NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petitions	:	**AMENDED DETERMINATION**
of	:	**TAT(H)14-12(UT)**
	:	**TAT(H)14-13(UT)**
U.S. Sprint Communications Company, LP	:	

Bunning, A.L.J.:

The two Petitions in these consolidated matters were filed with the Administrative Law Judge Division of the New York City (City) Tax Appeals Tribunal (Tribunal).

The Petition in TAT(H)14-12(UT), dated June 25, 2014, protests a Conciliation Order, dated March 28, 2014, affirming a Notice of Determination, dated March 20, 2013, seeking to impose City utility tax (Utility Tax) under Chapter 11 of Title 11 of the City Administrative Code (Code) on the Petitioner for the period January 1, 2001 to June 30, 2003 (First Audit Period) in the amount of $1,115,169.85, interest computed to April 30, 2013 of $1,475,436.17, and penalty of $143,925.36, for a total of $2,734,531.38.

The Petition in TAT(H)14-13(UT), also dated June 25, 2014, protests a second Conciliation Decision, also dated March 28, 2014, upholding a Notice of Determination dated May 28, 2013 seeking to impose Utility Tax on Petitioner for the period July 1, 2003 to December 31, 2005 (Second Audit Period) in the amount of $1,110,177.34, interest computed to July 31, 2013, of $1,053,089.25, and penalty of $118,643.39, for a total of $2,281,909.98.

On February 9 and 10, 2016, a hearing was held before the undersigned at One Centre Street, New York, New York, where testimony was taken, a Stipulation of Facts was submitted, and exhibits were admitted into evidence. The parties filed briefs after the hearing, the last of which was Respondent's Reply Brief, filed on September 23, 2016.

Petitioner, U.S. Sprint Communications Co., LP, (Sprint or Petitioner) was represented by Marc A. Simonetti, Esq. and Nicole Boutros, Esq. of Sutherland Asbill & Brennan LLP. Respondent, City Department of Finance, was represented by Martin Nussbaum, Esq., Assistant Corporation Counsel, with the City's Law Department.

ISSUES

1. Whether Utility Tax applies to Petitioner's receipts from taxes and fees passed through to its customers which were based on usage and incurred in providing long-distance telephone service.

2. Whether Utility Tax applies to Petitioner's receipts from certain access charges passed through to its customers which were based on usage and incurred in providing long-distance telephone service.

3. Whether Utility Tax applies to Petitioner's receipts from certain flat-fee and non-usage access charges passed through to its customers which it incurred in providing long-distance telephone service.

4. Whether Utility Tax applies to Petitioner's charges for services related to its long-distance telephone service.

5. Whether Utility Tax applies to Petitioner's charges for sales and installation of equipment used to provide long-distance telephone service.

6. Whether Utility Tax applies to Petitioner's charges for providing Internet access.

FINDINGS OF FACT

At issue are certain receipts that Petitioner argues relate to long-distance telephone and data service. These charges fall into six broad categories: (1) recoupment of taxes and fees which Petitioner attributed to the costs of providing long-distance service and billed as a percentage of the charge of long-distance calls, (2) recoupment of access charges based on usage for use of the local telephone company's facilities in completing long distance telephone calls and data transmission, (3) recoupment of access charges which were a flat fee not based on usage, (4) charges for services such as data transfer and voicemail, (5) charges for sales and installation of equipment, and (6) charges for Internet access.

During the years at issue, Petitioner provided local[1] and long-distance telephone service in the City. Local telephone service involved telephone calls that both began and ended within the City. Long-distance telephone service consisted of calls

[1] One of Sprint's witnesses testified at the hearing that, "[D]uring that time, we attempted to become a competitive local telephone company within the State of New York by reselling services from the incumbent . . . [Verizon]" (Tr 259:14-18).

that either began or ended within the City but ended or began outside the City. Petitioner also provided bandwidths and data speeds for both local and long distance transmission of voice, data, and video for its customers, as well as sales and installation of equipment. The parties agree that the discrete charge for a long-distance telephone call is exempt from Utility Tax, and they also agree that all local telephone service is subject to Utility Tax. Only Petitioner's long-distance service is at issue here.

Petitioner owned no local telephone equipment. In order to provide a long-distance telephone call, Petitioner was required to use the local telephone facilities of a local exchange carrier (LEC) to bring the long-distance telephone call the "last mile" between the customer's location and Sprint's "point of presence," meaning Sprint's long-distance switch. Sprint paid access charges to the LEC based on a schedule set by the Federal Communications Commission (FCC). Some of the access charges were based on usage and others were a fixed monthly fee per line.

Competition among long-distance telephone companies spurred them to advertise, use, and bill for low "per-minute" long distance rates, accompanied by a series of charges by which they recouped associated costs. These other charges consisted of (1) government taxes and fees, and (2) access charges paid to LECs.

