THE STATE OF NEW HAMPSHIRE
BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

BayRing Petition For Investigation Into Verizon New Hampshire's Practice Of Imposing Access Charges, Including Carrier Common Line (CCL) Access Charges, On Calls Which Originate On BayRing's Network And Terminate On Wireless and Other Non-Verizon Carriers' Networks	Docket No.06-067

AT&T PHASE 2 REPLY BRIEF

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Introduction

Verizon's December 18, 2008 brief is founded on a number of misstatements of fact and law regarding the two legal issues in Phase 2 of this proceeding; the applicable reparations period(s) and the appropriate interest rate(s) to be applied. Verizon's errors are addressed herein.

AT&T's initial brief demonstrated that, pursuant to RSA 365:29, the Commission must establish a uniform reparations period for all Verizon customers unlawfully overcharged the carrier common line charges at issue in this case and that such period begins on April 28, 2004. Adoption of Verizon's position would unlawfully discriminate by allowing Verizon to charge different carriers different rates for the same service over the same period of time. On the second issue – the appropriate method for compensating wrongfully charged carriers for the time value of money – AT&T showed that Tariff 85, by its own terms, prescribes precisely that for the vast majority of overpayments. Under Tariff 85, refunds of overpayments disputed within three months of payment are subject

to the disputed amount penalty. With regard to the narrow range of payments made more than three months prior to dispute, the Commission should use the same .0005 per day factor that underlies the calculation of the disputed amount penalty.

Verizon's initial brief does nothing to refute AT&T's position. As we show below, Verizon's argument that the reparations period is carrier-specific relies on language that supports the CLEC position that there is only one reparations period, beginning with the filing of BayRing's petition on April 28, 2004. There is no merit to Verizon's arguments that the remedial provisions of Tariff 85 that prescribe the disputed amount penalty do not apply. Consequently, the Commission should issue an order establishing a single reparations period for all carrier customers beginning on April 28, 2004, and require Verizon to apply the .0005 per day factor required by its tariff.

Argument

I. CONTRARY TO VERIZON'S CLAIM, THE REPARATIONS PERIOD IN THIS CASE BEGINS ON APRIL 28, 2004, FOR ALL CARRIER CUSTOMERS.

A. VERIZON'S ARGUMENT THAT THE REPARATIONS PERIOD IS CUSTOMER SPECIFIC IS BASED ON LANGUAGE THAT SUPPORTS THE CLEC'S POSITION OF A SINGLE REPARATIONS PERIOD.

Verizon's argument (that the reparations period under the version of RSA 365:29 that was in effect when this case was commenced applies) is only two paragraphs long. Verizon Phase 2 Brief, at 13-14. In the first paragraph, Verizon focuses on language that supports the CLECs position, and in the second, it makes the unhelpful, conclusory comment that it could not find a Legislative intent consistent with the CLEC view. There is nothing here that the Commission can accept as support for Verizon's position.

Verizon's reliance on the terms "the person" and "the petition for reparation" in RSA 365:29 does not help its case. Indeed, these very words are the basis of the CLECs'

position, as shown by One Communications' initial phase 2 brief, filed on December 18, 2008, in this case:

> The statute is explicit: "whenever" a petition or complaint is filed, the Commission may order reparations going back two years before the filing of the petition. The "date of . . . filing of the petition for reparation" referred to in the last sentence refers back to the only other instance of the word "petition" in the provision, that in the first line — "whenever a petition or complaint has been filed." Further, the provision refers to "the petition" — *one* petition — not multiple petitions.
>
> In addition, the Commission is authorized to order the utility that has collected an illegal rate to make reparation "to the person who has paid" the illegal charge. Thus, any utility customer that paid an illegal charge may receive reparations of overcharges when the Commission so orders.

One Communications Phase 2 Brief, December 18, 2008, at 2 (italics in original, bold supplied).

The second, and last paragraph, of its argument is equally unpersuasive. Verizon makes the conclusory assertion that "[n]othing in the statute indicates the slightest intent by the Legislature to allow a person to recover reparations for payments made more than two years before the person seeks relief from the Commission" on the ground that another petition was filed earlier. Apparently, Verizon did not look very hard to find such intent. Had it done so, it may have found the language that the Legislature actually used, which – as One Communications makes clear – provides for a uniform reparations period for all persons "that paid" based on the date of "the" petition.

