THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2008 TERM

No. 2008-0645

Appeal of Verizon New England, Inc. d/b/a Verizon New Hampshire & a.

MOTION FOR SUMMARY DISPOSITION

FREEDOM RING COMMUNICATIONS, LLC, D/B/A BAYRING COMMUNICATIONS

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September 26, 2008

MOTION FOR SUMMARY DISPOSITION

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing"); AT&T Corp. ("AT&T"); and Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as One Communications ("One") (collectively "Competitive Carriers" or "Appellees"), by and through their undersigned attorneys, and respectfully move this Honorable Court to dismiss the Appeal by Petition filed by Verizon New England Inc. d/b/a Verizon New Hampshire ("Verizon") and Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") (collectively "Appellants"), for the reason that the Court lacks jurisdiction to hear this appeal because the Appellants failed to file their Petition within the deadline set forth in RSA 541:6. In the alternative, should this Honorable Court determine that it has jurisdiction to hear the Appellants' Petition because it has been timely filed, the Appellees respectfully move, pursuant to Supreme Court Rule 25 (2), that this Honorable Court summarily dispose of this docketed matter by affirming the decision of the New Hampshire Public Utilities Commission ("Commission") from which Verizon and FairPoint appeal. In support of these Motions[1], the Appellees state as follows:

[1] Benjamin J. Aron, counsel for Sprint Communications Company, L.P. and Sprint Spectrum L.P. ("Sprint"), a party to the proceeding below, has reviewed the within pleading and concurs with the relief sought herein.

MOTION TO DISMISS FOR LACK OF JURISDICTION

1. The Appellants filed their Petition pursuant to RSA 541:6 which provides that appeals from orders of administrative agencies may be filed with this Court "[w]ithin thirty days days after the application for rehearing is denied...". RSA 541:6.

2. The Appellants' motions for rehearing were denied by the Commission on August 8, 2008. *See Appendix to Appeal by Petition Pursuant to RSA 541:6*, p. 11 (Order on Motions for Rehearing and Motion to Intervene, Order No. 24,886 (August 8, 2008)). The Petition was filed with this Court on Monday, September 8, 2008, which is thirty-one days after the motions for rehearing were denied. The Appellants, therefore, failed to comply with RSA 541:6 so their appeal should be dismissed. *See LaCroix v. Mountain*, 116 N.H. 545, 546 (1976) (Court dismissed appeal that was not filed within the time limit prescribed by RSA 541:6).

3. Because the Petition is untimely, this Court lacks jurisdiction over it. *See Appeal of Donald R. Carreau (Board of Trustees of the City of Manchester Employees' Contributory Retirement System)*, 157 N.H. 122, 123 (April 8, 2008) (petitioner's failure to comply with appeal period set forth in RSA 541:6 deprives this Court of jurisdiction to hear the appeal). This Court has "'repeatedly held that New Hampshire follows the majority rule regarding compliance with statutory time requirements, and, thus, '[o]ne day's delay may be fatal to a party's appeal.'" *Carreau, supra* quoting *Dermody v. Town of Guilford*, 137 N.H. 294, 296 , 627 A.2d 570 (1993).

4. That the thirtieth day after the Commission's decision fell on a Sunday cannot extend the filing deadline or confer jurisdiction upon the Court where it is otherwise lacking. There is no currently-effective statute which allows for an extension of the thirty-day deadline established in RSA 541:6 in the event that such deadline falls on a Saturday, Sunday or legal holiday. The statutory provision governing calculation of time excludes from the calculation ***only*** the day from which the time period is to be reckoned:

> Except where expressly stated to the contrary, when a period of time is to be reckoned from a day or date, that day or date shall be excluded from and the day on which the act should occur shall be included in the computation of the period or limit of time.

RSA 21:35. This Court has found that, when a statute expressly excludes the day from which the time period is to be reckoned, and provides for no other exclusion, then "that is the only day to excluded in making the computation." *Clough v. Wilton,* 79 N.H. 66, 67 (1918).

5. The Court may not assume that the Legislature implied a general extension of statutory deadlines until the next business day when the deadline falls on a Sunday. Nor may the Court assume that the Legislature implied a specific extension in the case of the deadline for filing appeals under RSA 541:6. *See Appeal of Donald R. Carreau (Board of Trustees of the City of Manchester Employees' Contributory Retirement System)*, 157 N.H. 122, 124 (April 8, 2008). When the Legislature wanted to exclude Saturdays, Sundays, and legal holidays from a statutory time period, it has done so explicitly. For example:

> Whenever *the election laws* refer to a period or limit of time, Saturdays, Sundays, and holidays shall be included, except as provided in paragraph I. However, when the last day for performing any act *under the election laws* is a Saturday, Sunday or official state holiday, the act required shall

> be deemed to be duly performed if it is performed on the following business day.