Petitioner's Regulatory Policy Manager testified that all of the charges at issue related solely to long-distance telephone service, and that only long-distance customers were charged for these items. Petitioner could have increased its per-minute long-distance charge to cover these amounts. As Respondent notes, Petitioner's cost structure was of its own choosing,

although the competitive environment encouraged the approach it used, in order to match costs to revenues for each customer.

He testified that although Sprint theoretically had discretion to allocate costs as it chose, the market spurred Sprint to match costs incurred in providing a service to the corresponding revenue:

> "In a competitive market you would have that discretion, but you certainly wouldn't want to take that discretion, because your prices in the market would not be competitive if you try to collect costs from some other customer from -- if you didn't collect the costs that were incurred from the customer directly related to that customer. * * * if a particular customer causes you to incur a particular expense, if you try to recover that expense in any way, other than directly from that customer, then you're distorting the pricing in the market. And in a competitive market you cannot do that. So Sprint would, as much as possible, recover the costs directly from the . . . causer of that cost." (Tr 371:4-20.)

Petitioner timely filed its Utility Tax returns as a "vendor of utility services."[2] Respondent examined the returns for the First Audit Period. Its examination of Petitioner's books and records revealed certain revenues that were not reported on the returns. Respondent determined these revenues did not relate to long-distance transactions and were subject to Utility Tax.

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[2] Utility Tax is computed on the "gross income" of a "utility" (defined as a person subject to the supervision of the Department of Public Service) and to the "gross operating income" of a "vendor of utility service" (defined as a person not subject to such supervision) (Code §§ 11-1101.4, 11-1101.5, 11-1101.6, and 11-1101.7). Respondent agrees that Petitioner is a vendor of utility services.

The auditor prepared a document entitled "U.S. Sprint Comm Company LP Summary of Assessment by Category." He also prepared detailed spreadsheets showing all charges, taxable surcharges, and taxable revenue for each of the five boroughs of the City for each of the five semi-annual periods in the First Audit Period, divided into "usage" and "non-usage."[3] The auditor did not testify. The audit supervisor testified that he did not know the difference between usage and non-usage (Tr 64:8-22).

The parties stipulated to the "accuracy of the calculation" of the Notice of Determination. However, at the hearing it was apparent that Petitioner's employees and counsel did not recognize one of the accounts ("MTS") identified in the auditor's summary as taxable, and did not understand how some of the amounts were computed. The auditor's summary identified the MTS account as having over $3.7 million in revenue and called it "an unexplained surcharge." Apart from pointing out other references to this term in the audit workpapers, the audit supervisor could not explain the MTS acccount.

Rather than rely on the City's listing of the accounts in the auditor's summary, Petitioner prepared exhibits (Exhibits Q and T) showing what it believed to be the categories of charges and amounts at issue.[4] Sprint's tax supervisor, who had represented it in Respondent's audit, provided testimony to

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[3] For reasons that were not explained, the spreadsheets for the period July - December 2002 are not in the same format and contained far fewer categories of charges. There is no spreadsheet for Manhattan usage for this period.

[4] Exhibit Q provides Sprint's description of each charge or service with the associated amount of revenue. Exhibit T is a summary of the auditor's workpapers, containing data for each of the five boroughs for the five semi-annual periods involved in the First Audit Period and the totals for each category of revenue determined to be taxable.

correlate the amounts listed on these exhibits with the auditor's workpapers. A comparison of the auditor's summary of charges and Exhibit T is presented in the Appendix to this determination.

Despite its inclusion in the summary of taxable items, the MTS account was not treated as a taxable account on the spreadsheets. They show all revenue of Petitioner, only some of which was treated as taxable, and MTS was not so treated.[5]

Petitioner's Exhibits Q and T summarize the charges it believed are in dispute. They contain most of the auditor's categories, add amounts for installation of equipment, ATM service and WATS, omit the auditor's category for "other taxes and surcharges," and break out access charges into usage and non-usage. The auditor's total of taxable charges is $47,454,036.60 and Petitioner's total is $47,939,181.52, a difference of 1% (see Appendix). Therefore, the parties appear to be referring to the same charges.

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[5] The items that were treated by the auditor as "Taxable Revenue" were Feature Charges, "Local Conn/Discon Charges Reg," Frame Relay, Local Service Features, Local Reg, Voicemail Charges, Local Service Features Non Reg, Long Distance PICC Non Reg, Telemanagement Services Non Reg, Line Charges Reg, "Local Conn/Discon Non Reg," Local PICC Reg, Installation Charges Non Reg., Local Service Charges Reg, Access Charges Non Reg, Local Non Reg (this was listed twice; the first number is positive and the second number is negative; this was not explained), Local Data Reg, Local Service Equipment, Local Data Non Reg, Equipment Sale Non Reg, Local Service Install Charges Non Reg." In addition, Respondent's audit workpapers include as "Taxable Surcharges" Carrier Prop Tax/Reg Fees, Carrier Universal SVC Chg, Carrier Property Tax, Carrier Universal SVC Chg, and Regulatory Fee. (It is not known why Carrier Universal Service Charge was listed twice, in different amounts.) The auditor separately accounted for various categories of usage. The MTS account appears on the non-usage spreadsheet. Apparently the original spreadsheets had colored areas on them and that is where it appears. On the copies submitted as exhibits, the colored area appears as a black box, through which the numbers are very hard to read, but some of the original pages were submitted and here the MTS account is readily discernible.

