 prefix lines are not part of the Hopewell Telephone Exchange, Verizon has more than 51% of the dial tone and access as of the January 1, 2008 valuation date. Despite this acknowledgement and the importance of the Merrill Lynch dial tone and access data when determining Verizon's market share, neither party attempted to obtain any data directly from Merrill Lynch.

Based on the foregoing, the court must first define the term "local telephone exchange" before consideration can be given to the methodology used to analyze and determine market share. Generally speaking, the court also acknowledges that once a definition of "local telephone exchange" is adopted, the credibility and weight given to the experts' analysis and methodology will be highly fact sensitive, will likely vary from year to year, and may also be dependent on the characteristics of a specific exchange.

PROCEDURAL HISTORY

By letter dated August 22, 2008, Verizon informed the Borough's mayor and tax assessor that it no longer provided dial tone and access to at least 51% of the customers in the Hopewell Telephone Exchange and therefore it was no longer required to file Form PT-10.⁸ The letter further

⁸ The form PT-10, a tax return for the reporting of tangible personal property used in business by a local exchange telephone company and the form on which Verizon reports its line share, is a self-reporting and self-assessing form/requirement. The statute does not have a calculation for how to determine the 51% requirement, no regulations are in place establishing the calculation, and there is no statutory or regulatory requirement that any CLEC or ILEC report their market share data.

advised that Verizon would not file the next annual Form PT-10, due September 1, 2008.⁹ The form is due on September 1, and is used by the assessor to set the assessment for the next tax year, which in this case was tax year 2009. N.J.S.A. 54:4-2.48.

Verizon did not file the required Form PT-10, and the Borough's assessor used the information provided on the Verizon return filed for tax year 2008 to establish a \$1,897,655 assessment for tax year 2009. Verizon appealed the assessment to the Mercer County Board of Taxation, which affirmed the assessment without prejudice. This appeal followed. The Borough filed a counterclaim seeking, among other things, a declaratory judgment as to the interpretation and application of N.J.S.A. 54:4-1.

Verizon's complaint initially alleged that the assessment was improper because Verizon provided dial tone and access to less than 51% of the local telephone exchange in the Borough, and it was therefore no longer a local exchange telephone company subject to the tax. The Borough moved for summary judgment on the ground that the "51% test" is not an annual test. The Borough maintained that the Legislature intended the 51% test to be applied just once – on April 1, 1997. Because it is undisputed that Verizon provided dial tone and access to 51% or more of the Hopewell Telephone Exchange in 1997, the Borough contends that Verizon is obliged to file returns and pay the business personal property tax annually thereafter until such time as the Legislature amends the statute.¹⁰

⁹ Verizon provided the same notice to four other municipalities in addition to the Borough in 2008 with respect to tax year 2009. Only the Borough assessed a business personal property tax that year. In the years that have followed, hundreds of cases have been filed by Verizon, the other two ILECs and municipalities involving this same tax, and those cases have been marked inactive awaiting final resolution of this case.

¹⁰ The League of Municipalities filed an amicus brief in support of this position.

Verizon thereafter filed an amended complaint alleging that, even if construed to mean that Verizon would not be subject to the tax if it provided dial tone and access to less than 51% of a local exchange, N.J.S.A. 54:4-1, as applied to it, nevertheless: (1) violated the Equal Protection Clause, U.S. Const. amend. XIV, § 1, and similar guarantees of equal protection under N.J. Const. art. I, § 1; (2) was a special law violating N.J. Const. art. IV, § 7, ¶ 9; and (3) violated the Uniformity Clause, N.J. Const. art. VIII, § 1, ¶ 1(a). Verizon cross-moved for summary judgment on the issue of the appropriate statutory interpretation and also on the constitutional issues raised in its amended complaint.

In disposing of the summary judgment motions, the court concluded that N.J.S.A. 54:4-1 subjects a local telephone exchange company to tax on its business personal property located in a municipality when it provides dial tone and access to 51% of a local telephone exchange, with the 51% test to be performed annually as of the assessment date.¹¹ The court also determined that the provisions of N.J.S.A. 54:4-1, requiring Verizon to pay a tax on its business personal property when it provides dial tone and access to 51% of a local telephone exchange, comports with federal and state guarantees of equal protection, does not constitute special legislation, and does not violate the Uniformity Clause.

