STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

In the Matter of	)	
	)	
FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS	)	DT 06-067
	)	
	)	
Complaint Against Verizon New Hampshire Re: Access Charges	)	

BRIEF OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

Global Crossing Telecommunications, Inc. ("Global Crossing") submits this brief in the above-captioned proceeding pursuant to the schedule established during the technical session held on November 5, 2008. *See* Letter from Lynn Frabrizio to Debra Howland, DT 06-067, Nov. 5, 2008. This brief addresses the questions of: (1) how far back Verizon should be required to make restitution to Global Crossing for the carrier common line ("CCL") charges that the Commission determined in Phase I of this proceeding were wrongly billed; and (2) the manner in which interest on these reparations should be calculated.

I. Background

Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") filed its complaint in this proceeding on April 28, 2006. In that complaint, BayRing alleged that Verizon had been improperly billing carrier common line ("CCL") charges for traffic that did not originate or terminate on local loops operated by Verizon. On June 23, 2006, the Commission issued an order of notice setting forth a procedural schedule. *See* Order No. 24,837, at 2 (Mar. 21, 2008) (discussing procedural history). Following a hearing conducted in Phase I of this proceeding, the Commission agreed that Verizon's access tariff does not allow the company to bill CCL charges for the traffic at issue. *See id.* at 31; Order No. 24,886 (Aug. 8, 2008). The

Commission then established Phase II of this proceeding to determine the extent of reparations Verizon should pay to its customers for wrongly billed CCL charges. *See* Order No. 24,837 at 32-33.

Global Crossing submitted a petition to intervene in this proceeding dated September 24, 2008, stating that it had for a period of several years paid the Verizon CCL charges that the Commission had determined were improperly billed. None of the parties opposed Global Crossing's petition, but in an October 6, 2008 filing captioned "Verizon New Hampshire's Response to Global Crossing Telecommunications, Inc. and XO Communications, Inc.'s Petitions to Intervene," Verizon stated that reparations to Global Crossing and XO should be limited to two years prior to the respective dates of their intervention petitions. Three additional pleadings ensued — Global Crossing's October 13 "Reply to Verizon's Response to Petition to Intervene," Verizon's October 22 "Motion to Strike Reply to Verizon's Response to Petitions to Intervene" and Global Crossing's October 30 "Objection to Verizon's Motion to Strike" — all of which contained arguments on the subject of how far back reparations should be owed to Global Crossing.

In an order issued on October 31, 2008, the Commission, *inter alia*, granted Global Crossing's petition to intervene and deferred ruling on the issue of how far back Verizon must pay restitution until later in Phase II. *See* Order No. 24,913, at 9. It was then determined during the technical session held on November 5, 2008, that the question of how far back Verizon owed damages to BayRing and the intervening parties, as well as how interest thereon should be calculated, should be addressed in briefs due on December 19, 2008. Accordingly, those issues are addressed below.

II. Verizon Should Pay Restitution to Global Crossing Going Back at Least to April 28, 2004.

The statute governing restitution to customers for illegal charges billed by a utility is RSA 365:29. That statute, which was amended effective August 31, 2008, establishes in both its original and amended versions that customers are entitled to restitution going back two years prior to the filing of a petition for reparation. In the version that was effective prior to August 31, 2008, RSA 365:29 said the following:

> Whenever complaint has been made to 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 date of the filing of the petition for reparation.

Following an amendment effective August 31, 2008, the statute now says the following:

> 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.

As discussed further below, both versions clearly require customers to be made whole for wrongly billed charges going back two years prior to the filing of a petition for reparation. At the very least, the statute requires restitution to Global Crossing going back two years before the date of the order of notice in this proceeding. And even if the statute somehow limits reparations to Global Crossing to two years prior to its intervention petition — thus unjustly enriching Verizon for collecting illegal CCL charges prior to that time — the Commission has inherent authority aside from RSA 365:29 to award full restitution going back at least to April 28, 2004.

A. RSA 365:29 Requires Restitution to Global Crossing Going Back Two Years Prior to the Date of BayRing's Complaint, i.e., to April 28, 2004.

