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

REPLY OF BAYRING COMMUNICATIONS AND ONE COMMUNICATIONS TO OBJECTION TO MOTIONS FOR REHEARING OR RECONSIDERATION

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Lightship Telecom, LLC, all d/b/a
One Communications

June 15, 2009

REPLY OF BAYRING COMMUNICATIONS AND ONE COMMUNICATIONS TO OBJECTION TO MOTIONS FOR REHEARING OR RECONSIDERATION

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") and One Communications ("One") (collectively, "Appellees"), by and through their undersigned attorneys, and, pursuant to this honorable Court's June 5, 2009 Order, submit this Reply to the Objection to Motions for Rehearing or Reconsideration filed on May 28, 2009 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, "Verizon" or "Appellants").

I. Introduction

BayRing and One appreciate the opportunity to submit this Reply for the Court's consideration when ruling on the outstanding Motions for Rehearing or Reconsideration. They respectfully submit that rehearing or reconsideration is necessary in this case because the Court's Opinion dated May 7, 2009 ("the Opinion") failed to follow the appropriate rules of statutory construction[1] that have been established and repeatedly recognized in a long line of New Hampshire cases. As discussed further below, the Opinion overlooked applicable precedent and thus failed to consider all of the relevant tariff provisions and the structure of the tariff as a whole, and also failed to construe the tariff to avoid an absurd or unjust result. Accordingly, this case must be reheard or reconsidered.

[1] Principles of statutory construction apply to the tariff in this case. Because a tariff has the same force and effect as a statute, it is interpreted in the same manner as a statute. Slip. op. at 3.

II. BayRing and One Have Met The Criteria For Rehearing/Reconsideration

1. Contrary to the Appellants assertions in paragraph 1 of their Objection, BayRing and One have, in fact, identified points of law and fact that were overlooked or misapprehended by the Court. In support of their Motion for Rehearing or Reconsideration, Bay Ring and One Communications have asserted that the Court overlooked or misapprehended the proper legal standard for construing a tariff. *See Motion of BayRing and One Communications For Rehearing or Reconsideration,* ¶ *5* ("[t]he Court's analysis fails to comport with the required legal standard for tariff interpretation... ") As discussed below, the Court's interpretation of tariff 85 overlooked two of the required elements of statutory construction: it failed to consider all of the relevant tariff provisions together as a whole and it overlooked the important final step of examining whether the result of its interpretation is absurd or unjust.

2. In addition to identifying the above-referenced point of law that was overlooked in the Opinion, the Appellees' Motion for Rehearing or Reconsideration also asserted that the Opinion overlooked section 6.6.3.A of the tariff (referenced on page 18 of the Appellees' brief) which, when read with all of the other relevant provisions of the tariff, supports the Appellees' interpretation and avoids an absurd or unjust result. Thus, BayRing and One have met their burden for rehearing or reconsideration under N.H. Sup. Ct. R. 22 (2).

III. The Opinion Failed to Follow Precedent and Applied An Erroneous Tariff Interpretation Standard

1. This Court has expressly and repeatedly held that, in addition to interpreting statutory provisions according to their plain meaning, the Court construes "**all** parts of the statute together to effectuate its overall purpose **and** to avoid an absurd or unjust result."

Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000) (emphasis added). *Van Lunen* (and cases decided before and after it) clearly establishes that the first step in the Court's statutory construction analysis is to "ascribe the plain and ordinary meanings to words used." *Van Lunen, supra, quoting Appeal of N.H. Dep't of Transportation,* 144 N.H. 555, 556 (1999). In addition, *Van Lunen* and its progeny also make clear that the Court's analysis does not end with an examination of the plain meaning of the statutory language: "**Furthermore**, when examining statutory language, we construe **all parts** of a statute together to effectuate its overall purpose **and to avoid an absurd or unjust result.**" *Van Lunen,* 145 N.H. at 86 (emphasis added). The use of the word "furthermore" and the conjunction "and" in foregoing statement clearly indicate that, even if in the first instance the Court is capable of interpreting a statute according to its plain meaning, the Court's analysis must go further and must include two additional steps: construing all parts of a statute as a whole and making sure that the interpretation avoids an absurd or unjust result.

2. The foregoing fundamental principle of statutory construction has been consistently and repeatedly applied by this Court in numerous recently-decided cases. *See, e.g., Sara Realty, LLC v. Country Pond Fish and Game Club, Inc.*, No. 2008-520, slip op. at 3 (April 9, 2009); *State v. Fournier,*No. 2008-616, slip op. at 4 (March 19, 2009); *Zorn v. Demetri*, No. 2008-402, slip op. at 2 (March 18, 2009); *State v. Pratte*, 158 N.H. 45, 47 (2008); *In Re Alexis O.*, 157 N.H. 781, 785 (2008); *State v. Gubitosi,* 157 N.H. 720, 724 (2008); and *Franklin v. Town of Newport,* 151 N.H. 508, 510 (2004). All of these cases contain identical language which states that the Court construes "all parts

of a statute together to effectuate its overall purpose **and** avoid an absurd or unjust result." *Id.* (emphasis added).

