

**THE STATE OF NEW HAMPSHIRE
BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

BayRing Petition For Investigation Into
Verizon New Hampshire's Practice Of
Imposing Access Charges, Including Carrier
Common Line (CCL) Access Charges, On
Calls Which Originate On BayRing's Network
And Terminate On Wireless and Other Non-
Verizon Carriers' Networks

Docket No.06-067

AT&T PHASE 2 BRIEF

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Introduction

On November 5, 2008, Commission Staff and parties participated in a technical session in this docket pursuant to Commission Order No. 24,913.¹ The participants agreed on a proposed procedural schedule for Phase 2 of this docket, including briefing on two legal issues (the applicable reparations period(s) and the appropriate interest rate(s) to be applied), and a uniform method for calculating amounts at issue in this proceeding. *See*, November 5, 2008, Letter from Staff Attorney, Lynn Fabrizio, to Debra A. Howland, Executive Director, New Hampshire Public Utilities Commission. In accordance with the agreed upon schedule, AT&T files this brief setting out and explaining its position on the two legal issues for Phase 2.

¹ Participants included representatives from Verizon, BayRing Communications, One Communications, AT&T, Global Crossing, Sprint Nextel, XO Communications, FairPoint Communications and Staff.

Summary

Reparations Period. RSA 365:29 requires that the Commission establish a uniform reparations period for all Verizon customers unlawfully overcharged the carrier common line charges at issue in this case and that such period begins on April 28, 2004. Adoption of Verizon's position – that the reparations period is customer specific, depending upon when each customer files a petition – would allow Verizon to charge different rates for the same service over the same period of time. Such a result is contrary to New Hampshire law. It would officially sanction rate discrimination, which is illegal under RSA 387:10. Moreover, as explained below, not only does the text of RSA 365:29 not support Verizon's interpretation, but recent amendments made by the Legislature make clear that RSA 365:29 has always required and continues to require a uniform reparations period.

Interest Rate. The interest that Verizon must pay to AT&T on all overpayments is determined by the disputed amount penalty prescribed in Verizon's Tariff 85, with one important exception. Tariff 85 provides no interest on payments made prior to three months before the date that a customer begins disputing the bills, over the period from date of payment to date of dispute. The Commission, however, has the authority under RSA 365:29 to award appropriate interest from date of payment to date of dispute for such payments and should exercise its authority to do so in this case. For the reasons discussed below, the Commission should award interest for such payments between date of payment and date of dispute at a rate equivalent to the disputed amount penalty. At a minimum, the Commission should award interest for such payments over such period at Verizon's approved rate of return.

Argument

I. ALL PAYMENTS OF VERIZON'S UNLAWFUL CARRIER COMMON LINE OVERCHARGES MADE BY ANY CARRIER AFTER APRIL 28, 2004 MUST BE REFUNDED PURSUANT TO RSA 365:29.

RSA 365:29 states:

On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

The current statute reflects amendments made to an earlier version, which – as explained in more detail below – actually clarify the meaning of the language in the statute that did not change. It is the language that did not change that is material to this case.

The record in the case shows that Freedom Ring Communications, LLC d/b/a BayRing Communications (“BayRing”) filed a petition on April 28, 2006, requesting, *inter alia*, that the Commission order Verizon to make reparation of charges that it had illegally collected from BayRing.² On March 21, 2008, after an investigation and after hearings held on July 10 and 11, 2007, the Commission found that Verizon had indeed been charging an illegal rate. *See*, Order No. 24,837. Under RSA 365:29, therefore, the Commission can order Verizon, *inter alia*, to make “due reparation to the person who has paid the same, with interest from the date of the payment.”

² *See* BayRing’s Petition, at p. 5 (asking the Commission to “[i]nstitute an investigation and hearing for the purpose of determining the amount of due reparations to be made by Verizon under the provisions of RSA 365:29” on account of illegal CCL overcharges”).

Based on statements of Verizon counsel during this proceeding, it appears that Verizon does not contest that the Commission has authority to order reparations for BayRing covering the period beginning two years prior to April 28, 2006, *i.e.*, April 28, 2004. However, Verizon apparently is taking the position that it can continue to collect illegal charges from other customers until two years prior to the date such other customers file their own petitions. For AT&T in this case, therefore, it appears that Verizon's contends that the reparations period would begin on July 17, 2004, two years prior to the date AT&T filed its petition to intervene in this docket. For the reasons discussed below, Verizon's position is wrong; the reparations period for all customers from whom an illegal rate is collected is the same.

