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 OBJECTION TO JOINT MOTION TO STRIKE VERIZON'S REPLY TO FAIRPOINT'S MOTION FOR REHEARING AND/OR RECONSIDERATION

Verizon New Hampshire ("Verizon") submits the following objection to the Joint Motion of AT&T, BayRing Communications and One Communications to Strike Verizon's Reply to FairPoint's Motion for Rehearing and/or Reconsideration (the "Joint Motion"). In support of its objection, Verizon states as follows:

1. On May 15, 2008, AT&T, BayRing Communications and One Communications (the "Competitive Carriers") filed their Joint Motion to Strike Verizon's Reply to FairPoint's Motion for Rehearing and/or Reconsideration of Order 24,837 (the "Order"). Despite a claimed sense of urgency to conclude this proceeding, the Competitive Carriers waited 17 days after the filing of Verizon's Reply within which to file the Joint Motion. The Commission should deny the Joint Motion not only because of the Competitive Carriers' delay in filing but also because there is no legal basis for the relief sought.

2. The Competitive Carriers claim that under the Commission rules a party is only entitled to object to a motion for rehearing and is not entitled to otherwise file any

responsive pleading. Much like their substantive position in the case, the Competitive Carriers would have the Commission read words into its rules that do not exist. Puc 203.07, which governs motion practice at the Commission, specifies the content of motions. *See* Puc 203.07(d). While the rule refers to objections to motions, it does not define what constitutes an objection, identify the parameters of a permissible pleading or prohibit responsive comments. Rather, the rule provides only for the timing of a pleading's filing. Puc 203.07(e) and (f).

3. Contrary to the Competitive Carriers' position, the Commission has not interpreted Puc 203.07 to allow only objections in response to motions for rehearing. *See Investigation Into Implementation of Energy Policy Act of 2005*, Order 24,785 (August 31, 2007)(Commission allowed National Grid and Unitil to file letters in support of motion for rehearing); *Re: Public Service Co. of New Hampshire*, 70 NH PUC 367 (1985)(PSNH permitted to reply to motions for rehearing filed by Conservation Law Foundation of New England, Inc. and Office of Consumer Advocate). AT&T and BayRing are both well aware of this practice. In *Re: Bell Atlantic*, 86 NH PUC 774, 776 (2001), in which the Commission considered multiple motions for rehearing and/or reconsideration of an order ruling on Verizon's statement of generally available terms and conditions, Verizon filed a reply to a motion for rehearing filed by AT&T and BayRing. Neither AT&T nor BayRing moved to strike Verizon's reply on the grounds that only "objections" are allowed. They should not be permitted to do so here.

4. Nor should the Commission adopt the Competitive Carriers' unduly restrictive view of the Commission's rules, particularly when one considers the purpose of rehearing motions. The New Hampshire Supreme Court has made clear that the

objective of the rehearing process (and thus RSA 541:3) is to give administrative agencies the opportunity to review and correct any alleged errors before further appeal is taken. *See McDonald v. Town of Effingham Zoning Bd. of Adjustment*, 152 N.H. 171, 173 (2005); *NBAC Corp. v. Town of Weare*, 147 N.H. 328, 331 (2001), *citing Fisher v. Town of Boscawen*, 121 N.H. 438, 440 (1981)("The purpose of the rehearing process is to provide the board with the opportunity to correct any action it has taken, if correction is necessary, before an appeal to the court is filed"). The policy of fostering administrative and judicial economy, *Petition of Ellis*, 138 N.H. 159, 160 (1993)(administrative agencies should have the chance to correct their alleged mistakes before time is spent appealing from them), applies forcefully in this instance.

5. If the Commission were to adopt the Competitive Carriers' position, a party could provide comments in response to a motion for rehearing only to the extent that the party asserts that an administrative agency decision should be upheld; no responsive arguments would ever be allowed regarding errors that should be corrected.[1] This would unnecessarily limit the information available to the Commission in making its decision on rehearing, which defies the purpose of the rehearing statute. Yet, that is exactly what the Competitive Carriers seek to do in this case. For example, they claim that one reason to strike Verizon's Reply is that Verizon "cites no fewer than ten case decisions and one statutory reference that do not appear in FairPoint's discussion of retroactive ratemaking." Joint Motion at 4. Under this view, offering a thorough analysis to assist the Commission in its consideration of an alleged error provides a basis to strike a

[1] Indeed, taken to its logical conclusion, adoption of the Competitive Carriers' argument would mean that no party could ever file a response to any motion – whether for rehearing or otherwise – unless the

pleading. Surely, that cannot be the Commission's intent in adopting Puc 203.07 or the Legislature's aim in enacting RSA 541:4.[2]

6. The Competitive Carriers' position makes even less sense when one considers the nature of most dockets before the Commission, which involve multiple parties whose interests span a broad spectrum. Regardless of whether a party supports or is against a motion for rehearing, it is helpful for the Commission to hear those views in considering whether there is an error to be corrected. Perhaps that is why the Commission has allowed a variety of pleadings in response to motions for rehearing. To limit the right to only those parties that take a position contrary to the rehearing movant would result in an unprecedented change to longstanding Commission practice, as illustrated *supra*. The Commission should not adopt that position here.

