THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0645

Verizon New England Inc.
d/b/a Verizon New Hampshire
Northern New England Telephone Operations, LLC
d/b/a FairPoint Communications-NNE

Appeal By Petition Pursuant to RSA 541:6
From Final Order of The New Hampshire Public Utilities Commission

MOTION OF BAYRING AND ONE COMMUNICATIONS

FOR REHEARING OR RECONSIDERATION

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And

Choice One of New Hampshire,
Inc., Conversent Communications
of New Hampshire, LLC, CTC
Communications Corp. and
Lightship Telecom, LLC, all d/b/a
One Communications

May 18, 2009

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

MOTION OF BAYRING AND ONE COMMUNICATIONS FOR REHEARING OR RECONSIDERATION

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") and One Communications ("One") (collectively, "Appellees") and, pursuant to Supr.Ct.R. 22, respectfully move this honorable Court for rehearing or reconsideration of the Opinion issued May 7, 2009 ("Opinion") in the above-captioned matter. As discussed more fully below, in the professional judgment of the movants, the Court has:

1) overlooked Section 6.3.3.A of the tariff which supports the Appellees' position that the carrier common line ("CCL") charge may only be imposed when the specific CCL "rate element is used";

2) overlooked the legal point that, when interpreting a tariff[1], the Court must do more than merely give words and phrases their plain meaning--- the Court must also read all of the tariff provisions together as a whole, not in isolation, and must interpret the language to reach a reasonable rather than an absurd result;

3) overlooked the fact that a "plain reading" of just selected portions of the tariff elevates form over substance and produces absurd consequences, both of which are impermissible under the holding in *State v. Gallagher*, 157 N.H. 421 (2008);

[1] The Court applies principles of statutory construction when interpreting a tariff. Slip. op. at 3.

4) overlooked the fact that the Opinion enables Verizon/FairPoint to subject the Appellees to an unreasonable competitive disadvantage in violation of RSA 378:10; and

5) overlooked that, in light of the Federal Communication Commission's ("FCC's") determination that imposition of the CCL charge when no common line service is provided is unjust and unreasonable, *see AT&T Corp. v. Bell Atlantic-Pennsylvania,* 14 F.C.C.R. 556 at 594 (1998), the identical charges condoned by the Court in this case violate RSA 374:2 (which requires that all charges made or demanded by a public utility be, *inter alia*, "just and reasonable".) In support of this Motion, the Appellees state as follows:

1. The Court failed to consider Section 6.6.3.A of the tariff (referenced on page 18 of the Appellees' brief) which expressly states that "[u]sage rates apply ***only*** when a ***specific rate element is used.***" *Appendix to Appeal by Petition Pursuant to RSA 541:6* ("*App. to Appeal*") at 169. Because the CCL charge is clearly a usage rate (as opposed to a monthly rate or nonrecurring charge, *see Tariff 85, Section 6.6.1.A)* and is expressly identified as a specific rate element or "rate category" under Section 6.1.2.B.3, it is clear from the plain language of Section 6.6.3.A that the CCL charge applies only when that specific rate element is used. Thus, the Court erred in finding that Verizon/FairPoint could impose the CCL charge when a different, specific switched access rate element (i.e., local transport[2]) is used.

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[2] The Court found that "Verizon provided local switching and local transport with respect to the calls at issue." Slip. op. at 5. **This is factually incorrect.** As the Commission correctly noted below, Verizon does not provide the Appellees with local switching in the disputed calls. The Commission expressly found that "[b]ecause the end user is not Verizon's in the calls at issue in this case, **local switching is not involved.**" (Emphasis added.) *App. to Appeal* at 27. In addition, the call flow diagrams on page 9 of the Appellees' brief plainly show that "local switching" or "LS" is provided by either the CLECs or wireless carriers, not by Verizon. Thus, the Court erred when it concluded that "[a]s Verizon provided local transport and local switching services in connection with the calls at issue, and as these two services are part of switched access service, and therefore, subject to the carrier common line access charge, we

2. In determining that Verizon/FairPoint's Tariff 85 permits the imposition of a CCL charge when no corresponding Verizon/FairPoint common line service is provided to the Appellees, the Opinion relies primarily on what it considers to be the "plain meaning" of three provisions contained in Section 5 of the tariff (a section pertaining to the CCL service which, in the disputed calls, the Appellees have no use for and therefore do not order from Verizon/FairPoint), i.e., Sections 5, 5.4.1.A and 5.4.1.C, slip op. at 5-6, and fails to consider either Section 6.6.3.A (above) or other tariff provisions which support the reasonable interpretation that Verizon/FairPoint may not impose the CCL charge upon the Appellees unless it actually provides the CCL service to them.

