STATE OF NEW HAMPSHIRE

BEFORE

THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DT 06-067

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

Complaint Against Verizon New Hampshire Regarding Access Charges

segTEL'S POST-HEARING BRIEF IN SUPPORT OF THE PETITION

NOW COMES segTEL, Inc. (segTEL), by and through its undersigned attorney, and respectfully submits this Brief in support of Freedom Ring Communications, LLC d/b/a BayRing Communications' (BayRing) complaint entered with the New Hampshire Public Utilities Commission (the Commission) against Verizon, New Hampshire (Verizon) for its improper and unlawful access charges, including carrier common line (CCL) access charges, assessed on calls originating on BayRing's telecommunications network and terminating on the networks of wireless carriers.

This case calls upon the Commission to determine, *inter alia*, whether the language set forth in Verizon's access tariff, NHPUC No. 85, dated April 19, 2001, (Tariff 85) permits Verizon to charge certain rate elements, including, but not limited to, CCL charges for intrastate calls made by a CLEC customer to end-users not associated with Verizon or otherwise involving a Verizon local loop.

segTEL will show that Verizon is forbidden from charging rates for its services that are not properly set out in its tariff, and that there is no applicable rate for CCL charges made in the absence of a Verizon end user. segTEL will ask that the Commission find that Verizon has not identified the services and charges at issue in this docket in clear and unambiguous language in its tariff and, therefore, that there is no lawful charge that may be levied.

ARGUMENT

BayRing complains that Verizon is inappropriately assessing intrastate access charges on minutes of use (MOUs) for calls that are not routed to a Verizon end-user's local loop. Verizon rejects BayRing's claim, and asserts that Tariff 85 Section 5.4.1.A. allows it to charge CCL rates for "all switched access service provided to the customer...," and that there is no exclusion for tandem-switched minutes of use (MOUs). For the reasons set forth below the Commission should grant BayRing's Petition because Verizon's charges are not specified in its Tariff and are therefore unlawful.

I. THE CHARGES VERIZON SEEKS TO ASSESS ARE NOT SPECIFIED IN ITS TARIFF AND ARE THEREFORE UNLAWFUL

A. Tariff language must be clear and unambiguous.

There is no lawful basis for the charges that Verizon seeks to impose on BayRing. Verizon's tariffs do not entitle them to collect CCL charges for calls to wireless carrier end users that originate with BayRing end users, because Verizon's tariffs do not allow for CCL charges where there is no Verizon end user customer. In the absence of clear and unambiguous language

in Tariff 85 specifying the inclusion of CCL charges without the limitations established by the Tariff, Verizon is prohibited by state law from imposing charges.

New Hampshire law holds that it is unlawful for a carrier to charge for any service not set out in its tariffs. RSA 378:1 states:

> Every public utility shall file with the public utilities commission, and shall print and keep open to public inspection, schedules *showing the rates, fares, charges and prices for any service rendered* or to be rendered in accordance with the rules adopted by the commission pursuant to RSA 541-A; provided, however, that public utilities which serve as seasonal tourist attractions only, as determined in accordance with rules adopted by the commission pursuant to RSA 541-A, shall be exempt from the provisions of this chapter. [Emphasis added.]

The New Hampshire Supreme Court has consistently articulated that such "rates, fares, charges and prices for any service rendered" must be set forth in clear and unambiguous language to be enforceable. In *Komisarek v. New England Telephone & Telegraph Co.*, 11 N.H. 301 (1971), the Court held that the Commission erred in permitting a telephone utility to disconnect additional customer lines based on non-payment for a separate line because that the phrase "customer's service" in the telephone company's tariff providing that delayed payment of bills may result in interruption or discontinuance of the customer's service could not be reasonably be considered to be "plain and clear," and the tariff therefore could not reasonably be construed to authorize termination of the customer's service on those lines for which payments were current based on arrearages accrued on a separate line. Although the relief that New England Telephone sought in *Komisarek* was logical and even an acknowledged standard practice for the industry, it was denied nonetheless because filed rate doctrine places preeminent importance on limiting the rights of the utility to the tariff. Overturning the NHPUC ruling on appeal, the Court held that, if the utility intended to make such action possible, "it was incumbent upon it to make this plain to its customers by its tariff." *See id.*, at 04.

The Commission has likewise held that a tariff must be clear and unambiguous in order to permit its enforcement. *See, e.g., In Re: New Hampshire Electric Cooperative, Inc.*, 86 N.H. P.U.C. 539 (2001). These principles are applicable with equal force here. Verizon seeks to charge BayRing under Tariff 85 for services it did not provide and for use of facilities it does not own. It is precisely to avoid this type of uncertainty that carriers are required to set forth their charges clearly and unambiguously in a tariff. If Verizon believes that it should have the right to charge in this instance it may seek approval of that right by submitting a tariff modification to the Commission.