B. EVEN IF VERIZON'S VIEW OF RSA 365:29 WERE CORRECT (AND IT IS NOT), RSA 365:29 WOULD NOT PRECLUDE THE COMMISSION FROM EXERCISING ITS PLENARY AUTHORITY, AS IT OFTEN HAS, TO ESTABLISH A UNIFORM REPARATIONS PERIOD BEGINNING ON THE DATE OF BAYRING'S PETITION.

Prior to the amendment of RSA 365:29, that statute addressed reparations upon the filing of a complaint. If RSA 365:29 were read as limiting the Commission's plenary power to award reparations, as Verizon now contends, the Commission would have had

no power to require refunds prior to the 2008 Order, *except upon the filing of a complaint*, and then only with respect to that particular complaint. Yet, clearly, the Commission has ordered refunds on numerous occasions (some of which are cited in Verizon's Phase 2 Brief) for *all* customers, or for a class of customers, without the filing of a complaint. And, certainly, the Commission did not require each customer to file a separate complaint before he or she was entitled to a refund.

Thus, even if Verizon were correct (which it is not) that RSA 365:29 prescribes individually determined reparations periods, that in no way prevents the Commission from establishing a uniform reparations period in the instant case, just as it has done many times in the past.

II. TARIFF 85 DETERMINES REIMBURSEMENT FOR THE TIME VALUE OF MONEY APPLICABLE TO REFUND OF OVERCHARGES IMPOSED UNDER THE AUTHORITY OF TARIFF 85.

A. VERIZON'S ARGUMENT THAT RSA 336:1, II APPLIES SIMPLY BECAUSE THE COMMISSION PERFORMS A JUDICIAL FUNCTION IN RENDERING ITS DECISION IS NOT RELEVANT TO THE ISSUE BEFORE THE COMMISSION.

In its initial brief, Verizon spills much ink on the argument that the Commission's decision awarding reparations is akin to a court's award of damages. If it is, according to Verizon, then RSA 336:1, II determines the applicable interest rate. Verizon is wrong. Even if the Commission is subject to RSA 336:1,II in the same way a court is, RSA 336:1,II does not authorize a court to abrogate the existing relationship between the parties. Where the parties are bound by pre-existing contract or tariff to specific late-payment or interest terms, those terms must be given effect.

As AT&T, BayRing, and One Communications made clear in their initial briefs, Tariff 85 sets forth the terms under which a party that has been wrongly overcharged is reimbursed. *See, e.g.*, AT&T Phase 2 Brief, at 7-9. Tariff 85 prescribes in excruciating

detail the terms by which a customer that prevails on a billing dispute is to be compensated for the time value of money, with one exception.[1] *See*, Section 4.1.8.E of Tariff 85.[2] In the present case, therefore, AT&T asks only that the Commission enforce Tariff 85 according to its terms with respect to all AT&T overpayments as to which the tariff prescribes the terms of compensation for the time value of money. For the overpayments made within three months of lodging a dispute, the Commission need not reach the issue of whether RSA 336:1, II. applies.

Clearly, in cases where a court enforces a contract that prescribes in writing the interest rate applicable to late payments, or to delayed refund of overpayments, the court does not ignore the agreement of the parties. Indeed, it is the court's duty when enforcing the contract to give effect to its terms. RSA 336:1 has always reflected that basic principle in paragraph 1, which prior to the 1995 amendment applied to judgments as well. When the Legislature provided additional detail for the judgment provisions and moved those provisions to a separate paragraph, it did not intend to eliminate *sub silentio* the parties' right to agree on interest rates applicable in their contracts. In the present case, the parties' rights are governed by tariff rather than contract, but that makes no difference. In its March 21, 2008, decision, the Commission applied the terms of the tariff to resolve the dispute, and it should continue to do so now.

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[1] Tariff 85 provides no interest on payments made prior to three months before the date that a customer begins disputing the bills, over the period from date of payment to date of dispute.

[2] Section 4.1.8.E states:

> If a customer disputes a bill within three months of the payment date and pays the total billed amount on or before the payment date and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of payment and ending on the date of resolution. The credit for the disputed amount penalty shall be as set forth following.

B. VERIZON'S ARGUMENTS THAT TARIFF 85 DOES NOT APPLY TO DETERMINE REFUND AMOUNTS ARE ILLOGICAL, UNFAIR, AND PERVERSE ON THEIR FACE.

Verizon makes two, very strained arguments that the clear and very precise terms of Tariff 85 prescribing a disputed amount penalty do not apply. Neither has merit.

