STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges	)	Docket DT 06-067

VERIZON NEW ENGLAND'S BRIEF
REGARDING CALCULATION OF REPARATIONS

I. Introduction

Pursuant to the agreement of the parties and Staff at the technical session in the above proceeding held on November 5, 2008, Verizon New England Inc. ("Verizon") files this brief addressing: (1) the interest rate(s) to be applied to any reparations awarded by the New Hampshire Public Utilities Commission ("Commission") to the petitioner and intervenors ("Competitive Carriers" or "CLECs") pursuant to RSA 365:29; and (2) the appropriate period for calculating any such reparations.[1]

Any interest the Commission awards on reparations ordered in this proceeding must be at a rate no greater than the rate for judgments set forth in RSA 336:1, II. In determining liability in this proceeding and in ordering Verizon to pay refunds or reparations to the CLECs under RSA 365:29, the Commission is acting in a judicial capacity, and its orders thus constitute judgments for the purpose of determining interest. Moreover, awarding interest at the statutory

[1] As the Commission is aware, Verizon has appealed to the New Hampshire Supreme Court the Commission's Orders Nos. 24,837 and 24,886, finding that Verizon was not authorized by its access tariff to charge the CLECs the carrier common line charge in the circumstances at issue in this docket. *See* New Hampshire Supreme Court Case No. 2008-0645. Verizon's position is that it properly billed the CCL charges and that no reparations or refunds of any sort are due to the CLECs. In submitting this brief, Verizon waives no such argument or any other argument applicable to its appeal.

rate for judgments and pre-judgment interest is consistent with the compensatory purpose of RSA 365:29 as well as Commission practice and precedent. Contrary to the assertions of the CLECs, the penalty provisions of Verizon's access tariff, NHPUC No. 85 ("Tariff 85" or "the Tariff") do not apply here because the Commission has determined in its Orders Nos. 24,837 and 24,886 in this proceeding that the charges at issue were not authorized by the Tariff. In any event, the penalty provisions of Tariff 85 do not apply here by their own terms.

With respect to the appropriate reparations period, RSA 365:29 is clear: a petitioner may recover reparation only for payments made within two years before the date it filed its petition. Accordingly, the reparations period for each CLEC is the two years immediately prior to the date on which that CLEC filed a petition for reparation or a petition to intervene in this docket. The CLECs' creative efforts to expand the reparations period have no basis in law and should be rejected. No provision of the statute entitles an intervenor to have its petition "relate back" to the date of an earlier petition filed by another carrier. Nor does the statute define the two-year reparations period from the date on which a carrier notifies the utility that it disputes a billed amount, as apparently claimed by BayRing. Finally, the recent amendment of the statue allowing a petitioner to reach back two years from the date the Commission enters a notice of hearing in a proceeding, relied on by Global Crossing, cannot be applied here without violating the prohibition on retrospective laws in the New Hampshire Constitution.

II. Procedural History

Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") filed a petition on April 28, 2006 requesting that the Commission investigate Verizon's assessment of switched access charges, including carrier common line ("CCL") access charges, on calls originating on BayRing's network and terminating on a wireless carrier's network. *See* Order

No. 24,705 at 1 (November 29, 2006). BayRing asserted that Verizon could only apply these charges under Tariff 85 to calls involving a Verizon end-user via Verizon's local loop, and not to calls between non-Verizon carriers. *Id.* Bayring took the position that Verizon has no tariff authorizing access charges for the traffic at issue in this case. Direct Testimony of Darren Winslow at 8; Tr. Day 1 (Phase I) at 80. Verizon maintained its entitlement to assess these charges under the provisions of Tariff 85. Order No. 24,837 at 20 (March 21, 2008).

AT&T Communications of New England, Inc. ("AT&T") subsequently filed a petition to intervene on July 20, 2006, and One Communications filed its petition to intervene on July 24, 2006. Sprint Communications Company and Sprint Spectrum ("Sprint") filed a petition to intervene on January 8, 2007. At the request of the CLECs, the Commission subsequently expanded the case to include calls made or received by either wireless or wireline end users of carriers other than Verizon that do not employ a Verizon local loop. Order No. 24,837 at 4.