B. Filed rate doctrine holds that a carrier may charge only the rates that are described in its tariffs.

While this is a case involving a state tariff, the language governing federal tariff interpretation is equally explicit and supports segTEL's argument. It is unlawful under federal law for a carrier to "charge, demand, collect, or receive a greater or less or different compensation" other than "the charges specified" in its tariff. 47 U.S.C. § 203(c). The "filed rate doctrine," also known as the "filed tariff doctrine," likewise mandates that the rate of the carrier duly filed is the only lawful charge "that the carrier may charge for a service." *Bryan v. BellSouth Communications, Inc*, 377 F.3d 424, 429 (4th Cir. 2004) (quoting *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (*Central Office Tel.*), cert. denied, 543 U.S. 1187 (2005). Pursuant to this doctrine, a carrier may not charge for services that are not clearly described in its tariff, for tariffed rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached." *Access Charge Reform*, CC Docekt No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) 14 & n.51 (quoting *Central Office Tel*. at 223). As the Supreme Court held in *Louisville & Nashville R. Co., v. Maxwell*, 237 U.S. 94, 97

(1915), "[d]eviation from it is not permitted upon any pretext. Ignorance or misquotation of rates is not an excuse for paying or charging *either less or more than the rate filed.* This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." [Emphasis added.]

The Federal District Court for New Hampshire, in *ASI Worldwide Communications Corp. v. Worldcom, Inc*., 115 F.2d 201 (D.N.H. 2000), held that filed rate doctrine ensures that a tariffed rate is the only allowable rate.

> In its classic form, the [filed rate] doctrine 'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.' *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls ... [T]o permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the Congressional scheme.); *Town of Norwood Massachusetts v. New England Power Co*, 202 F.3d 408, 416 (1st Cir. 2000) (Barbadoro, J.).

Therefore, a carrier may charge only the rates that are contained in its approved tariff.

C. In a similar case, access charges were disallowed because the carrier's tariff did not properly define the charge being assessed.

Verizon itself has successfully argued for such strict interpretation of tariffs when Paetec sought to impose originating access charges on MCI for toll-free calls that were placed from a wireless telephone not associated with Paetec's network[1]. *See MCI WorldCom Network Services, Inc. V. Paetec Communications, Inc*., Verizon Response Brief, 2006 WL 1348303 (*Verizon Paetec Brief*). Verizon argued, *inter alia*, that Paetec purported to charge MCI for

[1] In this case, the opposite situation has occurred, in which Verizon seeks to impose *terminating* access charges on BayRing for calls placed by BayRing customers from BayRing's network and terminating to a wireless end user.

providing "switched access service," which Paetec's tariff defined as a service that "provides a two-point electrical communications path between a Customer's premises and an End User's premises." Verizon pointed out that Paetec's tariff defined an end user as "[a]ny customer of an interstate telecommunications service that is not a Carrier or Common Carrier." Verizon contended that the tariff's wording made clear that Paetec provided switched access service only when it provided the entire path between the end user and the putative customer under the tariff, not merely some part of it. Verizon argued, "Because Paetec did not provide that full transmission path here, its 'service' is not covered by the tariff." and, "Paetec may charge only for services specifically described in its own tariff. Here, the tariff describes a specific service that does not include the 'service' that Paetec provided here." *See Verizon Paetec Brief at id.* Verizon's argument prevailed, and segTEL's argument, which is virtually identical, should prevail as well.

D. Verizon's Tariff 85 does not provide for CCL charges in the absence of a Verizon-provided common line.

Verizon should not be allowed to pick and choose the individual situations in which filed rate doctrine should and should not apply. In the instant case, Verizon claims that Section 5.4.1.A. of Tariff 85 allows it to charge CCL rates for "*all switched access service* provided to the customer," and that there is no exclusion from these charges for tandem-switched MOUs or cellular tandem-switched MOUs. However, the plain language of Verizon's Tariff 85 states that CCL charges apply when "common lines" exist which provide other carriers with access to Verizon's end-users. Tariff 85 Section 5.1.1.A. reads, "Carrier common line access provides for the use of *end users' Telephone Company* [*i.e.* Verizon] *provided common lines* by customers [*i.e.* BayRing] for *access to such end users to furnish intrastate communications.*" [Emphasis

added.] "Common Line" is defined in Tariff 85, Section 1.3.2. as "[a] line, trunk or other facility *provided under the general and/or local exchange service tariffs of the Telephone Company* [Verizon]*, terminated on a central office switch*." [Emphasis added.]

