STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

FREEDOM RING COMMUNICATIONS, LLC d/b/a BAYRING COMMUNICATIONS Complaint Against Verizon New Hampshire Re: Access Charges	))))	Docket DT 06-067

REPLY BRIEF OF SPRINT

Sprint Communications Company, L.P. and Sprint Spectrum L.P. (collectively "Sprint"), respectfully submits its Reply Brief in the above captioned matter as per the schedule announced at the November 5, 2008 technical session and memorialized in a November 5, 2008 letter filed with the New Hampshire Public Utilities Commission ("Commission") by Commission staff. Sprint submits its Reply Brief in opposition to those arguments made in separate briefs filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("Fairpoint") and Verizon New England Inc. ("Verizon") on December 19, 2008.[1]

1. Reparations Period.

While the parties may differ on the starting date of the reparations period, all parties agree that the reparations period applicable to the matter at bar is governed by RSA 365:29. The statute itself has been amended since the initiation of this docket, and Verizon and Fairpoint both contend that the original version of the statute must be applied. Sprint contends that under either version of RSA 365:29, the applicable

[1] Verizon's Brief was not, unfortunately, served upon Sprint. Sprint only became aware of Verizon's Brief during a recent conversation with another counsel participating in the instant docket. Verizon apparently attempted to electronically serve Sprint's former counsel in this matter, Garnet M. Goins, instead of its current counsel, Benjamin J. Aron. (Sprint filed a Notice of Appearance/Substitution of Counsel in Mid-August to alert all parties and the Commission that Mr. Aron was substituted as counsel of record for Sprint). As Ms. Goins' email address was no longer in operation at the time of Verizon's attempted service, Sprint's counsel never received Verizon's Brief. Despite the truncated reply period Sprint faces resulting from Verizon's ineffective attempted service, Sprint does not herein request any extension of time or other relief. Sprint does reserve the right to address this issue at a later date.

reparations period must be calculated based on the date the original petition initiating this proceeding was filed. The record shows that Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") filed its petition on April 28, 2006. Accordingly, the reparations period begins two years prior to that date, *i.e.* April 28, 2004.

Prior to its revision, RSA § 365:29 read as follows:

> Whenever complaint has been made to the commission covering any rate, fare, charge or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the date of filing the petition for reparation.

RSA 365:29 clearly indicated a single date from which to calculate the reparations period: the date on which "the petition for reparation" was filed. The statute contained no reference to later or alternate dates. Neither did the statute mention or differentiate parties joining the case through intervention, impleader or any other means. Thus, it seems apparent that the legislature intended for the reparations period to be calculated from a single date regardless of developments in an open docket.

Review of the pre-revised statute also shows that it was quite specific in certain regards. For instance, the statute specifically required that the Commission have a "hearing and investigation" and find that "an illegal or unjustly discriminatory rate, fare, charge or price has been collected" in order for it to take any action pursuant to RSA 365:29. Similarly, the statute specifically defined the class of persons to whom the Commission could order the utility to make reparations as "the person that has paid the [illegal or unjust charges]." Thus, the statute specifically required that the Commission

hold a hearing and investigation, find that a defined injury had occurred, and limit the applicability of its reparations order to a defined class. Despite the specificity evident throughout RSA 365:29, there is no language whatsoever indicating that the reparations period must be measured by the date a specific aggrieved party filed its own petition. Despite the absence of such language, Verizon and Fairpoint urge the Commission to read such language into the statute when interpreting RSA 365:29.

In interpreting a statute, the reviewing body must give the statute its plain and ordinary meaning, and a statute must be interpreted without adding or subtracting language from the text. "When examining the language of the statute, we ascribe the plain and ordinary meaning to the words used ... We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include ... Further, we interpret a statute in the context of the overall statutory scheme and not in isolation." *New Hampshire v. Langill*, 157 N.H. 77, 84; 945 A.2d 1, 14 (2007).

Applying these principles, it is clear that there is but one relevant date applicable to the determination of the reparations period: the date the petition for reparations was filed by BayRing. This conclusion is inescapable from the absence of language describing other forms of pleadings, later intervening parties, impled parties, etc. Similarly, the identification of a single relevant pleading, "*the* petition for reparation," instead of broader language that could include other pleadings or parties leads to the same conclusion. Had the legislature wished to differentiate the relevant reparations period for different parties, it easily could have drafted RSA 365:29 in such a way as to effectuate such intent, but no such differentiation is evident from the clear language of the statute.