The Commission issued Order No. 24,837 on March 21, 2008 determining that Verizon was imposing charges not permitted by Tariff 85, and concluding that the Company owed restitution to certain customers. The Commission stated that:

> [W]e interpret Verizon's access tariff to permit the imposition of CCL charges only in those instances when a carrier uses CCL services. We therefore find that Verizon is, and has been, impermissibly imposing a CCL access charge in those instances where neither Verizon's common line nor a Verizon end-user is involved for either terminating or originating calls.

Order No. 24,837 at 32. The Commission further stated that it would proceed to Phase II "to determine the extent to which restitution should be made" and noted its statutory authority to order reparations under RSA 365:29. Verizon sought rehearing on March 28, 2008. On April 21, 2008, Northern New England Telephone Operations LLC, d/b/a FairPoint Communications ("FairPoint") moved to intervene. The Commission denied Verizon's motion but allowed

FairPoint's in Order No. 24,886 dated August 8, 2008. The Commission subsequently clarified that in Phase II of these proceedings it "will determine how much, if any, is owed in reparations to the affected carriers." Order No. 24,913 at 8 (Oct. 31, 2008).

Global Crossing Telecommunications, Inc. ("Global Crossing") and XO Communications, Inc. filed petitions to intervene in Phase II on September 25 and September 29, 2008, respectively. The Commission allowed those in Order No. 24,913. Following the technical session on November 5, 2008, Staff directed the parties to submit briefs and their calculations of the disputed charges by December 19, 2008. Letter from Lynn Fabrizio to Debra Howland (November 5, 2008). Verizon is filing today its calculations of the charges it has billed each of the CLECs for calls that do not use a Verizon local loop, beginning in August 2003 for Bayring and April 2004 for the other CLECs.[2]

III. Argument

A. Any Interest On Refunds Or Reparations The Commission Awards In This Proceeding Must Be Based On The Statutory Rate For Judgments In RSA 336:1, II.

RSA 365:29 authorizes the Commission to grant reparations in appropriate cases, with interest, but it does not specify an interest rate. In the version applicable to this proceeding, RSA 365:29 provides that:

> Whenever a 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

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[2] Verizon's Calculations of Disputed Charges do not show the amounts that the CLECs have paid on those billings, which are to be submitted in January, 2009. In addition, the time periods were selected at the technical session in order to provide the Commission with data for all reparations periods claimed by the CLECs. They do not represent Verizon's position on the time periods that apply to the CLECs' claims for reparations, which Verizon demonstrates below are shorter than the time covered in the Calculations.

> 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 filing the petition for reparation.[3]

In the absence of an interest rate specified in RSA 365:29, any interest on any reparations awarded in this proceeding must be calculated under RSA 336:1, II, which establishes the interest rate on judgments in New Hampshire, because the Commission has acted in a judicial capacity in making its determination in this proceeding and in granting any reparations, so that any order for reparations must be treated as a judgment for the purpose of determining interest. Even if the Commission were not required to apply the statutory rate for judgments (which it is), the Commission should nevertheless apply that interest rate here, at most, because that rate would fully compensate the CLECs for the time-value of their alleged overpayments to Verizon, consistent with the compensatory purpose of RSA 365:29. Moreover, such a decision would be consistent with the Commission's longstanding precedent of providing for interest on refunds at a rate equal to the statutory rate for judgments.

1. The Commission must apply the annual simple rate of interest on judgments in RSA 336:1, II because the Commission is acting in a judicial capacity in this proceeding in awarding any reparations.

RSA 336:1, II establishes a simple default rate for interest on judgments:

> The annual simple rate of interest on judgments, including prejudgment interest, shall be a rate determined by the state treasurer as the prevailing discount rate of interest on 26-week United States Treasury bills at the last auction thereof preceding the last day of September in each year, plus 2 percentage points, rounded to the nearest tenth of a percentage point. On or before the first day of December in each year, the state treasurer shall determine the rate and transmit it to the director of the administrative office of the courts. As established, the rate shall be in effect beginning the

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[3] The legislature recently amended RSA 365:29 to authorize the Commission to order reparations covering "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 (Supp. 2008). These amendments took effect on August 31, 2008, over two years after the Commission opened this docket and over five months after it issued Order 24,837.

> first day of the following January through the last day of December in each year.