Following the court's June 26, 2012 decision, the Borough filed a Motion for Leave to Appeal, which was denied by the Appellate Division on September 12, 2012. The Borough then sought review before the Supreme Court, which was rejected on January 11, 2013. The parties then began a five year period of discovery, which included multiple motions, consent orders and a

¹¹ A bill introduced to the New Jersey Legislature to reverse this decision was introduced on May 18, 2017. See Assemb. B. 4831, 217th Leg., Reg. Sess. (N.J. 2017) (Dead). A second bill was introduced on February 1, 2018. See Assemb. B. 2664, 218th Leg., Reg. Sess. (N.J. 2018) (Referred to Assembly Appropriations Committee.)

protective order. Trial in this matter was held on September 4, 5, and 6, 2018, and the parties requested until December 14, 2018 to file closing submissions, which was extended at the parties request until January 4, 2019.

EXPERT TESTIMONY

Verizon's Experts

To assist the court, Verizon presented the expert testimony of two individuals, who were deemed qualified in the field of telecommunications without objection.

The first expert to testify was a former Verizon employee who was directly involved in establishing Verizon's 2007-2008 calculation of market share in the Hopewell Telephone Exchange ("Verizon's internal expert"). Verizon's internal expert's conclusion that Verizon provided less than 51% of dial tone and access in the Hopewell Telephone Exchange as of January 1, 2008 utilized the NPA-NXX listings to define the exchange, and was based in part on E911 data.¹²

Verizon's internal expert explained that the E911 data is reliable because NENA standards require up-to-date and accurate recordkeeping. He also offered that Verizon, as the E911 administrator, has used E911 data in multiple prior regulatory proceedings, where the data has always been accepted by the administrative board.

Verizon's internal expert also testified that the use of E911 data to calculate market share requires translating the number of E911 listings into lines. This stems from the fact that the E911

¹² The Verizon line data came from the Access Line Reporting and Forecasting System. The data reflects actual in-service line accounts. The E911 database was used to calculate the competitors' share of the listings in the Hopewell Telephone Exchange.

data includes both residential and commercial listings, and there are typically more commercial listings than lines.

For example, larger businesses generally have fewer lines than employees, but may wish to have a separate telephone listing for each employee. In this situation, every employee could not use the telephone at the same time; only the maximum number of actual telephone lines can be used. In this instance, a telephone listing does not equate to a dial tone and access line. On the other hand, small businesses and most residences have one telephone listing which corresponds to one telephone line. Regardless of the ratio of telephone lines to listings, the E911 system is designed to inform the emergency responders of the location of the listing from where the call originates.

Verizon's internal expert calculated that as of January 1, 2008, Verizon provided dial tone and access to 5,134 residential lines, out of a market of 5,862 residential lines associated with the Hopewell Rate Center. The competitor CLECs provided dial tone and access to 728 residential lines attached to the Hopewell Rate Center.

To address the CLEC's business customers' representation, Verizon developed a Business Line to Listing Ratio (BLLR) based upon its own customer base, using E911 listings and its own business line data in New Jersey. The resulting calculation was a BLLR of 0.63. Verizon then applied that conversion factor to the number of Verizon business listings assigned to the Hopewell Rate Center, and to the number of CLEC business listings. Using this methodology, Verizon's internal expert concluded that Verizon provided dial tone and access to 1,534 business lines, out of a total market of 8,068 business lines in the Hopewell Rate Center.

Verizon's number of residential lines (5,134) coupled with its number of business lines (1,534) totaled 6,668 lines out of an overall market of 13,930 lines. Verizon's internal expert

therefore concluded that as of January 1, 2008, Verizon provided dial tone and access to 47.9% of the NPA-NXX lines assigned to the Hopewell Rate Center. Since Verizon's position is that the NPA-NXX numbers define the local telephone exchange, it concludes that it is no longer subject to the business personal property tax in the Hopewell Telephone Exchange.

