STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges	)	Docket DT 06-067

VERIZON NEW ENGLAND'S REPLY BRIEF
REGARDING CALCULATION OF REPARATIONS

Verizon New England Inc. ("Verizon") demonstrated in its initial Brief Regarding Calculation of Reparations ("Verizon Brief") that (1) the proper interest rate to apply to any reparations granted in this proceeding is, at most, the rate for judgments set forth in RSA 336:1, II, and (2) under RSA 365:29 the Commission may order Verizon NH to make reparation to a CLEC only for payments made within the two years before that CLEC filed its petition for reparation or for intervention in this proceeding. Predictably, the CLECs argue in their briefs for higher interest rates and longer reparations periods, but those arguments have no basis in fact or law, and the Commission should reject them.

I. The Proper Interest Rate on Any Reparations Is The Rate In RSA 336:1, Not The Penalty Rate In The Access Tariff Nor A Rate Derived From Verizon NH's Cost Of Capital.

A. The "disputed amount penalty" in Tariff 85 does not apply to reparations awarded under RSA 365:29.

Verizon NH has shown that the interest rate for judgments under RSA 336:1, II, is the appropriate rate to apply to any award of reparations, because the Commission would be performing a judicial function in making such an award, and the Commission has long applied a

rate equal to the prevailing statutory rate in awarding interest in similar situations. *See* Verizon Brief at 5-9. Sprint agrees, stating that, "the interest rate to be applied is governed by R.S.A. 336:1." Sprint Brief at 6.

The other CLECs, however, offer an assortment of theories in support of interest rates far higher than the statutory rate, a rate that fully compensates claimants for the lost time-value of their money. Bayring concedes that the Commission acts in a judicial capacity when it awards reparations, *see* BayRing Brief at 8, but it nevertheless argues that the Commission should award interest at the rate of the "disputed amount penalty" applicable to billing disputes that Verizon NH resolves in a customer's favor under the informal resolution process in Verizon NH's access tariff, NHPUC No. 85 ("Tariff 85"). *Id.* at 10. Bayring asserts that the tariffed penalty rate (0.0005 per day, or 18.25% annually), "reflects Verizon's position on the rate that should apply as 'interest' in access charge billing disputes." *Id.* Likewise, One Comm acknowledges that reparations under the statute "do not strictly fall within the 'disputed payment amount' provisions of the tariff" but argues that the Commission should apply that penalty anyway, since "Verizon has determined that $0.0005 per day is an appropriate rate to compensate those who overpaid under Tariff No. 85." One Comm Brief at 8. AT&T also seeks the tariffed penalty rate. *See* AT&T Brief at 7-9.[1]

The CLECs' arguments are groundless. The Commission has already found that Tariff 85 did not authorize Verizon NH to impose the CCL charges at issue here, and the penalty provisions of the Tariff cannot apply to charges that the Commission has established were not assessed under the Tariff. *See* Verizon Brief at 9-10. Furthermore, nothing in the Tariff supports

[1] Global Crossing does not seek interest at the tariffed penalty rate but at a rate equal to Verizon NH's cost of capital. *See* Global Crossing Brief at 8. That argument is refuted below.

these carriers' assertion that a far higher, 18.25% rate, is the appropriate interest rate in this formal and lengthy proceeding before the Commission.

The disputed amount penalty is available under the Tariff only in the context of the private, abbreviated and informal dispute resolution process expressly detailed in §4.1.8 of the Tariff. *See* Verizon Brief, at 10-12. The CLECs attempt to take that penalty out of context while ignoring all of the other terms of the Tariff. In order for there to be even a basis to assert that this penalty rate should apply, a CLEC must have filed a dispute with Verizon by providing the data listed in § 4.1.8(B) and Verizon must have resolved that dispute in the customer's favor. *See* Tariff 85, § 4.1.8(C). Of course, there is no evidence that Verizon NH resolved any such dispute in favor of any CLEC. Even under a theory that Verizon NH should have, but failed, to resolve such disputes in the CLECs' favor, the penalty would be available only to those CLECs who actually filed disputes in compliance with the Tariff.

Moreover, the penalty would accrue only for the limited duration of the tariffed dispute resolution process. If Verizon NH resolves a billing dispute in favor of a CLEC customer who paid the disputed bill and disputed the bill within three months of the payment due date, the disputed amount penalty accrues "for the period starting with the date of payment and ending on the date of resolution." *Id.* §§ 4.1.8(E) and (F). Where Verizon NH resolves a billing dispute in favor of a CLEC customer who paid the disputed bill but did not dispute the bill within three months of the payment due date, however, the penalty accrues only "for the period starting with *the date of dispute* and ending on the date of resolution." *Id.* §4.1.8 (H) and (I) (emphasis added). The Tariff also defines the "date of resolution" - the date on which the penalty would cease to accrue - as "the date on which the Telephone Company [*i.e.* Verizon] completes its investigation of the dispute, notifies the customer of the disposition and, if the billing dispute is

resolved in favor of the customer, applies credit for the correct disputed amount [and] the disputed amount penalty as appropriate." *Id.* § 4.1.8(C) (emphasis added).

