STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Freedom Ring Communications, LLC d/b/a BayRing Communications — Complaint Against Verizon New Hampshire re: Access Charges	DT 06-067

ONE COMMUNICATIONS' REPLY MEMORANDUM REGARDING CLAIM PERIOD AND INTEREST

In its earlier memorandum dated December 19, 2008 ("One Communications Brief"), One Communications showed that the interest rate that the Commission should require Verizon New Hampshire to pay along with refunds of unlawfully billed carrier common line ("CCL") charges is the rate of $0.0005 per day that Verizon established as the "disputed amount penalty" under its own Tariff No. 85. That rate should apply both to disputed payments that fall within the parameters set by § 4.1.8 of the tariff, as well as to all other payments. One Communications also showed that the applicable period for One Communications' claims begins to run on April 28, 2004, the date two years prior to the date when BayRing filed its complaint in this action. That period applies irrespective of the amendment to RSA 365:29 that became effective in August 2008. Although there was not precise overlap among the positions taken by the other CLEC parties, BayRing, AT&T, Sprint, and Global Crossing, and by One Communications, the other CLEC parties' briefs were substantially consistent with and supported the showings made by One Communications.

Though Verizon and FairPoint attempted to refute the showings made by One Communications and the other CLECs, they failed to do so. In particular, Verizon's attempt to disavow the interest rate provision in the tariff upon which it absolutely and vigorously relied for its authority to impose the charges at issue should be rejected outright.

Therefore, the Commission should order Verizon to pay interest at the rate of $0.0005 per day, as set forth in Tariff No. 85, and should order Verizon to refund all CCL charges improperly imposed on calls in which no Verizon end-user or Verizon common line is involved, beginning on April 28, 2004, the date two years before BayRing filed its petition in this docket.

Discussion

I. The Commission Should Award Interest at the Rate of $0.0005 Per Day, the Rate Established by Tariff No. 85.

A. The Disputed Amount Penalty Is Applicable to the Refunds of the Charges at Issue.

1. Verizon Assessed the Charges Under Tariff No. 85 and the Dispute Arose Under Tariff No. 85.

The Commission should take no more than a nanosecond to dispatch Verizon's claim that the "disputed amount penalty" provisions under Tariff No. 85, § 4.1.8, do not apply because the Commission found that Tariff No. 85 does not apply to the charges at issue. Verizon New England's Brief Regarding Calculation of Reparations, December 19, 2008 ("Verizon Brief") at 9-13. The disputed payment penalty does apply, because Verizon imposed the CCL charges pursuant to Tariff No. 85, and the dispute involves charges purportedly assessed under the tariff. Tariff No. 85, § 4.1.8.A.

As the Commission has correctly noted, Verizon's contentions in this case all were based on the claim that Tariff No. 85 permitted Verizon to impose the CCL charges at issue. The

Commission pointed out that " . . . Verizon filed an answer disputing BayRing's complaint and contending that Tariff No. 85 provides that 'all switched access services will be subject to carrier common line access charges.'" Order Interpreting Tariff, Order No. 24,837, March 21, 2008, at 2. The Commission further noted, "Verizon contended that if CLECs avail themselves of Verizon's switched access services, they must pay the rates and charges set forth in Tariff No. 85, including CCL charges." *Id.* at 22.

The Commission's descriptions of Verizon's contentions are accurate. The case is full of statements by Verizon claiming that Tariff No. 85 gave it the right to impose the charges at issue. Examples include these statements in Verizon's post-hearing brief:

> This case, though it may appear factually complicated, centers on a matter of basic tariff interpretation and whether competitive providers must pay carrier common line charges to Verizon New Hampshire for the switched access services they receive when their calls traverse Verizon's network. Based on the plain meaning of Verizon's Tariff 85, competitive carriers like BayRing and AT&T are receiving switched access service as that term is used in Tariff 85, and thus Verizon is entitled to be paid for the service provided.

