

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC d/b/a BAYRING COMMUNICATIONS.

Complaint Against Verizon New Hampshire Re: Access Charges

Order Denying Motion to Stay and Granting Petitions to Intervene

ORDER NO. 24,913

October 31, 2008

I. INTRODUCTION

On September 8, 2008, Verizon New England, Inc. d/b/a Verizon New Hampshire (Verizon) filed a motion to stay proceedings in Docket No. DT 06-067 pending its appeal of Commission Order No. 24,886 to the New Hampshire Supreme Court pursuant to RSA 541:6. On September 18, 2008, AT&T, BayRing Communications, One Communications and Sprint filed a joint opposition to Verizon's motion to stay.

Commission Order No. 24,886, issued on August 8, 2008, denied a motion for rehearing and reconsideration of Order No. 24,837 filed jointly by Verizon and the successor to its utility franchise in New Hampshire, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (FairPoint).

In Order No. 24,837 the Commission determined that Verizon was not authorized under its access tariff to bill competitive local exchange carriers (CLECs) for certain switched access charges, referred to in the tariff as "carrier common line" (CCL) charges, for calls that involve neither a Verizon customer as the end-user, nor a Verizon-provided local loop.

Verizon is appealing to the New Hampshire Supreme Court the Commission's decision as set forth in Order No. 24,837 and upheld in the Commission's denial of rehearing in Order

No. 24,886. The motion to stay requests a continuance of Phase II of Docket No. DT 06-067. In Phase II, the Commission will determine the amount of refunds, if any, due to individual competitive carriers.

Petitions to intervene were granted during Phase I of the proceeding to AT&T Communications of New England, Inc., One Communications, Otel Telekom, Inc., segTEL, the New Hampshire Telephone Association (NHTA), the affiliates Sprint Communications Company and Sprint Spectrum, and RNK Inc. d/b/a RNK Telecom (RNK). RNK subsequently withdrew its intervention. On September 24, 2008, the Commission issued a secretarial letter rescheduling the Phase II prehearing conference from October 1, 2008 to November 5, 2008, upon request by the parties.

Petitions to intervene were filed by Global Crossing Telecommunications, Inc. (Global Crossing) and XO Communications, Inc. (XO) on September 26, 2008, and October 1, 2008, respectively. On October 6, 2008, Verizon filed a response to the two petitions to intervene. Replies to Verizon's response were filed by Global Crossing, on October 14, 2008, and by BayRing, AT&T, One Communications, Sprint Communications and Sprint Spectrum (collectively, "the Competitive Carriers" or "Carriers") jointly on October 15, 2008. Verizon filed a motion to strike Global Crossing's reply on October 22, 2008.

II. SUMMARY OF MOTIONS AND OBJECTIONS

A. Verizon Motion to Stay Proceedings

1. Verizon

Verizon requests a stay of Phase II of the proceedings in Docket No. DT 06-067 "in the interests of justice and administrative efficiency." Verizon argues that Phase II will likely involve extensive discovery, technical sessions and hearings to determine the amount of

reparations due under Order No. 24,837. Verizon contends that to embark on Phase II proceedings in the face of Verizon's appeal to the Supreme Court would cause irreparable harm not only to Verizon, but to all parties involved, as well as the Commission, given the substantial amount of resources that will be required – resources that will have been wasted should Verizon prevail in its appeal. Verizon further argues that a stay will not prejudice the public interest or the interests of the petitioner or intervenors. On the contrary, according to Verizon, a stay will benefit all parties and the Commission by preserving scarce resources and ensuring that there is no unnecessary expenditure of assets, time and resources going forward.

2. Competitive Carriers

The five Competitive Carriers contend that Verizon's motion fails to meet the legal standards for the granting of a stay. Specifically, the Competitive Carriers argue that Verizon has not demonstrated that it will suffer irreparable harm; nor has it demonstrated that the potential harm it alleges outweighs the public interest. The Carriers assert that Verizon's only support for its claim of irreparable harm lies in its assertion that it will be "forced to devote resources to the litigation that will determine the amounts that it unlawfully overcharged and must repay." The Carriers further argue that they, rather than Verizon, will be harmed irreparably by further delay in the proceedings, which will, in turn, delay the refunding of the monies owed them. The Carriers also contend that the public interest is not served by a stay of proceedings. Rather, they argue the public interest will be harmed by an increasing risk as time goes by of unavailable witnesses, lost records, and fading memories in light of the transfer of Verizon's assets to FairPoint in April 2008. Further, according to the Competitive Carriers, the sale of its operations in New Hampshire means that Verizon has no ongoing relationship with the Commission other than this case. The Carriers argue that the public has a right to expect that

Commission decisions will be followed, and that a delay in the Phase II proceedings contravenes the statutory requirement of prompt repayment of overcharges. Finally, the Carriers suggest that the granting of a stay in this case could encourage meritless appeals taken to delay the effect of adverse rulings or to preserve the bargaining power of the losing party in a possible settlement.