Respondent examined Petitioner's Utility Tax Returns for the Second Audit Period and computed an amount due by applying an error ratio of 42.553% determined from the First Audit Period.

Respondent issued the two Notices of Determination referenced above.[6] Petitioner filed Requests for Conciliation Conference, on June 14, 2013 and August 23, 2013, respectively. Conciliation Decisions were issued on March 28, 2014, affirming the Notices of Determination.

As stated, the parties stipulated to the accuracy of Respondent's computations, but because the auditor's summary is inconsistent with the underlying spreadsheets, it is not clear what numbers were agreed to. A thorough examination of the auditor's spreadsheets[7] shows that Petitioner's Exhibit T accurately summarizes the auditor's workpapers. It is therefore accepted as a summary of the charges at issue.

Petitioner's Regulatory Policy Manager testified about each of these categories of charges. Respondent's audit report contains descriptions of some of the charges, and additional statements of Respondent's understanding of the charges were presented at the hearing.

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[6] The amount of the Utility Tax due for the First Audit Period was computed as a total of $49,631,104.06 in taxable services, resulting in tax at 2.35% of $1,166,330.95, less tax paid of $51,161.09, for a tax due of $1,115,169.85. This computes to additional taxable revenue of $47,454,036.

[7] As part of the review of the evidence, spreadsheets were prepared summarizing the auditor's worksheets and the results (totalling $47,938,340.25 in additional taxable revenue) are either identical to, or virtually the same as, the totals found in Petitioner's Exhibit T (totalling $47,939,181.52 in additional taxable revenue). Because the auditor's workpapers and Petitioner's Exhibit T are consistent, the 1% difference reflected in the summary in the Appendix is due to the discrepancy between the auditor's summary and the auditor's workpapers.

The disputed charges fall into six categories. The first of these is the recoupment of taxes and fees which Petitioner attributes to providing long-distance telephone calls: Carrier Universal Service Charge (CUSC), State Gross Receipts Surcharge, Carrier Property Tax/Reg Fees, Carrier Property Tax, and Regulatory Fee. In each case, Sprint paid a tax or fee to a governmental agency or its designee, and was permitted but not required to charge its customers to recover these amounts.

The CUSC was a recovery of a charge imposed by the FCC based on a percentage of a carrier's interstate and international revenues. The fund was used to promote access to telecommunications services at reasonable rates for residents of rural and high-cost areas, income-eligible consumers, rural health facilities, and schools and libraries. The audit comments noted that, "This line item appears when a company chooses to recover its USF contributions directly from its customers by billing them for this charge."

A Sprint document received in evidence entitled "Taxes and Surcharges Matrix," dated June 6, 2003, states that, "Effective April 1, 2003, Sprint will apply the FCC prescribed universal service contribution rate off [sic] 9.1%." A similar document, dated August 19, 2005, states that "Sprint will apply the FCC-prescribed universal service contribution rate of 10.2%."[8]

The State Gross Receipts Surcharge was a means for Sprint to pass on the New York State gross receipts tax imposed at 2.35% on its long-distance calls. Sprint imposed a 3.16% surcharge on its

[8] Petitioner's Exhibits W and V, respectively.

long distance telephone charges in order to recoup this charge (apparently with a profit).

The Carrier Property Tax/Regulatory Fee Surcharge was Sprint's recovery of amounts of property taxes it paid nationwide. Depending on the time period, it was in the amount of 1.41 - 1.54% of the amounts of billed interstate and international calls.[9] The regulatory fees imposed on Sprint as a long-distance carrier were also passed on to its long-distance customers, as a charge of 0.51% of all interstate and international calls.

The second category is access charges that Sprint paid to LECs to use local telephone facilities to complete long-distance calls, based on usage. The auditor wrote, "This federally ordered charge billed by your local telephone company pays part of the cost to the local telephone company of supplying a phone line into your home or business. It is designed to help local phone companies recover the cost of providing 'local loops' which refers to outside telephone wires, underground conduit, telephone poles and other equipment and facilities connecting you to the telephone network."

The third category is access charges which were fixed in amount, not based on usage. These consist of the Presubscribed Interexchange Carrier Charge (PICC) (also known as the Long Distance Presubscribed Line Charge), and non-usage access charges.

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[9] Petitioner's Exhibits W and V.

PICC was a charge to business customers to recoup fees that Sprint paid to a LEC where the customer designated Sprint as its long-distance carrier. The parties agree that this was a monthly fee in a fixed amount. Petitioner's employee testified at the hearing that it was imposed regardless of the number of calls made or whether any calls were made. If no calls were made, the LEC still charged Sprint and Sprint charged the customer (Tr 378:13 - 379:19).