RSA 652:18, II. (emphasis added). In another example, the Legislature stated:

> Any probationer or parolee who is arrested under the authority of RSA 504-A:4 or RSA 651-A:25 shall be detained at the county jail closest to the location where he or she was arrested or any other suitable confinement facility in reasonable proximity to the location where he or she was arrested. Such probationer or parolee shall be detained there pending a preliminary hearing which shall be held within 72 hours from the time of arrest, excluding Saturdays, Sundays, and holidays . . . .

RSA 504-A:5. Similarly, the Legislature is familiar with the concept of "business days," and has used the term explicitly when it has wanted to set a time period based on business days rather than calendar days. For example:

> **Saturdays, Sundays, and Legal Holidays.** If the date for filing any report, claim, tax return, statement, remittance, or other document falls upon a Saturday, Sunday or legal holiday, the filing shall be considered timely if performed on the next business day.

RSA 80:55, III.[2] Neither RSA 21:35 nor RSA 541:6 contains such an explicit extension of a filing deadline when the deadline falls on a Sunday. The Court, therefore, has no basis for adding one. *Carreau,* 157 N.H. at 124.

6. In fact, the Legislature recently recognized that statutory deadlines are not, under current law, extended when such a deadline falls on a Sunday. This session, the Legislature passed an amendment to RSA 21:35 providing just such an extension:

> II. If a statute specifies a date for filing documents or paying fees and the specified date falls on a Saturday, Sunday, or legal holiday, the document or fee shall be deemed timely filed if it is received by the next business day.

[2] The phrase "any report, claim, tax return, statement, remittance, or other document" refers back to the introductory language in RSA 80:55, I: "Any report, claim, tax return, statement and other document, relative to tax matters, required or authorized to be filed with or any payment made to the state or to any political subdivision thereof . . . ." RSA 80:55, III, therefore, is confined to tax matters.

N.H. Laws of 2008, Chapter 11:1. However, this amendment does not become effective until January 1, 2009. N.H. Laws of 2008, Chapter 11:2 ("Effective Date: January 1, 2009"). Thus, because this new provision in RSA 21:35 is not yet in effect, it does not operate to extend the deadline for the Appellants' Petition. Moreover, since the Legislature determined that the amendment should not go into effect until 2009, the Court may not contravene that determination by applying it to the Appellants' Petition.

7. Further, Supreme Court Rule 27 does not operate to extend the appeal period established under RSA 541:6 when the thirtieth day of such period falls on a Saturday, Sunday or legal holiday. In *Appeal of Donald R. Carreau (Board of Trustees of the City of Manchester Employees' Contributory Retirement System)*, 157 N.H. 122 (April 8, 2008) this Court held that it cannot, through its rules, create an exception to or extension of a statutorily prescribed time period for vesting the Court with jurisdiction over appeals filed under RSA 541:6. In *Carreau,* the Court stated "that compliance with a statutory appeal period 'is a *necessary prerequisite* to establishing jurisdiction in the appellate body.'" *Id.,* at 123 (quoting *Dermody v. Town of Gilford,* 137 N.H. 294, 296 (1993)). The Court further held that statutory time requirements must be distinguished from the Court's procedural rules, and that the Court cannot invoke a procedural rule to establish jurisdiction in the first instance. *Id.* "Jurisdictional time limits are mandatory and interpreted literally. Accordingly, a court has no authority to extend filing periods for actions brought under statutes containing jurisdictional time limits except as the statute permits." 86 C.J.S. Time §2. Jurisdictional time provisions. Since neither RSA 541:6 nor any other currently-effective, applicable statute contains any such exception,

Supreme Court Rule 27 cannot operate to extend the jurisdictional time period established under that statute.

8. The Appellees are aware that this Court, in a 1961 case dealing with motions for rehearing under RSA 31:74, applied what the Court described as "the recognized principle that when the terminal day of a time limit falls upon Sunday that day is to be excluded from the computation (86 C.J.S. Time §14 (2)". *H I K Corporation v. City of Manchester*, 103 N.H. 378, 381 (1961). *H I K*, however, cannot be considered controlling precedent. First, the case cites no New Hampshire law or precedent and is contrary to repeated holdings that New Hampshire follows the majority rule regarding compliance with statutory time requirements. Most importantly, the more recent holding in *Carreau, supra* squarely contradicts *H I K.* As the Court stated in *Carreau*,

> The explicit language of RSA 541:6 requires that an appeal be brought "[w]ithin thirty days" after an application for rehearing is denied. "The legislature could not have more clearly expressed its intent to require appeals to be filed by a date certain."