Verizon New Hampshire's Post-Hearing Brief, Sept. 10, 2007, at 1.

> Verizon's Tariff clearly identifies CCL as a switched access service rate category, Tariff 85 §§ 6.1.2.B.3, 30.5.1, which may be combined with other switched access services to provide a "complete switched access service." Tariff 85 § 6.1.2.D. And while switched access service components may be purchased separately from carrier common line access, the CCL charge plainly and unambiguously is to be billed for each and all of Verizon's switched access services. Tariff 85 §§ 5.1, 5.4.

Id. at 11.

> Ultimately, the language of Tariff 85 must control, and the Tariff quite simply authorizes the billing of CCL charges for all switched access services rendered by Verizon.

Id.

Other examples may be found in the pre-filed testimony of Verizon's witness, Peter Shepherd:

> Moreover, while switched access Tariff No. 85 provides for the TC's [CLEC's] use of Verizon NH facilities to originate or terminate the TC's toll services from or to a Verizon NH end-user, it does not require such use and is not limited to instances involving a Verizon NH end-user. That is precisely why such limitations are not documented in the tariff. In fact and practice, switched access is also applicable where Verizon NH is collaborating with another TC, ITC or other carrier to provide the TC, whose end-user originates a non-local call, with transmission and switching for the purposes of terminating non-local toll calls. This is switched access service pursuant to Tariff NHPUC No. 85, which applies according to Section 2.1 when carriers use Verizon NH's network to provide their toll services.

Testimony of Peter Shepherd on Behalf of Verizon New England Inc., D/B/A Verizon New Hampshire, March 9, 2007, at 10, lines 1-10.

> I submitted initial direct testimony on March 9, 2007 describing why the service at issue in this proceeding is switched access service provided pursuant to Verizon NH's tariff NHPUC No. 85 and not switched interconnection tandem transit service under tariff NHPUC No. 84. The testimony also explained how the provisions of NHPUC No. 85 have been properly applied in assessing a carrier common line charge on all switched access service provided under the tariff.

Rebuttal Testimony of Peter Shepherd on Behalf of Verizon New England Inc., D/B/A Verizon New Hampshire, April 20, 2007, at 1, lines 7-12. "Again the controlling authority is NHPUC No. 85." *Id.* at 12, line 17.

> As stated in the Commission's procedural orders, the issue to be determined in phase I involves the proper interpretation and application of Verizon NH's NHPUC No. 85 access services tariff. If the disputed calls involve the provision of switched access service, phase I will also determine if the tariff is being properly interpreted to apply switched access charges, including the CCL, for the types of calls disputed in BayRing's complaint. Whether the tariff is being properly interpreted and applied centers on language of the tariff and whether such application is consistent with the underlying rate design establishing the tariff.

Id. at 22, lines 8-15.

Thus, Verizon imposed the charges at issue pursuant to Tariff No. 85, and throughout the case invoked Tariff No. 85 as the authority to which the Commission should look in deciding the case. The Commission should not now allow Verizon to make a 180 degree about-face and

contend that Tariff No. 85 is not the controlling authority for interest on refunds of overcharges levied under the auspices of that tariff.

Of course, the Commission concluded that Tariff No. 85 did not permit Verizon to impose the CCL charges at issue here.

> In summary, based on our review of the tariff language and the record developed in this proceeding, we 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 Interpreting Tariff, at 32. But that in no way detracts from the fact that the dispute clearly arose under the tariff and concerned charges that Verizon improperly billed pursuant to the tariff. To arrive at its conclusion, the Commission "interpreted" the tariff. The "disputed payment penalty" under that tariff therefore applies.