The instant proceeding was initiated by a complaint filed by BayRing on April 28, 2006. BayRing and the other affected ratepayers that have intervened in this proceeding, including Global Crossing, are therefore entitled under both versions of the statute to reparation going back two years before the date of BayRing's complaint, i.e., to April 28, 2004. Verizon has previously argued in this proceeding that reparations for intervenors should be limited to two years prior to the date of their intervention petitions. *See* Verizon New Hampshire's Response to Global Crossing Telecommunications, Inc.'s and XO Communications, Inc.'s Petitions to Intervene, Oct. 6, 2008, at 2. To so limit restitution, however, would treat ratepayers differently from each other depending on whether they are the original complainant or an intervenor. It would also treat intervenors differently from one another depending on when their petitions to intervene were filed.

Nothing in either version of RSA 365:29 supports such an outcome. Both versions of the statute simply say that reparations for unauthorized charges are to be made "to the person who has paid the same" from two years before the date of the petition for reparation. There is no requirement that the two years of reparations only be paid to the ratepayer who filed the petition. Indeed, it would make little sense for the Commission to require every customer who has paid an illegal charge to a utility to file a separate petition for reparation under RSA 365:29 in order to receive restitution, and for the Commission then separately to calculate the appropriate two-year period for each customer — particularly where the customers involved, as here, are all parties to the same proceeding concerning the same type of wrongful charges. Therefore, the only logical interpretation of RSA 365:29 is one that requires restitution to all affected ratepayers going back two years prior to the date of the original complaint in this proceeding.

B. At the Very Least, RSA 365:29 Requires Restitution to Global Crossing Going Back Two Years Prior to the Order of Notice in This Proceeding, i.e., to June 23, 2004.

Even if RSA 365:29 did not allow intervenors to receive reparations going back two years from the date of BayRing's complaint, Global Crossing is at least entitled to reparation going back two years from the date of the June 23, 2006 order of notice in this proceeding, i.e., to June 23, 2004. As quoted above, the amended version of RSA 365:29 — which was effective on August 31, 2008, and hence applies to Global Crossing's September 24, 2008 intervention petition — says that an 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." RSA 365:29 (emphasis added). Because the hearing in this case took place before Global Crossing filed its intervention petition (to the extent that is considered the applicable petition for reparation under RSA 365:29), the statute requires that restitution be made to Global Crossing going back two years from the Commission's June 23, 2006 order of notice.

Contrary to Verizon's previous arguments in this proceeding, *see* Motion to Strike Reply to Verizon's Response to Petitions to Intervene, Oct. 22, 2008, this would not be an impermissible retrospective application of the amended version of RSA 365:29 under the New Hampshire Constitution. The version of the statute in place at the time of the filing of Global Crossing's intervention petition should govern that petition, and application of the current version of the statute is therefore not "retrospective." But even if it were retrospective, applying the current version to Global Crossing's petition is perfectly consistent with the state constitution and New Hampshire Supreme Court precedent.

According to the New Hampshire Supreme Court, the prohibition against retrospective laws in Part I, Article 23 of the state constitution prevents the legislature from changing the law in a manner that deprives a person of a vested property right acquired under existing law. *In re*

Estate of Sharek, 156 N.H. 28, 31 (2007). The only property right at issue here is the right of ratepayers not to pay unauthorized charges and, if they have done so, to be reimbursed for those payments. There is no protected right on Verizon's part not to pay back monies it collected impermissibly. According to the Court, a "mere expectancy of a future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right" protected from retrospective application of a statute. *In re Goldman*, 151 N.H. 770, 774 (2005) (quoting *Southwestern Bell v. Kansas Corp. Comm'n*, 29 P.3d 424, 430 (Kan. Ct. App. 2001) (internal quotation marks omitted)); *see also Sharek*, 156 N.H. at 30-31. The Court has also made it clear that "[w]hen a statute is remedial or procedural in nature ... it may be applied to cases pending at the time of the enactment." *In re Goldman*, 151 N.H. 770, 772 (citing *Gelinas v. Mackey*, 123 N.H. 690, 695 (1983)). Where the statute at issue is not punitive in nature, then the Court has determined it to be remedial. *See In re Franklin Lodge of Elks # 1280 BPOE*, 151 N.H. 565, 568-68 (2004) (citing *Trop v. Dulles*, 356 U.S. 86, 96-97 (1956), and *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003)).

Using these well-settled principles, the Court has allowed statutes to be applied retrospectively on numerous occasions. *See, e.g., Sharek*, 156 N.H. 28 (disallowing the named executrix in a will to be the executrix due to a statute passed after the will in question was executed); *Franklin Lodge of Elks*, 151 N.H. 565 (upholding a decision of the New Hampshire Sweepstakes Commission not to renew a gambling license due to a misdemeanor conviction of the applicant, notwithstanding the fact that the statutory amendments that were the grounds for the non-renewal were passed after the date of the conviction); *Goldman*, 151 N.H. 770 (disallowing a request for college expenses in a child support proceeding pursuant to a statute that had been passed following commencement of that proceeding); *Pepin v. Beaulieu*, 102 N.H.