Carreau, 157 N.H. at 124 (quoting Phetteplace v. Town of Lyme, 144 N.H. 621, 624, 744 A.2d 630 (2000)). The Court was crystal clear in stating that a court may not alter the Legislature's determination by adding provisions — such as an extension when the deadline falls on a weekend — that the Legislature did not include: "When applying a statute, however, '[w]e will neither consider what the legislature might have said nor add words that it did not see fit to include.'" *Id. (quoting* N.H. Dep't of Envtl. Servs. v. Marino, 155 N.H. 709, 713, 928 A.2d 818 (2007)). Respectfully, it appears that the *HIK* Court did precisely what this Court in *Carreau* forbade — it added words that the legislature did not include, *i.e.,* an extension of time when the filing deadline fell on a weekend.

Second, if *H I K* were controlling, there would have been no need for the Legislature to have passed N.H. Laws of 2008, Ch. 11. This Court will not presume that the Legislature enacted unnecessary provisions. *See State v. Gifford*, 148 N.H. 215 (2002). That the Legislature saw fit to pass the above-referenced statute with an effective date of January 1, 2009, indicates two things: 1) the Legislature recognized the lack of a statutory provision for extending statutorily prescribed filing deadlines when the last day to perform the act falls on a Saturday, Sunday or legal holiday; and 2) the statutory deadline extension created by Laws of 2008, Ch. 11 does not exist until January 1, 2009.

Further, unlike the instant action which involves the statutory period for vesting this Court with appellate jurisdiction, the Court in *H I K, supra,* was interpreting a statutory provision regarding the time period for filing a motion for rehearing of a municipal zoning board of adjustment decision. Thus, because it involves the time period for motions for rehearing filed with an inferior tribunal (as opposed to a statutory prerequisite for vesting this Court with jurisdiction), the holding in *H I K, supra,* is inapposite. Moreover, its continued vitality is questionable in light of the passage of time and, more importantly, in light of this Court's more recent pronouncements in *Carreau, supra* and the cases cited therein which evidence the Court's intent to require strict compliance with statutory time limits.

MOTION FOR SUMMARY AFFIRMANCE

In the alternative, should this Honorable Court determine that the Petition was timely filed, the Appellees respectfully request that the Court summarily affirm the Commission's decision for the reasons discussed below.

9. The Court may enter an order of summary affirmance when "the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable." *Sup. Ct. R.*25 (1) (c).

10. The instant case should be disposed of summarily because the administrative agency order appealed from presents no substantial question of law and is neither unjust nor unreasonable.

The Petition Presents No Substantial Question of Law

11. This case raises esoteric questions about a telecommunications tariff that are of concern only to a limited number of parties, i.e. Verizon, FairPoint and certain telecommunications companies, like Appellees, rather than to the public at large. *See Appendix to Appeal by Petition Pursuant to RSA 541:6*, p. 26, ftnt. 2 ("Tariff 85 generally applies to interexchange carriers...)". The Appellants admit in their Petition that "...the central issue in this appeal involves the interpretation of a written instrument...", i.e. "...a tariff, which is a written document filed by petitioners and approved by the Commission." *Appeal by Petition*, p. 5. Although a tariff approved by the Commission has the force and effect of law, s*ee Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980), it is of limited applicability as it merely defines the relationship between a utility and its customers. *Id.* Thus, the tariff that the Commission interpreted is unlike a statute that affects the general public. Further, the tariff at issue is not a retail tariff which governs Verizon's (and now FairPoint's) relationships with thousands of their retail customers throughout the state. Instead, the tariff in this case relates only to the Appellants and a limited number of other, similarly situated telecommunications carriers

that purchase switched access services under Tariff 85. *See Appendix,* p. 26, ftnt. 2. In these circumstances, no substantial question of law exists for this Court's consideration.