RSA 336:1, II (Supp. 2008). It is well-established that RSA 336:1 governs the calculation of interest rates on judgments and prejudgments in "civil proceedings at equity or in law" under RSA 524:1-b. *See, e.g., United Student Aid Funds, Inc. v. Prodanis, Inc.*, Civil No. 07-214-JL, Opinion No. 2008 DNH 108 at p. 10 (D.N.H. May 23, 2008) (applying RSA 336:1 in conjunction with RSA 524:1b); *Singer Asset Fin. v. Winer*, 156 N.H. 458, 477 (2007) (same); *Metropolitan Prop. & Liabil. Ins. Co. v. Ralph*, 138 N.H. 378, 385 (same) ("[A]n examination of the legislative history of RSA 524:1-b and RSA 336:1 reveals that the intent of the legislature was to calculate interest on a simple basis under RSA 336:1.").

RSA 336:1, II is equally applicable to any order for reparations entered by the Commission in this proceeding, which for all intents and purposes would be a judgment ordering one party to pay money to the others. The New Hampshire Supreme Court has held that "[i]n awarding reparation, the PUC performs a judicial function." *Appeal of Granite State Electric Co.*, 120 N.H. 536, 539 (1980) (Commission had authority to order electric company to pay refunds on rates which had been approved by the Commission in a non-final order but later reduced following appeal). In that case, the court also noted that the commission is "endowed with 'important judicial duties,'" (citation omitted), and held that, "[a] refund order [involving utility rates] is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired." *Id.* 539-540 (emphasis added). The court also held that, "the payment of such interest [on Commission-ordered refunds] is consistent with the statutory framework for payment of interest in civil proceedings at equity or in law." *Id.* at 541 (citing RSA 365:29 and RSA 524:1a, 1b).

Likewise, the First Circuit has held that in making decisions such as determining whether a contract constitutes a special contract (pursuant to RSA 378:18) and in denying an intervenor's motion for a hearing, "the Commissioners perform tasks functionally comparable to judges: they review and decide facts, apply relevant law to those facts, resolve disputes, and issue written orders explaining their decisions." *Destek Group v. N.H. Pub. Util. Comm'n*, 318 F.3d 32, 41 (1st Cir. 2003) (NH PUC commissioners were entitled to absolute immunity from claims arising from the performance of "their 'quasi-judicial' function.").

Of course, the Commission has performed all of these judicial functions in reviewing the terms of the Tariff and the history of CCL charges by Verizon, applying the law to those facts and entering its written orders in Phase I of this proceeding. The Commission will perform those functions again in determining in this Phase II the amount of reparations due, if any, and in entering any order for reparations. *Appeal of Granite State Elec. Co.*, 120 N.H at 539. Because the Commission performs a judicial function when ordering reparations, and because the Supreme Court has explicitly equated the payment of interest on Commission-ordered refunds to the payment of interest in civil proceedings pursuant to RSA 524:1-a and RSA 524:1-b, *Granite State Elec. Co.*, 120 N.H. at 539-541, an order for reparations in this docket is equivalent to a judgment and cannot carry an interest rate greater than that mandated by RSA 336:1, II.

2. **The Commission should apply an interest rate equal to the rate for judgments under RSA 336:1 to any reparation it grants, consistent with the Commission's longstanding practice of awarding interest at that rate on orders requiring refunds or restitution.**

The Commission historically has applied an interest rate equal to the statutory judgment rate when exercising its power to award restitution, evidencing the Commission's longstanding determination that such a rate provides full and just compensation in such circumstances. For example, in *Nelson v. Public Service Co. of NH*, 64 NH PUC 345 (1979), the Commission

ordered a utility to issue refunds to customers for improperly collected charges with interest added at 6% per year. *See also Nelson v. Public Service Co. of NH*, 64 NH PUC 169 (1979). At that time, the annual rate of interest on judgments pursuant to RSA 336:1 was set at 6% per annum. *See* RSA 336:1 (1966) (setting the rate at "six dollars on a hundred dollars for one year"). In 1987, the Commission ordered a utility to refund overcollected charges to utility customers with interest added at 10%, again equivalent to the then-prevailing rate of interest on judgments set forth in RSA 336:1. *Re Public Service Co. of N.H.*, 72 NH PUC 237, 263 (1987); *Re Public Service Co. of N.H.*, 72 NH PUC 316, 318 (1987); *see also* N.H.H.R. Jour. 914 (1981 Jan. Session) (amending the statute to raise the interest rate to 10% and noting that the interest rate in effect at the time had not changed since 1769); RSA 336:1, History (Supp. 2008).