Verizon's position produces a patently unjust and discriminatory result. Under Verizon's interpretation, it may continue to collect charges that the Commission has declared unlawful until two years prior to the time that each customer files a complaint for reparations. Indeed, Verizon would have this Commission permit it to continue to collect an unlawful rate *indefinitely*, until each and every customer has established a start date for reparations by filing his or her own petition. This makes no sense. Not only would Verizon be entitled to charge an illegal rate to a customer until a date determined by when the customer complains, it would – in the meantime – be charging *different* rates for the *same* service based on when each customer complains. Such a result would officially sanction rate discrimination otherwise illegal under New Hampshire law. *See*, RSA 387:10. In addition, it would be entirely unworkable in a retail rate context, to which RSA 365:29 also (and more often) applies.

Moreover, the clear text of RSA 365:29 does not support Verizon's interpretation. RSA 365:29 authorizes the Commission to order Verizon "to make due reparation to the person who has paid" the illegal charges. In the following sentence, referring to such reparations order, RSA 365:29 does not limit the reparations only to the person who filed a petition for reparations. Furthermore, it does not contemplate many petitions. Rather it establishes the start date based on the filing date of "the" petition.

But most importantly, the Legislature's amendments in 2008 reveal the meaning of the text that was not changed by those amendments. Set forth below are the changes that were made to RSA 365:29 in 2008:

~~Whenever~~ **On its own initiative or whenever a petition or** complaint has ~~made to~~ **been filed with** the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the **earlier of the** date of **the commission's notice of hearing or the** filing **of** the petition for reparation.

Clearly, the Legislature was intending to clarify that, in the absence of a complaint by an individual customer, the Commission nonetheless has the power to find that a particular rate is illegal or unjustly discriminatory and to order reparations therefor. When it made those changes, the Legislature had to establish the beginning of the reparations period without reference to the filing of a petition, so it used the Commission's notice of hearing for that purpose.³ Tellingly, the Legislature made no other changes to the statute. Yet,

³ So as not to shorten the reparations period when an investigation is commenced by a petition, the Legislature made the start date *the earlier of* the filing of the petition or the notice of hearing.

Verizon would have the Commission believe that the Legislature intended a common reparations period if the Commission suspects an illegal charge and an individually determined reparations period if a customer happens to spot the illegal charge before the Commission does. It makes no sense for a customer's right to reparations for an illegal charge to depend upon whether the Commission or another customer finds the problem and initiates the proceeding.

Verizon's interpretation would convert what is, in law and substance, a statute of repose into something akin to a statute of limitations for individual customers, with the anomalous effect of authorizing different charges for the same service in the same period of time. Contrary to Verizon's interpretation, the two year period in RSA 365:29 is for the purpose of protecting a utility against unlimited reparations to all customers over an indefinite period of time. The Legislature did not want to permit a contingent liability of indefinite size and duration, which could create problems for a utility to raise capital when faced with such uncertain exposure and risk. In this sense, the Legislature intended to establish the equivalent of a statute of repose and not some sort of statute of limitations for individual claimants. *See, e.g., Big League Entertainment, Inc. v. Brox Industries, Inc.*, 149 N.H. 480, 821 A.2d 1054 (2003).⁴ Thus, the filing of a petition claiming that a charge is illegal establishes the outer most limit on the extent of the utility's liability for the illegal charge on whomever it may have been imposed. Verizon should not be allowed to use a statute intended to protect it against exposure to claims arising from the

⁴ The Court in *Big League Entertainment* described statutes of repose as establishing an absolute outer boundary in time within which a claim may be asserted. *Big League Entertainment*, 821 A.2d 1054, 1057. Quoting *See v. Hartley*, 896 P.2d at 1053, the Court stated "Statutes of repose ... operate as a grant of immunity serving primarily to relieve potential defendants from anxiety over liability for acts committed long ago." Statutes of repose are not based on when a claim of any particular individual may arise.

distant past to create a multi-tiered, discriminatory set of charges for different customers during the two years prior to BayRing's petition.