1. The Commission Should Reject Verizon's Extraordinary Argument That Only Verizon, And Not The Commission, Decides When The Disputed Amount Penalty Applies.

In its initial brief, Verizon makes the extraordinary argument that "the 'disputed amount penalty' applies only where a CLEC customer has filed a dispute *with Verizon* by providing the data required by the Tariff and *Verizon* has resolved that dispute in the customer favor." Verizon Phase 2 Brief, at 11 (emphasis in original). Such an argument creates an absurd result: the disputed amount penalty applies only when Verizon wants it to apply. According to Verizon,refunds arising from disputes resolved in a customer's favor are subject to the disputed amount penalty only if *Verizon* agrees that the customer is right.

At the outset, the Commission can reject such a preposterous interpretation of a tariff. Such an interpretation creates a perverse incentive for Verizon to deny the customer's claim, even if the claim is meritorious, to avoid paying the disputed penalty amount under its tariff. In addition, Verizon's interpretation would upset the symmetry in the Tariff between treatment of delayed refunds and treatment of late payments. Under section 4.1.2.B. of Tariff 85, Verizon is entitled to charge on late payments the same .0005 per day factor that applies to the disputed amount penalty. Surely, the Commission – when it permitted Tariff 85 to go into effect – understood the late factor and the disputed amount penalty factor to be applied symmetrically.

The need to apply the late payment factor and the disputed amount penalty factor symmetrically is well illustrated by Verizon's presumed position if "the shoe were on the other foot." If Verizon had prevailed in Phase 1, we can be sure that it would be seeking application of the .0005 late factor in calculation of the amounts due it from CLECs that had not paid the disputed CCL charge. Under Verizon's interpretation, Verizon gets the .0005 per day factor if it prevails, but pays only a fraction of that if it loses.

Verizon's "heads I win, tails you lose" argument is unfair and illogical. More importantly, it creates an incentive for the carrier whose tariff application is challenged to force disputes to the Commission for resolution. Under Verizon's interpretation, the scales would be tipped in favor of the carrier whose tariff is challenged even in situations where – on the merits – the parties' respective positions are equally plausible. The Commission should reject such an unbalanced and perverse interpretation of Tariff 85.

2. **Contrary To Verizon's Claims, The Commission's Interpretation Of Tariff 85 In Its March 21, 2008, Decision In This Case Does Not Mean That Tariff 85 Does Not Apply To Disputes Of Bills Rendered Under Tariff 85.**

Citing to language in the March 21, 2008 Commission order that Verizon was not authorized under Tariff 85 to impose the CCL in the disputed call flows, Verizon argues that "[t]he penalty provisions of the Tariff cannot be applied to charges that the Commission has established fall outside the authority granted by the Tariff." Verizon Phase 2 Brief, at 10. Verizon's argument is logically absurd.

Indeed, Verizon's argument proves too much. If Verizon's position were accepted, the Tariff 85 dispute provisions would never apply in any billing dispute resolved in the customer's favor. In such situations, by definition, the charges would not be authorized by the tariff. For example, suppose that, through a computer or human

error, Verizon were to charge AT&T for calls that another carrier actually carried. Verizon charging AT&T for another carrier's traffic is not authorized by the tariff, but – under Verizon's interpretation – AT&T could not get the disputed amount penalty.

In any event, Verizon purported to apply the charges under authority of Tariff 85. More importantly, the call flows at issue were indeed subject to Tariff 85. AT&T, for example, did not contest Verizon application of other Tariff 85 charges to the exact same calls on which Verizon sought to impose the disputed CCL charges. Verizon certainly did not refuse to accept AT&T's money paid pursuant to bills rendered under Tariff 85. It is a bit disingenuous for Verizon now to claim that the remedial provisions of Tariff 85 do not now apply.

Conclusion

For the reasons set forth above, New Hampshire law requires that the Commission establish a uniform reparations period for all Verizon customers unlawfully overcharged the carrier common line charges at issue in this case and that such period begins on April 28, 2004.

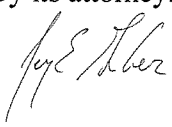
Furthermore, the interest that Verizon must pay to AT&T on all such overpayments is determined by the disputed amount penalty prescribed in Verizon's Tariff 85 for all payments disputed within three months of payment. For the limited number of AT&T payments not disputed within three months of payment (payments made prior to January 27, 2006), the Commission should award interest at the rate of

.0005 per day for the period between date of payment and date of dispute, and afterwards according to the tariff.

Respectfully Submitted,

AT&T CORP.

By its attorneys,



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