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 HAMPSHIRE'S REPLY TO FAIRPOINT COMMUNICATIONS-NNE'S MOTION FOR REHEARING AND/OR RECONSIDERATION OF COMMISSION ORDER 24,837

Verizon New Hampshire ("Verizon") submits the following reply to FairPoint Communications-NNE's ("FairPoint") Motion for Rehearing and/or Reconsideration of Order No. 24,837. In support of its reply, Verizon states as follows:

1. On April 21, 2008, FairPoint filed a Petition to Intervene and a Motion for Rehearing and/or Reconsideration of Commission Order No. 24,837 (the "Order"). FairPoint's intervention is appropriate, as FairPoint has succeeded to Verizon's interest and is providing service to competitive carriers such as BayRing, AT&T and One Communications (the "Competitive Carriers") under Tariff 85 (the "Tariff"), which was the subject of the Order.[1] FairPoint has a legitimate interest in the interpretation of the Tariff and whether carrier common line charges can be assessed when switched access is

[1] On March 28, 2008, Verizon also filed a motion to reconsider or rehear Order No. 24,837 on grounds similar to those raised by FairPoint. On April 9, 2008, the Competitive Carriers then filed a joint opposition to Verizon's motion (the "Joint Opposition"). Verizon's comments on FairPoint's Motion require Verizon, in part, to address the Competitive Carriers' Joint Opposition to the extent relevant to FairPoint's Motion.

being provided on a stand-alone basis, *i.e.*, in the absence of a Verizon (now FairPoint) common line.

2. As FairPoint Motion's makes clear, the central issue in this docket is what constitutes "switched access" under the Tariff. The Supplemental Order of Notice plainly states that the primary issue in the docket is "whether calls made or received by end-users which do not employ a Verizon local loop involve Verizon switched access." Supplemental Order of Notice at 3. To answer the question, one must determine what constitutes "switched access" under the Tariff. For all of the reasons set forth in FairPoint's Motion, which Verizon incorporates by reference, the Commission erred when it concluded that carrier common line charges could not be charged where Verizon (and now FairPoint) provides switched access on a stand-alone basis.

3. It is undisputed that Verizon provided switched access to the Competitive Carriers, which they concede: "Verizon can, and does, provide a component of switched access (local transport) for which it is entitled to charge under Section 6 [of Tariff 85] when it transports a call over its facilities for delivery to another carrier." Joint Opposition at 7. The concession is significant because the Competitive Carriers have admitted that the local transport services they have been receiving are switched access and that the switched access is provided under the Tariff. The Competitive Carriers further admit that had the Commission reached the conclusion that the carrier common line charge does apply to any switched access under the Tariff, "it would have had to address the many provisions in the tariff that provide for the offer, use and payment for many services or service components that do not constitute a complete switched access

service." Joint Opposition at 13. This is, however, precisely what the Commission failed to do.

4. To avoid the application of the carrier common line charge to the provision of *any* switched access service – as the Tariff clearly provides – the Competitive Carriers and the Commission have adopted a contorted reading of the Tariff. Most telling is the Competitive Carriers' repeated reference to the need to read the Commission's finding "*in context*" to support the Commission's conclusion that the carrier common line charge applies only when "complete" switched access is provided. *See* Joint Opposition at 5 ("The correctness of the Commission's statement ... becomes apparent when it is placed in the context of the Commission's *Order*;" "In that context, the Commission understood Section 5.4.1.A," *id*; "The Commission's statement ... was – in context – referring to the *switched access service to which Section 5 refers*" at 6 (emphasis in original); "When the Commission's statement is properly understood in context, it becomes evident that there is nothing inconsistent with the second statement cited by Verizon" at 7).

5. The Competitive Carriers' insistence that the Commission's finding must be read "in context" is an admission that the plain meaning of the Tariff supports FairPoint's and Verizon's position. There is no language in the Tariff limiting the carrier common line charges to instances where "complete" switched access is provided. In fact, the only place where the term "complete switched access" even appears is in Section 6.1.2.D, which states that "[l]ocal transport, local switching and carrier common line when combined to provide a complete switched access service is as illustrated in Exhibit 6.1.2-1." The Tariff then includes a diagram of what end-to-end switched access service looks like, but does not limit the definition of switched access service solely to that illustrated

in the end-to-end configuration. Stated differently, the record evidence is undisputed that carriers are in no way limited to purchasing the "complete" access service depicted in the diagram. In fact, the prior language in Section 6.1.2, which enumerates the variety of switched access services provided under the Tariff, could not be clearer about what is switched access.