Verizon also produced a second expert, who was qualified as an expert in the telecommunications industry, without objection. Specifically, the second expert reviewed Verizon's internal expert's analysis and found it to be both credible and reasonable. In addition, the second expert performed his own analysis of Verizon's market share using his company's proprietary methodology. His analysis is also based on a definition of local telephone exchange as defined by the NPA-NXX numbers assigned to the Hopewell Rate Center, which included the NPA-NXX listings assigned to Merrill Lynch. The expert's proprietary software was developed using publically available government data as well as other reputable data sources to calculate competitors' dial tone and access. The sources relied upon are regularly used in the industry and by other experts in the field.

Based on his review, the second expert testified that as of January 1, 2008, Verizon provided dial tone and access to 4,597 residential lines, out of a market total of 5,393 residential lines assigned to the Hopewell Rate Center. CLECs provided dial tone and access to 796 residential lines assigned to the Hopewell Rate Center.

For business lines, the second expert focused on the "telecommunications spend" of each business, which is based on the number of employees and type of industry, and is calibrated at the national level. Applying this proprietary methodology for businesses, the expert opined that Verizon provided dial tone and access to 1,226 business lines, out of a market total of 7,818

business lines assigned to the Hopewell Rate Center. He further opined that CLECs provided dial tone and access to the remaining 6,592 business lines.

Verizon's number of residential lines (4,597) coupled with Verizon's number of business lines (1,226) total 5,823 lines out of an overall market of 13,211 lines. It was the second expert's conclusion that based on his methodology, as of January 1, 2008, Verizon provided dial tone and access to 44.1% of the Hopewell Telephone Exchange.

Borough's Expert

The Borough produced an expert in telecommunications who was qualified without objection. The expert testified that FCC data indicates that Verizon provided more than 51% of dial tone and access in the State of New Jersey in both 2007 and 2008. Specifically, the FCC's Local Competition Report indicates that, when taken as a whole, ILECs in New Jersey (of which Verizon is the largest) served greater than 51% of the dial tone and access until sometime in 2012. It was the Borough's expert's opinion that, in 2007, ILECs served 82.8% of the dial tone and access lines in New Jersey and 66.1% in 2008 (access lines were counted as of December 31st of each year). The expert found this data reliable as it was based upon mandatory reports submitted twice per year by individual dial tone and access providers to the FCC.¹³

In commenting on the testimony of Verizon's expert, the Borough's expert concludes that Verizon's market share analysis differs so dramatically from the FCC's data due almost entirely to the Verizon experts' use of the NPA-NXX listings to define the local telephone exchange. More

¹³ See Local Telephone Competition Reports, <https://www.fcc.gov/general/local-telephone-competition-reports>. ("Data on subscription to voice telephone services as collected by FCC Form 477 twice a year through December 2013. Data after December 2013 are published in the Voice Telephone Services Reports. The reports include data on connections served by incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs), mobile wireless providers, and—as of 2008-interconnected Voice over Internet Protocol (VoIP) service providers.") This report is also referenced by Verizon's expert.

specifically, the difference results from Verizon's decision to capture the large Merrill Lynch complex at 1100-1800 Merrill Lynch Drive, Pennington, New Jersey.

The Merrill Lynch complex was served by a competitor in 2007-2008 and resulted in an additional 9,998 telephone numbers being assigned to the Hopewell Rate Center and included in the E911 database. Since the complex is not located in the Hopewell Telephone Exchange as depicted on Verizon's tariff map, the Borough's expert testified that the 6,000 or more dial tone and access lines serving that facility should not be included in an analysis of Verizon's market share in the Hopewell Telephone Exchange. When the Merrill Lynch NPA-NXX lines are removed, the expert concludes that Verizon has an 87.4% market share, which is more in line with the FCC report.

The Borough's expert also disputed the reasonableness of using the Hopewell Rate Center as a basis to define a local telephone exchange. The expert explained that rate centers are a conceptual construct used in the telecommunications industry as an administrative tool for measuring the distance between a person making a telephone call and the party answering a telephone call. For this purpose, each telephone number is assigned a rate center. When one telephone number is used to call another telephone number, the distance between the two rate center points assigned to those two telephone numbers is then used to calculate the distance of the call.