Consequently, even if the tariffed disputed amount penalty were to apply here, the Commission would first have to conduct a full factual investigation (with opportunity for testimony, discovery and hearing) to determine which CLECs filed disputes with Verizon NH concerning the CCL charges in accordance with the Tariff and thus would be eligible for any disputed amount penalty at all. For CLECs that did file such disputes, the Commission would also need to determine which monthly bills they disputed, the dates on which any disputes were filed and, for each dispute, whether it was filed within three months of the due date of the disputed bill. All of that information would be necessary to determine whether the penalty should begin to accrue at the date of payment or the date of dispute. The Commission would also need to determine when Verizon NH denied, and presumably should have allowed, each such dispute and notified the CLEC of its disposition of the dispute, in order to determine the date on which the penalty would cease to accrue.

In addition, Bayring's claim that the disputed amount penalty began to accrue on April 28, 2004 is simply incorrect, since the penalty would begin to accrue under the Tariff only on the date of payment or the date of dispute.[2] AT&T is likewise incorrect in asserting that "the date of resolution," and thus the date on which the penalty ceases to accrue, is the date on which refund is made. *See* AT&T Brief, at 5 and note 8; *see also* BayRing Brief at 10 (arguing that interest under the Tariff runs until refund is made). The Tariff clearly defines the date of resolution as the date on which Verizon NH completes its investigation, notifies the customer of the resolution

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[2] Bayring's claim also has no basis in RSA 365:29, which provides for interest from the date of payment, not from the inception of the reparations period. In any event, Bayring highlights the incompatibility of the penalty terms of the Tariff and the reparations period of RSA 365:29. *See also*, AT&T Brief, at 7-8, acknowledging that under the Tariffed penalty accrues only from the date of dispute, where AT&T failed to dispute bills within three months of the payment due date.

and applies appropriate credits. Even on a theory that Verizon should have resolved a CCL-related billing dispute in the CLEC's favor, the date of resolution would be the date Verizon NH denied, but allegedly should have granted, each such dispute.

Finally, the terms of the Tariff make abundantly clear that the disputed amount penalty would apply only for the short time necessary for Verizon NH to investigate a disputed bill and make a determination. *See* Attachment A to Bayring's Brief, showing that Verizon NH resolved each of Bayring's disputes within days or weeks of filing. Nothing in the Tariff even hints that the 18.25% penalty rate applies to any other circumstances, such as a contested, phased and lengthy adjudication before the Commission. The high penalty rate in the Tariff is appropriate not only in light of the brevity of the tariffed dispute resolution process but also because Verizon NH alone controls the speed of that process and thus the length of time during which the penalty will accrue. Verizon NH can avoid an onerous penalty by making prompt determination of claims.[3] That is by no means the case here, in which the Commission has structured the case in phases and established various case schedules based on its own concerns and with input from multiple parties (including Verizon NH) and renders its decisions on a timetable of its choosing. Nothing in the Tariff implies that if Verizon NH incorrectly resolves a billing dispute in its favor, it thereby subjects itself to a disputed amount penalty accruing for whatever length of time it takes for the customer to bring a claim to the Commission and for the Commission to resolve the claim. It would be singularly inappropriate to penalize Verizon NH for something that is completely beyond its control.

Accordingly, if the Tariff applied to an assessment of interest under RSA 365:29 in this proceeding, the disputed amount penalty would apply only to disputes actually filed by the

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[3] The same reasoning applies to the late payment penalty provided in § 4.1.8(D), since the customer can always avoid the penalty by paying the disputed amount pending resolution of its claim.

CLECs and determined by Verizon NH under the Tariff, and would accrue only during the short lifespan of the tariffed dispute resolution process.

AT&T concedes that where it failed to dispute Verizon NH's bills within three months of their payment due date, the Tariff does not allow AT&T to recover a disputed amount penalty for the period before AT&T disputed those bills. *See* AT&T Brief, at 8-9. AT&T argues that the Commission should nevertheless apply the 18.25% tariffed penalty rate for that period, apparently to punish Verizon NH for asserting in this proceeding that the CCL charges are authorized by the Tariff, and/or because Verizon NH somehow billed the CCL charges to AT&T "surreptitiously," even though AT&T did "discover" these charges, albeit months after Bayring, a much smaller carrier, had already disputed them. *See id.* at 9-10. These arguments in no way justify applying the 18.25% disputed amount penalty to a time period that the Tariff clearly excludes.

AT&T alleges that "Verizon NH deliberately, knowingly and consciously took an extraordinary position" on the merits of this case. AT&T Brief at 10. But the purpose of reparations under RSA 365:29 is compensatory, *see* Verizon Brief at 8-9; *Appeal of Granite State Electric Co.*, 120 N.H. 536, 539 (1980), and affords no basis for penalizing Verizon NH by assessing interest at a rate far greater than the purely compensatory interest rate of RSA 336:1, which the Commission has traditionally relied on. Second, there is no factual basis for AT&T's claim. Verizon NH's position that the CCL charges were authorized by the Tariff is amply supported by the terms of the Tariff (including the language in § 5.4.1.A stating that "all switched access service provide to the customer will be subject to carrier common line access charges" and the preamble to § 5.1), briefs and testimony. That AT&T disagrees with that position hardly makes it extraordinary or shows that it was offered in anything less than good