6. Adopting the Commission's position – that local transport services when provided on a stand-alone basis without the use of a Verizon (now FairPoint) common line are not switched access – raises a host of questions. If local transport without the use of the common line is not switched access, what are the services that the Competitive Carriers concede are being provided under Section 6 of Tariff 85? If those services are not switched access under Tariff 85, does FairPoint have any obligation to provide them to the Competitive Carriers? How can FairPoint lawfully impose any charge for them if they are not services available under the Tariff? If the services are not subject to the Tariff, then must they be provided free of charge, since there is no tariffed rate for them? But if provided free of charge, wouldn't FairPoint be violating RSA 378:21 (barring "deviations" from tariffed rates)? Each of these questions reveals the fallacy of the Commission's decision and the Competitive Carriers' position that the use of switched access services on a stand-alone basis does not constitute "switched access" under Tariff 85.

7. It also becomes clear that the Commission's interpretation of the Tariff should more aptly be characterized as *editing* the Tariff to inject words where they do not exist. As described in FairPoint's Motion, the Commission compounds this initial error by then requiring Verizon to pay restitution to the Competitive Carriers, thereby applying its

revisionist view of the Tariff to historical billing. This is retrospective ratemaking, plain and simple.

8. As FairPoint's Motion points out, the Public Utilities Commission is authorized to fix rates on a prospective basis only. FairPoint Motion at 10; *see also* RSA 378:7. RSA 378:7, which grants the Commission the authority to set rates on a forward-looking basis, closely parallels 16 U.S.C. § 824(e), which states in relevant part:

> Whenever the [Federal Energy Regulatory Commission] . . . shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(Emphasis added).

9. While the New Hampshire Supreme Court has never considered whether RSA 378:7 precludes the ordering of refunds if a previously approved rate is found to be unjust or unreasonable, the United States Court of Appeals for the First Circuit has addressed the issue under the federal statute, holding that changes may be made "only prospectively even if existing rates are determined to be unreasonable or unjust." *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st 1988). In *Boston Edison Co.*, the First Circuit further noted the "settled" principle that the Federal Energy Regulatory Commission "lacks power to order 'reparations' in compensation even for unjust or unreasonable past rates." *Id.*; *see also Maine Pub. Serv. Co. v. FPC*, 579 F.2d 659, 667 (1st Cir. 1978) (*citing FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944)). Other jurisdictions recognize the same prohibition. *See, e.g., Dist. of Columbia v. Dist. of Columbia Pub. Serv. Comm'n*, 905 A.2d. 249, 257 (D.C. App. 2006) ("A regulatory agency may not order reparations.").

This prohibition comes under the umbrella of a broader principle commonly known as the "rule against retroactive ratemaking." *See, e.g., Appeal of Pennichuck Water Works,* 120 N.H. 562, 566 (1980); *Maine Pub. Serv.*, 579 F.2d at 667; *see also So. Central Bell Telephone Co. v. Louisiana Pub. Serv. Comm'n*, 594 So.2d 357, 359 (La. 1992) ("Generally, retroactive rate making occurs when . . . a utility is required to refund revenues collected pursuant to its lawfully established rates."); *Public Advocate v. Pub. Util. Comm'n*, 718 A.2d 201, 204 (Me. 1998) ("The rule [against retroactive ratemaking] prohibits a utility commission from making a retrospective inquiry to determine whether a prior rate was reasonable and imposing . . . a refund when rates were too high.") (citation omitted).

10. The rule against retroactive ratemaking generally prohibits the ordering of refunds or rebates to account for an error made in the rate review and approval process. The U.S. Supreme Court first articulated this prohibition in the seminal case *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932). In *Arizona Grocery*, "the Supreme Court held that the Interstate Commerce Commission could not order a common carrier to pay reparations for charging a rate that the agency had explicitly approved at the time it was collected, but subsequently determined to have been unreasonable." *Verizon Telephone Co., Inc. v. FCC*, 269 F.3d 1098, 1106 (D.C. Cir. 2001). Specifically, the Supreme Court held:

> Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation arising when its previous order was promulgated, by declaring its own findings as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding.