The North American Number Plan Administrator ("NANPA") describes a rate center as allowing a consumer's service location to be defined for purposes such as local calling plans and calculating distances to rate long distance telephone calls. It is a geographic area represented by a single point. Each NPA-NXX in the NANPA (except special purpose codes such as those used for "toll free" numbers) is associated with a rate area.

Verizon's market share analysis is primarily based on telephone numbers that are tied to its Hopewell Rate Center – regardless of where that customer is located geographically. The Borough's expert's testimony was that local telephone exchanges are well defined, geographical areas with known boundaries that can be mapped with specificity. For this reason, the Borough's expert believes that rate centers cannot be used to define a local telephone exchange. He also noted that local telephone exchanges are the building blocks of the local telephone marketplace from a network, service, and regulatory standpoint, and together they form LATAs. Additionally, in the case of VoIP, telephone numbers identified with a specific rate center may be assigned to customers using dial tone and access services located hundreds of miles away from the single point of the rate center or even in different states.

The expert further testified that distance sensitive toll rates have become less prominent as telecommunications technology continues to progress beyond simple copper wire telephone line services. Accordingly, the need for measuring the distance of calls is becoming obsolete (as noted by NANPA).

To emphasize his point, the Borough's expert noted that Verizon has not updated its tariff maps since 1974, which was prior to deregulation. This he believes is because defining the geographic area of such an endeavor would at this point be amorphous. Numbers assigned to rate centers can be used by dial tone and access customers located nearly anywhere in the world, and commonly are used by dial tone and access customers far outside the geographic boundaries of the exchange associated with the rate center. For this reason, the Borough's expert opined that a rate

center is not a defined geographic area and as such it does not provide the necessary geographic boundaries over which a reasonable analysis of market share can be calculated.¹⁴

The Borough's expert also notes that Verizon did not retain the actual E911 records from 2007 and 2008 upon which its analysis is based, and as such Verizon cannot identify the service addresses of the actual dial tone and access line customers it relies upon in its market share calculations. Instead Verizon relies on a summary analysis which no longer includes the actual addresses of subscribers in its study. The only E911 data provided by Verizon which includes addresses that can be identified or mapped is dated July 1, 2015.

The Borough's expert criticizes Verizon's experts' inclusion of CLEC dial tone and access services provided at the Merrill Lynch complex in his analysis. Verizon included dial tone and access services at that address because New Star had assigned the entire block of 609-274 telephone numbers to the Hopewell Rate Center, even though the complex is not within the boundaries of the Hopewell Telephone Exchange as depicted on Verizon's tariff map. This, the Borough's expert believes, is arbitrary and unreasonable because by 2007 the distance between V&H coordinates of rate centers had become almost irrelevant.

The Borough's expert also points out that if a local telephone exchange is defined geographically and not by NPA-NXX numbers, Verizon can include a substantial volume of dial tone and access services provided by a CLEC to a large Johnson & Johnson complex located at 199 Grandview Road, Skillman, New Jersey. Verizon excluded these services from its analysis because New Star had assigned the NPA-NXX numbers given to this customer to its Belle Meade Rate Center rather than the Hopewell Rate Center. The Johnson & Johnson facility has

¹⁴ The expert references that a market share analysis includes both a product and geographic dimension as explained by the Department of Justice in its Horizontal Merger Guidelines.

approximately 1,200 employees and is located within the geographic boundaries of the Hopewell Telephone Exchange as depicted on Verizon's tariff map.

The Borough's expert performed an analysis wherein he excluded the Merrill Lynch complex and included the Johnson & Johnson Skillman facility. He also made the conservative assumption that all 1,200 employees at the Johnson & Johnson Skillman facility are provided a unique dial tone and access line. This analysis still results in Verizon having a 75.5 % market share in 2007, and a 72.2 % market share in 2008.

ANALYSIS

N.J.S.A. 54:4-1 provides, in pertinent part:

Personal property taxable under this chapter shall include . . . the tangible goods and chattels, exclusive of inventories, used in business of local exchange telephone, telegraph and messenger systems, companies, corporations or associations that were subject to tax as of April 1, 1997 under P.L. 1940, c. 4 (C.54:30A-16 et seq.) as amended As used in this section, "local exchange telephone company" means a telecommunications carrier providing dial tone and access to 51% of a local telephone exchange.