2. The Disputed Amount Penalty Should Not Apply Only When Verizon Says it Does.

The Commission also should reject Verizon's contention that "The 'disputed amount penalty' applies only where a CLEC customer has filed a dispute with *Verizon* and *Verizon* has resolved that dispute in the customer's favor." Verizon Brief at 11 (emphasis in original). Under Verizon's interpretation, Verizon exercises unilateral, complete, and apparently unreviewable control over the applicability of the disputed amount penalty. If the penalty applies only when Verizon allows a dispute, then Verizon can always avoid paying the penalty by the simple expedient of denying the dispute. By this means, Verizon can force its customers to conduct what is now nearly three years of litigation to vindicate their rights, only to be relegated to the statutory interest rate, which in 2009 is 3.5%. *See* Verizon Brief at 9.

Further, under Verizon's interpretation, Verizon's unilateral nullification of the tariff's disputed amount penalty provisions by its denial of a dispute is unreviewable. According to Verizon, when, as here, the Commission determines that Verizon wrongfully imposed the charges, the Commission has no authority to require Verizon to pay the amount that Verizon's own tariff calls for. Verizon stridently argues:

> 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" [Verizon] as the trigger for applying a disputed amount penalty, and the CLECs cannot substitute "the Commission" for "the Telephone Company."

Verizon Brief at 12. Thus, under Verizon's interpretation, only Verizon determines whether it pays the disputed amount penalty, and the Commission has nothing to say about it.

The Commission should not permit such illogical, unjust, and unreasonable results. The Commission should interpret the tariff so as to produce a reasonable outcome, not an absurd one. *Weare Land Use Assoc. v. Town of Weare,* 153 N.H. 510, 511 (2006). Stated another way, the Commission's interpretation should not lead to an illogical or an unjust result. *State v. Farrow,* 140 N.H. 473, 476 (1995).

It would be illogical, absurd, and unjust to allow Verizon unilaterally to nullify the disputed payment penalty simply by denying the dispute, no matter how wrong, unjust, or arbitrary the denial was. Instead, when, as here, the Commission has found Verizon's denial to be incorrect, Verizon should be required to pay the disputed amount penalty.

3. Even if Verizon is Correct That the Disputed Amount Penalty Applies Only When Verizon Allows a Dispute, Verizon Must Now Allow All Such Disputes Involving the CCL Charges at Issue in This Case.

Even assuming *arguendo* that Verizon is correct, and Verizon itself must allow the dispute for the disputed amount penalty to apply, then it is now incumbent on Verizon to do

exactly that. Verizon denied numerous disputes over imposition of the CCL charges on the basis of its interpretation of the tariff. The Commission has interpreted the tariff and determined that Verizon's interpretation was wrong. The Commission's interpretation, not Verizon's, controls. Verizon is required to comply with that interpretation, and is not permitted to act in a way that frustrates or undermines the Commission's determination. Therefore, in light of the Commission's controlling interpretation, Verizon now is obligated to reverse its previous denials and *allow* all disputes over CCL charges imposed when no Verizon end-user was involved. Even under Verizon's view of § 4.1.8, the disputed payment penalty then will apply through the date Verizon allows the dispute.

Verizon's obligation to allow the disputes and pay the disputed amount penalty arises because the Commission has authoritatively interpreted Verizon's tariff. Verizon is obligated to follow the Commission's interpretation and take the necessary action to implement it. No further action or specific direction by the Commission should be required. However, out of caution and to reduce the possibility of future disputes, the Commission should state its intention to direct Verizon to allow all disputes filed with Verizon involving the disputed charges. That will give Verizon additional incentive to settle or otherwise expedite the resolution of Phase II. According to Verizon, the disputed payment penalty runs until Verizon determines to allow the dispute. The sooner Verizon does so, the less disputed amount penalties it will have to pay.

B. The Commission is Not Limited to the Rate in RSA 336:1, II.

Verizon and FairPoint contend that the Commission should apply the pre-judgment interest rate established in RSA 336:1, II to the reparations determined in Phase II. Verizon Brief at 4-9; Brief of Northern New England Telephone Operations LLC, d/b/a FairPoint Communications - NNE Regarding Reparations, Dec. 19, 2008 ("FairPoint Brief") at 2-3.