II. THE INTEREST RATE APPLICABLE TO AT&T'S PAYMENT OF OVERCHARGES IS DETERMINED BY TARIFF 85 AND THE COMMISSION'S AUTHORITY UNDER RSA 365:29.

A. TARIFF 85 REQUIRES VERIZON TO PAY A "DISPUTED AMOUNT PENALTY" OF .0005 PER DAY FROM THE DATE OF PAYMENT TO THE DATE OF REFUND FOR ALL AT&T PAYMENTS MADE AFTER JANUARY 27, 2006.

Section 4.1.8.E of Tariff 85 states:

If a customer disputes a bill within three months of the payment date and pays the total billed amount on or before the payment date and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of payment and ending on the date of resolution. The credit for the disputed amount penalty shall be as set forth following.

On April 27, 2006, AT&T began disputing Verizon's CCL charges declared illegal in this proceeding. *See*, e-mail attached hereto as Exhibit A. AT&T continued to dispute such charges on each bill thereafter. AT&T nevertheless paid all such disputed charges on or before the payment date. Thus, AT&T disputed all bills with payment dates on or after January 27, 2006, within three months of the payment date and paid such bills on or before the payment date. As a result, Section 4.1.8.E. requires Verizon to pay the "disputed amount penalty" for the period starting with the date of payment and ending on the date of resolution for all payments made on or after January 27, 2006.

"The credit for the disputed amount penalty . . . as set forth following" is shown in Section 4.1.8.I.2 of Tariff 85, which states:

The disputed amount penalty shall be the disputed amount resolved in the customer's favor times a penalty factor. The penalty factor shall be 0.0005 per day for the number of days from the first date to and including the last date of the period involved.

As noted above, under Section 4.1.8.E., the first and last dates of “the period involved” is the date of payment and the date of resolution for all payments made on or after January 27, 2006.⁵

In summary, for each payment that AT&T has made on or after January 27, 2006, AT&T is entitled to receive reimbursement of such amount plus a disputed amount penalty calculated by multiplying .0005 times the number days from such payment until refund times the amount of such payment.

B. TARIFF 85 REQUIRES VERIZON TO PAY A “DISPUTED AMOUNT PENALTY” OF .0005 PER DAY FROM THE DATE OF DISPUTE TO THE DATE OF REFUND FOR ALL AT&T PAYMENTS MADE PRIOR TO JANUARY 27, 2006.

Section 4.1.8. H. of the tariff states:

If a customer disputes a bill after three months from the payment date and pays the total billed amount on or before the dispute date, and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of dispute and ending on the date of the resolution. The credit for a disputed amount penalty shall be as set forth following. The customer shall not receive a credit for the late payment penalty.

Because AT&T began disputing the CCL overcharges on April 27, 2006, its dispute of overcharges for payments made prior to January 27, 2006, was made after three months from the payment date, and Section 4.1.8. H applies to such payments. AT&T, therefore, should receive a disputed amount penalty applied to all payments made on bills with payment dates before January 27 for the period starting with the dispute date (April 27, 2006) and ending on the date of refund.

⁵ The date of resolution is the date that AT&T finally receives its reimbursement. *See*, Section 4.1.8.C.

In summary, for each payment that AT&T has made prior to January 27, 2006, AT&T is entitled to receive reimbursement of such amount plus a disputed amount penalty calculated by multiplying .0005 times the number days from April 27, 2006 until refund times the amount of such payment.

C. THE COMMISSION CAN AND SHOULD ORDER VERIZON TO PAY AN INTEREST RATE OF .0005 PER DAY FOR THE PERIOD FROM THE DATE OF PAYMENT TO THE DATE OF DISPUTE FOR PAYMENTS OF OVERCHARGES MADE PRIOR TO JANUARY 27, 2006.