[N.J.S.A. 54:4-1.]

A thorough analysis of the background of N.J.S.A. 54:4-1, and its context within the deregulation of, and increased competition in, the telecommunications industry is set forth in Judge Menyuk's June 26, 2012 opinion:

In general terms, telephone service in the United States was operated as a monopoly by AT & T prior to the settlement of anti-trust litigation brought by the federal government. See generally United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C.1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983). Local telephone service was provided by several local operating companies, popularly known as Baby Bells, most of which were wholly owned by AT & T. Id. at 139. Under the divestiture decree entered in the antitrust litigation, effective January 1, 1984, the AT & T monopoly was dismantled, and AT & T divested itself of the Baby Bells, which included New Jersey Bell Telephone Company

("NJ Bell"), the operating company that provided local telephone exchange service for virtually all of New Jersey. In re MCI Telecomm. Corp., 263 N.J. Super. 313, 316 (App. Div. 1993). Verizon, the plaintiff here, is the corporate successor to NJ Bell.

Following divestiture, the Baby Bells, including NJ Bell, had a monopoly over the provision of local telephone service and telephone connections within specified geographic regions (called local access and transport areas, or LATAs). Ibid. However, the local telephone companies were severely limited by the terms of the divestiture decree from providing other telecommunication services, including connections between LATAs, even where, as in New Jersey, more than one LATA was located within the service area of the Baby Bell. United States v. Am. Tel. & Tel. Co., 552 F. Supp. at 186; In re MCI Telecomm. Corp., 263 N.J. Super. at 316. Competitive long distance telephone service between LATAs was offered by carriers such as the post-divestiture AT & T, MCI and Sprint. Ibid.

[26 N.J. Tax at 407-408 (citations omitted)]

The divestitures decree permitted states to “regulate the local telephone companies and the intrastate business of long distance carriers” as well as “determine whether or not the long distance companies would be permitted to compete with the local telephone companies for the provision of intrastate intra-LATA service.” Id. at 408. New Jersey long distance carriers were initially not permitted to “provide intra-LATA service in competition with NJ Bell.” Ibid.

Thereafter the New Jersey Legislature enacted the Telecommunications Act of 1992, L. 1991, c. 428, authorizing local telephone companies to offer some competitive telecommunications services while simultaneously determining that long distance service in New Jersey was sufficiently competitive. See N.J.S.A. 48:2-21.19. A few years later, Congress passed the Federal Telecommunications Act of 1996, authorizing “Baby Bells to compete in the inter-LATA long distance market, provided that they had taken sufficient steps to facilitate competition in the intra-LATA telephone market.” Verizon New Jersey, Inc., 26 N.J. Tax at 409.

In addressing competition in the local telephone market Judge Menyuk writes:

According to information published by the Federal Communications Commission ("FCC") on its website and included in Verizon's motion papers, new entrants to the local telephone market provided about 1.2% of total local services nationwide as of 1997. FCC data further indicates that, by the end of June 2008, there was considerable competition in the New Jersey local telephone market from new entrants and from companies offering local telephone service by way of cable modem. As of June 30, 2008, the Borough was served by sixteen local exchange carriers in addition to Verizon. However, the FCC data indicates that those companies that had provided local telephone exchange service at the time of enactment of the Federal Communication Act of 1996 (that is, Verizon's predecessor and two other companies with limited service areas in New Jersey, together known as "incumbent local exchange carriers" or "ILECs") continued to provide the majority of local telephone service in New Jersey. Verizon's property tax manager notes in his certification submitted in support of Verizon's motion that, based on FCC data, Verizon and the other ILECs provided 62% of total end-user connections for land line (as distinguished from wireless) local telephone services in New Jersey as of June 2008.

[Id. at 409-410 (footnote omitted).]