faith – nor has the Commission called into question Verizon NH's good faith conduct of this proceeding. Further, the New Hampshire Supreme Court recently denied the motion of AT&T, One Comm and BayRing for summary disposition of Verizon NH's appeal of the decision in Phase 1 of this case, thereby indicating that Verizon NH's position presents, at the bare minimum, a viable issue for consideration on appeal. *See Appeal of Verizon New England*, Supreme Court Case No. 2008-0645, order issued October 24, 2008. In addition, there is no evidence that any conduct by Verizon NH had any effect whatsoever on AT&T's ability to dispute the CCL charges. AT&T fails to explain how Verizon NH could possibly have billed CCL charges to AT&T "surreptitiously." AT&T is a large corporation and must be expected to review its bills. BayRing, with a fraction of AT&T's resources, disputed the CCL charges eight months before AT&T saw fit to do so.

B. Verizon NH's cost of capital is immaterial to the issues in this proceeding.

One Comm argues that if the Commission declines to apply the 18% tariffed penalty "where it does not strictly apply by the tariff's terms," it should award interest at Verizon NH's cost of capital, on the grounds that Verizon NH has allegedly been unjustly enriched by the amounts the CLECs overpaid. *See* One Comm Brief at 9. AT&T likewise asserts that "the value of the benefit that AT&T has conferred upon Verizon is easily calculated. It is the cost to Verizon of obtaining those funds - a cost Verizon did not incur because it has had the benefit of AT&T's payments." AT&T Brief at 10-11. Global Crossing also asserts that interest in this proceeding should be set at Verizon NH's cost of capital. See Global Crossing Brief at 8-9.

The Commission should reject these arguments. Verizon NH's cost of capital has no bearing on determining the appropriate interest rate here. The purpose of reparations under RSA 365:29 (as well as restitution in equity) is compensatory, to restore to the petitioner payments of

utility rates that should not have been charged. *See* Verizon Brief at 8-9. That purpose is not served by assessing the theoretical amount by which the utility could have benefitted had an overpayment allowed it to avoid taking on additional debt. In this regard, *Granite State Electric*, cited by One Comm, in fact supports Verizon NH's position. Although the court in that case likened reparations to restitution upon unjust enrichment, it stated that such remedy is based on an implied promise "that one will restore to the person entitled thereto that which in equity and good conscience belongs to him." *Granite State Electric,* 120 N.H. at 539. Nowhere in that decision did the court hold that interest on reparations is properly measured by the benefit conferred on the utility. Rather, the court observed that the appropriate interest rate would be "that which the ratepayer could have obtained on the money he or she was unlawfully deprived of through the overcharge." *Id., citing Consumers Power Co. v. Public Service Commission*, 15 P.U.R. 4th 508, 512 (Mich. Cir. Ct. 1976). Thus, the proper measure of interest in this case is the time-value to the CLECs of the amounts they allegedly overpaid. That measure is the interest rate for judgments under RSA 336:1, II.

The CLECs' theory fails for the additional reason that the causal connection they would have the Commission assume is not supported by the facts. AT&T blithely asserts that Verizon NH benefited from the alleged overpayment of CCL charges by avoiding the costs it would otherwise have incurred to obtain that money. AT&T Brief at 10-11. But there is no evidence that Verizon NH would actually have sought or obtained additional capital, and thus incurred any additional costs, in the absence of the CCL payments at issue here. The Commission cannot base its decision on such speculation.

Global Crossing argues that the Commission should use Verizon NH's cost of capital to calculate interest here because in *EnergyNorth Natural Gas, Inc., DG 06-154,* the Commission

approved a settlement that used the utility's cost of capital for that purpose. *See* Global Crossing Brief at 8. The *EnergyNorth* case has no application here. In that case, the utility had voluntarily agreed as part of the settlement to use its cost of capital as a proxy for interest on amounts credited to customers bills. Verizon NH has made no such agreement, and the fact that another utility determined that it was expedient to do so in another case provides no precedent for imposing such treatment on Verizon NH.

Global Crossings' additional argument that the Commission should award a high rate of interest here on account of the alleged "serious" nature of Verizon NH's billing error, *id.*, has no merit. First, Global's notion that the interest rate should depend on the conduct of the utility is a punitive theory, inconsistent with the compensatory goal of reparations. Contrary to Global's argument, *id.* at 9, Verizon NH's cost of capital is not the interest rate that would be necessary to "fully and fairly compensate Verizon's customers" for the overbilling. *Id.* at 9. Also, the alleged overbilling here is no more (or less) "serious" than other instances in which the Commission's resolution of a billing dispute has resulted in the need for refunds. And in such cases, the Commission has awarded interest on refunds at a rate equal to the statutory rate for judgments in RSA 365:29. *See e.g.*, Verizon Brief at 7-8, *citing Nelson v. Public Service Co. of NH*, 64 NH PUC 345 (1979) (utility imposed new, higher rate before effective date of tariffed increase); *Re Public Service Co. of N.H.*, 72 NH PUC 237, 263 (1987) (overbilling due to difference between bonded rate and permanent rate approved by the Commission).