B. Global Crossing and XO Communications Petitions to Intervene

1. Global Crossing

Global Crossing petitions to intervene, asserting substantial interests affected by Phase II of the proceeding. Global Crossing claims that Verizon's wrongful imposition of CCL charges has caused it damage. Global Crossing further argues that its intervention would not prejudice the rights of any existing parties, nor impair the orderly and prompt conduct of the proceeding. Global Crossing contends that the fact that it had not participated in Phase I of the proceeding is not a bar to its participation in Phase II, citing *Concord Elec. Co.*, DE 01-247, Order No. 24,046 at 8 (Aug. 28, 2002).

Global Crossing also requests that the Commission treat its petition as a petition for reparation under RSA 365:29, in accordance with Commission Order No. 24,705 (Nov. 29, 2006), in which the Commission stated that it would "treat petitions for intervention in this docket as petitions for reparation under RSA 365:29, upon request of the intervenor." *Id.* at 6. Global Crossing further notes that it is currently preparing a calculation of the estimated financial impact of the disputed charges with supporting materials.

2. XO Communications

XO Communications petitions to intervene, asserting that, similar to other CLEC parties to the proceeding, it has been billed erroneously for several years by Verizon for carrier common line (CCL) charges assessed on calls that have not originated or terminated on local loops

operated by Verizon. XO argues that because it has been damaged by Verizon's wrongful imposition of CCL charges, it clearly has substantial interests at stake in Phase II. XO further argues that its intervention in Phase II will serve the interests of justice, will not prejudice the rights of any existing parties, and will not impair the orderly and prompt conduct of this proceeding. On the contrary, XO states, great efficiency and consolidation of scarce Commission resources can be achieved by allowing its intervention and avoiding an entirely separate proceeding related to XO Communications. XO further contends that no other party can properly represent XO's interests, as only XO can present the specifics of its billing records and history with Verizon for purposes of determining the exact amount of refunds or reparations necessary.

XO also requests that the Commission treat its petition as a petition for reparation under RSA 365:29, in accordance with Commission Order No. 24,705 (Nov. 29, 2006), noting that it is currently preparing a calculation of the estimated financial impact and supporting materials the Commission requested of other parties earlier in the proceeding.

3. Verizon

In a response to the petitions to intervene of Global Crossing and XO, Verizon argues that the two petitions further support its request to stay Phase II proceedings, as there would now be 11 parties participating, making the case even more complex and resource intensive. Verizon further argues that, in the event the Commission accepts the petitions for reparations under RSA 365:29, it should limit any potential reparations to payments made within two years prior to the dates of filing of the petitions.

4. Competitive Carriers

In their reply to Verizon's comments on the petitions to intervene, the Competitive Carriers contend that, contrary to Verizon's arguments, the petitions to intervene support the case for proceeding forthwith to Phase II proceedings and the expeditious determination of reparation amounts. The Carriers argue that the public interest is served by prompt enforcement of Commission orders, particularly where repayment of unlawful overcharges collected from an entire industry is required. They further argue that Verizon seeks a stay and retention of the monies unlawfully collected in order to preserve its bargaining power in any possible settlement and, further, that Verizon overstates the case in claiming that the legal basis for ordering reparations is fundamentally in question. The Carriers argue that the Commission's order remains valid and in effect, and that the Commission should proceed expeditiously to decide Phase II.

C. Global Crossing's Reply and Verizon's Motion to Strike Reply

1. Global Crossing

In its October 13, 2008 reply to Verizon's October 6, 2008 response, Global Crossing notes that Verizon did not object to Global Crossing's petition to intervene. It argues that Verizon's request in that filing to limit reparations to two years prior to Global Crossing's September 25, 2008 petition to intervene is inconsistent with the plain language of RSA 365:29 and contrary to basic principles of fairness and to the public interest. Global Crossing asserts that the statute permits reparations back to the earlier of a petition date or the commission's order of notice. Global Crossing requests the Commission to make clear that, in accordance with RSA 365:29, Global Crossing is entitled to restitution for damages going back at least to June 23, 2004, two years prior to the Commission's order of notice.