These orders evince the well-established, if tacit, understanding of the Commission that the rate set forth in RSA 336:1 provides the appropriate compensation for the time-value of money whether it is applied to civil money judgments or to Commission orders for refunds, and that it is the proper measure of interest in both cases. Furthermore, in 1994, the Commission ordered Verizon's predecessor to revise a proposed late payment charge for residential customers from 18% to 10% on the grounds that "a maximum interest rate of 10% annually . . . would be consistent with the benchmark established in RSA 336:1." *New England Telephone Company*, 79 NH PUC 179 (1994). The Commission thus made explicit its practice of using RSA 336:1 as a touchstone for setting interest rates when the substantive statute does not set the amount.

Consistent with this precedent, the Commission should award interest on any reparations granted in this case at a rate equivalent to the statutory judgment rate -- independent of the Commission's obligation to apply that rate as described in Section III(A)(1) above. The manifest purpose of reparations under RSA 365:29 is compensatory -- to restore to a petitioner charges

that the Commission has found to be "illegal or unjustly discriminatory" -- as is the purpose of restitution, and the Commission should follow the same policy with respect to interest in either situation. Moreover, given that an award of interest by the Commission in all such instances "is consistent with the statutory framework for payment of interest in civil proceedings," *Granite State Elec. Co.*, 120 N.H. at 541, the Commission's policy of applying the statutory judgment rate is appropriate and should be followed here.

The rate under RSA 336:1, II is revised annually, and the then-current rate must be applied to each calendar year for which payment is due. *See, e.g., Linteau v. Gauthier*, 142 N.H. 460, 462 (1997) (applying different rates for 1994-1995 (10%) and 1996 (7.21%)); *see also United Student Aid Funds, Inc. v. Prodanis, Inc.*, Civil No. 07-214-JL, Opinion No. 2008 DNH 108 at p. 10 (D.N.H. May 23, 2008) (applying separate rates for damages accrued in 2007 (6.8%) and 2008 (6%)). Applying a single rate of interest to the entire reparations period "would not realistically reflect the economic market of our time." *Linteau*, 142 N.H. 461. "Accordingly, the intent of the legislature is to apply to each new year the then-current interest rate." *Id.* at 461-62. Thus, if the Commission exercises its discretion to order reparations pursuant to RSA 365:29, it must apply the relevant interest rates for each year of the reparations coverage period, which are: 3% (2004); 4% (2005); 5.7% (2006); 6.8% (2007); and 6% (2008).[4] The rate for 2009 is 3.5%.[5]

3. The penalty provisions applicable to the billing dispute resolution process in Tariff 85 do not apply here.

There is no merit to the position taken by some CLECs at the November 5 technical session that an interest rate purportedly set forth in Tariff 85 should apply here. The CLECs' claim in this case is that Tariff 85 does not authorize Verizon to assess the charges at issue here.

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[4] *See* http://www.courts.state.nh.us/sitewidelinks/interest.htm

[5] *Id.*

See Order No. 24,837 at 12 ("Bayring argued that ... the tariff does not permit Verizon to impose the disputed CCL charges"), at 16 (re One Comm), at 18 (re segTEL). And the Commission determined in Phase I that the Tariff does not apply here:

> [W]e interpret Verizon's access tariff to permit the imposition of CCL charges only in those instances when a carrier uses CCL services. We therefore find that Verizon is, and has been, impermissibly imposing a CCL access charge in those instances where neither Verizon's common line nor a Verizon end-user is involved for either terminating or originating calls.

Order No. 24,837 at 32. As the Commission explained in a subsequent order:

> 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.

Order No. 24,913 at 1 (Oct. 31, 2008, emphasis added). The penalty provisions of the Tariff cannot be applied to charges that the Commission has established fall outside the authority granted by the tariff.

Moreover, when interpreting the provisions of a utility's tariff, the Commission applies principals of statutory construction and contract interpretation and therefore applies the plain and ordinary meaning of the terms of the tariff. *See* Order No. 24, 387 at 25 (*citing Public Service Company of New Hampshire*, 79 NH PUC 688, 689 (1994); *City of Rochester v. Corpening*, 153 N.H. 571, 573 (2006)).[6] Here, the express terms of the penalty provisions of the Tariff, given their plan and ordinary meaning, make clear that the penalty provisions apply only to disputes resolved through the private dispute resolution process established in the Tariff, and cannot be applied to any reparations granted by the Commission in this proceeding.