Both Verizon and FairPoint are wrong. Section 336:1, II does not apply. It does not apply by its terms and it cannot overrule the rate set forth in Verizon's Tariff No. 85 for repayments of overcharges imposed under the purported authority of that tariff. Contrary to Verizon's contention, there is no clear and consistent line of decisions under which the Commission has applied 336:1, II to reparations or refunds of overcharges. If RSA 336:1 applies at all, then the applicable rate is the 10% rate for business transactions in 336:1, I, not the pre-judgment rate in 336:1, II.

1. By Its Terms, RSA 336:1, II Does Not Apply to Commission Decisions.

First, contrary to Verizon's and FairPoint's claims, the rate in RSA 336:1, II simply does not apply. RSA 336:1, II governs "[t]he annual simple rate of interest on judgments, including prejudgment interest." A "judgment" is entered by a court after jury trial or bench decision. RSA 524:1-c.[1] Whether or not the Commission is performing a judicial function is irrelevant; the Commission does not enter "judgments." Under the Administrative Procedure Act, the Commission's determination is a "final decision" or an "order," not a judgment. RSA 541-A:35.[2] By its terms, therefore, RSA 336:1, II does not apply to Commission proceedings. This

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[1] RSA 524:1-c provides:

> Upon a general verdict of a jury, or upon a decision by the court, that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith, sign, and enter the judgment upon motion of the prevailing party without awaiting any direction by the court. In all other civil cases, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it as of the judgment day next following the return of verdict or filing of findings. The entry of judgment shall not prejudice the rights of any party to undertake further proceedings in the same cause on the basis of exceptions previously preserved.

[2] RSA 541-A:35 provides:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to a party's recognized representative.

inapplicability is further shown by the statute's direction that the State Treasurer shall calculate the interest rate and transmit it to the Administrative Director of the Courts — not to the Commission's Chairman or Executive Director, or for that matter to any other administrative agency or commission. RSA 336:1, II.

2. There Is No Consistent Line of Commission Precedent Applying the Pre-Judgment Rate in RSA 336:1, II.

Contrary to Verizon's claims, there is no clear and consistent line of Commission decisions applying the pre-judgment rate in RSA 336:1, II when ordering restitution. *See* Verizon Brief at 7-9. When ordering restitution of improper overcharges, the Commission has required payment of interest at a number of different rates.

At the outset, the Commission should note that RSA 336:1, in its present form, only came into being in 1995. Prior to that, the statute consisted of only one clause, and applied both to the interest rate on judgments and that applicable to business transactions where the rate was not otherwise specified. There was no difference between the rate applicable to business transactions and the rate applicable to judgments and pre-judgment interest. The Legislature amended the statute in 1995, giving it the two-clause structure it has today, and adding the mechanism by which the pre-judgment and judgment rate varies on the basis of Treasury bill rates. Importantly, however, the interest rate applicable to business transactions where a rate was not otherwise specified remained at the statutorily-fixed rate of 10%. Laws of 1995, ch. 242.[3]

Therefore, even if in the pre-1995 decisions that Verizon cites, the Commission looked to RSA 336:1 as a benchmark, touchstone, or guide, it goes too far to claim definitively that the Commission intended to apply the rate applicable to judgments, as opposed to the business

[3] A copy of Laws of 1995, ch. 242 showing the amendment is attached as Attachment 1. In addition, RSA 336:1 has been amended two additional times since 1995; neither amendment affected the point being made here. Laws of 1997, ch. 193:4, eff. June 18, 1997; Laws of 2001, ch. 160:2, eff. Sept. 1, 2001.

transaction rate. Prior to 1995, the distinction was meaningless. The Commission just as easily could have looked at the transactions between the customer and utility in those cases and considered them "business transactions." If so, and if those precedents held today, the Commission should apply the fixed 10% rate of RSA 336:1, I, not the variable rate of RSA 336:1, II.