N.J.S.A. 54:4-1 was amended several times beginning in 1989. Judge Menyuk's opinion called attention to key aspects of the amendments:

The changes to the telecommunications industry following divestiture were first reflected in the New Jersey tax statutes by the enactment of L. 1989, c. 2, which amended N.J.S.A. 54:4-1 to exclude "certain interexchange and interstate telecommunications companies" (primarily AT & T) from the local personal property tax imposed by that section. Senate Revenue, Finance and Appropriations Committee, Statement to Assembly, No. 135 (Oct. 20, 1988). See also N.Y. SMSA Ltd. P'ship v. E. Hanover Twp., 13 N.J. Tax 564, 568 (Tax 1994) (effect of amendment was to shift the local personal property tax from AT & T to NJ Bell); "Assembly OKs bills to cut AT & T taxes, raise funds for 911," Trenton Times, June 24, 1988, at A4; "Unwrapping Package of New N.J. Phone Tax," Philadelphia Inquirer, Apr. 2, 1989, at B1.

Following amendment by L. 1989, c. 2, the relevant portion of N.J.S.A. 54:4-1 continued the tax on the personal property of local exchange telephone companies, which were defined as "a telecommunications carrier providing dial tone and access to substantially all of a local telephone exchange." L. 1989, c. 2, § 3

also excluded telecommunications carriers other than local exchange telephone companies, such as AT & T, from taxation under the FGRT. Consequently, long distance telephone carriers became taxable as ordinary corporations under the CBT Act rather than as public utilities. See N.J.S.A. 54:10A-3 (a) (excluding from the CBT those corporations subject to a tax assessed on the basis of gross receipts).

The last amendment to N.J.S.A. 54:4-1 that is pertinent here was made by L. 1997, c. 162, which generally revised the taxation of gas and electric utilities as well as of local telephone companies. The legislation was entitled: "An act revising the taxation of gas and electric public utilities and certain telecommunication companies, and sales of electricity, natural gas and energy transportation service, in order to preserve certain revenues under transitions to more competitive markets in energy and telecommunications, revising and repealing various sections of statutory law." Following amendment by L. 1997, c. 162, § 60 ("Section 60"), the relevant portion of N.J.S.A. 54:4-1 continued to tax only those local exchange telephone companies subject to the FGRT as of April 1, 1997, and redefined local exchange telephone company as "a telecommunications carrier providing dial tone and access to 51% of a local telephone exchange."

[Id. at 412-414.]

N.J.S.A. 54:4-1 does not define "local telephone exchange." Verizon's position is that a local telephone exchange is defined by the NPA-NXX codes assigned to a given rate center. A rate center is a specific geographic point, generally defined by V&H coordinates, that is used to calculate mileage and determine applicable long distance charges for calls between telephone exchanges. Each rate center has a unique set of NPA-NXX codes assigned to it.

Prior to deregulation, AT&T assigned the NPA-NXX codes to customers in a geographical area surrounding the rate center. The physical parameters of these rate centers were designated on exchange maps. As a result, the NPA-NXX codes and rate centers aligned with the geographic boundaries on the exchange maps.

Once deregulation occurred and competition began, Verizon was not in control of all aspects of the management of this system, and this continuity ceased. In this new telecommunications environment, New Star issues the NPA-NXX and assigns it to a given rate center, without knowledge of or consideration for the physical location of the customer.

Verizon argues that this difficulty in being able to include all customers within the boundaries of its tariff exchange map makes very little difference in identifying the local telephone exchange or in determining market share, since the routing, rating, and billing of calls takes place without any reference to customer's addresses or their location on an exchange area map. Instead Verizon asserts that the entire basis for the routing, rating, and billing of calls is associated with the NPA-NXX code's rate center and that in turn defines a local telephone exchange.

The Borough takes the adverse position and argues that a local telephone exchange is a physical concept represented by the dial tone and access lines providing service within the geographic boundaries established in the tariff exchange maps, and not by NPA-NXX numbers associated with a rate center. Market share is determined by the number of dial tone and access lines within the boundaries of the tariff exchange maps, which it argues can be reasonably calculated using public sources of data and information.

N.J.S.A. 54:4-1 nor any other New Jersey statute defines a local telephone exchange, nor the method for calculating what constitutes 51% of a local telephone exchange. In fact nowhere in New Jersey law or its administrative code is a telecommunications carrier provided direction as to how to determine the 51% calculation. Moreover, there is no publically available data reflecting the market share of every telecommunications carrier in a particular exchange. While Verizon has data on its own customers, it has no means to calculate market share without using some reliable methodology to calculate competitors' dial tone and access lines.