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[6] *See also Edwards v. Ral Auto*, 156 N.H. 700, 706 (2008) (*citing Ryan James Realty v. Villages at Chester Condo. Assoc.*, 153 N.H. 194, 197 (2006)) (explaining principles of contractual interpretation); *Debenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793, 798 (2006) (explaining principles of statutory construction).

Section 4.1.8 of Tariff 85 establishes a detailed process for the private resolution by Verizon and its customer of billing disputes regarding tariffed services, without the participation of the Commission. A customer initiates a dispute by furnishing Verizon with "the account number under which the bill has been rendered, the date of the bill and the specific items on the bill being disputed." Tariff 85, Section 4.1.8(B). The date on which that data is provided is defined as the "first day of the dispute." *Id.* Verizon then investigates the claim. The Tariff defines the "date of resolution" of the claim as "the date on which *the Telephone Company* [*i.e.* Verizon] completes its investigation of the dispute, notifies the customer of the disposition and, if the billing dispute is resolved in favor of the customer, applies credit for the correct disputed amount [and] the disputed amount penalty as appropriate." *Id.* § 4.1.8(C) (emphasis added). The "disputed amount penalty" takes the form of a credit on the customer's bill (not a payment to the customer) that is calculated by multiplying the amount Verizon resolves in the customer's favor by a "penalty factor" of 0.0005 per day (18.25% per annum), either from the date the customer paid the disputed amount or the first day of the dispute through the "date of resolution," depending on whether the customer gave notice of the dispute within three months of the payment date. Id. §§ 4.1.8(E), (F), (H), (I).

Under the plain and ordinary meaning of these terms, the "disputed amount penalty" and the "penalty factor" apply only where a billing dispute has been resolved in accordance with the private, abbreviated dispute resolution procedures described in § 4.1.8, and only for the short duration of that process. The "disputed amount penalty" applies only where a CLEC customer has filed a dispute *with Verizon* by providing the data required by the Tariff and *Verizon* has resolved that dispute in the customer's favor. Even if some of the CLECs had initiated the dispute resolution process in accordance with the terms of the Tariff, there is no evidence that

Verizon resolved any such dispute in favor of any CLEC. Nothing in the Tariff implies that the "disputed amount penalty" can be applied in the guise of "interest" on reparations or other restitution ordered by the Commission. The Tariff plainly refers to a resolution of the dispute by "the Telephone Company" as the trigger for applying a disputed amount penalty, and the CLECs cannot substitute "the Commission" for "the Telephone Company."

Moreover, the "disputed amount penalty" is a penalty, not interest, and the 18% annual penalty rate is many times greater than any interest rate the Legislature has deemed appropriate (through RSA 336:1, II) to compensate a party for the time-value of money over the years at issue here. RSA 365:29 is not a penal statute, and the tariffed penalty rate cannot be levied in conjunction with the purely compensatory remedy of reparations. Finally, the penalty accrues under the Tariff only during the relatively short time period needed for Verizon to complete its investigation of the customer's claim, the timing of which is within the control of Verizon. No term of the Tariff could justify applying that same high penalty rate to the much longer time period mandated by RSA 365:29, which is extended even further by the formal and lengthy procedures required of the Commission in resolving disputes, none of which is within Verizon's control.

Indeed, the time periods for which the penalty applies under the Tariff are entirely incompatible with RSA 365:29. The statute provides for reparation for payments made within two years before the petitioner files its petition for reparations with the Commission, "with interest from the date of the payment." In contrast, the penalty under the Tariff accrues from the date of payment only for payments made within three months, not two years, before the dispute is filed. For earlier payments, the penalty begins to accrue only on the date the customer files its dispute with Verizon, not on the (earlier) date of payment, as RSA 365:29 would have it. *See*

Tariff 85, § 4.1.8(B) and (H). The CLECs cannot cherry-pick the most appealing elements from two incompatible authorities – the two-year retroactive reparations period from RSA 365:29 coupled with the 18% penalty rate from Tariff 85 – to achieve the most advantageous result.

Simply put, the billing dispute provisions of the Tariff do not contemplate complaints brought before the Commission pursuant to RSA 365:29 and were never intended to apply in this context.

B. A CLEC May Be Granted Reparation Only For Payments Made To Verizon After The Date Two Years Before That CLEC Filed Its Petition For Reparation In This Proceeding.