But, even the cases that Verizon cites show that the Commission did not consistently apply the rate specified in RSA 336:1. First, in *In re New England Telephone Company,* 79 NH PUC 179 (1994), it is true that the Commission limited NET's late payment rate for residential customers to 10%. But the Commission did not state that it was bound by the 10% interest rate set by RSA 336:1. Instead, the Commission looked to 336:1 as a "benchmark," and found that a 10% late payment rate was "consistent with" that benchmark.

In addition, as described above, the 10% rate in the pre-1995 version of RSA 336:1 did not distinguish between the "judgment" rate and the "business transaction" rate. In looking toward the "benchmark" interest rate of 10% in RSA 336:1 as it existed at the time, the Commission probably was not analogizing to pre-judgment interest at all. Instead, the Commission likely viewed the late payment charge as part of a business transaction between NET and its residential customers. On that basis, the Commission could well have adopted the "business transaction" rate of 10% as a suitable benchmark.

More important, Verizon fails mention the significant fact that the Commission approved an *eighteen percent (18%)* late payment rate for non-residential accounts. *Id.* Obviously, neither NET (now, of course, Verizon) nor the Commission felt bound by the 10% "benchmark" when setting an interest rate for business customer accounts.

Similarly, Verizon correctly relates that in *In re Public Service Company of New Hampshire,* 72 NH PUC 237 (1987), the Commission ordered PSNH to make customer-specific refunds for overcharges bearing interest at a rate of 10%. *Id.* at 263. But, in that case, the Commission offered no explanation why it chose the rate of 10%. The Commission did not make reference to RSA 336:1 or any other provision of statute or regulation. *Id.* So, Verizon exaggerates at best when it cites this case as precedent for the application of RSA 336:1 to Commission-ordered refunds. If the Commission did have RSA 336:1 in mind when setting that rate, there is no indication whether it considered the rate to be based on the "judgment" rate or the "business transaction" rate. Indeed, as described above, at the time, the statute did not set different rates of interest for these two categories.

Further, in an interesting later decision, the Commission approved a settlement based on its earlier order requiring refunds. The settlement called for 10% interest, as specified in its previous order, for six months. *In re Public Service Company of New Hampshire,* 72 NH PUC 316, 319 (1987). The parties further stipulated, and the Commission approved, that interest after the six-month period would bear interest at 6.5%, reflecting "the approximate interest rate earned by PSNH on the refund amounts held by the Company." *Id.*

The interest rate that the company earns on moneys collected from customers, of course, is its cost of capital or rate of return. When a utility collects cash from customers, it does not have to acquire those funds elsewhere, such as through the capital markets. The utility "earns" its cost of capital by not having to pay that cost to lenders or investors. In this case, therefore, the Commission determined that the utility's rate of return was an appropriate interest rate to apply to refunds of over-collected funds.

In other cases that Verizon does not cite, the Commission has required various rates of interest other than the judgment rate in RSA 336:1 to be paid on refunds of overpayments. For example, in at least one other case beside the *PSNH* case cited above, the Commission has required, as part of a settlement, payment of interest at a rate equal to the utility's cost of capital. *In re EnergyNorth Natural Gas, Inc. — Investigation Into Thermal Billing Practices,* Docket No. DG 06-154, Order Approving Settlement Agreement, Order No. 24,752, at 20 (May 25, 2007). In requiring interest at a rate equal to the utility's cost of capital, the Commission determined: "This interest rate favors customers, being significantly higher than the prime interest rates in effect during the over-billing period applied to over and under collections of gas costs. Thus, the settlement fully and fairly compensates customers for the direct effects of the Company's over-billing." *Id.* (footnote omitted).