2. Verizon

Verizon moves to strike Global Crossing's reply, arguing that it is not permitted by Commission rules and that Global Crossing did not seek leave to file it. Verizon contends that Global Crossing could have addressed the time period for reparations in its petition to intervene. Verizon further argues that Global Crossing's citation of RSA 365:29 is inapposite in that the statute, as amended, was not in effect when this proceeding commenced, and that to apply the provisions of the amended statute to Global Crossing's reparations claim would constitute a retrospective application in violation of Part I article 23 of the New Hampshire Constitution.

III. COMMISSION ANALYSIS

A. Motion to Stay

RSA 541:18 permits a suspension of an administrative agency's order where justice may require. A suspension in this case effectively would stay the Phase II proceedings of this docket. The Commission's orders are accorded a legislative presumption of reasonableness and are not "lightly to be set aside." *Tilton v. Boston & Maine R.R.*, 99 N.H. 503, 504 (1955). Unless an appeal is successfully maintained, the order in question remains valid and in effect and any consequences stemming from that order must ultimately be accepted as a part of the Commission's determination. *Id.* A stay may be granted subject to conditions in the interest of administrative efficiency. *N.H. Milk Dealers' Ass'n v. N.H. Milk Control Board*, 107 N.H. 150 (1966). A suspension of administrative proceedings is not warranted, however, for the mere fact that an administrative order may cause injury or inconvenience to one or another party. *Union Fidelity Life Insurance Co. v. Whaland*, 114 N.H. 549, 550 (1974).

The proceedings at issue here consist of the remedy phase of Docket No. DT 06-067. In Order No. 24,837, we determined that Verizon had inappropriately applied the provisions of its

access tariff by charging for carrier common line (CCL) services where its facilities were not involved in the relevant transport of competitive carrier traffic. In Phase II we will determine how much, if any, is owed in reparations to the affected carriers. That determination will involve an accounting based on invoices and payments recorded by the parties. We have already determined in Order No. 24,823 that Verizon will be responsible for the reparations, if any, owed in this docket. The fact that Verizon has transferred its landline assets and operations to FairPoint does not change that result. The CCL charges deemed inappropriate in this docket were billed and paid prior to the landline transfer; in the event that we find in Phase II that FairPoint continued to bill such charges where its loop facilities were not involved, reparations may be due from FairPoint, as well.

In the interest of administrative efficiency, we deny Verizon's motion to stay Phase II of the proceedings, inasmuch as the passage of time may lead to the ultimate unavailability of expert witnesses or records, in light of Verizon's sale of its assets and operations in New Hampshire. We find furthermore, that proceeding with the calculations to determine the amount of reimbursement owed in Phase II has not been shown to be overly burdensome to the parties. We therefore conclude that the better course is to proceed now with the calculation of amounts, if any, owed, rather than to wait until Verizon's appeal has concluded. Waiting until the appeal has run to start the calculations necessary to complete Phase II would prolong the resolution of this docket unnecessarily, to the potential detriment of parties with outstanding claims totaling millions of dollars. We will not require reimbursement until after the appeal is concluded and will decide during Phase II whether Verizon should be required to escrow any amounts due after a determination that the calculations are correct.

B. Petitions to Intervene

We turn now to the pending requests of Global Crossing and XO Communications for intervenor status. To qualify as an intervenor, each company must have stated in its motion “facts demonstrating that the petitioner’s rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding.” RSA 541-A:32, I(b) Here, the facts provided by both Global Crossing and XO relate solely to the reparations issue that remains to be decided in Phase II of this docket, as distinct from the tariff interpretation issues resolved in Order No. 24,837. Both companies have set forth arguments supporting their stake in the outcome of the reparations phase of the case. Furthermore, both companies have met the statutory requirement to tender their requests “at least 3 days before the hearing.” RSA 541-A:32, I(a).

We find that both Global Crossing and XO have demonstrated that Phase II may affect their rights and interests. Therefore, we grant their petitions to intervene.