3. In focusing only on the plain meaning of the three provisions noted above, the Court's analysis falls short of the legal requirement that **all** of the relevant tariff provisions be examined together as a whole, rather than reviewing particular provisions in isolation. *See Weare Land Use Association v. Town of Weare,* 153 N.H. 510, 511 (2006). When examined as a whole, the overall structure of the tariff and numerous provisions other than those relied upon by the Court, support the Appellees' position, which was adopted by the New Hampshire Public Utilities Commission ("the Commission"), that the CCL charge is a "usage rate" that Verizon/FairPoint can apply only when the corresponding CCL service is actually used by the Appellees (i.e. when a call is made between a Verizon/FairPoint end user customer and a customer of the Appellees.)

4. For example, as the Commission noted below, the tariff is structured such that "Common Line Service" is described in Section 5 of the tariff, separately from Section 6

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conclude that Verizon did not violate section 4.1.1.A. when it imposed this charge upon the disputed calls." Slip. op. at 7. When the tariff is read as whole, as it must be, the provisioning of local transport alone is an insufficient basis for imposing CCL charges for calls that do not access a Verizon/FairPoint common line.

(which describes "Switched Access Service".) *App. to Appeal* at 27. Section 5 provisions clearly refer to common line "usage": Section 5.1.1.A states that "[c]arrier common line access provides for the **use** of the end user's Telephone Company (i.e. Verizon/FairPoint) provided common lines); and Section 5.1.1.A.1 states that Verizon/FairPoint "**will provide** carrier common line access service to customers in conjunction with switched access provided in Section 6." (Emphasis added.) Similarly, Section 5.2.1 of the tariff (which is not mentioned in the Opinion) provides that "[w]here the customer (e.g. the Appellees) is provided with switched access service under this tariff, the Telephone Company (i.e. Verizon/FairPoint) **will provide the use of Telephone Company common lines**..." (Emphasis added.)

Thus, when read as a whole, the logical conclusion reached by the Commission is that "the CCL charge is properly imposed only when (1) Verizon provides the use of its common line and (2) facilitates the transport of calls to a Verizon end user." *App. to Appeal* at 27. In reaching a contrary conclusion, the Court has treated as superfluous the Section 5 provisions which require that Verizon/FairPoint actually provide the CCL. This result is impermissible under applicable rules of construction. *See Churchill Realty Trust v. City of Dover Zoning Bd. of Adjustment,* 156 N.H. 668, 675 (2008)(document must be interpreted such that "no clause, sentence or word, shall be superfluous, void or insignificant.")

5. The Court's analysis fails to comport with the required legal standard for tariff interpretation because, in addition to overlooking specific tariff provisions (noted above) and failing to read the tariff as a whole, the Court fails to consider the outcome of its interpretation, i.e. whether the tariff interpretation leads to an absurd result. As this Court

has recently held, even if language is plain and unambiguous, the Court may not read it literally if doing so leads to an absurd result. *See State v. Gallagher*, 157 N.H. 421 (2008).

6. In the instant case, the Opinion results in the absurd and unfair situation where Appellees will be required to pay Verizon/FairPoint a CCL charge when no corresponding CCL service is provided by Verizon/FairPoint to the Appellees and, at the same time, will (rightfully) pay yet another CCL charge to the carrier that is actually providing the CCL service. The absurdity and inequity of this is that, for no good reason[3], Appellees will be paying substantially more for calls that their customers exchange with customers of CLECs or wireless carriers than Verizon/FairPoint pays when its customers make the same type of calls.[4]

7. Another absurd result under the Opinion is that inter-exchange carriers ("IXCs") like AT&T and Appellee One Communications (when it purchases Feature Group D ("FGD") exchange access service)[5], will pay **four** CCL charges for certain calls: two of the CCL charges will be paid to Verizon/FairPoint (for a CCL service it does not provide), one will be properly paid to the originating LEC, and the other will be properly paid to the CLEC or wireless carrier that actually transports and terminates the call on its facilities. *See Appellees' Brief* at p. 9 (call flow 7). Under similar circumstances (i.e.

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[3]The Commission expressly rejected Verion/FairPoint's claim that it was entitled to impose the CCL charge (without regard to CCL usage) to recover joint and common costs. The Commission disagreed with Verizon's argument that the CCL rate is a "contribution element not dedicated to the common line or designed to recover the costs of the common line itself." *App. to Appeal* at 31. Instead, the Commission found, **as a matter of fact,** that because the CCL rate element "does recover a portion of the costs of the local loop or common line" the charge "may be applied only when Verizon provides the use of its common line." *Id.*

[4] As BayRing pointed out to the Commission below, "Verizon pays only 3 cents per minute in terminating access charges for a call from one of its customers to a CLEC end user, while BayRing pays a total of 5.6 cents per minute when terminating a call from one of its customers to the end user of another CLEC." *App. to Appeal* at 10.