3. The Court's May 7th Opinion failed to follow the above-cited precedent. Instead, the Opinion cites only one New Hampshire case, *Nenni v. Comm'r, N.H. Ins. Dep't*, 156 N.H. 578 (2007), and another from Missouri, *Laclede Gas Co. v. Public Service Com'n,* 156 S.W.3d 513 (Mo. Ct. App. 2005) in support of the following tariff interpretation standard (which differs significantly from the precedent cited in paragraph 2 above): "We begin by examining the language used in the tariff, ascribing the plain and ordinary meaning to the words used. [citation omitted.] Where the tariff's language is plain and unambiguous, we will not look beyond it to determine its intent."[2] Slip op. at 3. The Appellees respectfully submit that the foregoing description of the required analysis is incomplete given the rule of law articulated in the cases cited in paragraph 2, above. Moreover, even *Nenni, supra* and *Laclede, supra* require more than simply examining the plain meaning of tariff language. [3]

4. The Appellees respectfully assert that the Court's analysis ended prematurely in this case. All of the cases cited in paragraphs 1 and 2, above, indicate that a "plain reading" of the tariff provisions is just the first step interpreting a statute/tariff and does not dispense with the additional requirements that the Court examine all of the provisions together as a whole, and that it consider whether a "plain reading" of the statute/tariff

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[2] This standard was repeated on page 5 of the May 7th Opinion: "[b]ecause we find the tariff's language to be plain and unambiguous, we will not look beyond it to determine its intent."

[3] In *Laclede,* the Missouri Court of Appeals found that it "can look beyond the plain and ordinary meaning of the ...[t]ariff 'only when the meaning is ambiguous **or [acceptance of the plain and ordinary language] would lead to an illogical result** defeating the purpose of the [tariff]." *Laclede,* 156 S.W.3d at 521 (emphasis added). In addition, the holding in *Nenni* requires more than just a plain reading of the language used a statute; it also requires that the Court "interpret a statute in the context of the overall statutory scheme and not in isolation." *Nenni,* 156 N.H. at 581.

would lead to an absurd or unjust result. The above-cited precedent clearly states that the Court construes "all parts of a statute together to effectuate its overall purpose **and** avoid an absurd or unjust result." The use of the conjunction "and" in the above-quoted language must certainly mean that in addition to applying the plain meaning to the words used in a tariff, and in addition to reading all of the tariff provisions as a whole to effectuate the tariff's overall purpose, the Court must also examine the result of its interpretation. If that examination reveals that the interpretation produces an absurd or unjust result, the Court must avoid it. This precisely what the Court did in *State v. Gallagher*, 157 N.H. 421 (2008)[4], a case decided a few months after *Nenni*. In *Gallagher,* the Court agreed with Gallagher's position that language in a sentencing statute was "plain and unambiguous" but did not adopt Gallagher's interpretation because the Court found that "a plain reading of the sentencing statute would lead to an absurd result." *State v. Gallagher*, 157 N.H. 421, 423 (2008). In the instant action however, the Court undertook no evaluation of whether its tariff interpretation produced an absurd or unjust result; it merely determined that it was "obliged to give effect to the plain language used in the tariff", slip op. at 7. Because the Opinion did not include the additional steps of examining all of the provisions of the tariff as a whole, and avoiding an absurd or unjust result, it should be reheard or reconsidered.

5. The Opinion must be set aside because it overturns a large body of precedent in contravention of the doctrine of stare decisis. That doctrine demands that precedent be followed to insure that legal standards are not open to revision in every case and that

[4] Verizon challenges the applicability of *Gallagher* to the instant case on the ground that *Gallagher* dealt with a drafting error in the context of a statutory recodification. However, nothing in the *Gallagher* decision indicates that the Court intended to limit the rule of law expressed therein solely to cases involving statutory drafting errors.

deciding cases does not become "a mere exercise of judicial will with arbitrary and unpredictable results.'" *State v. Gubitosi*, 152 N.H. 673, 678 (2005). Because the Opinion departs from language that has been repeatedly employed by the Court to articulate the standard for construing statutory language, allowing the Opinion to stand in its current form will create difficulty for lower courts, administrative agencies and others who routinely engage in the exercise of interpreting statutes or tariffs. In these circumstances, reconsideration of the Opinion is warranted.