According to Exhibit Q, the PICC amount included the in-state access recovery fee and the single bill fee.[10] The in-state access recovery fee was a flat-rate fee Sprint imposed on its residential customers to recover the higher charges imposed by some LECs. Exhibit Q states that it was the residential customers' analog to the PICC imposed on business customers. The single bill fee was imposed to recoup the expense Sprint paid to a LEC to prepare a single bill for both the LEC's local and Sprint's long-distance service, instead of customers' receiving two bills. It was in the amount of $1.50 per month.

The fourth category of charges is for additional long-distance services: ATM, frame relay, WATS, feature charges, and voicemail. All of these were imposed only on long-distance customers. The ATM charge was a charge to recoup the cost Sprint paid to a LEC to get from the customer's location to Sprint's point of presence in the use of the asynchronous transfer mode (ATM) network.

[10] Respondent did not break out these components from the PICC.

Frame relay was a charge for transmission of telecommunications on Petitioner's frame relay service, which was intended to provide consistently fast transmission speeds.

WATS service was for 800 numbers, where customers could call a business toll-free, with the cost paid by that business. All such calls were long-distance.

Feature charges were for ancillary services provided to long-distance customers, such as call routing, three-way calling, call waiting, and, caller ID. (FCC Consumer Guide, Exhibit M, p. 2.) Although this exhibit includes voicemail among "feature charges," voicemail was apparently a separate account: the auditor's spreadsheets, and Exhibits Q and T, listed it separately.

The voicemail charges at issue were for a voicemail service for long-distance customers. Sprint's Regulatory Policy Manager testified:

> "A. Voicemail. So there must have been some customers that wanted a different voice communication when you -- no one picked up for long distance calling versus customers that were called and it was a local call. So they would set a separate message, and this was our charge for collecting that functionality." (Tr 346:21 - 347:3.)

According to Sprint's Exhibit Q, "The Voicemail charge is a charge that Sprint imposes on Long Distance customers for standard voicemail."

The fifth category of charges is for the sale and installation of long-distance telephone equipment at the customer's premises. Sprint's employee testified that customers

were free to buy and install their own equipment, and then obtain long-distance service from Sprint.

The sixth and final category of charges is for "Local Data - DSL." This represented charges for digital subscriber lines to provide access to the Internet.

The audit supervisor testified that Utility Tax was not imposed on "a taxpayer that's in the business of just doing long distance service," (Tr 155:22-24). He also testified that revenue paid by an exclusively long-distance customer "would never come to my jurisdiction . . ." (Tr 454:8-18). Thus, it appears that the audit arose because Sprint offered both local and long-distance service and Respondent did not accept Petitioner's distinctions between the two.

POSITIONS OF THE PARTIES

Petitioner contends that its charges for long-distance telephone service, however stated or broken out, are not subject to Utility Tax. It contends that its entire long-distance service is exempt from tax. Petitioner argues that its telemanagement reports, single-bill fee, and installation charges are not ancillary to the provision of telephone service within the meaning of the statute and accordingly are not subject to Utility Tax. Finally, it argues that Internet access charges are exempt from tax pursuant to the Internet Tax Freedom Act (47 U.S.C. § 151, note).

Respondent argues that Petitioner's stating a charge for anything other than long-distance telephone service is an election to recoup a cost, and is thus the taking of a deduction,

which is not permitted by the statute. Using an example, Respondent states that if a long-distance carrier charged $3 per minute for a call, the receipt would be wholly exempt from tax, but if the carrier charged $2 per minute for the call and an additional $1 for access charges, recovery of taxes, etc., the first $2 would be exempt from tax and the third dollar would not. In Respondent's view, Sprint made a business decision to recover its costs, and this is not permitted by the statute.

CONCLUSIONS OF LAW

City Administrative Code (Code) § 11-1102 (a) imposes an excise tax of 2.35% on the gross operating income of a vendor of utility services. Code § 11-1101.7 provides that utility services includes "telecommunications services," which are defined in Code § 11-1101.9 as:

> "Telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call waiting and the like) and also include any equipment and services provided therewith . . . ."

Code § 11-1101.5 defines "gross operating income" to include receipts received in or by reason of any sale made or services rendered of the specified services in the City, "without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or other services, delivery costs or any other costs whatsoever . . . ."

All receipts subject to Utility Tax are presumed to be taxable and to be derived from a business conducted wholly within the City; the taxpayer has the burden of proving that a receipt is exempt from tax (Code § 11-1102.c).

In construing a statute, courts are to give effect to the Legislature's intent, and the starting point is the language of the statute (*Matter of Shannon*, 25 NY3d 345, 351 [2015]). "'The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction'" (*Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 692 [2006] quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94).