7. The Commission should also reject the Competitive Carriers' argument that Verizon should have raised the issue of retroactive ratemaking during the conduct of the evidentiary proceeding. Until the Order was issued, Verizon could not have known that the Commission would read words into the Tariff and then apply that new reading retroactively.[3] Thus, Verizon was not required to have raised the issue earlier. *See*

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substance of the responsive pleading were an "objection." Years of practice at the Commission undermine the reality and appropriateness of that contention.

[2] The Competitive Carriers also argue that "Verizon is prohibited by RSA 541:4 from raising the claim [regarding retroactive ratemaking] in its purported 'reply.'" Joint Motion at 4. As addressed *infra*, Verizon did raise the issue of retroactive ratemaking in its Motion for Rehearing and/or Reconsideration, and the Competitive Carriers are incorrect. Even if that were not the case, RSA 541:4 does not prohibit a party from addressing an issue in a responsive pleading during the rehearing/reconsideration phase of a proceeding. The intent of RSA 541:4 is to give the administrative agency every opportunity to correct its alleged errors, and the Competitive Carriers' narrow reading of RSA 541:4 would defeat the purpose of the statute.

[3] In fact, the Supplemental Order of Notice stated that the Commission would consider "whether such services [the switched access services] are more properly assessed under a different tariff provision [than Tariff 85]." October 23, 2006 Supplemental Order of Notice. Thus, Verizon had every reason to believe that it would be granted some form of remuneration for the services provided, whether under Tariff 85 or otherwise.

Appeal of Richards, 134 N.H. 148, 157-58 (1991)(alleged ratemaking issue could not have been discovered prior to issuance of Commission decision and was a legal, rather than a factual issue, and thus did not need to be raised during proceeding). As discussed *supra*, the purpose of the rehearing statute is to allow the Commission to correct any alleged errors. The issue of retroactive ratemaking is squarely before the Commission, having been raised by both FairPoint and Verizon in their Motions for Rehearing, and the Commission now has the opportunity to review that alleged error and correct it.

8. Moreover, despite the contentions of the Competitive Carriers, Verizon did raise the issue of retroactive ratemaking at the first possible opportunity. In its Motion for Rehearing and/or Reconsideration, Verizon plainly asserted that the Commission erred by changing the language of Tariff 85 by reading words into it, and then applying that changed tariff language to charges that had been assessed previously. *See* Verizon Motion for Rehearing and/or Reconsideration at 8-10. There can be no dispute that one of the central arguments in Verizon's Motion is that the Commission changed the language of a tariff that had previously been approved and had the continuing force and effect of law. That is the very description of what constitutes retroactive ratemaking, as the New Hampshire Supreme Court has explained:

> [T]he vehicles by which utility rates are set, the tariffs or rate schedules required to be filed with the PUC (RSA 378:1, :3, :5, :6, :7, :27, and :28), do not simply define the terms of the contractual relationship between a utility and its customers. They have the force and effect of law and bind both the utility and its customers. As such, the customers of a utility have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change. Once customers consume a unit of those services, they are legally obligated to pay for it and in that sense the transaction has been completed and the charges are set in accordance with the rates then in effect and on file with the PUC or with rates later approved by the PUC based on a pending request for a change. If the PUC were to allow a rate increase to take effect applicable to services rendered at any

> time prior to the date the petition for the rate increase was filed, *it would be retroactively altering the law and the established contractual agreement between the parties.*

Appeal of Pennichuck Water Works, Inc., 120 N.H. 562, 566 (1980)(emphasis added). Verizon's Motion for Rehearing and/or Reconsideration expressly referred to this very page of the *Pennichuck* case, *see* Verizon Motion at 10, and set forth Verizon's assertion that the Commission could not go back and change a tariff provision that had the "unequivocal 'force and effect of law.'" *Id.* "Retroactive ratemaking" is nothing more than the term used to describe the harm in need of remedy. That Verizon did not use the specific label in its Motion is of no consequence.[4]