IV. The Court Did Not Examine All Parts of the Tariff or Its Structure, Both of Which Support the Position that the CCL Charge Is Contingent Upon Usage of Verizon's Common Line

A. The Court Overlooked Section 6.6.3. A.

1. The Court overlooked a provision in section 6 of the tariff that supports the Appellees' interpretation. Contrary to the Appellants' claims, this argument was not waived. The Appellees' Brief quotes the following language from section 6.3.3.A. in support of their argument that the CCL charge is assessed only when the CCL is actually used: "[u]sage rates apply only when a specific rate element is used." *Brief of Appellees BayRing Communications, One Communications and AT&T,* at 18; *see also App. to Appeal* at 169. The Appellees' argument concerning the applicability and effect of section 6.6.3 A of the tariff was presented to the Court in the Appellees' Brief at page 18 and to the Commission below on page 13 of BayRing's Post-Hearing Brief.[5] Thus, the record in this appeal includes an important tariff provision that clearly requires that a **"specific"** rate element must be used in order for usage rates, such as the CCL, to apply. *Id.* However, the Court's analysis did not refer to this tariff provision. Instead, the Court focused on 3 provisions within section 5 of the tariff (a section that the Appellees

[5]Record, Volume IX, Document 109.

have no use for because they do not purchase carrier common line service), and accorded them their plain meaning without regard to how those 3 provisions fit into the tariff as a whole and without considering the clear language of section 6.6.3.A. that requires usage rates to apply only when a specific rate element is used.

2. Appellants' reading of section 6.6.3 A. contained in paragraph 5 of their Objection is improper. Appellants argue that section 6.6.3.A. "does not purport to identify which usage rates apply to which elements..." Appellants nonetheless argue that section 6 permits section 5 rates to apply even though the Appellees are only using section 6 services. This interpretation is contrary to the United States Supreme Court's holding that "[r]ates have meaning only when one knows the service to which they are attached." *AT&T Corp. v. Central Office Tel., Inc.,* 524 U.S. 214, 223 (1998). Thus, the more reasonable interpretation of section 6.6.3.A. is that only when the specific CCL rate element is used is the corresponding CCL rate to be charged.

B. The Tariff Provisions, Read As A Whole, Reveal An Intent that The CCL Charge Is To Be Levied Only When the CCL Service Is Actually Provided

The Court's failure to read all of the tariff provisions as a whole caused it to overlook other sections of the tariff that demonstrate an intent that the CCL service must be provided in order for the CCL charge to be imposed. While the Opinion discussed section 5.1.1.A.1 of the tariff, it overlooked section 5.1.1.A. which describes carrier common line access as providing "for the **use** of end users' Telephone Company provided common lines for access to such end users...". *App. to Appeal* at 138. The Opinion also overlooked section 5.2.1.A. which requires that Verizon provide "the use of Telephone Company common lines" when a customer such as BayRing or One "is provided with switched access service under this tariff..." *App. to Appeal* at 139. The

Court also overlooked that the structure of the tariff supports the Appellees' interpretation. More specifically, because the Appellees are buying only local transport service from Verizon under section 6 of the tariff, and are not being provided with the use of Verizon's common lines, it is inappropriate to look to any of the provisions of section 5 for the authority to impose an additional CCL charge when no CCL service is being provided under section 5. The more reasonable approach is to focus on section 6.6.3.A. which plainly requires that a specific charge is imposed only when a specific rate element or service is used.

V. The Court Did Not Interpret The Tariff to Avoid An Absurd Or Unjust Result

A. It is Absurd and Unjust to Permit Verizon to Collect A CCL Charge When No CCL Service Is Provided.

1. In support of its assertion that the Opinion does not create an absurd result, Verizon impermissibly resurrects the argument that it may impose the CCL charge in the disputed calls to recover a contribution toward its joint and common costs. *See Objection*, ¶ 7. This argument was presented below and was flatly rejected by the Commission. The Commission expressly disagreed with Verizon's factual assertion that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. *See App. to Appeal* at 31. The Commission held that the CCL rate element may be applied only when Verizon provides the use of its common line because, as a matter of fact, the CCL charge "does recover a portion of the costs of the local loop or common line." *Id.* Verizon never moved the Commission for rehearing of this finding and is therefore barred from asserting on appeal its "joint and common cost recovery" argument as justification for applying the CCL charge when it provides no carrier common line service. *See Appeal of Campaign for Ratepayers Rights,*

145 N.H. 671, 677 (2001)(arguments not raised in a motion for rehearing before the Commission are not preserved for review on appeal). Moreover, the Commission's factual finding that the CCL charge is not a contribution rate element may not be disturbed by this Court. *See Appeal of Town of Newington,* 149 N.H. 347, 350 (2003) and RSA 541:13. Accordingly, because the joint and common cost argument cannot, as a matter of law, provide the basis for interpreting tariff 85 to allow Verizon to impose the CCL charge when no CCL service is provided, there is no rational explanation why Verizon should be entitled to collect a CCL charge when it does not provide the use of its common line.