In another case, the Commission required that interest on refunds be paid at the prime rate. *In re Union Telephone Company,* Dkt. DR 95-177, Order No. 21,913, 80 NH PUC 744, 750 (Nov. 20, 1995). In that case, specifically invoking the authority of RSA 365:29, the Commission ordered the utility to calculate monthly interest at the applicable prime rate throughout the refund period. *Id.*

The bottom line is that, contrary to Verizon's assertion, there is no clear and consistent line of Commission decisions applying the prejudgment interest rate of RSA 366:1, II to refunds that the Commission orders under RSA 365:29. To the extent that in the cases Verizon cites the Commission invoked 366:1 at all, those cases pre-dated the 1995 bifurcation of "judgment" and "business transaction" interest rates in RSA 366:1, and the Commission in all probability was applying the statute to the business transactions that resulted in the reparation order. But the

Commission also has approved the use of the utility's rate of return and the prime rate as the appropriate interest rate to apply to refunds.

C. The Commission Should Apply a Rate of $0.0005 Per Day.

As set forth above and in the other parties' filings, the disputed amount payment applies to the unlawful overcharges at issue in this case. Therefore, the Commission should order Verizon to pay those amounts along with its refunds of the CCL overcharges.

It is important to note the substance of Verizon's (unconvincing) argument — that the disputed amount penalty under the tariff does not apply, and because the tariff rate is inapplicable, the statutory rate of RSA 336:1, II applies. Verizon does *not* argue that the pre-judgment interest rate provision in RSA 336:1, II somehow overrides an applicable rate in the tariff. Verizon could not credibly make such an argument. Nothing in RSA 336:1, II suggests that when a tariff applies a rate to be added to refunds of overpayments, the tariff provision is subordinated to or preempted by the statutory pre-judgment rate. If that occurred, it would render all such tariff provisions nugatory. Nothing suggests that the Legislature intended such a result.

Even if, however, the Commission determines that that disputed amount penalty under the tariff is inapplicable by its terms in whole or part, the Commission could still apply that rate as the appropriate interest rate under RSA 365:29. Verizon has determined that a rate of $0.0005 per day is an appropriate rate for overpayments of access charges under the tariff. It would be appropriate for the Commission to look to Verizon's own determination as a benchmark. *See* One Communications Brief at 8-9; AT&T Phase II Brief, December 18, 2008 ("AT&T Brief"), at 9-10; Brief of Freedom Ring Communications, LLC d/b/a Bay Ring Communications (Reparations Period and Interest Rate), Dec. 19, 2008 ("BayRing Brief"), at 10-11. Notably, if a CLEC *underpays* a charge under Tariff No. 85, Verizon imposes a late payment charge of

$0.0005 per day (the same rate as the disputed amount penalty) from the payment due date until the date that the payment is actually made by the customer. Tariff No. 85, § 4.1.2. Imposing a symmetric obligation on Verizon for the customer overpayments at issue here would be appropriate and fair. *See* BayRing Brief at 10-11.

If, however, the Commission determines that the tariff's disputed amount penalty does not apply at all or in part, then the Commission should require Verizon to pay interest at a rate equivalent to its cost of capital for wholesale services. Requiring Verizon to pay interest equivalent to its cost of capital takes into account that Verizon has been unjustly enriched by holding its customers funds in contravention of law and the tariff. The Commission should specify a rate of 17.93%, the rate Verizon advocated for wholesale services in the 2002-03 cost of capital case. *In re Verizon New Hampshire — Investigation into Cost of Capital,* DT 02-110, Order Establishing Cost of Capital, Order No. 24,265, at 5-6 (Jan. 16, 2004).[4] Alternatively, the Commission should apply the wholesale cost of capital rate, to which Verizon and the Commission Staff stipulated in Docket No. 97-171 — approximately 10.46%.[5] *See* One Communications Brief at 9; AT&T Brief at 10-11; Brief of Global Crossing Telecommunications, Inc., Dec. 18, 2008 ("Global Crossing Brief"), at 8-9.