The scope of the Utility Tax is curtailed in two ways by General City Law § 20-b, which authorizes a city to enact such a tax. First, it requires that the tax be "a tax such as was imposed by" State Tax Law § 186-a. Second, it provides that the Utility Tax "shall have application only within the territorial limits" of the City. General City Law § 20-b does "not authorize the imposition of a tax on any *transaction* originating or consummated outside the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to *such transaction* within such limits." (Emphasis added.) Thus, the Utility Tax does not reach a long-distance telephone call even if some part of it occurs within the City.[11]

[11] The enabling acts and amendments were reviewed in *Matter of Paging Network of New York, Inc.* (TAT[E]93-901[UT] [City Tax Appeals Tribunal, Appeals Division, 1999]), which quoted the administrative law judge's observation that the relationship among these provisions is "far from a model of clarity" (p. 5).

This seemingly clear rule is complicated somewhat by *Matter of Hotel Waldorf Astoria* (TAT No. 91-0718 [City Tax Appeals Tribunal, Appeals Division, 1994], *aff'd sub nom. Matter of Hilton Hotels Corp. v Commissioner of Fin. of City of N.Y.*, 219 AD2d 470 [1st Dept 1995], which Respondent relies on here. That case considered a hotel's providing long-distance telephone service to its guests. The hotel's charge to the guest for such a call was greater than the telephone company's charge to the hotel for the call. The issue was whether the hotel's "supplemental charge" was taxable. For more than 50 years, Respondent and its predecessor agencies had treated such a charge as part of the long-distance phone call and not taxable. It reversed its position and asserted that Utility Tax was due from the hotel on these charges.

In granting summary determination to Respondent, the Tribunal framed the issue as whether the provision of the long-distance service to a guest was either an inseparable part of the price of a long-distance call resold to the guest, or a discrete taxable charge for on-premises access to the system by which such a call was made. Reasoning that the City tax was to conform as closely as possible to its State counterpart, Tax Law § 186-a, it looked to State Tax Regulation (20 NYCRR) § 45.9(c) (then § 501.9[c]), which provides a special rule where a hotel or apartment house supplies telephone service to its guests or tenants. In such case, the hotel pays tax on the amount it pays to the phone company, and its guest pays tax on the supplemental charge, i.e., the difference between what the hotel charges the guest for the call and what it pays the telephone company.

The Tribunal implemented this rule for the Utility Tax, despite the fact that, as noted in the decision, "unlike the

City, the State may tax some portion of the proceeds of the utility transactions that extend beyond its borders" (p. 5). Thus, the Tribunal's adoption of this rule, which at the State level allocated the tax on a long-distance telephone call between the hotel and its guest, had the effect in the City of converting part of a tax-exempt long-distance telephone call involving a hotel guest or apartment tenant into a taxable transaction.[12]

The First Appellate Department affirmed that part of the Tribunal's determination,[13] holding that it was not "irrational or unreasonable" and that it "need not find that its construction is the only reasonable one, or even that it is the result [it] would have reached had the question arisen in the first instance in judicial proceedings." (219 AD2d at 476, quoting *Udall v Tallman*, 380 US 1.) It made clear that the distinction it drew was between "the service provided by the telephone companies and the supplemental access provided at the hotel by the hotel . . ." and noted that the fact that the hotel could break out the charges showed they were not inseparable (219 AD2d at 476).

That case has no application beyond the scope of the predicate State tax regulation, which was restricted to hotels and apartment houses. It does not apply to a long-distance carrier's charges for long-distance telephone service. Thus, it has no application here.

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[12] The Tribunal wrote, "Admittedly, if left to our own devices, we might not so readily have discerned phone 'access' as a discrete aspect of the phone system furnished by Petitioner to its guests. But the authority of the State Regulation [footnote 14], as informed by the State Agency's practical experience regarding utility services, is certainly persuasive in the absence of equally weighty guidance to the contrary [footnote 15]" (p. 5).

[13] The Court reversed that portion of the Tribunal's determination which permitted the supplemental charge to be taxed retroactively.

The case at issue involves the provision of long-distance telephone service by a provider of that service. At the hearing, the parties discussed Respondent's letter ruling FLR-954650-011 (February 28, 1996),[14] which was issued to a provider of local telephone service that provided local access to a long-distance telephone provider for "access revenues." These were defined in the ruling as "revenues recorded under the Taxpayer's uniform system of accounts maintained as required by the FCC in accounts numbered 5081, 5082, 5083, and 5084," and corresponding accounts, except certain subaccounts. The ruling holds that the access charges paid by long-distance telecommunications carriers "are receipts from sales for resale by those carriers and, therefore, exempt from the Utility Tax." It concluded that:

> " . . . such access, provided by the Taxpayer as required by law, is an integral part of long distance communications transactions that do not originate and consummate within the City. Therefore, access revenues, as defined above, received from Taxpayer's customers are not subject to the Utility Tax. In our opinion, such access revenues are distinguishable from a surcharge or supplemental charge collected by a vendor of telecommunications services from its customers on long distance telecommunications service because such surcharges or supplemental charges are not imposed in exchange for providing an integral component of long distance telecommunications service."