12. The question of whether the Commission erred in ruling that Appellants had an affirmative obligation to seek revisions to the tariff to either recover costs or because the tariff no long fit changing market and technical conditions, is not a substantial question of law. The Commission is statutorily vested with broad administrative and supervisory powers over the utilities it regulates. *See Appeal of Granite State Electric Co.,* 120 N.H. 536, 539 (1980) and RSA 374:3. Thus, the Commission has the authority to determine that utilities should have modified their tariffs to address changed financial circumstances or industry conditions. This is a policy choice which the Court should not review. Instead, the issue should be left to the sound discretion of the Commission as part of its responsibility to oversee the tariff, the affected telecommunications utilities and the telecommunications market in New Hampshire. The Court gives the Commission's policy decisions "considerable deference." *See Appeal of the Office of Consumer Advocate*, 148 N.H. 134, 136 (2002). The Court should so defer in this case by summarily disposing of it.

13. The Petition raises the purportedly legal question of whether the Commission has engaged in unlawful retroactive ratemaking when it interpreted Verizon's existing and effective tariff. As they also tried to do before the Commission, the Appellants intentionally confuse retroactive ratemaking with the Commission's express authority under RSA 365:29 (a statute that the Petition fails to mention or even acknowledge) to order refunds or reparations for past charges that the Commission has determined were unlawfully imposed. As the Commission correctly noted:

> ...construing an unambiguous tariff unfavorably to a utility does not amount to making a retroactive change to the tariff. In other words, if a utility collects charges that are not authorized by and in fact are inconsistent with its tariff, any monetary relief awarded to aggrieved customers amounts to rate enforcement rather than ratemaking.

Appendix to Appeal by Petition Pursuant to RSA 541:6, p. 126.

It is well-settled that the Commission has the authority to order refunds or reparations when it has been determined that a utility has improperly charged its customers. *Appeal of Granite State Electric Company*, 120 N.H. 536, 539-540 (1980) (Commission has power to award restitution if one has been unjustly enriched at the expense of another.) Thus, there is no substantial question of law presented by the Appellants' challenge to the Commission's order which requires Verizon to refund charges that the Commission correctly determined Verizon had no authority under its tariff to collect from Appellees and other telecommunications service providers.

The Commission's Orders Are Just and Reasonable

14. The Commission's Orders interpreting Verizon's tariff are just and reasonable; the Court should therefore summarily affirm them. This Court pays substantial deference to the construction of statutes by those charged with administering them. *See N.H. Retirement System v. Sununu*, 126 N.H. 104, 108 (1985). The same holds true for tariffs which have the force and effect of law. *Appeal of Pennichuck Water Works*, 120 N.H. at 566 . Interpretation of the complex, lengthy telecommunications tariff at issue here is squarely within the technical expertise of the Commission rather than the courts.

The Petition and the material contained in the Appendix unquestionably establish the technical nature of the matter decided below. One need look no further than the

telecommunications network diagram on page 8 of the Petition and the nearly 50 pages of tariff contained in the *Appendix* to see that this matter involves complex regulatory issues. It is not a simple matter of interpreting a document, as the Appellants claim. *See Petition,* p. 5. Because this case clearly involves a technical matter, the Court should accord considerable deference to the Commission's interpretation of the tariff and should summarily affirm the Commission's decisions. *See Dion v. Secretary of Health and Human Services,* 823 F. 2d. 669, 673 (1st Cir.) (1987) ("deference due an agency's interpretation depends, in the first instance, on whether the matter is more properly viewed as within the agency's expertise or, on the contrary, as a clearly legal issue that courts are better equipped to handle.")

15. In addition, the Court should summarily affirm the Commission's decisions because they are the well-reasoned products of a thorough and exhaustive adjudicative process. Verizon requested[3] and received the benefit of a fully litigated proceeding before the Commission. *See Appendix to Appeal by Petition Pursuant to RSA 541:6,* pp. 2-7 and pp. 117-119. The Commission's proceeding spanned over two years. It comprised several rounds of discovery, technical sessions, prefiled testimony, pre-filed rebuttal testimony, two days of evidentiary hearings where witnesses were subject to cross-examination, and post-hearing briefs. *Id.* On the basis of these proceedings, the Commission issued a thoughtful, reasonable and just decision in which it interpreted Verizon's tariff and ruled that Verizon did not have the authority to impose charges for

[3] At the July 17, 2006 procedural conference, counsel for Verizon stated to the Commission:

> "We want an opportunity for adjudication, not on paper. We would like the typical discovery opportunities, just as we're giving a lot of other carriers and other parties in other proceedings, and then I'd like a hearing on this, your Honor, with witnesses. We'd like an opportunity for cross-examination."

Transcript of Prehearing Conference, July 27, 2006, pp. 22-23 (copy attached).

services it was not providing (i.e., Verizon cannot assess a Carrier Common Line Access Charge on calls that did not utilize a Verizon common line). *Appendix,* p. 32.