Despite AT&T's claim that Verizon NH's cost of capital "is easily calculated," neither AT&T nor any other CLEC has provided a current, approved cost of capital for Verizon NH. AT&T admits that it "has not been able to identify the approved rate of return." AT&T Brief at 11. As a proxy, AT&T proposes that the Commission use a set of figures included in a

stipulation between Verizon NH's predecessor and Staff filed in DE 97-171 in 1998. *See* AT&T Brief at 11 and Exhibit B. There is no evidence that the Commission approved those figures, however, and the stipulation itself states that it applies "for purposes of this proceeding only." And, of course, the figures are more than a decade out of date.

In an even further stretch, One Comm argues that the Commission should peg Verizon NH's cost of capital at 17.93%, which is the figure that Verizon advocated in DT 02-110 for wholesale services. *See* One Comm Brief at 9, note 7. Using that reasoning, the Commission could just as easily adopt the 7.20% rate proposed by the CLEC parties in that docket.[4] *See In Re Verizon New Hampshire - Investigation into Cost of Capital*, DT 02-110, Order Establishing Cost of Capital, Order No. 24,265 at 7 (January 16, 2004). The Commission rejected both of those proposals, however, and instead approved a single cost of capital for Verizon NH of 8.2%. *Id.* at 70, 71. This rate is much closer to the judgment rate set by the legislature in RSA 336:1, II, and the Commission approved it only a few months before the earliest reparations period at issue here (for Bayring) commenced, in April of 2004.

II. The Reparations Period For Each CLEC Begins On The Date Two Years Before That CLEC Filed Its Petition For Reparations Or A Petition To Intervene.

A. Under RSA 365:29, the Intervenors' reparations periods are defined by the dates each of them moved to intervene, not the date that BayRing filed its petition for reparations.

Verizon NH demonstrated in its initial brief that RSA 365:29 authorizes the Commission to award reparation to the CLECs on an individual basis and does not confer any collective rights of action. *See* Verizon Brief, at 11-14. Accordingly, the Intervenors cannot piggy-back their claims on the original petition for reparations filed by Bayring to extend their reparations periods beyond the two years allowed by the statute.

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[4] Those parties included BayRing, Conversent Communications and CTC Communications, the latter two of which are now subsidiaries of One Comm.

In the hope of circumventing the express terms of the statute, the Intervenors argue that the statute does not really mean what it says, that the Commission should not require claimants actually to file claims in order to recover reparations as a matter of policy, and that enforcing the statute as written would sanction discriminatory utility rates. None of these arguments has merit.

With respect to the language of the statute, One Comm argues that the statute's reference to a single petition for reparations and its authorization of the Commission to order reparation "to the person who has paid" mean that the Commission is not limited in ordering reparations only to the person who filed the complaint. *See* One Comm Brief at 2; *see also,* Global Crossing Brief at 4; AT&T Brief at 5 (relying on the phrase, "the person who has paid," and arguing that the statute "does not contemplate many petitions"). Sprint argues that the statute provides the date of a petition for reparations as the only date from which to calculate the reparations period and that had the legislature intended for there to be different periods for intervenors, it would have so stated. *See* Sprint Brief at 3. Sprint also argues that by using the term "petition for reparations," the legislature must have meant to exclude other petitions, such as for intervention, from providing the date from which to calculate the reparations period. *Id.* at 4.

The Intervenors read far more into the statute than is actually there. RSA 365:29 merely authorizes the Commission, upon the filing of an appropriate petition for reparation, to grant reparation for "payments made within 2 years before the date of filing the petition for reparation" to "the person who has paid" an unlawful utility rate. The Intervenors claim that "the person who has paid" need not be the petitioner, but the statute speaks of no one else. It does not authorize reparation to "*all persons* who have paid" nor to "*any* person who has paid." It does not state that the date a petitioner files a petition for reparations will also apply to all subsequent parties seeking similar relief, nor does it (in the version applicable to this proceeding) excuse a

party from the requirement of filing a complaint with the Commission as a prerequisite to relief. Nothing in the statute indicates any intent by the legislature to suspend the normal rules of standing or to authorize a petitioner to act as a private attorney general to prosecute claims on behalf of others. BayRing thus represents only itself in this proceeding, not all similarly situated wholesale customers of Verizon NH.

There is no merit to the Intervenors' argument that the failure of RSA 365:29 to address the possibility of multiple petitions and intervenors in a proceeding necessarily means that the legislature intended for all intervenors to enjoy a reparations starting date defined by the date of another party's petition. The purpose of RSA 365:29 is to provide a remedy for utility customers who have paid an unlawful rate. It does not purport to address the many procedural issues that may arise in the course of a proceeding under the statute. Whether and when to allow intervention is a procedural matter properly left to the Commission to decide, in light of the facts of a particular petition. Therefore, the failure of the statute to anticipate multiple petitions or that the Commission may or may not allow intervention in particular circumstances is not surprising and does not imply that the date of the original petition applies to all intervenors.

Sprint also missteps in arguing that the statute's use of the phrase "petition for reparations," rather than "petition," means that the date of a petition for intervention cannot define a reparations period. Sprint parses the language of the statute too finely. The legislature was not overly concerned with the nomenclature it used for the means by which a person could assert a claim under RSA 365:29, referring to it both as a "complaint" and as "the petition for reparations." In any event, the Commission ruled in Phase I of this case that it "will treat petitions for intervention in this docket as petitions for reparation under RSA 365:29...," *see* Order 24,705, at 6, rendering immaterial the distinction Sprint would make.