Finally, as stated above, if the Commission is inclined to look to RSA 336:1 as a benchmark for the applicable interest rate if the tariff does not apply in whole or part, then the Commission should use the rate of 10% set forth in 336:1, I, not the prejudgment interest rate in 336:1, II. The charges at issue unquestionably arose from a business transaction between Verizon and its customer like One Communications. The Commission should look to the

[4] That Verizon's suggested cost of capital is roughly equivalent to the Tariff No. 85 "disputed amount penalty" on an annualized basis, and provides further support that Verizon's "disputed amount penalty" rate is the appropriate rate to apply to all overpayments at issue here, whether or not strictly within the terms of the tariff.

[5] One Communications understands that that rate is set forth in a letter between Verizon and the Commission Staff dated March 4, 1998, and is approximately 10.46%. A copy of the march 4, 1998 letter is AT&T Brief Exhibit B.

Legislature's determination that 10% is the appropriate rate to apply in the context of such business transactions.

D. Verizon Must Credit Any Late Payment Charges, Interest, or Similar Charge Assessed Against One Communications or Other Carriers for Disputed, Unpaid CCL Charges.

In its earlier brief, One Communications suggested that with respect to any bills for CCL charges that One Communications disputed and withheld, the Commission should ensure that any late payment charges, interest, or any other charge or fee that Verizon has imposed on account of One Communications' non-payment of any unlawful CCL charge be eliminated. One Communications Brief at 9. Verizon must credit *any* such charge, whether imposed pursuant to Tariff No. 85, § 4.1.2 or otherwise.

No party has suggested that late payment charges should not be credited as One Communications suggested. Thus, in addition to issuing a credit to One Communications for any CCL charges that Verizon carries on its books, Verizon must also issue full credits for any late payment charges or interest.

II. One Communications' Claims Begin to Run on April 28, 2004.

A. Under RSA 365:29, One Communications' Claim Begins to Run Two Years Before BayRing Filed its Complaint.

In its earlier brief, One Communications showed that its claim begins to run on April 28, 2004, the date two years before BayRing filed its complaint in this case. This conclusion results from straightforward application of RSA 365:29, in both its current version and the version that existed before the August 2008 amendment. Under both versions, *whenever* a complaint has been filed, the Commission may make an order of reparation covering payments made within two years of the filing of the petition. The statute does not say that the reparation order may go back only two years from the date the particular party that is to be reimbursed files its own,

individual petition. One Communications Brief at 2-4. Other CLEC parties' filings support this conclusion as well. *E.g.,* AT&T Brief at 4-5; Global Crossing Brief at 4. No party has shown One Communications to be wrong.

Neither Verizon nor FairPoint, the parties that advocate for individualized claims periods based on the filing of a particularized petition for reparations, succeed in explaining how such individual claims periods advance the remedial purpose of RSA 365:29. To tie eligibility for reparations and/or an individual claimant's claim period to the filing of an individual petition for reparations would defeat the purpose of the statute — to make whole customers that have paid illegal charges to public utilities. Indeed, refunds have been ordered or approved under RSA 365:29 without there being any indication that each and every recipient of reparations had filed a petition. *See Appeal of Granite State Electric Co.,* 120 N.H. 536, 541, 421 A.2d 121, 124 (1980) (petition filed by public interest group); *In re EnergyNorth Natural Gas, Inc. — Investigation into Thermal Billing Practices,* DG 06-154, Order Approving Settlement Agreement, Order No. 24,752, at 22 (May 25, 2007) (utility receives release of liability for claims under RSA 365:29 on account of refunds made to customers even though no individual customer filed a petition under RSA 365:29). Indeed, requiring each and every claimant to file a petition for reparation as a condition of receiving a refund would serve no purpose other than to discourage reparations of unlawful overcharges by increasing the transaction costs of seeking such reparations. One Communications Brief at 3; AT&T Brief at 4.

B. If the Commission Does Not Agree that One Communications' Claims Run from Two Years Prior to BayRing's Complaint, then the Commission Should Find that the Claim Runs from Two Years Prior to the Order of Notice.