Arizona Grocery Co., 284 U.S. at 390.[2] Thus, the holding of *Arizona Grocery* has subsequently been understood to be "a proscription against the retroactive revision of established rates through ex post reparations." *Verizon Telephone Co., Inc.* 269 F.3d at 1106 (*citing Alabama Power Co. v. ICC*, 852 F.2d 1361, 1373 (D.C. Cir. 1988); *AT&T v. FCC*, 836 F.2d 1386, 1394-5 (D.C. Cir. 1988); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 189 n. 7 (D.C. Cir. 1986)); *see also Dist. of Columbia*, 905 A.2d. at 257; *cf. Appeal of Granite State Elec. Co.*, 120 N.H. 536, 538 (1980) (agreeing with appellant utility that "absent statutory authority, final rates cannot be retroactively adjusted." (*citing Arizona Grocery Co.*, 284 U.S. at 383-90)).

11. Based on these well-established principles, the Commission cannot reach back in time and change the rates charged by Verizon under a legally enforceable tariff. The Commission can effect that change only on a *prospective* basis. Further, as FairPoint's Motion establishes, the Commission has very limited authority to grant reparations at all – only for "an illegal or unjustly discriminatory rate, fare, charge or price." FairPoint Motion at 12. The carrier common line charge is not illegal; it was established in 1993 (*see* Order 20,980) and has been in effect ever since. The undisputed evidence demonstrates that Verizon billed the carrier common line charge since at least 2001, and the Competitive Carriers paid those charges without quarrel. That cannot be the hallmark of an illegal rate. Similarly, there is no evidence that Verizon has ever applied the carrier common line charge in a discriminatory manner.

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[2] The Supreme Court explained that "[a]ll the reported court decisions declare and sustain the proposition that a regulatory tribunal . . . cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved." *Arizona Grocery Co.*, 284 U.S. at 377.

12. As FairPoint's Motion makes clear, the issue of confiscation is far from moot. FairPoint has succeeded to Verizon's interest and is now providing switched access service under the Tariff. *See* FairPoint's Petition to Intervene at 1-2. FairPoint will be providing utility service without just compensation if it is forced to provide switched access "components" under Tariff 85 but is not authorized to bill for them, given the strained interpretation the Commission adopted to reach its conclusion that carrier common line charges do not apply. FairPoint Motion at 9.

13. In this case, permanent rates were set when Tariff 85 was adopted, and those rates have remained in effect for many years. The rates, which included charges for switched access and the carrier common line charge, were within the constitutionally required zone of reasonableness when set. *See Appeal of Campaign for Ratepayer Rights*, 145 N.H. 671, 676 (2001). To now go back and retrospectively revise one of those rates to zero and allow no compensation for it would violate the prescribed zone of reasonableness. Moreover, to readjust downward only one element of tariffed rates without consideration of the impact of that action on all other rates in their totality results in the type of single-issue ratemaking that the Competitive Carriers claim the Commission cannot do.

14. In addition, the access charge structure set forth in Tariff 85, including the common carrier line charge prescribed in Section 5.4, was established in Docket DE 90-002. Tr. Day II at 11; *see also*, Verizon's September 10, 2007 Post-Hearing Brief at 18–25. Prior to DE 90-002, the carrier common line access charge did not exist, and contribution was obtained directly from local transport and local switching rate categories. *Id.* As a result of DE 90-002, the carrier common line rate element was

established to provide contribution[3] flowing from all switched access usage on a "residual" basis, while the local transport and local switching rate elements were set at incremental cost. *See* Tr. Day II at 11, 12; *see also* DE 90-002 Testimony Day X (McCluskey) at 199-200 (attached to the Pre-filed Direct Testimony of Peter Shepherd). In ordering restitution without allowing Verizon an opportunity to recover the contribution associated with the switched access services that the Competitive Carriers were using, the Commission is engaging in retroactive ratemaking that further violates the prescribed zone of reasonableness.