The Commission has the authority to order Verizon “to make due reparation to the person who has paid the [illegal overcharges], *with interest from the date of the payment.*” RSA 365:29. The Commission can, therefore, and should require Verizon to pay interest on all amounts it has collected and retained for its benefit back to the date its customers paid and Verizon unlawfully received such funds (within the two year back period permitted by RSA 365:29). As noted above, Verizon’s tariff requires it to pay a disputed amount penalty which AT&T accepts compensates for interest from the date of payment on all amounts with one very important exception. As noted above in Section II., B., under Section 4.1.8. H. of Tariff 85, AT&T’s payments on bills with payment dates prior to January 27, 2006, accrue the disputed amount penalty only from the date of dispute, not from the earlier date of payment. In order to make AT&T whole for Verizon’s unlawful overcharges going back to April 27, 2004, therefore, the Commission should order Verizon to pay interest on such amounts from the date of payment.

It is within the Commission’s discretion to determine the appropriate rate of interest applicable from the date of payment. RSA 365:29. In this case, the Commission should order an interest rate equivalent to Verizon’s .0005 factor for its disputed amount penalty. Such a rate is justified on the facts of this case, in light of the reasoning

underlying the tariff's omission of a disputed amount penalty for the period prior to dispute in cases where the customer disputes more than three months after a bill's payment date. Clearly, the rationale under the tariff for not permitting interest to begin to accumulate until the dispute date on bills disputed more than three months late is to encourage customers to dispute promptly.

However, this case does not present an ordinary dispute. In this case, Verizon deliberately, knowingly and consciously took an extraordinary position on the meaning of well accepted industry language, inconsistent with its own interpretation of essentially the same language in its other tariffs, including its F.C.C. 11, and indeed inconsistent with its own representation to carriers who would be purchasing out of Tariff 85 that they could rely on their understanding of F.C.C. 11 to understand Tariff 85. *See*, AT&T Post-Trial Brief, at p. 21, and record evidence cited therein. After these representations, without notice or warning to its customers, Verizon began billing surreptitiously for services it was not providing. Under these facts, Verizon should not be permitted to benefit from the time it took its customers to discover Verizon's novel billing position and bring it to dispute. The Commission should require Verizon to pay the disputed amount penalty as interest accumulating from the date of payment for all payments, including those made more than three months prior to the date of dispute.

D. AT A MINIMUM, THE COMMISSION SHOULD AWARD INTEREST UP TO THE DISPUTE DATE FOR PAYMENTS MADE MORE THAN THREE MONTHS PRIOR TO THE DISPUTE DATE BASED ON VERIZON'S APPROVED RATE OF RETURN.

Verizon has had the benefit of AT&T's funds from the date of AT&T's payment. The value of the benefit that AT&T has conferred upon Verizon is easily calculated. It is the cost to Verizon of obtaining those funds – a cost Verizon did not incur because it has

had the benefit of AT&T's payments. There is no reason that Verizon should enjoy free money at AT&T's expense, when it was Verizon whose conduct was wrongful. At a minimum, Verizon should be required to pay to AT&T the cost of the funds that AT&T has "lent" Verizon for payments AT&T made prior to January 27, 2006, for the period between date of payment and the date of dispute (April 27, 2006).

Verizon in New Hampshire was a rate of return utility at all times material to this dispute. As a result, it had an approved rate of return. AT&T has not been able to identify the approved rate of return. If the parties are unable to do so, AT&T recommends that a reasonable proxy is the rate of return to which Bell Atlantic-New Hampshire and Commission staff stipulated in a 1998 agreement. *See*, March 4, 1998, letter from Verizon counsel, Victor Del Vecchio to Hearing Examiner E. Barclay Johnson, attached hereto as Exhibit B.

Conclusion

For the reasons set forth above, New Hampshire law requires that the Commission establish a uniform reparations period for all Verizon customers unlawfully overcharged the carrier common line charges at issue in this case and that such period begins on April 28, 2004.

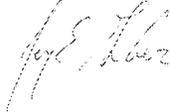
Furthermore, the interest that Verizon must pay to AT&T on all such overpayments is determined by the disputed amount penalty prescribed in Verizon's Tariff 85, except for the interest on payments made prior to January 27, 2006, over the period from date of payment to date of dispute. For interest on such payments for the period between date of payment and date of dispute, the Commission has the authority to award appropriate interest and should exercise its authority to award interest at the rate of

.0005 per day. At a minimum, the Commission should award interest for such payments over such period at Verizon's approved rate of return.

Respectfully Submitted,

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