[5] One Communications purchases both FGD exchange access and local interconnection services from Verizon/FairPoint.

when a Verizon/FairPoint customer calls another carrier's customer), Verizon/FairPoint will only pay one CCL charge to the terminating carrier. *See Appellees' Brief* at 8 (call flow 5). Thus, the tariff interpretation contained in the Opinion will lead to disproportionate results among similarly situated companies and is therefore absurd and impermissible as a matter of law. *See State v. Gallagher, 157 N.H. at 423.*

8. The Court has overlooked the fact that its tariff interpretation allows Verizon/FairPoint to gain an unreasonable advantage over its competitors by ensuring that the Appellees will pay much more than Verizon does for the same types of calls. Not only is this clearly anti-competitive from a business standpoint, it is also unlawful. Under RSA 378:10, a public utility is prohibited from subjecting any person or corporation "to any undue or unreasonable prejudice or disadvantage **in any respect whatever**." (Emphasis added). Thus, because the Opinion adopts Verizon/FairPoint's position which subjects the Appellees to serious anti-competitive consequences, it effectuates an unreasonable prejudice or disadvantage in violation of RSA 378:10. Accordingly, the Opinion must be reconsidered.

9. Because, as demonstrated above, the Court's out-of-context reading of some of the Section 5 tariff provisions essentially elevates form over substance and leads to an absurd result, the Court must consider other indicia of intent underlying the tariff language. *See State v. Gallagher, 157 N.H. at 424-425.* Record evidence of the intent underlying the tariff supports the Appellees' and the Commission's interpretation of it.

a. Tariff 85 was intended to implement competition in the intrastate **toll** market, not **local** exchange competition. "In 1993, switched access rates were primarily designed

to provide interexchange carriers access to end users of local exchange carriers" such as Verizon/FairPoint. *App. to Appeal* at 28.

b. Tariff 85 was not intended to cover the disputed calls in this case, i.e. those originating with CLECs and terminating to customers of other CLECs or wireless carriers. *See App. to Appeal* at 29 (Commission Docket DE 90-002, which gave rise to Tariff 85, was "not intended to address issues of separate competing networks or multiple exchange carriers in the same franchise territory.") Significantly, the Commission found that "[t]he record in this proceeding reveals that when the language of Section 5 of Tariff No. 85 was initially introduced, it was not contemplated that a carrier would use switched access without using Verizon's common line." *App. to Appeal* at 28. Accordingly, Section 5.1.1.A.1.is worded to make clear that Verizon/FairPoint must provide the CCL service in conjunction with switched access.

c. The CCL rate "was intended to recover, and, in fact, does recover a portion of the costs of the... common line" [therefore] "the CCL charge may be applied only when Verizon provides the use of its common line." *App. to Appeal* at 31.

10. Given that under the current telecommunications landscape the Appellees have no reason to purchase the CCL service from Verizon/FairPoint in the calls at issue here, it makes no sense to read the tariff either to compel Verizon/FairPoint to provide that service to the Appellees (when they do not need it) or to charge them for it (when they do not receive the service). In short, the words and phrases in the tariff should be examined not just according to their literal meaning; they must be interpreted consistently with the tariff's intent and with common sense to avoid an absurd or unreasonable result.

11. RSA 374:2 expressly prohibits a public utility from demanding a charge that is "unjust or unreasonable." The FCC has determined that imposition of the CCL charge when no CCL service is provided is unjust and unreasonable. *See AT&T Corp. v. Bell Atlantic-Pennsylvania,* 14 F.C.C.R. 556 at 594 (1998). Because the Court's Opinion in this case authorizes Verizon/FairPoint to impose a charge that the FCC has determined is unjust and unreasonable, the Opinion runs afoul of RSA 374:2 and therefore must be reconsidered.

WHEREFORE, in view of the foregoing, the Appellees respectfully request that this honorable Court:

A. Reconsider its May 7, 2009 Opinion and affirm the New Hampshire Public Utilities Commission's decision of March 21, 2008;

B. In the alternative, in the event that the Court determines that there is insufficient record evidence to establish that its tariff interpretation leads to an absurd, unreasonable or unlawful result, remand the case to the Commission for further findings of fact and rulings of law; and

C. Grant such further relief as it deems appropriate.

Respectfully submitted,

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Date: May 18, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2009, copies of the within Motion have been sent by first class mail, postage prepaid to the parties of record, the Executive Director and Secretary of the New Hampshire Public Utilities Commission and to the New Hampshire Attorney General.

_____
Susan S. Geiger

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