While the statute clearly articulates certain requirements that must be met for the Commission to award relief and certain limitations on the relief it may award, the requirement that Verizon and Fairpoint advocate is simply not mentioned in the statute, nor is it reasonably inferred from the text.

Analysis of the equitable principles underlying the statute also dictates such a conclusion. The Supreme Court of New Hampshire ("Court") has interpreted the legislative intent behind the statute and concluded that the purpose of the statute is to empower the Commission to make whole parties that have been unjustly deprived of their property. S*ee Appeal of Granite State Electric Company*, 120 N.H. 536, 539-41; 421 A.2d 121 (1980). As the legislature's goal was correcting unjust enrichment, this goal is best realized by interpreting the plain language of the statute in a way that broadly empowers the Commission to correct unjust enrichment, not in a way that narrowly limits the relief the Commission may grant.

The Commission should also consider a broader policy purpose underlying the defined reparations period. As described above, the legislature has an obvious interest in correcting unjust enrichment of utilities at their customers' expense. The legislature also, however, has an interest in limiting utilities' exposure to liability for past acts. Were a utility subject to liability for all past actions without limit, the risk of such liability exposure would create obvious difficulty for any utility in its ongoing operations. Thus, the legislature balanced its competing goals and limited the length of the reparations period to two years before the petition for reparations was filed. Once any party, or the Commission, brings an action which may result in damages under RSA 365:29, the utility is on notice of its exposure to liability and can accurately plan to address such exposure

to liability as may follow. It must be noted, that once an action is commenced, no one is better situated than the utility itself to assess and address the extent of its liability. Thus, the legislature's interest in enabling a utility to forecast its potential exposure to liability is satisfied when any action is instituted under RSA 365:29. To take this a step further and argue that a utility should have additional protection from its past malfeasance, such protection coming in the form of multiple reparations periods, each defined not by the date on which the utility is placed on notice that unjustly collected funds may need to be returned, but by the date on which any later-complaining party seeks recourse, is to go well beyond what is required to effectuate the legislative interest. This is unnecessary.

Applied to the matter at bar, once Verizon and Fairpoint were on notice that their impermissible billing practices were being challenged, they were uniquely situated to determine with specificity the extent of their potential exposure. Once BayRing filed its petition, Verizon, and later Fairpoint, could calculate the exact amount of their potential exposure and plan accordingly. All that remained to be determined at that point was how many carriers would intervene to seek reparations, and how much of Verizon's and Fairpoint's unwarranted profits they would ultimately be required to return. To the extent that the reparations period serves a legislative purpose of allowing utilities to develop their business plan with some knowledge of their potential liability exposure, this goal was satisfied once BayRing filed its petition and thereby placed Verizon and Fairpoint on notice. To limit the permissible recovery any further than the point in time at which Verizon and Fairpoint were placed on notice of their potential exposure to liability is to elevate their interest in analyzing liability exposure above aggrieved carriers' interests in recovering the funds Verizon and Fairpoint were never entitled to collect.

Verizon and Fairpoint also advance an argument that the Commission's statement in a prior Order in this docket indicating that petitions for intervention would be treated as petitions for reparations under RSA 365:29 is controlling in determining the calculation of the reparations period. This is simply not the case. While the Commission clearly did indicate in its prior order that petitions for intervention would be treated as petitions for reparations, that statement was made in the context of determining whether an intervenor was eligible for relief under RSA 365:29. No party can credibly argue that intervenors do not qualify for relief under the statute, and the Commission's statement was no more than an affirmation that intervenors would be given equal status to BayRing, the initial plaintiff. The absurdity of Verizon's and Fairpoint's position is highlighted by the fact that the Commission's staff asked the parties to address the length of the reparations period. If this was a settled issue, as Verizon and Fairpoint argue, the Commission's staff would not have asked the parties to brief the issue.

As stated above, during the pendency of this matter, the legislature amended RSA 365:29. Despite this amendment, there is no change to the outcome. The revised statute indicates that the claims period begins at the *earlier* of the date of the Commission's notice of hearing or the date the petition for reparation was filed, and allows the Commission to order reparations in a proceeding opened on its own initiative, but otherwise leaves the statute unchanged. The outcome remains consistent under the revised statute because, as discussed above, the statute continues to identify the date "the petition for reparation" was filed as the date from which to calculate the reparations period, and BayRing's petition predates the Commission's notice of hearing.