9. The Competitive Carriers also collaterally challenge FairPoint's right to raise the issue of retroactivity. But there is no question that FairPoint has standing to raise the issue of retroactive ratemaking. FairPoint's rights "'may be directly affected' by the decision" because the Commission's decision to re-write the Tariff and apply that Tariff retroactively has going-forward consequences for FairPoint. *See Appeal of Richards*, 134 N.H. at 154, 156. Since the Order has been issued, FairPoint has continued to provide services under Tariff 85. Should the Commission deny Verizon and FairPoint's Motions for Rehearing, FairPoint will be barred from billing for the charges at issue, thereby suffering direct injury. The harm to FairPoint is far more than a "mere interest" in the issue and certainly is different than the general injury to the public as a result of the Commission's decision. *Id.*

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[4] The Competitive Carriers further complain that they have been harmed by Verizon's reply because they did not have the opportunity to respond when they filed their objection to the FairPoint Motion. *See* Joint Motion at 4. The argument is entirely unpersuasive. In fact, the Competitive Carriers now have had three opportunities to address the issue: first in reply to Verizon's Motion, then in response to FairPoint's Motion and, most recently, in the body of their Joint Motion. The Competitive Carriers thus cannot legitimately complain that they have been denied the opportunity to respond.

10. The Competitive Carriers also misconstrue Verizon's position regarding reparations. Verizon does not dispute that the Commission has general authority to award reparations under RSA 365:29. As the Competitive Carriers point out, however, the question is whether reparations have been ordered "in proper circumstances," *see* Joint Motion at 12. That is exactly Verizon's point here: the Order's conclusions and the facts of this case do not provide "proper circumstances" for the award of reparations. Not surprisingly, in that regard, the Competitive Carriers have yet again failed to address the inherent illogic of the Commission's decision which prohibits the assessment of carrier common line charges when switched access services have in fact been provided under Tariff 85.

11. Finally, the Competitive Carriers' continued efforts (at 11-13) to argue that the prohibition on retroactive ratemaking does not apply here because rates were established by tariff are meritless. At least one court has recognized that this is a distinction without a difference. *See Kansas Gas & Elec. Co. v. Kansas Corp. Comm'n*, 794 P.2d 1165, 1171 (Kan. App. 1990)("tariffs are encompassed within the prohibition against retroactive ratemaking, particularly when ... they share similarities with rate schedules."). As described at length in this proceeding and Verizon's Post-Hearing Brief, the Tariff establishing the carrier common line charge was the result of a fully litigated docket at the Commission. *See* DE 90-002. The process leading to the approval of Tariff 85 bears no resemblance to One Communications' tariff that was the subject of the Pennsylvania litigation referenced by the Competitive Carriers. In that case, One Communications' tariff was merely filed with the Commission and "allowed to take effect without substantive investigation and thus was insufficient in that case to create

'commission made rates.'" *See* Verizon Surreply Brief at 2 (attached to the Joint Motion). The Competitive Carriers' attempt to analogize to the Pennsylvania case is misplaced and should be ignored.

12. For the reasons stated above, Verizon requests that the Commission deny the Competitive Carriers' Joint Motion to Strike and issue an order granting Verizon and FairPoint's motions for rehearing and/or reconsideration.

WHEREFORE, Verizon respectfully requests that the Commission:

A. Deny the Joint Motion of AT&T, BayRing Communications and One Communications to Strike Verizon's Reply to FairPoint's Motion for Rehearing and/or Reconsideration; and

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

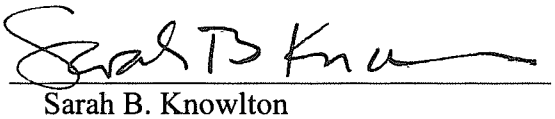
Respectfully submitted,

VERIZON NEW HAMPSHIRE

By its Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: May 27, 2008

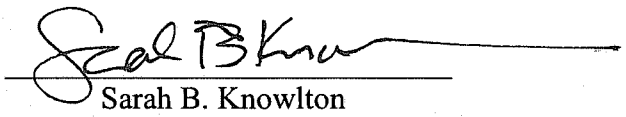
By: 

Sarah B. Knowlton
100 Market Street, P.O. Box 459
Portsmouth, New Hampshire 03802
Telephone (603) 334-6928

Victor D. Del Vecchio, Esquire
Verizon New England Inc.
d/b/a Verizon New Hampshire
185 Franklin Street
Boston, MA 02110-1585

Certificate of Service

I hereby certify that on May 27, 2008, a copy of the foregoing Objection has been forwarded to the parties listed on the Commission's service list in this docket.



Sarah B. Knowlton