Indeed, that ruling is consistent with Verizon NH's position on the reparations period and is inconsistent with the Intervenors' position. If BayRing's petition date had defined the reparations period for all customers who paid the CCL charges at issue, including Intervenors and even customers who have not filed a claim, there would be no need for the Commission to treat petitions for intervention as petitions for reparations. Such treatment is necessary only where a customer must file a petition for reparations in order to recover under the statute and where the date of that petition, not some other person's petition, defines the reparations period for that claimant. The Commission's ruling was necessary and correct and should not be reviewed now.

AT&T argues that in amending the statute to allow the Commission to grant reparations "[o]n its own initiative," the legislature "was clearly intending to clarify" that the Commission already had authority under the prior version of the statute to order reparation in the absence of a complaint by a customer. AT&T Brief at 5. AT&T offers absolutely no evidence in support of its theory. Further, if RSA 365:29 had formerly bestowed that power upon the Commission, there would have been no need for the amendment. "It is elementary that the legislature should not be presumed to do an idle and meaningless act." *Kalloch v. Board of Trustees*, 116 N.H. 443, 445 (1976). The legislative history suggests that the purpose of the 2008 amendments to RSA 365 (though not to this specific section) were intended to "strengthen the Commission's ability" to address overcharges by a utility, not merely to confirm its pre-existing abilities. *See* Verizon Brief at 19-20.

Aside from the terms of RSA 365:29, One Comm argues that as a matter of policy, requiring a CLEC to take the trouble to file a claim in order to recover reparations would defeat the purpose of the statute, which it claims is to "make whole customers who have paid illegal

charges," by increasing the transaction costs of recovery. *See* One Comm Brief at 2-3; *see also* Global Crossing Brief at 4 ("[I]t would make little sense for the Commission to require every customer ... to file a separate petition for reparation"). One Comm and Global Crossing are wrong on a number of counts. First, a complaint is essential to allow the adjudicatory process before the Commission to function properly, as this case demonstrates. Although Verizon NH would have been content to litigate this proceeding without the participation of the CLECs, the Commission has consistently indicated its interest in obtaining information from all parties as this case progresses, including most recently in directing all parties, not just Verizon NH, to file briefs and statements of the amounts of CCL charges billed to and paid by each CLEC, in order to determine any reparations that may be due here. Second, requiring a claimant to file a claim is hardly a unique or onerous prerequisite to recovery and is standard in both civil disputes and before the Commission. Third, while "transaction costs" may deter retail customers from filing claims, the case now before the Commission is not a retail one, and there is no basis for suggesting that wholesale customers of Verizon NH -- including some of the largest corporations in America as well as small, local companies -- would be deterred from seeking reparation by the cost of filing a petition. Finally, the purpose of RSA 365:29 is not to provide unlimited reparations to "make whole" all customers who have paid unlawful utility rates. Rather, the statue expressly limits recovery to amounts paid within a stated timeframe and only upon the filing of a complaint with the Commission. The requirement that a customer file a petition in order to recover would not impair the actual, limited purpose of the statute in the context of wholesale rates.

AT&T goes further than One Comm, and asserts that applying individual reparations periods based on the date of each Intervenor's petition would allow Verizon NH to "continue to

collect charges that the Commission has declared unlawful until two years prior to the time that each customer files a complaint for reparations." AT&T Brief at 4. By allowing Verizon NH to charge different rates to different customers for the same service, the theory goes, the Commission would sanction illegal rate discrimination. *Id.*

AT&T's theory has no basis in reality. Whether each Intervenor has its own reparations period has no bearing on the Commission's ability to halt the billing of rates it has found to be unlawful. In this very case, Order No. 24,837 directed Verizon NH to cease billing the CCL charges on calls that do not use a Verizon NH common line, and Verizon NH (and FairPoint) ceased such billing, long before the Commission began to consider reparations periods in this Phase 2. Moreover, Verizon NH uniformly charged the same CCL rate to each of its wholesale customers, and thus has engaged in no discrimination. That RSA 365:29 limits the reparations period to two years from the date the claim is asserted does not convert refunds into claims of rate discrimination. That is because the customer – not the utility – controls the time when the claim for a refund is asserted and thus the period for which reparations are available. The fact that a customer who delayed petitioning for reparations may have a reparations period different than that of a ratepayer who filed earlier does not equate to rate discrimination.[5]

B. Application of the August 2008, amendment of RSA 365:29 to this matter would retrospectively increase the amount of the intervenors' reparations and Verizon's liabilities in violation of the New Hampshire Constitution.

One Comm and Global Crossing argue that the Commission should apply the recent amendment of RSA 365:29 to stretch their reparations period back two years before the

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[5] For the same reason, Global Crossing states a mere truism in asserting that Verizon NH would have the Commission "treat ratepayers differently from each other depending on whether they are the original complainant or an intervenor. It would also treat intervenors differently from one another ...." Global Crossing Brief at 4. That result is mandated by the terms of RSA 365:29, which expressly ties the amount of reparations to the date the claim is filed. A ratepayer can always avoid this result by promptly filing its petition for reparations.