If there were any doubt that the plain meaning of the tariff is that CCL only applies when Verizon supplies the end user's "line, trunk, or other facility," and there is not, there is further evidence in the tariff. BayRing's complaint centers primarily on terminating access. Tariff 85 Section 1.3.2. defines the "Terminating Direction" as "[t]he use of switched access service for the completion of calls from a customer premises *to an end user premises*." [Emphasis added.] Premise is defined as a "building, or a portion of a building in a multi-tenant building, or buildings on continuous property (except railroad right of way, etc.)" As stated above, the tariff provides for the lines at these premises, or buildings, to be terminated on a central office switch. None of these conditions exist for the calls incurring CCL charges at issue in this docket.

Finally, the Tariff 85 diagrams which further describe the various components of switched access service in Section 6.1.2. illustrate that a CCL charge is associated with access to a *Verizon* end-user's local loop. In no instance does the tariff describe a switched access service that does not include local switching and a Verizon-provided end-user service. If Verizon intended otherwise, it is Verizon's responsibility to ensure that its tariff clearly and in plain language reflects that intent.

Instead, the definitions and diagrams found in Tariff 85 presume the existence of a Verizon wireline customer with a fixed premise. This would mean that the switched access components in dispute in the instant case are limited to access to common line facilities installed under the general or local exchange tariffs of Verizon, that terminate in a physical end user

premise. Since that is not the case, BayRing should prevail.

E. Even if Tariff 85 were ambiguous, Verizon should not prevail.

segTEL believes that the foregoing analysis of the tariff is adequate to find that Verizon's charges are not described in its tariff, and, as Verizon asserted in *MCI v. Paetec, supra*, "[T]he fact that the service was not described in [the] tariff should be the end of the matter." However, to the extent that Verizon points to other portions of the tariff in support of its charges for CCL in conjunction with services that neither use a common line provided under Verizon's tariffs, nor terminate to an end user premises, segTEL contends that the tariff is ambiguous, and must also be found not to apply.

Courts have relentlessly held that ambiguities found in tariffs are to be strictly construed against the carrier which drafted the tariff. *See, e.g., Komatsu Ltd. v. State S.S. Co.*, 674 F.2d 806, 811 (9th Cir.1982) (As the carrier is the tariff's author, ambiguities in its language must be strictly construed against the carrier.); *Norfolk & W. Ry. Co.v. B. I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir. 1980) ([T]he tariff should be construed strictly against the carrier since the carrier drafted the tariff...); *United States v. Interstate Commerce Comm'n*, 198 F.2d 958, 966 (D.C.Cir.1952) (Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier.); *Pink Dot, Inc. v. Teleport Commc'ns Group*, 89 Cal.App.4th 407 (2001) (The rule has been stated many times that if there is an ambiguity in a tariff any doubt in its interpretation is to be resolved in favor of the [non-drafter and against the utility].)

Therefore, even if, *arguendo*, the Commission accepts Verizon's claim that Section 5.4.1 of Tariff 85 allows it to charge CCL rates for "*all switched access service* provided to the

customer," Tariff 85, Section 5.4.1.C. limits the application of CCL access rates and charges to switched access service "provided under this tariff," thereby excluding from these charges tandem switched MOUs or cellular tandem switched MOUs which are not described as switched access. Consequently, at best, the tariff is ambiguous; at worst, the tariff is unclear. In either event, proper application of filed rate doctrine mandates that Verizon's charges be disallowed.

II. IF THE TARIFF IS AMBIGUOUS OR INAPPLICABLE THERE IS NO VALID CHARGE

Since Verizon is forbidden from charging rates for its services that are not properly filed, there is no applicable rate for CCL charges made in the absence of a Verizon end user. As provided for in 47 U.S.C. § 203(c) a carrier may not "charge, demand, collect, or receive a greater or less or different compensation" other than "the charges specified" in its tariff. Verizon may not choose to charge a rate that is less than or greater than the rate that is in its approved tariff.

Testimony in this docket shows that Verizon has provided the "services" described for several years, but has only started charging for them recently. Filed rate doctrine does not empower Verizon with the discretion to impose or ignore the terms of its Tariff. Just as Verizon is *entitled* to charge for a service, it is also *obligated* to charge for a service. To do otherwise would be unjust, potentially discriminatory, and to the detriment of the body of New Hampshire ratepayers.

Therefore, if the tariff is inapplicable, there is no valid charge. This means that there can be no partial charge nor can the Commission choose to provide for a partial correction of the invalid charges assessed to date. The only lawful way for Verizon to start assessing CCL

charges on services that do not include service to a Verizon end user would be for Verizon to modify its tariff.

In conclusion, segTEL respectfully requests that the Commission find that Verizon has not identified the services and charges at issue in this docket in clear and unambiguous language in its tariff and, therefore, that there is no applicable charge that may be levied.

Respectfully submitted,

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