In interpreting RSA 365:29, the Commission must "ascribe the plain and ordinary meaning to the words used" and "interpret legislative intent from the statute as written." *Upton v. Town of Hopkinton*, 157 N.H. 115, 118-19 (2008). RSA 365:29 states, in part, that:

> [T]he commission may order the public utility which collected the [charge] to make due reparation to ***the person*** who has paid 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 filing ***the petition for reparation***.

RSA 365:29 (1995) (emphases added). By its plain language, RSA 365:29 is clearly intended to apply on an individual basis only and grants no collective rights. It confers on the Commission authority to award reparation to "the person who has paid," in the singular, and does not refer to "the people" or even to "any person." Thus, under the plain meaning of the statute's terms, "the person" means the person who made complaint to the Commission, and an order of reparation may cover only the payments that person made within two years before that person filed its petition for reparation.

Nothing in the statute indicates the slightest intent by the Legislature to allow a person to recover reparations for payments made more than two years before that person seeks relief from the Commission, merely because another person had earlier filed a petition seeking reparation on

similar grounds. Of course, the Commission has discretion to allow a person to intervene in an existing proceeding in appropriate circumstances and in the interests of administrative efficiency, but that discretion provides no authority to rewrite RSA 365:29 to allow an intervenor to piggy-back its claim on that of the original petitioner's and thereby expand the intervenor's substantive rights beyond the two-year statutory calculation period. Accordingly, any reparation to a CLEC in this proceeding is restricted by statute to payments made by the CLEC subsequent to the date two years before that CLEC filed its petition for reparations in this proceeding (in the case of Bayring) or its petition to intervene.

From early in this proceeding, the Commission has properly treated petitions for intervention as separate petitions for reparations in this matter. Specifically, the Commission stated that "[f]or purposes of Phase II, we will treat petitions for intervention in this docket as petitions for reparation under RSA 365:29, upon request of the intervenor." Order No. 24,705 at 6 (November 29, 2006).[7] There is no basis for revising that decision now. Based on the date of each CLEC's petition in this matter, the reparations period for each CLEC runs from the dates listed below through March 31, 2008, when Verizon ceased billing the CCL charges to the CLECs and transferred its wholesale accounts receivable in New Hampshire to FairPoint. Any payments of the disputed CCL charges the CLECs made after that date went to FairPoint.

BayRing	April 28, 2004
AT&T	July 20, 2004
One Communications	July 21, 2004
Sprint	January 5, 2005
Global Crossing	September 25, 2006
XO Communications	September 29, 2006

[7] Moreover, Global Crossing and XO specifically requested that their respective petitions for intervention be treated as petitions for reparation under RSA 365:29.

Any order of reparation to a CLEC calculated from a date earlier than the date for that CLEC listed here would contravene the provisions of RSA 365:29.

1. BayRing is Not Entitled to Reparations Prior to April 2004, Two Years Prior to the Filing of Its April 28, 2006 Petition.

BayRing asserted at the November 5 technical session that its reparation period should date back not from the date of its petition initiating this action (April 28, 2006) but from seven months earlier (September of 2005) when Bayring alleges it first disputed to Verizon the CCL charges at issue in this matter. *See* Petition of Freedom Ring Communications, LLC d/b/a BayRing Communications, Attachment A.

BayRing's argument has no merit. RSA 365:29 could not be clearer. It states that an order for reparations "shall cover only payments made within 2 years before the date of filing ***the petition for reparation***." (Emphasis added.) It does not mention an earlier date, such as the date the petitioner first notified the utility that it disputed an amount on the utility's bill, and the statutory phrase "petition for reparation" can only refer to the petition filed with the Commission, not a notice of a dispute to Verizon. Consequently, no reparations are available to BayRing for payments made to Verizon prior to April 28, 2004, two years before the date of BayRing's petition. Nor can BayRing appeal here to the Commission's alleged "inherent authority" to order restitution in appropriate cases as a means of recovering payments in addition to those authorized by the statute. Exercising the Commission's inherent authority in that manner would effectively read the final sentence of RSA 365:29 right out of the statute. Whatever the Commission's inherent authority, it does not extend to circumvention of clear statutory directives.

2. The August 2008, amendment of RSA 365:29 cannot be applied retrospectively to increase the amount of the intervenors' reparations and Verizon's liabilities.