2. Contrary to Verizon's assertion in paragraph 7 of its Objection, the tariff interpretation contained in the Opinion, **does** require the Appellees and other carriers to pay twice for the use of a common line, which is an absurd and unjust result. When Appellees's end use customers place a call to a customer of a competitive local exchange carrier ("CLEC") or wireless carrier, the Appellees will pay two CCL charges: one to the CLEC or wireless carrier that is actually providing the Appellees with access to an end use customer and another to Verizon (on top of a local transport charge[6]) who provides no CCL service. Moreover, as explained in paragraph 7 of BayRing and One's Motion for Rehearing or Reconsideration, some carriers will pay **four** CCL charges when Verizon pays only one CCL charge in similar circumstances. This is indeed an absurd, unjust and anti-competitive result. Because the Opinion's tariff interpretation will lead to disproportionate results among similarly situated companies it is absurd and

[6] Only local transport service is provided by Verizon to the Appellees in the calls at issue in this case. As explained in footnote 2 of the Appellees' Motion for Rehearing or Reconsideration, the Opinion erroneously found that "Verizon provided local switching and local transport with respect to the calls at issue." Slip op. at 5.

impermissible as a matter of law. *See State v. Gallagher*, 157 N.H. 421, 423 (2008). It must, therefore, be reconsidered.

B. It is Absurd and Unjust to Permit Verizon to Charge a Discriminatory Rate In Violation of RSA 378:10.

1. Significantly, Verizon's Objection never counters the Appellees' contention that the Opinion produces an anti-competitive result in violation of RSA 378:10. Nor could it. RSA 378:10 prohibits a public utility like Verizon from subjecting any person or corporation "to any undue or unreasonable prejudice or disadvantage in any respect whatever." The statute implements Part 2, Article 83 of the New Hampshire Constitution which grants to the legislature the power to enact laws to prevent corporations from destroying free and fair competition in industries through "any unfair means".

2. Record evidence demonstrates the unfairness of the disputed CCL charge. BayRing has established that "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. That BayRing and One use a portion of Verizon's network to provide telecommunications services in New Hampshire does not justify the vast discrepancy in the access charge rates noted above. While the Opinion notes that the Appellees are competitors that "use Verizon's network", slip op. at 2, it is improper to infer that the Appellees are "free riders" that do not fully compensate Verizon for that use and therefore should pay Verizon a CCL charge in addition to the local transport rate. BayRing and One use their own (or other non-Verizon) telecommunications facilities, in addition to Verizon's facilities, to complete calls in New Hampshire. The Appellees compensate Verizon for the use of *all* Verizon network

elements that they *use* (every time they use them), either pursuant to tariff 85, wholesale tariff 84 or interconnection agreements. As to this, there is no dispute.

3. Because the Opinion results in the situation where BayRing pays almost twice the amount of access charges that Verizon pays in order to complete calls from their respective end use customers to end use customers of wireless carriers and other CLECs, and because the disputed charges "create a substantial new source of revenue for Verizon" *Brief of Appellees* at 10, the anti-competitive and unduly discriminatory effects of those charges are obvious violations of RSA 378:10. This unfair result is absurd and unjust and therefore warrants that the Opinion be reconsidered.

C. The Opinion Produces an Absurd And Unjust Result Because It Permits the Imposition of an Unjust and Unreasonable Rate In Violation of RSA 374:2.

Verizon's Objection did not address the Appellees' argument that the Opinion produces a result which contravenes RSA 374:2's prohibition against allowing a public utility to demand a charge that is unjust or unreasonable. It is undisputed that the Federal Communications Commission ("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). In light of the FCC's decision (regarding a tariff worded similarly to tariff 85) that imposition of the CCL charge is unjust and unreasonable when no CCL service is provided, the Opinion produces an absurd and unjust result in that it would allow Verizon to engage in conduct that is expressly prohibited by RSA 374:2. The Opinion, therefore, must be reconsidered.

WHEREFORE, for the foregoing reasons, as well as those set forth in the Appellees' and AT&T's Motions for Rehearing or Reconsideration and AT&T's Reply,

all of which are hereby incorporated into the within pleading by reference, BayRing and One respectfully request that this honorable Court grant their Motion for Rehearing or Reconsideration, set aside the May 7, 2009 Opinion and affirm the Commission's orders below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 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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