15. The Competitive Carriers also mischaracterize the record evidence in asserting that Verizon did not bill carrier common line charges until 2005. To the contrary, there is substantial, undisputed evidence that Verizon billed the carrier common line charge prior to 2005 when individual components of switched access were provided. At the July 11, 2007 hearing, Verizon's witness testified that:

> There was traffic that was billed on Verizon CABS that terminated to non-Verizon providers and non-Verizon end-users that used switched access to which the carrier common line would have been charged. This is evidenced by the financial analysis itself, if you go into the level of detail of the months that occurred during the year 2005, before the billing was taken back from the New York Access Billing Corporation or LLC. There are differences between the carrier common line minutes and the local switching minutes, which would show that there are common line minutes being billed that are not associated with a Verizon end office switch. That's a fact. That was probably and most likely would have been calls terminated to wireless carriers.

Tr. Day II at 36. Additional evidence on this point was then provided later that same day:

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[3] Contribution recovers costs that are not recovered directly from other rates and charges, and helps cover a firm's joint and common costs so that the firm is able to meet its revenue requirements. Tr. Day II at 100; *see also* DE 90-002 Testimony Day XIV (McCluskey) at 49.

Q. There are other types of calls similarly involving CCL that are disputed in this case that Verizon did bill, because they had not been handed over to a billing agent, is that correct?

A. That's correct. That would be the calls we discussed this morning, where a call either originated from a CLEC and terminated to a wireless provider or the call originated – terminated from an IXC to a wireless provider, where Verizon was providing the switched access functions, including the tandem switching.

Q. And that covers a period prior to the 2005 period, which triggered the complaint or complaints filed by the various parties in this docket?

A. Yes. Verizon has consistently applied the carrier common line charge on calls that terminate to a wireless provider for either an IXC's toll traffic or a CLEC's toll traffic.

Id. at 126-27.

16. Not only do the Competitive Carriers ignore this evidence – that prior to 2005, Verizon billed the carrier common line charge when individual components of switched access were provided – they never refuted it. In fact, Verizon also provided post-hearing documentary evidence (in accordance with Puc 203.09(k)) that the carrier common line charge had been applied prior to 2005. For example, Verizon's First and Second Supplemental Replies to Staff 1-19, introduced into the record by AT&T as part of Exhibit 17, provided examples of billing information that related to a variety of disputed scenarios, including scenario numbers 3, 8, 9, 10, 16 and 20. The Third Supplemental Reply, in turn, also related to disputed scenario numbers 8, 9, 10 and 16 (addressed in the earlier supplements) as well as disputed scenario numbers 14 and 15. The Third Supplemental Reply provided billing information (bills and summary billing output) from Verizon's carrier access billing system from 2001 through 2004. Yet the Competitive Carriers, which bear the burden of proof as the petitioners in this case, *see* Puc 203.25, never refuted this evidence, and thus have never met their evidentiary burden.

17. Further, the Competitive Carriers claim that Verizon's third party billing agent's failure to bill the carrier common line charge for a period of time supports the Competitive Carriers' interpretation of the Tariff. But they introduced no evidence at the hearing about *why* the third party billing agent did not bill the carrier common line charges. To conclude that it was because of its interpretation of the Tariff is pure speculation and completely unsupported by the record.

18. For the reasons stated above and in Verizon's and FairPoint's Motions, the Commission should reverse its decision in Order No. 24,837.

WHEREFORE, Verizon respectfully requests that the Commission:

A. Grant Verizon's and FairPoint's Motions for Rehearing and/or Reconsideration; and

B. Grant such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

VERIZON NEW HAMPSHIRE

By its Attorneys,

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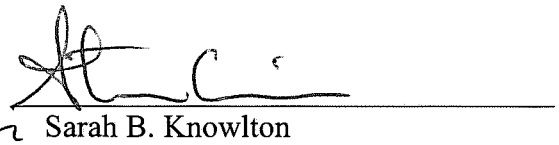
PROFESSIONAL ASSOCIATION

Date: April 28, 2008

By: 
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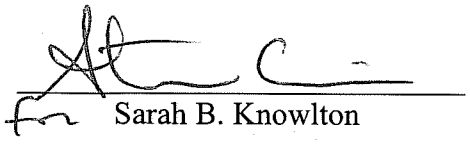
Certificate of Service

I hereby certify that on April 28, 2008, a copy of the foregoing Reply has been forwarded to the parties listed on the Commission's service list in this docket.



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