Respondent states that it followed the FLR here because it did not assess tax on the Sprint accounts identified as exempt in the FLR. However, neither party correlated the accounts in the letter ruling to Sprint's accounts or to the audit results.

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[14] City Tax Regulation (19 RCNY) § 16-05(a) provides that such a ruling "is binding upon the Department of Finance only with respect to the person to whom the ruling is rendered, provided that the facts are as stated in the ruling request. A taxpayer may not rely on a ruling issued to another taxpayer. All bureaus of the Department of Finance must follow the conclusions stated in the rulng where the factual situations are the same."

Further, since Respondent was looking at long-distance revenue here and the telephone company involved in the FLR provided only local service, it is conceivable that Respondent examined the long-distance analog to the local accounts held to be exempt in the FLR. What is clear, however, is that in the FLR, Respondent took the position that *Hilton* and the state regulation do not apply to access charges, and that access charges are an integral part of long-distance service.

General City Law § 20-b prohibits Utility Tax from being imposed on a "transaction originating or consummated outside the territorial limits" of the City. It does not address an exempt service, as Petitioner argues, but instead speaks to exempt transactions, as Respondent urges. Therefore the transactions must be examined to see whether they are long-distance or local in nature (*Matter of Paging Network of New York, Inc.*, TAT[E]93-901[UT][City Tax Appeals Tribunal, Appeals Division, 1999]).

There is a preliminary issue: whether the exemption for a long-distance transaction applies to all related charges (Petitioner's position) or whether the exemption is limited to discrete charge for those transactions, excluding related cost-recovery charges (Respondent's position). The parties have presented no authority on this issue, and none has been found.

General City Law § 20-b does not address charges or billing. It addresses only transactions. It excludes a long-distance transaction from Utility Tax, regardless of how it is billed. It does not indicate that only the discrete charge for a long-distance telephone call is exempt from Utility Tax, but related charges to pass through costs associated with the call are taxable. The fact that the charges relating to a long-distance

call are broken out for the customer does not change the fact that all the charges relate to a long-distance telephone call. Therefore, once a long-distance transaction is identified, all of the revenue associated with it is exempted by General City Law § 20-b. This is not taking a deduction, as Respondent argues. Instead, it is associating revenue with an exempt transaction.

Certain charges relate to taxes and fees that were imposed on Sprint solely because it provided long-distance service. These include the Carrier Universal Service Fee, the State Gross Receipts Surcharge, and regulatory fees. Sprint was assessed property taxes, which related to its provision of long-distance service, because it owned no other property. These charges were billed only to long-distance customers, and were billed as a percentage of the customer's charge for the long-distance call. These charges are for long-distance telephone calls and are therefore exempt.

Sprint's costs associated with providing long-distance telephone service also include the access charges Sprint was required to pay to the LEC to complete its customer's long-distance phone call. There were two types of access charges: those related to usage and those which were a flat fee.

Respondent argues that local access fees relate to a purely local transaction between Sprint and the LEC. That is true, so far as the cost is concerned. However, Sprint must pay these access charges in order to provide long-distance telephone service. General City Law § 20-b addresses this issue by providing that a transaction is exempt from Utility Tax "notwithstanding that some act be necessarily performed with respect to such transaction within such limits." When Sprint

charged its customer an access fee computed with respect to the long-distance phone calls, that charge related exclusively to those calls. The access fees based on usage are therefore exempt from Utility Tax pursuant to General City Law § 20-b.

The PICC, the non-usage access fee, and the in-state access recovery fee were not based on the number or duration of long-distance calls. The first two were related to expenses Sprint incurred, which it passed on to its customers, and the other was an attempt to equalize access rates across the country so that Sprint could offer nationwide long-distance rates. In each case, customers paid a fixed fee per month, without regard to whether long-distance calls were made.

Respondent points to the decision in *Matter of Helio, LLC*, (DTA No. 825010 [NYS Tax Appeals Tribunal, 2015]). At issue there was the Federal Universal Service Charge. In *Helio*, the petitioner offered packages of local and long-distance telephone services, estimated the CUSC based on FCC safe-harbor percentages for the amount of long-distance service provided, and billed its customers in the same fashion. Thus, the FUSC was not based on actual long-distance charges, and the result was that the CUSC could be collected from customers "whether or not they made any calls, much less any interstate or inter-national calls, for the time period covered by their invoice" (*Helio*, p. 17).[15] The Tribunal upheld the administrative law judge's determination that it was an integral part of the mobile telecommunications service, did not relate to calls separately stated, and was subject to sales tax. This Tribunal is required to follow as precedent the decisions of the State Tax Appeals Tribunal in so far as those

[15] This is not the case here. As noted, Sprint paid FUSF on long-distance calls and then sought reimbursement from its customers.

decisions pertain to substantive legal issues before us (City Charter § 170([d]).