C. Motion to Strike

At this time, we choose to defer ruling on the issues raised by Global Crossing’s arguments concerning the applicable period for its reparations claim under RSA 365:29, as amended, and Verizon’s motion to strike those arguments. We will make a determination on that issue in Phase II of these proceedings.

IV. CONCLUSION

In summary, we find that justice and fairness would not be served by granting a stay of the proceedings in Phase II of this docket. Nonetheless, in recognition of Verizon’s interests (and potentially those of FairPoint), we do not intend to require payment of any reparations that we may determine are due in Phase II until the pending appeal at the Supreme Court is

concluded. We further find that the interventions of Global Crossing and XO Communications at this time in the proceedings are appropriate.

In the interest of administrative efficiency, we hereby determine that a prehearing conference is not required to launch Phase II of this docket. Parties have been provided ample notice of these proceedings through a number of orders, including orders of notice and procedural schedules. In lieu of a prehearing conference, we direct Staff and parties to conduct a technical session on November 5, 2008, for purposes of establishing: (1) a procedural schedule; (2) agreement on how to proceed with the calculation of claims; and (3) a method for compiling documentation to support those claims. In light of the fact that all parties submitted initial claim estimates in Phase I, or are currently in the process of preparing estimates, in the case of the two new intervenors, we direct parties to bring those estimates with supporting working papers to the November 5 technical session.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Verizon New Hampshire for a stay of Phase II of the proceedings in Docket No. DT 06-067 is DENIED; and it is

FURTHER ORDERED, that the petitions of Global Crossing and XO Communications for intervention in this proceeding, are GRANTED and it is

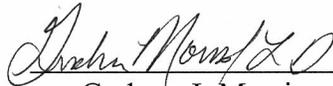
FURTHER ORDERED, that the parties and Staff convene a technical session on November 5, 2008, at 9:00 a.m. to determine a recommendation on how to proceed with the calculation of reparations in Phase II of the proceeding.

By order of the Public Utilities Commission of New Hampshire this 31st day of October

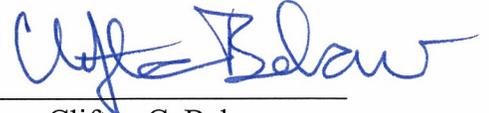
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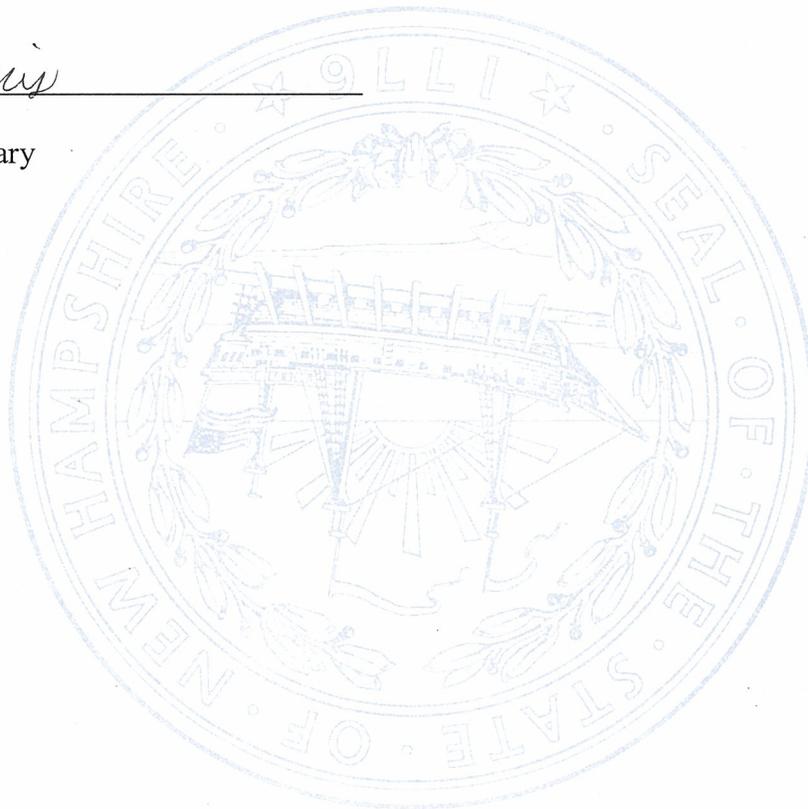


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