STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

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

REPLY BRIEF OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

Global Crossing Telecommunications, Inc. ("Global Crossing") submits this reply brief in the above-captioned proceeding pursuant to the schedule established during the technical session held on November 5, 2008.[1]

In their first round of briefs in Phase II of this proceeding, the parties addressed: (1) how far back Verizon should be required to pay reparations to the complainant and intervenors 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 those reparations should be calculated. There is widespread agreement among AT&T, BayRing, Global Crossing, One Communications and Sprint that Verizon must pay reparations going back at least to April 28, 2004. AT&T, BayRing, Global Crossing and One Communications also agree that interest on those reparations should be at the rate contained in Tariff No. 85 or one approximating Verizon's cost of capital. These issues are addressed further below.

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1 *See* Letter from Lynn Frabrizio to Debra Howland, DT 06-067, Nov. 5, 2008.

I. Verizon Should Pay Reparations Going Back at Least to April 28, 2004.

As AT&T, Global Crossing, One Communications and Sprint explain in their briefs, reparations must be paid to all intervenors in this proceeding for a uniform period going back two years from the date of BayRing's April 28, 2006 complaint — i.e., to April 28, 2004.[2] This is required by the versions of RSA 365:29 in effect both before and after the August 31, 2008 amendments to the statute. Verizon, however, wishing to minimize reparations to customers for its illegal CCL charges, argues that the two-year period in RSA 365:29 should be different for each customer based on when that customer filed its complaint or intervention petition.[3] Because RSA 365:29 does not mention separate reparations periods for different customers, the result Verizon seeks would require language to be read into the statute that is not there.

Sprint points out that this would contravene the requirement in New Hampshire law that statutes "be given their plain and ordinary meaning."[4] One Communications correctly notes that tying the claim period under RSA 365:29 to the date of each customer's petition "would defeat the purpose of the statute — to make whole customers that have paid illegal charges to public utilities."[5] One Communications also cites to instances where the Commission has approved refunds under RSA 365:29 without indicating that the recipients had each filed a petition.[6] And

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2 *See* AT&T Phase 2 Brief, Dec. 19, 2008, at 4-7 ("AT&T Brief"); Brief of Global Crossing Telecommunications, Inc., Dec. 18, 2008, at 3-4 ("Global Crossing Brief"); One Communications' Memorandum Regarding Claim Period and Interest, Dec. 18, 2008, at 2-4 ("One Communications Brief"); Brief of Sprint, Dec. 19, 2008, at 1-5 ("Sprint Brief").

3 *See* Verizon New England's Brief Regarding Calculation of Reparations, Dec. 19, 2008, at 13-14 ("Verizon Brief").

4 Sprint Brief at 3.

5 One Communications Brief at 3.

6 *See id.*

AT&T correctly notes that allowing Verizon to refund CCL charges to different customers for different time periods would result in illegal rate discrimination under RSA 387:10.[7]

BayRing and Global Crossing also point out in their briefs that, aside from RSA 365:29, the Commission has inherent authority to prevent the unjust enrichment of utilities such as Verizon.[8] As a result of this authority, the Commission may order Verizon to make restitution for illegally collected CCL charges going back for the entire period during which Verizon collected those charges. It is therefore unnecessary for the Commission to reach the issues of which version of RSA 365:29 applies and whether restitution should be paid going back two years from the date of the complaint or from the date of the order of notice. At the very least, the Commission's authority to prevent unjust enrichment ensures that reparations should go back to April 28, 2004 for all intervenors.

Even if the Commission does not agree that restitution to all affected customers must go back two years from the date of BayRing's complaint, then, as Global Crossing and One Communications point out in their briefs, RSA 365:29 at a minimum requires restitution to go back two years from the date of the Commission's June 23, 2006 order of notice in this proceeding — i.e., to June 23, 2004.[9] Verizon argues that use of the current version of the

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7 *See* AT&T Brief at 2, 4.