Throughout the first two and a half years that this docket has been open, RSA 365:29 provided that the Commission could award reparations only for "payments made within 2 years before the date of filing the petition for reparation." RSA 365:29 (1995). Thus, there is only one date from which to calculate the reparations period, and that is the date on which the petitioner filed its petition with the Commission. *See In re Pub. Svc. Co. of N.H.*, 86 NH PUC 407, 410 (Oct. 24, 2002) (two-year period ends on date of petition). Effective August 31, 2008, more than two years after the Commission issued its Order of Notice in this docket (June 23, 2006) and more than five months after the Commission issued Order No. 24,837 concluding that Verizon had impermissibly imposed CCL access charges without authority of Tariff 85, the legislature amended RSA 365:29 to permit the Commission to order reparations for payments made within two 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 (Supp. 2008).

Seeking to capitalize on this amendment, intervenor Global Crossing has argued that it should be entitled to reparations for any payments it made since June 23, 2004 – two years prior to the Commission's Order of Notice -- even though Global Crossing did not participate in Phase I of this case and did not petition to intervene until September 2008. *See* Objection of Global Crossing Telecommunications, Inc. to Verizon's Motion to Strike (October 30, 2008) ("Objection of Global").[8] Thus, Global Crossing seeks a reparation period more than twice as

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[8] Even if the amended statute were to apply here, which it cannot, Global Crossing has misapplied its terms. The revised statute does not key the reparations period from the date of the Commission's Order of Notice but from the date of its "notice of hearing." The Commission did not issue a notice of a hearing in this proceeding until June 7, 2007. *See* letter from Debra Howland to the parties dated

long as it would have been entitled to had it petitioned to intervene *earlier*, in July 2008, before it actually filed and before the effective date of the amendment.

Application of RSA 365:29 as amended to this matter would effectuate a retrospective application of a statute in violation of Verizon's rights under the New Hampshire Constitution. "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. CONST., pt. I, art. 23. A retrospective law is one which "takes away or impairs vested rights, acquired under existing laws, or ***creates a new obligation***, imposes a new duty, or attaches a new disability, ***in respect to transactions or considerations already past.***" *Opinion of the Justices*, 131 N.H. 664, 651 (1989) (emphases added); *see also North Am. Mfg., Inc. v. Crown Int'l, Inc.*, 115 N.H. 114, 116 (1975). The court has explained as follows:

> Our State Constitution forbids the promulgation or application of retrospective laws, deeming them "highly injurious, oppressive, and unjust," and ordering that "[n]o such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." The underlying purpose of this prohibition is to prevent the legislature from interfering with the expectations of persons as to the legal significance of their actions taken prior to the enactment of a law.

Iandolo v. Powell, 134 N.H. 630, 632 (1991) (citation and quotations omitted). Thus, statutes are "presumptively intended to operate prospectively." *Appeal of Silk*, 156 N.H. 539, 542 (2007). A recently amended or enacted statute will apply to cases already commenced but not yet decided when the amendment takes effect, but only when the statute is "remedial or procedural" in nature. *Gelinas v. Mackey*, 123 N.H. 690, 695 (1983). However, if the "***application of a new law would adversely affect an individual's substantive rights, . . . it may not be applied retroactively.***" *Silk*, 156 N.H. at 542; *see Gelinas*, 123 N.H. at 695.

Changes in statutes that increase damage limitations affect parties' substantive rights.

June 7, 2007, scheduling hearings for July 10-12, 2007. Consequently, under Global Crossing's theory, its reparations period would begin only on June 7, 2005, not on June 23, 2004 as claimed.

They can be enforced only prospectively and can apply only to causes of actions arising after the effective date of the statute. *LaBarre v. Daneault*, 123 N.H. 267 (1983). In *Labarre*, the court held that a statute doubling the amount of damages previously available for an accident caused by a drunk driver would not be enforced retrospectively:

> [C]ourts refuse to apply a statute retrospectively if it imposes a liability not existing at the time of its passage, or affects an existing liability to the detriment of the defendant. ... Most jurisdictions hold that statutory increases in damage limitations are changes in substantive right and not mere remedial changes; and, absent legislative intent to the contrary, courts apply these changes only prospectively.

LaBarre, 123 N.H. 267 at 271-72; *see also McKinley v. Cummings*, 123 N.H. 282, 283 (1983) ("The defendant's liability is significantly increased, which is a change of a substantive nature"). Where a new law imposes new liabilities upon a defendant or increases existing liabilities, it can only be applied to causes of action arising after its effective date. *See LaBarre*, 123 N.H. at 272; *Silk*, 156 N.H. at 542-43.