That the legislature's primary concern remains the correction of unjust enrichment is illustrated in its decision to allow aggrieved parties to use the *earlier* of the two statutorily specified events to calculate the claims period. Despite the indicia of legislative intent found in the statutory revision, Verizon and Fairpoint continue to press their argument that the statute must be read in such a manner as to apply the shortest possible claims period for intervenors. This is blatantly contrary to the legislature's clear policy favoring the availability of equitable relief to combat unjust enrichment, and contrary to the plain meaning of the language used in the statute itself.

As is clear from the foregoing, the Commission must conclude that absent any language in RSA 365:29 establishing a separate, shorter reparations period, the only logical interpretation of the statute is one which advances the statute's purpose: to make whole parties that have been unjustly deprived of their property. Accordingly, the Commission must find that there is a single applicable date for calculation of the reparations period, and that date is the date BayRing's petition was filed, April 28, 2006.

2. **Interest.**

RSA 365:29 empowers the Commission to order reparations, with interest, from the date of payment. The Commission's powers under RSA 365:29 have been broadly interpreted. "In awarding reparation, the PUC performs a judicial function. As such, it must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power." *Granite State Electric* at 539 (internal citations omitted). The Court, in analyzing the Commission's authority, strayed from the strict language of the statute and found that RSA 365:29 empowered the Commission to act

beyond the strict bounds of those powers delineated in the statute so long as such action was taken to effectuate the goal of the statute.

In *Granite State*, the Court found that the Commission had authority to order a refund even where the Commission had authorized and approved the rates at issue. This is significant, of course, because RSA 365:29 requires the Commission find that "an illegal or unjustly discriminatory rate, fare, charge or price has been collected ..." Despite the absence of the Commission finding required by RSA 365:29, and indeed despite the fact the Commission had in fact approved and authorized the rates in question, the Court held that the Commission could exercise its powers under RSA 365:29 to order refunds where those rates had been found improper on appeal. No such authority is found in the statute. In explaining its holding, the Court stated the following:

> Although the PUC's statutory refund authority does not expressly encompass a situation where, as here, the PUC seeks to order a refund of revenues found to have been collected under an improper rate base upon judicial review by this court, we note that the PUC is vested with broad statutory power ... As such, it must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power.

Granite State at 539 (internal citations omitted). The holding in *Granite State* illustrates that RSA 365:29 broadly empowers the Commission to act in such a manner as is necessary to vindicate the statutory intent of correcting unjust enrichment.

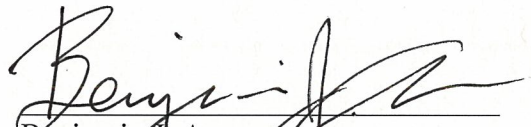
Sprint contends now, as it did in its Brief, that the equitable principles effectuated by RSA 365:29 empower the Commission to award such interest as it deems appropriate in order to correct unjust enrichment. Such a broad reading of the statute is consistent with Court's holding in *Granite State* and appropriate due to the facts established by the record. *See* AT&T Phase II Brief at 10, citing AT&T Post-Trial Brief at 21. A variety of

appropriate interest rates have been suggested in the Phase II Briefs submitted to the Commission, and the Commission has authority under RSA 365:29 to award interest at the highest rate it deems reasonable and appropriate.

3. **Conclusion**.

For the foregoing reasons, the Commission should find that the reparations period for Sprint, and all parties, begins on April 28, 2004, a date two years before the BayRing brief was filed. The Commission should find that it has authority to determine the appropriate rate of interest and should award interest at the highest rate is deems reasonable and appropriate.

Respectfully submitted,



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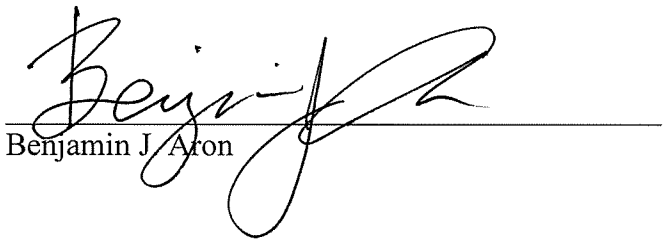
Dated: January 8, 2009

CERTIFICATE OF SERVICE

I, Benjamin Aron, certify that I have served a copy of the foregoing document upon the parties of record by electronic mail on the 9th day of January, 2009.



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