In New Jersey, it is firmly established that “[t]he Legislature is presumed to know the law”. Comm. of Petitioners for Repeal of Ordinance No. 522 (2013) of Borough of W. Wildwood v. Frederick, 435 N.J. Super. 552, 567 (App. Div. 2014). Accordingly it is also presumed that the Legislature intended not to provide an explicit method of calculating market share when it drafted N.J.S.A. 54:4-1 and its subsequent amendments. The court presumes that the Legislature appreciated what information would have been publically available at the time, given that the telecommunications industry is highly regulated both federally and by the State. The court also presumes that the Legislature had some understanding of the advances being made in technology and the increased ability to collect, store, and interpret market share data. The introduction of competition into the telecommunications market would have significant changes to the industry that would have been anticipated but not fully known or understood by the Legislature. Although it is speculation, it may have been for these reasons the Legislature did not design the statute with a rigid and specific method of calculation.

Absent Legislative direction, ILECs and municipalities are left to establish and create a calculation method based on the data they have at their disposal to determine whether an ILEC provides less than 51% of dial tone and access to a local telephone exchange. The Legislature in enacting N.J.S.A. 54:4-1 had to envision the ability to set forth a reasonable analysis to establish the calculation, otherwise it would render the 51% threshold meaningless.

The court finds the Borough’s expert’s view of the defining characteristics of a “local telephone exchange” persuasive. Although not defined in N.J.S.A. 54:4-1, the term “local telephone exchange” is a common and historical concept in the telecommunications industry. It is a geographically defined area serviced by a physical construct that functions as the building block for service delivery, call routing and the regulatory infrastructure that has dominated the

telecommunications industry for decades. Verizon's tariff maps are publicly available and define with specificity the boundaries of its Hopewell Telephone Exchange. That the business personal property being taxed is physically located within the boundaries of the exchange bearing its name demonstrates a geographic component to the definition of a "local telephone exchange." This connection to a geographically identifiable area also serves as a foundation for the boundaries of competition and the LATA system. Furthermore, the utilization of a geographic definition permits the usage of public and transparent data sources when calculating market share, such as data from the FCC, United States Census Bureau, Nielsen, PEW, and InfoUSA.

This court's interpretation of a "local telephone exchange" is also consistent with the United States Supreme Court's description of a "local exchange" in Verizon Communs., Inc. v. FCC, which reads as follows:

The physical incarnation of such a market, a "local exchange," is a network connecting terminals like telephones, faxes, and modems to other terminals within a geographical area like a city. From terminal network interface devices, feeder wires, collectively called the "local loop," are run to local switches that aggregate traffic into common "trunks." The local loop was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used, albeit to a far lesser extent than in long-haul markets. Just as the loop runs from terminals to local switches, the trunks run from the local switches to centralized, or tandem, switches, originally worked by hand but now by computer, which operate much like railway switches, directing traffic into other trunks. A signal is sent toward its destination terminal on these common ways so far as necessary, then routed back down another hierarchy of switches to the intended telephone or other equipment. A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like.

[Verizon Communs., Inc. v. FCC, 535 U.S. at 489-490 (2002).]

CONCLUSION

The court adopts a definition of the Hopewell Telephone Exchange that is based on the geographic boundaries as depicted on Verizon's tariff and product guide exchange maps, and as represented in the LATA system. Thus, the remaining issue to be determined is if Verizon has proven that it no longer provides 51% of dial tone and access to the Hopewell Telephone Exchange. Although the court finds that Verizon has the burden of proof, both parties are in agreement that exclusion of the Merrill Lynch complex from the Hopewell Telephone Exchange, even with the addition of the Johnson & Johnson Skillman facility, would result in Verizon furnishing more than 51% of dial tone and access in the Hopewell Telephone Exchange. Therefore the court finds in favor of the Borough, and affirms the imposition of the tax as imposed under N.J.S.A. 54:4-1 for tax year 2009.