84 (1959) (awarding interest on a verdict pursuant to a statute that had been enacted following commencement of the underlying case); *Wallace v. Stearns*, 96 N.H. 367 (1957) (allowing a plaintiff to exercise a right of partition pursuant to a statute that was enacted after a prior judgment disallowing the partition).

Verizon has no vested property right in having RSA 365:29 continue on as it was prior to the August 31, 2008 amendment. And because it simply provides a procedure for customers to recoup charges that have been assessed illegally and does not punish utilities beyond that for assessing improper charges, RSA 365:29 is clearly remedial in nature and not punitive. Thus, even if it were "retrospective" to apply the amended version of RSA 365:29 here, such an application is perfectly permissible under the state constitution and consistent with well-settled New Hampshire Supreme Court precedent. Global Crossing is therefore entitled, at a minimum under the amended version of RSA 365:29, to restitution going back two years before the Commission's order of notice in this proceeding.

C. Aside from RSA 365:29, the Commission Has Authority to Prevent the Unjust Enrichment of Verizon.

If, notwithstanding the discussion above, RSA 365:29 were somehow determined to require restitution to Global Crossing going back only two years prior to the date of its petition to intervene (i.e., to September 24, 2006), it would deprive Global Crossing of restitution for CCL charges paid over a significant period. This would unjustly enrich Verizon by allowing it to keep CCL charges that were billed and collected illegally, even after BayRing had filed its original complaint in this proceeding. Notwithstanding any limitations in RSA 365:29, the Commission has inherent authority to prevent this result.

The New Hampshire Supreme Court has held that the Commission has authority "inherent within its broad grant of power ... to award restitution if one has been unjustly

enriched at the expense of another." *Granite State Elec. Co.*, 120 N.H. 536, 539 (1980) (citing *Cohen v. Frank Developers*, Inc., 118 N.H. 512 (1978)); *see also Verizon New England Inc.*, 153 N.H. 50, 64 (2005) ("The PUC must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power."). The Commission may therefore award restitution to Global Crossing and other ratepayers going back to April 28, 2004, or to a prior date as necessary to avoid the unjust enrichment of Verizon.

III. Verizon Should Pay Interest on Illegally Collected CCL Charges Based, at a Minimum, on Its Cost of Capital.

Both the current and prior versions of RSA 365:29 require that utilities pay reparations to ratepayers who have been improperly billed "with interest from the date of the payment." Such interest should be calculated, at a minimum, based on Verizon's cost of capital. In *EnergyNorth Natural Gas Inc.*, DG 06-154, Order No. 24,752 (May 25, 2007), the Commission approved a settlement requiring that interest be based on cost of capital. In that case, the utility had overbilled customers by changing its methodology for measuring heat content without obtaining prior Commission approval. When it approved the settlement, the Commission noted that it "fully and fairly compensates customers for the direct effects of the Company's overbilling." *Id.* at 20.

Here, Verizon has similarly billed customers improperly for CCL charges for which it did not have Commission approval. Cases where a lesser interest rate, such as the prime rate, has been used typically do not involve any serious error on the part of the utility making reparation. *See, e.g., Granite State Elec. Co.*, 76 NH PUC 454 (1991) (requiring refunds to customers, with interest based on the prime rate, to reflect a wholesale rate case settlement). Because Verizon's infraction here is more similar to that in *EnergyNorth*, Verizon's cost of capital should, at a

minimum, be used to calculate interest so that the reparation fully and fairly compensates Verizon's customers for the effects of the overbilling.

IV. Conclusion

For the foregoing reasons, the Commission should require that Verizon make restitution to Global Crossing for damages for illegal CCL charges going back to April 28, 2004. The restitution should include interest based, at a minimum, on Verizon's cost of capital from the date of payment of the wrongly billed CCL charges.

Respectfully submitted,

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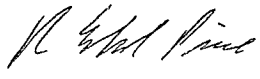
Certificate of Service

I hereby certify that, on the date written below, I caused the foregoing to be sent by electronic mail to the persons on the Commission's service list in this docket.



December 18, 2008

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