Commission issued its Order of Notice in this case, rather than two years from the date of their petitions to intervene as the statute provided prior to amendment, thereby enlarging their potential recovery and Verizon NH's liability. *See* One Comm Brief at 4-7; Global Brief at 5-7. These arguments misconstrue the law and misapply it to the facts.

The CLECs' conception of the kind of statute that may be applied retrospectively is incorrect. Contrary to their assertions, the fact that a statute is not penal in nature (*i.e.* designed to punish an offense against the public) does not mean it may be applied retrospectively. *See* One Comm Brief at 5; Global Crossing Brief at 6. Indeed, in the very case One Comm relies on, *LaBarre v. Daneault*, 123 N.H. 267 (1983), the court found that the statute at issue was not penal yet could not be applied retrospectively. The critical inquiry in assessing whether a non-penal change in a statute, such as the amendment to RSA 365:29, may be applied retrospectively is whether it is merely remedial or procedural, or, in contrast, whether it affects substantive rights. *See Appeal of Silk*, 156 N.H. 539, 542 (2007) (citing *LaBarre v. Daneault*, 123 N.H. 267, 272 (1983)) ("If application of a new law would adversely affect an individual's substantive rights, . . . it may not be applied retroactively"). Thus, "[A] statute, or its application, that creates a new obligation in respect to transactions already past, *must* be deemed retrospective." *Cagan's v. N.H. Dept. of Revenue Admin.*, 126 N.H. 239, 249 (1985) (quotation and ellipses omitted; emphasis added).

One Comm further miscomprehends the law in claiming that the amendment to RSA 365:29 would not affect the parties' substantive rights because it "does not affect the question whether Verizon's CCL charges were lawful or unlawful." *See* One Comm Brief at 6. A person's substantive rights, however, are not limited to whether it is liable to, or may recover from, another but also include the extent of any such liability or recovery. The courts have long

held that a statutory change that increases the amount of a defendant's liability is a substantive change and cannot be applied retrospectively. As the court stated in *Labarre*:

> [C]ourts refuse to apply a statute retrospectively if it imposes a liability not existing at the time of its passage, or affects an existing liability to the detriment of the defendant. ... Most jurisdictions hold that statutory increases in damage limitations are changes in substantive right and not mere remedial changes; and, absent legislative intent to the contrary, courts apply these changes only prospectively.

123 N.H. at 271-272 (statute increasing the damages limitation on claims arising from accident caused by drunk driver cannot apply retrospectively); *see also Mihoy v. Proulx,* 113 N.H. 698, 700-701(1973) (application of an increased statutory limit for wrongful death actions would "enlarge the defendant's liability retrospectively" and would be unconstitutional); *McKinley v. Cummings*, 123 N.H. 282, 283 (1983) ("The defendant's liability is significantly increased, which is a change of a substantive nature"). In the case at hand, Verizon NH has demonstrated that by enlarging the reparations period afforded the Intervenors, the amendment to RSA 365:29 would increase the damage limitations the statute had previously imposed, thus significantly impairing Verizon's substantive rights.[6] It is therefore prohibited by the New Hampshire Constitution. *See* Verizon Brief at 17-19.[7]

One Comm cites to *Workplace Systems, Inc. v. Cigna Property and Casualty Insurance Co.* 143 N.H. 322 (1999), in support of its position, but in that case the court held only that a

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[6] One Comm also argues that application of the amendment here would only alter "the time period during which a claim may be asserted" and is therefore similar to a change in a statute of limitations. But RSA 365:29 is not a statute of limitations but instead imposes a cap on the amount that a customer may recover in reparations. *See* Verizon Brief at 20. By expanding the time period for which reparations would be available, the amendment would increase that cap. Thus, AT&T is also incorrect in claiming that Verizon NH's position would convert RSA 365:29 into a statute of limitations. *See* AT&T Brief at 6.

[7] For its part, Global Crossing argues that RSA 365:29 "simply provides a procedure for customers to recoup charges..." and so may be applied retrospectively. *See* Global Crossing Brief, at 7. But the statute itself is not at issue here. The issue is whether the *amendment* affects the parties' substantive rights, and it clearly does, as demonstrated above.

statutory amendment that expanded the subject matter jurisdiction of the superior court to hear declaratory judgment claims "merely allows the parties' respective rights to be adjudicated in an additional forum" and did not enlarge or diminish the parties' rights and obligations. *Id.* at 325. Nothing in that case indicates that statutory changes may be applied retrospectively as long as they do not create or remove liability entirely, nor does the case suggest that a statutory change that increases a damages limitation is not a change in substantive right and may be applied retrospectively. Thus, *Workplace Systems* is not inconsistent with Verizon NH's position.