Respondent urges that the result in *Helio* requires that flat rate charges be treated as unrelated to long-distance transactions and are therefore taxable. But *Helio* dealt with a different tax and a different statute than those at issue here. That statute imposed sales tax on intrastate or international calls where they were sold for "a fixed periodic charge (not separately stated)" (Tax Law § 1105[b][1][B][1] and [2]). Because there was no attempt to allocate the FUSC to separately stated calls, these receipts were treated as part of the fixed periodic charge, and were therefore subject to sales tax.

In contrast, as noted, General City Law § 20-b does not consider charges; it considers transactions. Respondent's argument is that non-usage access charges do not relate to long-distance transactions because the charge is imposed regardless of the number or even the existence of long-distance calls. Respondent argues that such charges do not relate to a specific long-distance transaction, but are instead a local charge for access to long-distance service.

That argument has a certain appeal, but for three reasons it must be rejected. First, in considering this question, it is helpful to put aside access charges for a moment and consider long-distance telephone billing in general. During this period of time, local service was a monthly flat rate, while long-distance was billed by the call. Because of this, it is tempting to conclude that a flat rate charge, particularly an access charge, must be for something other than a long-distance call, such as for local service or access to long-distance.

Consider a telephone company that charged only a flat monthly rate for unlimited long-distance service regardless of how many calls were made or whether any calls were actually made. Would that flat fee be a charge for long-distance telephone calls? Plainly, it would be. If that telephone company also imposed a per-minute charge for the calls, that should not make any difference in this analysis, provided that the charges related solely to long-distance telephone calls. Therefore, the fact that a charge is not based on usage does not alter its status as a long-distance call.

Second, Sprint's billing model, consistent with its competitors', was to offer low per-minute long-distance rates, and then pass associated costs through to each customer. The charges Sprint paid to LECs for PICC and access charges were necessary to provide its long-distance service. The competitive market encouraged Sprint to pass these charges on to its customers, be they per minute or flat-rate. Whatever their nature, they were part of the cost of long-distance service.

Third, respondent relies on two non-binding advisory opinions issued by the New York State Department of Taxation and Finance (TSB-A-88[1]S and TSB-A-88[5]S).[16] At issue was the "End-User Common Line charge" (EUCL), which was a flat-rate monthly charge LECs billed their subscribers to recoup their costs of providing their facilities to long-distance telephone

[16] State Tax Regulation (20 NYCRR) § 2376.4 provides, "An advisory opinion represents an expression of the views of the Commissioner of Taxation and Finance as to the application of law, regulations and other precedential material to the set of facts specified in the petition for advisory opinion. An advisory opinion . . . is binding upon the commissioner only with respect to the petitioner and only about the facts described in the advisory opinion."

companies.[17] The rulings hold that these charges were an inseparable part of local telephone service, because local telephone service could not be purchased without it, and were therefore subject to sales tax as a local telephone service.

The rulings were issued to two local carriers. Applied to long-distance carriers, their logic would suggest that non-usage access charges billed by Sprint to its long-distance customers are an integral part of long-distance service, long-distance service cannot be purchased without it, and therefore they should be treated as a charge for long-distance service. Indeed, this was the decision in *Matter of Southern Pacific Communications Co.* (DTA No. 800275, TSB-D-91(41)S, [NYS Tax Appeals Tribunal, 1991]), which held in part that charges for access to a long-distance network were part of that network, could not be viewed as local transactions, and were therefore exempt from sales tax.

For each of these three reasons, all of the access charges, whether based on usage, were associated solely with long-distance telephone calls, and are exempt under General City Law § 20-b.

Charges related to long-distance transactions also include purely long-distance service or features that relate to long-distance telephone calls, such as ATM service, frame service, WATS service, and feature charges. These all correspond to Sprint's long-distance telephone service, and the charges were billed only to long-distance customers who received the service. Accordingly, they are all charges for long-distance service, and are exempt from Utility Tax pursuant to General City Law § 20-b.

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[17] The local companies also billed the long-distance companies a per-minute fee to recoup this cost). Therefore the EUCL appear to be the same access charges at issue here, but considered from the perspective of the LEC, rather than the long-distance carrier.

With respect to voicemail, however, Sprint did not demonstrate that this was a long-distance transaction. Voicemail would appear to be distinct from feature charges such as call waiting and call forwarding, which affect the long-distance call. Voicemail can exist apart from a long-distance call. Sprint did not demonstrate that the exemption applies to charges for voicemail.

The next category for consideration are charges for sale and installation of equipment to a customer to provide long-distance service. Petitioner argues that these charges, and the charges for telemanagement reports and a single bill are not subject to Utility Tax because they are not "ancillary to the provision of telephone service" pursuant to Code § 11-1101.9. Such items are defined in the statute as "(such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call waiting and the like) and also include any equipment and services provided therewith . . . ."