The New Hampshire Supreme Court has found the retrospective application of other legislative acts changing the terms of a party's underlying liability unconstitutional because they affected the party's substantive rights. *See, e.g., Geldhof v. Penwood Associates*, 119 N.H. 754 (1979) (statute requiring payment of interest on security deposits could not be applied to lease agreements executed prior to the effective date of the statute); *Mihoy v. Proulx,* 113 N.H. 698, 700-701(1973) (application of an increased statutory limit for wrongful death actions from $60,000 to $120,000 would "clearly enlarge the defendant's liability retrospectively" and therefore would be unconstitutional). S*ee also Norton v. Patten*, 125 N.H. 413, 417 (1984) ("Where a law affects substantive rights and liabilities, it is presumed to apply only to future causes of action unless there is some evidence of legislative intent that the statute be applied retrospectively.")

RSA 365:29 caps the amount the Commission can order a utility to pay to a customer for reparation, by limiting that amount to payments within a defined time period. By enlarging that time period (in Global Crossing's view), the amendment to RSA 365:29 increased the damage limitations the statute had previously imposed on a customer seeking reparations from a utility. Retrospective application of that amendment here would significantly increase Verizon's potential liability to the intervenors (and thus "affect[] an existing liability to the detriment of the defendant") long after Verizon ceased billing the disputed CCL charges in March of 2008 and thus long after the intervenors' causes of action ceased to accrue.[9] Application of the amended statute to this proceeding would thus constitute a significant change in Verizon's substantive rights (and the rights of the intervenors), not a mere remedial change, and is prohibited by the New Hampshire Constitution and case law.

Global Crossing argues that there is evidence of legislative intent to apply the amendment to RSA 365:29 retrospectively to claims that had accrued prior to its effective date, citing a statement in the legislative history that the amendment was intended to "strengthen the Commission's ability to handle a situation where a rogue utility *may be overcharging* a consumer or a particular customer." *See* Objection of Global at 6 (emphasis added). That statement, however, shows no such intent. It doesn't relate to RSA 365:29 but to the amended civil penalty provisions of RSA 365:41 and 42. *See* testimony of Sen. Deborah Reynolds, Hearing of Senate Committee on Energy, Environment and Economic Development, October 16,

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[9] For example, under the prior incarnation of RSA 365:29, the Commission had authority to award reparation to Global Crossing for payments made to Verizon after September 25, 2006, which was two years before Global Crossing filed its petition to intervene. Under Global Crossing's reading and application of the amendment, however, Verizon would be exposed to reparation for payments made by Global Crossing at any time since June 23, 2004 (two years prior to the Commission's order of notice). Application of the amendment as Global Crossing seeks would thus expose Verizon to additional liability equal to the total amount of the payments made by Global Crossing during the 27-month period from June of 2004 to September, 2006.

2007 at 2-3. Furthermore, the stated desire to strengthen the Commission's ability to respond when a utility "may be overcharging" indicates that the amendment of the civil penalty provisions was intended to apply only to claims accruing ***at the time the amendment took effect***, not to claims that had ceased to accrue, such as those at issue here.

Moreover, RSA 365:29 is not a statute of limitations, which sets a time limit for suing in a civil action based on the date a claim accrued. *See generally Singer*, 156 N.H. at 477-78. A statute of limitations addresses only the time period in which a remedy is available to a potential plaintiff, and not the amount that the plaintiff is entitled to recover from a defendant. Accordingly, such statutes have been labeled "remedial" (as in, related to a remedy), and changes thereto may be applied retrospectively. *See, e.g., State v. Preston*, 119 N.H. 877, 880 (1979). By contrast, the amendment to RSA 365:29 is substantive, not "remedial" or "procedural," because it directly affects the amount of the utility's liability, as demonstrated above.

IV. Conclusion

For the reasons set forth above, the Commission should not award interest on any amounts awarded as reparations at a rate greater than that authorized by RSA 336:1, and should not order reparation for any CLEC for any period starting prior to the date two years before that CLEC filed its petition in this docket.

Respectfully submitted,

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Certificate of Service

I hereby certify that on December 19th, 2008, a copy of the foregoing Brief has been forwarded to the parties listed on the Commission's service list in this docket.

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