One Comm and Global Crossing assert that the constitutional prohibition of retrospective laws applies only to laws that would deprive a person of "a vested property right," which they claim Verizon NH does not have here. *See* Global Crossing Brief at 5-6, *citing In Re Estate of Sharek*, 156 N.H. 28, 31 (2007); One Comm Brief at 6, *citing In Re Goldman*, 151 N.H. 770, 774 (2005). The CLECs are wrong on both counts. First, they truncate beyond recognition the rule stated in *Goldman* and *Sharek*, which is far more encompassing than the CLECs let on. For over 180 years, Article 23 of the New Hampshire Constitution has been interpreted to mean that:

> [E]very statue that takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Goldman, 151 N.H. at 772 (rule first stated in 1826) (citations omitted); *Sharek*, 156 N.H. at 30 (citing *Goldman*). Thus, retrospective application of the amended RSA 365:29 here would create a new obligation or impose a new duty on Verizon NH to refund payments which it would not be required to refund under the prior version of the statute. Moreover, even if the prohibition on retrospective laws was as limited as the CLECs claim, both *Goldman* and *Sharek* make clear that Verizon NH does indeed have a vested property right at issue here. Both cases state that:

> to be vested, a right must be more than a mere expectation based on an anticipation of the continuance of existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand, ***or a legal exemption from the demand of another.***

Goldman, 151 N.H. at 774; *Sharek*, 156 N.H. at 30 (citations omitted, emphasis added). Prior to the amendment of RSA 365:29, the statute exempted Verizon NH from any demands by One Comm or Global Crossing for reparation of payments of CCL charges made prior to two years before the dates of their respective petitions to intervene. Application of the amended statute here would take away or impair that property right and is thus prohibited.[8]

C. The Commission does not have authority to ignore the express terms of RSA 365:29 and award reparations for CCL payments made prior to the two-year reparations period stated in the statute.

RSA 365:29 states that a Commission "order for reparation shall cover ***only*** payments made within 2 years before the date of filing the petition for reparation." (Emphasis added.) BayRing nevertheless argues that the Commission has inherent authority to ignore the terms of the statute and order Verizon NH to refund CCL charges paid prior to the two-year period in the statute, in the interest of "fundamental fairness, equity and common sense." *See* BayRing Brief at 6-9. Likewise, Global Crossing argues that the Commission has inherent authority to prevent alleged unjust enrichment "[n]otwithstanding any limitations in RSA 365:29," citing a passage from *Granite State Electric Co.*, *supra*, 120 N.H. at 539. *See* Global Crossing Brief at 7. The Commission, however, cannot ignore the dictates of the statute.

As Verizon NH explained in its Initial Brief, at 15, exercising the Commission's alleged inherent authority as the CLEC's propose would effectively read the final sentence of RSA

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[8] There is no merit in Global Crossing's argument that application of the amended version of RSA 365:29 here would not be retrospective because it was in effect at the time Global petitioned for intervention. *See* Global Brief at 5. The date a claim is *asserted* is not relevant here. The relevant time is the date the claim *accrued*. *See LaBarre*, 123 N.H. at 272, holding that a statute imposing new, substantive liabilities on defendants "should be applied only to causes of action which arose after the effective date of the new law"; *see also, Appeal of Silk*, 156 N.H. at 542-43.

365:29 out of the statute. BayRing recognizes as much, and argues in vain that under its theory, this final sentence of the statute could still have meaning; it could be mean that "the Commission's authority to order interest as part of reparations payments is limited to awarding interest only to those payments made two years prior to the filing of the Petition." BayRing Brief at 8. Of course, the statute says nothing of the sort. It says, "Such order for reparation shall cover only payments made within 2 years before the date of filing the petition for reparation." This sentence limits the amount of reparations, not the amount of interest. Ordering Verizon NH to make reparation of payments made prior to two years before a CLEC filed its petition would make this sentence a nullity.

While the court in *Granite State Electric* did refer to the Commission's power to award restitution in appropriate circumstances, nothing in that decision authorizes the Commission to circumvent the statute's clear limitation on its authority. An administrative agency generally lacks equitable power and cannot contravene a statute or exceed the power granted to it by statute. *See In re State Employees' Ass'n*, 156 N.H. 507, 510-11 (2007) (PELRB could not waive deadline imposed by statute for equitable reasons). Indeed, the Commission itself has noted that "[i]t has long been established as a matter of New Hampshire law that the Commission is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *In re Public Service Company of New Hampshire*, 86 NH PUC 407, 409 (June 28, 2001, citation omitted). Contrary to the CLECs' argument, RSA chapter 365 "provides the Commission with less than plenary authority to redress customer complaints." *Id.* at 410. The Commission specifically acknowledged the limitation on its authority in RSA 365:29, explaining that, "[t]he Commission may order a utility to 'make due reparation' to a customer, with such reparation covering '***only*** payments made

within 2 years before the date of filing the petition for reparation'" in appropriate cases. *Id.* at 410 (quoting RSA 365:29) (emphasis added).

BayRing argues that in two cases dealing with refunds -- *Granite State Electric*, *supra*, and *Granite State Gas Transmission, Inc. v. State of New Hampshire*, 105 N.H. 454 (1964) -- the court did not imply that RSA 365:29 limited the Commission to ordering refunds only for the two-year period in the statue. But the issue did not arise in either of those cases. All of the charges at issue in *Granite State Electric* were assessed within 13 months of the date the Commission ordered the refunds. *Granite State Electric,* 120 N.H. at 538 (order authorizing company to increase rates issued on May 23, 1978, and order reducing rates issued on June 22, 1979). In *Granite State Gas Transmission*, the utility voluntarily passed along to its customers a portion of a refund from its own provider, based on an apportionment system that refunded to the customers only amounts they had actually paid. *See* 105 N.H. at 456. The court ruled that the Commission was not justified in ordering the utility to pass along the entire refund, even amounts that the customers had not paid. *Id.* at 458. No party argued that the Commission could or could not reach back to award reparations prior to the two-year period provided in RSA 365:29. Because the court had no reason to apply the statutory limit on reparations in either of these cases, its failure to do so does not imply that the limitation does not apply here, or that the Commission may freely ignore it and require reparation of earlier payments.