The fact that this non-exclusive list includes an item like directory information, which has nothing to do with the provision of the telephone service itself, is telling. It is a service not integral to telephone service, but one which has come to be expected to be associated with it, just as the public has come to expect telephone companies to sell and install equipment, because of their long history of doing so. And certainly billing, which brings revenue to Sprint, must be deemed "ancillary to the provision of telephone service." The statute specifically includes "equipment and services provided therewith," so sales and installation of equipment are plainly within the scope of the Utility Tax.

The sale and installation of equipment are local transactions. The fact that the equipment is necessary to provide long-distance service might be relevant if General City Law § 20-b spoke of a long-distance *service*, but it instead exempts a long-distance *transaction*. Petitioner's employee testified that customers could and did purchase and install their own equipment, and then subscribed to Sprint's long-distance service. This confirms the fact that these are not long-distance transactions.

The same is true of the billing fees. Although telemanagement reports and single billing relate to long-distance service, they are independent of the transactions and therefore not exempted by General City Law § 20-b.

The final item to be considered is the local DSL fee for Internet access. Petitioner argues in its initial brief that it may not be taxed pursuant to the Internet Tax Freedom Act (ITFA) (Pub L 105-277, 112 Stat 2681, 47 USC § 151 note, extended by Pub L 107-75, 115 Stat 703, and amended by Pub L 108-435, 121 Stat 1024, effective November 1, 2003).[18] Respondent did not address the issue and Petitioner did not mention it again.

The ITFA, as initially enacted in 1998, imposed a three-year moratorium on new taxes on Internet access, leaving in force such taxes if they were "generally imposed and actually enforced prior to October 1, 1998 . . . (47 USC § 151 note, § 1101(a)(1). It was extended to November 1, 2007 by the Internet Non-Discrimination Act of 2003, Public Law 107-75. Thus it covers the Audit Periods.

[18] It was amended subsequently, Pub L 110-108, 121 Stat 2014, effective November 1, 2007, after the Audit Periods.

In response to this, Respondent issued Finance Memorandum 99-5[19] which stated in pertinent part, "It is the policy of the Department of Finance not to treat Internet access service as telecommunications services for Utility Tax purposes." This policy was re-affirmed in Finance Memorandum 07-1 (January 4, 2007), which tracked the federal legislation's provisions for allocating receipts for providing Internet Access.

Respondent thus made clear that it was not imposing taxes on Internet access in 1999, and the ITFA bars subsequent imposition of such a tax. Therefore, the Utility Tax may not be imposed on the local DSL fees.

Accordingly, the Petitions are granted in part and the Notices of Determination are modified to limit the application of the Utility Tax to receipts for the sale and installation of equipment, voicemail, telemanagement reports, and the single billing fee, and are otherwise cancelled.

IT IS SO ORDERED.

Dated: New York, New York
December 29, 2016.

/s/
David Bunning
Administrative Law Judge

[19] It is unclear when Finance Memorandum 99-5 was issued. The version available on Respondent's website is entitled "99-5Rev. July 28, 2011." The title indicates it was first promulgated in 1999, a conclusion confirmed by Respondent's Finance Memorandum 07-1, which states that Finance Memorandum 99-5 was issued in 1999.

APPENDIX

COMPARISON OF AUDITOR'S SUMMARY AND PETITIONER'S EXHIBIT T

Item	Additional Taxable Revenue Per Auditor[1]	Per Exh T
Long Distance PICC Non Reg	$21,669,924.97	$23,741,268.58
Access Charges Non Reg	12,490,317.39	--
Access Charges - Non Usage	--	6,908,984.58
Access Charges - Usage[2]	--	6,006,047.29
Carrier Universal Svc Chg	3,927,767.46	4,371,985.29
MTS	3,778,064.24	--
Feature Charges	1,817,088.99	1,507,150.02
State Gross Receipts Surch	1,720,426.51	1,903,016.26
Installation Charges NonReg	--	1,060,540.76
Other Taxes and Surcharges	843,410.06	--
Carrier Prop Tax/Reg Fees	451,209.17	494,224.29
Carrier Property Tax	230,719.25	277,719.68
Local Data Reg	212,347.02	246,005.48
Telemanagement Reports Non Reg	188,420.83	199,212.73
Voicemail Charges	113,787.83	2,944.90
Frame Relay	8,399.63	13,091.11
ATM Service	--	1,202,794.68
Equipment Sale Non Reg	2,153.00	3,960.84
WATS Charges	--	234.60
Regulatory Fee	0.25	0.43
Total	47,454,036.60	47,939,181.52

[1] The categories have been arranged from largest to smallest dollar amounts, from largest to smallest. Further, the original audit documents lists "State Gross Receipts Surch[arge]" twice; here these have been combined and the dollar amounts added together.

[2] This combines two categories "Access Charges (Intrastate)($385.55)" and "Access Charges (Interstate orig local)($6,005,661.74).