The Commission's initial thirty-four page order is based on an extensive record, *see Appendix*, pp. 31-32, and is supported by the evidence and applicable law. The Order recites and discusses the positions of all of the parties and examines Tariff 85 as a whole rather than focusing upon just one section in isolation and out of context as the Appellants repeatedly have done throughout the proceeding below and at pages 4, 6, 9, 16, 17, 18, 19 and 21 of their Petition[4]. The Order recounts the historical background of the tariff, the procedural context within which the tariff was approved, and the changes that have occurred in the telecommunications industry since the time the tariff was initally adopted. The Commission's eleven page order on the motions for rehearing is similarly well-reasoned and just.

16. The Commission's findings and conclusions contained in the orders below "'are entitled to great weight and are not to be set aside lightly.'" *Public Service Co. v. Tenneriffe Development Co.*, 104 N.H. 339, 341 (1962) (citation omitted). Those orders, therefore, should be summarily affirmed.

WHEREFORE, for the reasons discussed above, the Appellees respectfully request that this Honorable Court:

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[4] Appellees note that the Petition does not fully comply with Supreme Court Rule 10 (1) (f) as the "statement of the case" is not concise (it is 10 pages long) and some statements which could be construed as "facts material to the consideration of the questions presented" are not supported with cites to the transcript and are actually not facts but are arguments that were rejected by the Commission when it made express findings to the contrary. For example: "the CCL Access Charge does not depend upon the use of the local loop." *Petition,* p. 9; "The CCL Access Charge was not designed to recover the direct cost of carrying traffic on a Verizon local loop." *Petition,* p. 11. Neither of these statements is supported with transcript cites and both of them contradict findings made by the Commission. *Appendix to Petition*, p. 31.

A. Dismiss the instant Petition for lack of jurisdiction;

B. In the alternative, summarily affirm the Commission's orders below;

C. Grant such other relief as it deems appropriate.

Date: September 26, 2008

Respectfully submitted,

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS
and
ONE COMMUNICATIONS

By their Attorneys,

ORR & RENO, P.A.

By: _____

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CERTIFICATION OF COMPLIANCE

I hereby certify that on this 26th day of September, 2008, I have forwarded a copy of the foregoing Motion by first class mail, postage prepaid, to the parties of record, opposing counsel, the Attorney General of the State of New Hampshire and the New Hampshire Public Utilities Commission.

Susan S. Geiger

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nothing. And, we believe that our tariff permits us to charge this, as it has for thirteen years, for thirteen years. And, we would be continuing willing to work this out with BayRing, but we're not going to concede completely, which is what they're seeking in this docket, particularly in light of the tariff language, which allows us to charge what we have charged and allows us to seek to have this Commission enforce our tariff as it's ordered.

And, lastly, Mr. Chairman regarding the procedural structure, I don't agree. Verizon wants an opportunity to see in writing, in testimony, what their position is, for example, on industry practice. They have made preference to this in their complaint, I've heard it again today. I want to see what the industry practice is, because we don't necessarily agree with it. I would like an opportunity to see their written testimony. I would like an opportunity to file our reply testimony. I would like written discovery on that, just as we would have when there's -- Verizon is seeking relief against another carrier. We want an opportunity for an adjudication, not on paper. We would like the typical discovery opportunities, just as we're giving a lot of other carriers and other parties in other proceedings, and then I'd like a hearing on this, your Honor, with witnesses.

We'd like an opportunity for cross-examination. Thank you, Mr. Chairman.

CHAIRMAN GETZ: Thank you. Mr. Kreis.

MR. KREIS: Thank you, Mr. Chairman. Staff doesn't take a substantive position on the outcome of this case at this time, other than observing that, with the possible exception of the argument that Mr. Del Vecchio just made on Verizon's behalf, it appears that the parties have been talking past each other, essentially because the Petitioner, the complainant, is suggesting to you that there isn't any switched access involved in calls that involve -- that are initiated by a CLEC and terminated on a wireless network. So, eventually, we're going to have to get these parties to talk about the same issue and figure out what the tariff really means. And, we're here to be earnest inquirers with respect to those issues, just like the Commission is.

On the question of what sort of proceedings ought to ensue from here, I think that there might be some benefit in the Commission receiving actual testimony, although not necessarily for the reasons that Mr. Del Vecchio just enumerated. Essentially, I think experts who testify at a hearing might be helpful to you, the Commissioners, in understanding what this problem is