BayRing also argues that the Commission may order reparation of payments pre-dating the statutory two-year period pursuant to its authority to redress "undue or unreasonable prejudice or disadvantage" under RSA 378:10, in light of the "unfair competitive cost advantage" Verizon NH allegedly obtained over BayRing by assessing the disputed CCL charges. *See* BayRing Brief 6, 7. BayRing's argument is fatally flawed in a number of ways.

Its reliance on *Granite State Gas Transmission, supra,* for this theory is misplaced. In that case, the court read RSA 365:29 and RSA 378:10 together as authorizing the Commission to award refunds in certain situations. See *Granite State Gas Transmission,* 105 N.H. at 456-457. The court did not intimate in any way that the Commission's RSA 378:10 authority allows it to *override* the limitation on reparations in RSA 365:29. BayRing's theory fails in light of the well-established rule of construction that statutes dealing with similar subject matter must be read so that they do not contradict each other, *see In the Matter of J.B. and J.G.*, 157 N.H. 577, 579 (2008). BayRing's theory fails on the facts, since there is no evidence that Verizon NH has benefitted from any alleged "cost advantage" here, and the Commission made no such findings in Phase 1 of this proceeding.

Moreover, the CLECs vastly overstate the policy of the legislature allegedly favoring unlimited equitable relief. *See e.g.*, BayRing Brief at 9 ("Principals of fundamental fairness, equity and common sense" dictate that Verizon NH not be allowed to retain earlier payments);[9] Sprint Brief at 5 (arguing for longer reparations period in light of "the legislature's clear policy favoring the availability of broad and inclusive equitable relief). As noted in Part II.A. above, the legislature expressed no such policy in RSA 365:29. Rather, the legislature strictly and expressly limited the reparations the Commission may award, thereby striking a balance between making a customer whole and providing certainty to utilities. As AT&T put it in its Brief, at 6, "the two year period in RSA 365:29 is for the purpose of protecting a utility against unlimited

[9] BayRing also argues that "Verizon's delay in failing to resolve the CCL disputes by Bayring ... should not operate to limit in any way the amount of the refunds to be made by Verizon." BayRing Brief at 9. BayRing's proscriptive argument fails not only for the reasons explained in the text but because BayRing has failed to show any delay by Verizon NH. Indeed, Attachment A to BayRing's Brief demonstrates that Verizon NH denied each CCL charge dispute by BayRing within 30 days of filing. Moreover, if Verizon NH had delayed resolving those disputes, BayRing was not required to await their resolution before petitioning the Commission.

reparations to all customers over an indefinite amount of time." That purpose would be defeated if the Commission were to award reparations beyond those allowed by the statute. Put another way, the legislature has already determined the appropriate extent to which the Commission may order reparation, based on its own considerations, no doubt including "principals of fundamental fairness, equity and common sense." The Commission cannot substitute its own judgment for that of the legislature and order reparation of payments a CLEC made more than two years before it filed its petition.

III. Verizon NH Properly Assessed CCL Charges on Calls Over Type I Interconnection Arrangements, Because Those Arrangements Use Verizon NH Common Lines.

In a letter filed with its brief on December 19, AT&T argued that Verizon NH must provide information showing the volume of any calls during the reparations periods over Type I interconnection arrangements sometimes used by wireless carriers. Type I interconnection arrangements, however, use Verizon NH common lines to carry calls between Verizon NH's facilities and the wireless carrier's facilities. *See, e.g.,* spreadsheet submitted by Staff on December 15, 2006, titled Types of Calls That Traverse Verizon's Tandem, tabs 17 and 18 (showing CCL charges for Type I arrangements not at issue in this case). Moreover, no party submitted testimony in Phase 1 of this proceeding contending that Type I interconnection calls do not use a Verizon NH common line or that Verizon NH improperly assessed the CCL charge on such calls, and the Commission made no such findings. Consequently, Verizon NH properly assessed CCL charges on calls over such arrangements, and they fall outside the scope of this proceeding. *See* Order No. 24,837, at 4 (stating that, "the scope of this investigation now includes calls made or receive by either wireless or wireline end users of carriers other than Verizon *that do not employ a Verizon local loop*") (emphasis added). If AT&T were to contend that Type I interconnection arrangements do not use make use of Verizon NH's common lines,

which AT&T has not done, testimony, discovery and a hearing would be necessary to adjudicate that factual dispute.

Conclusion

For the reasons set forth above, the Commission should not award interest on any reparations at a rate greater than that authorized by RSA 336:1, and should not order reparation to any CLEC for payments made prior to the date two years before that CLEC filed its petition in this docket.

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 9, 2009, a copy of the foregoing Reply Brief was forwarded to the parties listed on the Commission's service list in this docket.

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