As shown above, under either the current or prior versions of RSA 365:29, One Communications' claims begin to run two years before BayRing filed its complaint in this case — that is, the claim begins to run on April 28, 2004. Since this result obtains under either the

current or pre-August 2008 versions of the statute, it is not necessary for the Commission to decide which version of the statute applies to One Communications' claims.

If the Commission disagrees, however, and determines that One Communications' claims period is not determined by the date BayRing filed its complaint, then the Commission should determine that One Communications' claims run from June 23, 2004. That is the date two years before the earlier of the order of notice (June 23, 2006) and the filing of One Communications' petition for reparations (July 24, 2006).

The current version of RSA 365:29, which contains the "earlier of the order of notice or the filing of the petition for reparations" language, governs the claim period in this case regardless of the fact that it was not in effect when this case was commenced. The amendments to RSA 365:29 are procedural or remedial in nature, and apply to cases commenced but not yet decided when they were enacted. *Gelinas v. Mackey,* 123 N.H. 690, 695, 465 A.2d 498, 501 (1983); One Communications Brief at 5[6].

The central question is whether the amendment affects the parties' rights and obligations, not whether the outcome is altered or the party is subjected to liability that otherwise would have been barred. *Workplace Systems, Inc. v. Cigna Property and Casualty Insurance Co.,* 143 N.H. 322, 325, 723 A.2d 583, 585 (1999). Here, it is clear that the parties' underlying rights and obligations have not been affected. One Communications Brief at 5-6.

Further, application of the amendment to RSA 365:29 to One Communications' claims is not a "retrospective law" prohibited by Part I, Article 23 of the New Hampshire Constitution. The constitutional prohibition against retrospective laws prevents a change in law from depriving a person of a vested property right. To be vested, a right must be more than a mere expectation

[6] One Communications respectfully refers the Commission to its December 18, 2008 brief, which contains a fuller explanation of these issues.

based on an anticipation of the continuance of existing law. Verizon has no vested property right in its desire to escape liability for unlawful charges it imposed during the period June 23 – July 24, 2004. *In re Goldman,* 151 N.H. 770, 774, 868 A.2d 278, 282 (2005); One Communications Brief at 6-7.

Conclusion

The Commission should determine that the rate set forth in Tariff No. 85 as the "disputed amount penalty," calculated from the date that the customer paid through the date that Verizon fully refunds the overcharges, is the appropriate interest rate to be applied to reparations in this case. The Commission also should find that One Communications' claims begin to run on April 28, 2004, two years before the date BayRing filed its complaint in this action.

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Attachment 1

LEXSEE 1995 NH ALS 242

NEW HAMPSHIRE ADVANCE LEGISLATIVE SERVICE
STATENET

NEW HAMPSHIRE 1995 REGULAR SESSION

CHAPTER 242

HOUSE BILL 375

1995 NH ALS 242; 1995 NH LAWS 242; 1995 NH Ch. 242; 1995 NH HB 375

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT relative to the interest rate on judgments.

NOTICE: **[A>** UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED **<A]**

[D> Text within these symbols is deleted **<D]**

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

Be it Enacted by the Senate and House of Representatives in General Court convened:

[*1] 242:1 Interest Rate on Judgments. Amend RSA 336:1 to read as follows:

336:1 Rate of Interest.

[A> I. **<A]** The annual rate of interest **[D>** on judgments and **<D]** in all business transactions in which interest is paid or secured, unless otherwise agreed upon in writing, shall equal 10 percent.

[A> II. 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 52-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 FIRST DAY OF THE FOLLOWING JANUARY THROUGH THE LAST DAY OF DECEMBER IN EACH YEAR. **<A]**

[*2] 242:2 Effective Date. This act shall take effect September 1, 1995.

HISTORY:
Approved: June 19, 1995

Effective: September 1, 1995

SPONSOR: Mercer