8 *See* Brief of Freedom Ring Communications, LLC d/b/a BayRing Communications (Reparations Period and Interest Rate), Dec. 19, 2008, at 6-9 ("BayRing Brief"); Global Crossing Brief at 7-8. Verizon disputes the existence of this inherent authority. *See* Verizon Brief at 15. However, Verizon cites nothing in support of its contention and ignores, in this context, the clear ruling in *Granite State Elec. Co.*, 120 N.H. 536, 539 (1980), 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." *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."); *Granite State Gas Transmission, Inc. v. New Hampshire*, 105 N.H. 454, 457 (1964) (stating that the Commission has "authority to prevent unreasonable prejudice or disadvantage to customers").

9 Verizon argues in a footnote that even if the current version of RSA 365:29 applies to this case, it only requires restitution going back two years from the June 7, 2007 letter from Debra Howland

statute, as amended on August 31, 2008, would be an impermissible "retrospective" application of the law.[10] That is incorrect. Because Global Crossing's September 24, 2008 intervention petition was filed after the amendments to RSA 365:29 took effect, it would not be retrospective to apply the new version of the statute to Global Crossing's petition.[11] Indeed, because there has been no order yet in this proceeding awarding reparations, any application of the current version of RSA 365:29 here would be prospective and not retrospective.

Moreover, as discussed at length in the briefs of Global Crossing and One Communications, even if it is considered "retrospective" to apply the current version of RSA 365:29 to the instant case, such an application would be entirely consistent with Commission and New Hampshire Supreme Court precedent.[12] Verizon notes, correctly, that new versions of statutes may apply retrospectively when they are remedial or procedural in nature but not if they affect substantive rights.[13] But it goes on to conclude, incorrectly, that Verizon has some substantive right at issue because application of the current version of RSA 365:29 in this case

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to the parties in this proceeding scheduling hearings, and not from the Commission's June 23, 2006 order of notice. *See* Verizon Brief at 16-17 n.8. This would tie the reparations period to an administrative letter issued more than a year after commencement of this proceeding, as opposed to the Commission's original notice establishing the proceeding and informing Verizon that its CCL charges could be unlawful. This would clearly be inconsistent with the language of RSA 365:29, as well as its purpose of preventing the unjust enrichment of utilities.

10 *See* Verizon Brief at 17-20.

11 *See* Global Crossing Brief at 5. Verizon does not explain how application of the version of RSA 365:29 that became effective on August 31, 2008 to Global Crossing's September 24, 2008 intervention petition is "retrospective." Verizon simply focuses on the fact that Phase I of this proceeding began before the current version of the statute took effect. *See* Verizon Brief at 16. But if Verizon is correct that each party's intervention petition is the relevant petition before which the two-year reparations period under RSA 365:29 runs, *see id.* at 13-14, it is inconsistent to argue that application of the version of the statute in effect at the time such petition is filed is somehow "retrospective."

12 *See* Global Crossing Brief at 5-7; One Communications Brief at 5-7.

13 Verizon Brief at 17.

would increase the amount of reparations it owes.[14] There are two problems with this argument. First, Verizon has no vested right not to pay back monies it collected illegally for any period.[15] Second, according to Verizon's argument, if a party's liability would increase as a result of retrospective application of a statute, then the right at issue is *ipso facto* substantive. This argument is circular and, if true, would render meaningless the New Hampshire Supreme Court's remedial-substantive distinction.[16] The cases cited on page 18 of Verizon's brief do not support this outcome.[17]

II. Interest Should Be Based, at a Minimum, on Verizon's Cost of Capital.

In its brief, Verizon does not deny that RSA 365:29 requires reparations to be made with interest from the date of payment, but it says that the interest rate for civil judgments referred to in RSA 336:1(II) should apply.[18] In support of this proposition, Verizon argues that the Commission (1) performs a judicial function in ordering reparations and (2) has assessed interest

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14 *Id.* at 17-20. Verizon admits that "RSA 365:29 is not a penal statute," *id.* at 12, and that the "manifest purpose of reparations under RSA 365:29 is compensatory," *id.* at 8. These admissions are inconsistent with Verizon's position that RSA 365:29 cannot be applied retrospectively because it is not remedial.

15 Global Crossing Brief at 6; One Communications Brief at 6-7.

16 The New Hampshire Supreme Court has in several cases, cited by Global Crossing and One Communications, allowed the retrospective application of statutes. *See* Global Crossing Brief at 5-7; One Communications Brief at 5-7. Obviously, a party's liability had to increase as a result of the retrospective application of the statute in each of those cases, or the issue would never have been litigated. Verizon's argument is therefore contrary to logic as well as the Supreme Court's jurisprudence.

17 *LaBarre v. Daneault*, 123 N.H. 267 (1983), *McKinley v. Cummings*, 123 N.H. 282 (1983), *Geldof v. Penwood Assoc.*, 119 N.H. 754 (1979), and *Mihoy v. Proulx*, 113 N.H. 698 (1973), all involve statutes that created new liability which did not exist absent those statutes. The amendment to RSA 365:29 at issue here, however, simply modifies procedures for obtaining reparations to which parties were already entitled in the prior version of the statute and under legal principles relating to unjust enrichment that pre-exist the statute entirely. The other case Verizon cites on page 18, *Norton v. Patten*, 125 N.H. 413 (1984), actually supports an outcome opposite of what Verizon is arguing because the Court allowed a new statute to apply to a claim that arose before the statute was enacted.

18 *See* Verizon Brief at 4-9.

in some prior cases at a rate consistent with what RSA 336:1(II) would require in civil cases. The problem is that neither of these points, separately or together, restricts the Commission to the rate referred to in RSA 336:1(II) for reparations paid under RSA 365:29. RSA 365:29 does not specify an interest rate, and it is therefore within the Commission's discretion.[19]

In this case, consistent with the higher interest rate that has been applied where utilities assess charges without Commission approval[20] and the rate of .0005 per day specified in Tariff No. 85,[21] the Commission should require Verizon to pay interest at a rate that is at least equivalent to its cost of capital.[22] By assessing unlawful CCL charges, Verizon has been unjustly enriched with capital it has borrowed from the customers that paid those charges. It should therefore, in accordance with the unjust enrichment principles that underlie RSA 365:29, pay interest on the reparations it makes for unlawful CCL charges commensurate with the benefit it has received.[23]

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19 *See* AT&T Brief at 9.

20 *See* Global Crossing Brief at 8-9 (citing *EnergyNorth Natural Gas Inc.*, DG 06-154, Order No. 24,752 (May 25, 2007)).

21 *See* AT&T Brief at 7-11; BayRing Brief at 10-11; One Communications Brief at 7-8.

22 One Communications points out that Verizon has "advocated a cost of capital for wholesale services of 17.93%," which approximates the Tariff No. 85 rate of .0005 per day. One Communications Brief at 9 n.7.

23 *See* AT&T Brief at 10-11; One Communications Brief at 9. In *Re Public Service Co. of N.H.*, 72 NH PUC 237, 263 (1987), which Verizon cites on page 8 of its brief, the Commission ordered a refund to electric utility customers at an interest rate that Verizon claims was consistent with RSA 336:1. However, the utility in that case had filed tariff revisions and had begun charging customers the higher rates in those tariffs temporarily, under bond and subject to Commission proceedings to investigate the rates. Only after the Commission had investigated the new, bonded rates did it order the refund. The utility had not, as Verizon has here, charged customers over a period of years for a service it was not providing and in a manner not authorized by the Commission. Nor did the Commission in that case order the refund pursuant to RSA 365:29. The case is therefore inapposite.

III. Conclusion

For all of the foregoing reasons, the Commission should require Verizon to pay reparations for unlawful CCL charges going back at least to April 28, 2004, with interest based, at a minimum, on Verizon's cost of capital.

Respectfully submitted,

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January 8, 2009