

THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION
DT 06-067
FREEDOM RING COMMUNICATIONS, LLC d/b/a
BAYRING COMMUNICATIONS
COMPLAINT AGAINST VERIZON NEW HAMPSHIRE
RE: ACCESS CHARGES
PHASE II

REPLY BRIEF OF FREEDOM RING COMMUNICATIONS, LLC d/b/a
BAYRING COMMUNICATIONS (Reparations Period and Interest Rate)

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January 9, 2009

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Freedom Ring Communications, LLC d/b/a BayRing Communications (“BayRing”) replies to the initial briefs of Verizon New Hampshire and FairPoint by reasserting the arguments contained in BayRing’s initial brief, all of which are hereby incorporated into the within brief by reference. In addition, BayRing replies by concurring with the positions set forth in the initial and reply briefs of AT&T and One Communications regarding the interest rate to be applied to refunds in this case. BayRing also respectfully asserts the following reply arguments:

Reparations Period

For the reasons cited in BayRing’s initial brief, the Commission has the inherent authority, recognized by case law, to make BayRing whole by awarding refunds of all of the overpayments it made to Verizon of the unlawful CCL charges. Verizon and FairPoint have conceded in their initial briefs that BayRing is entitled to refunds for payments made since April 28, 2004 (i.e. two years before the date it filed its petition in

this case). Thus, there is no dispute that, at the very least, BayRing is entitled to a refund for payments made during the period from April 28, 2004 through the present. However, neither Verizon nor FairPoint recognize the Commission's inherent authority to order refunds; both rely only on the Commission's statutory authority under RSA 365:29 in their analysis of the reparations period issue. In the event that the Commission decides not to exercise its inherent authority to refund all of the CCL overpayments BayRing has made, it should not confine the reparations period to the two year period expressed in RSA 365:29. Verizon should not be rewarded for its delay in resolving BayRing's dispute of the CCL charges which the Commission has found to be unlawful. BayRing followed the dispute resolution process contained in Verizon Tariff 85 by initiating a dispute on September 7, 2005 of its August 25, 2005 CABS invoice. *See Petition, Attachment A.* When, after 6 months of diligent effort, BayRing did not obtain satisfactory results under the Tariff 85 dispute resolution process, BayRing was then forced to seek relief from the Commission. BayRing should not be penalized for following the protracted dispute procedure in Verizon's tariff, or for Verizon's delay in rendering a final decision in the dispute escalation process. Had Verizon conducted its dispute resolution process more efficiently and quickly, BayRing would have filed its petition with the Commission long before April 28, 2006. Accordingly, it is unfair to BayRing to limit Verizon's refund liability to payments dating back only to two years prior to the filing of the Petition in this case.

While BayRing believes that it would be appropriate for the Commission to order Verizon to fully refund all of the unlawful CCL charges paid by BayRing, in the alternative, BayRing respectfully suggests that the Commission exercise its inherent

authority and, at a minimum, order Verizon to make refunds to BayRing of all unlawfully collected CCL charges going back two years from the date that BayRing initiated its dispute with Verizon under the Tariff 85 process. Strong public policy reasons support this result. If the Commission fails to invoke its inherent authority to order reparations for a period that includes at least two years from the initial dispute date (versus the petition date), customers will be encouraged to file petitions with the Commission immediately (or at least sooner in the dispute process) instead of trying to resolve the dispute informally outside of the adjudicative process. This, in turn, will create an additional burden on Commission resources. Further, this approach is reasonable because it limits Verizon's refund liability by applying the two year reparation period under RSA 365:29. It is also fair to BayRing because the two year period is applied to the date when BayRing would have filed its Petition with the Commission (September of 2005) but was not able to do so because of Verizon's unreasonably long dispute resolution process. Accordingly, the reparations period for BayRing should commence September 7, 2003 (for invoices dated on or after August 25, 2003).

Interest Rate on Refunds

The Commission is not required to apply the interest rate on judgments under RSA 336:1, II. Although the Commission is a quasi-judicial body, its adjudications are not "judgments" within the meaning of RSA 336:1. The Commission issues orders; it does not enter "judgments". *Compare* RSA 541-A:35 (administrative agencies required to issue "final decision or order") *with* RSA 524 ("Judgments") which appears in Title LIII entitled "Proceedings In Court". Moreover, the Commission's statutory authority to award interest expressed in RSA 365:29 contains no cross-reference to RSA 336 or

any other statute. Since RSA 365:29 is silent on the amount of interest that may be awarded when the Commission orders reparations, the Commission has discretion regarding this issue. Contrary to Verizon's assertions on page 8 of its initial brief, there is no "well-established" or "tacit" understanding by the Commission that RSA 336:1 provides the appropriate interest rate for refunds ordered by the Commission in all cases. Even if the Commission had used the provisions of RSA 336:1 as support for an award of interest in prior cases, there is nothing that requires that the Commission do so in this case.

The penalty and interest rates prescribed in Verizon Tariff 85 should apply in this case because Verizon billed the CCL access charges under the auspices of that tariff. The fact that the Commission found that Verizon did not have authority to levy the disputed CCL charges under Tariff 85 does not mean that the entire tariff is irrelevant to damages phase of this case. Had Verizon prevailed in phase I of this case, it undoubtedly would have sought payment of all of the charges and penalties set forth in Tariff 85. Thus, it is appropriate that the interest rate here be tied to the rate that Verizon charges its customers under Tariff 85.

Verizon argues on page 12 of its initial brief that the same high penalty rate appearing in Tariff 85 should not apply "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.*" (Emphasis added.) This argument should be rejected if for no other reason than it completely ignores the fact that Verizon had control over its dispute resolution process and therefore directly contributed to the delay between the time the CCL dispute

was initiated by BayRing and the time BayRing filed its complaint with the Commission. In addition, by failing to acknowledge the impropriety of the disputed CCL charges, Verizon forced BayRing and others to seek relief from the Commission. Moreover, the record in this case plainly reveals that Verizon itself requested the “formal and lengthy procedures” in this case¹. See, e.g, *Transcript of Prehearing Conference*, July 27, 2006, pp. 22-23. Thus, for all of the reasons contained in BayRing’s initial brief and for the reasons set forth above, Verizon’s arguments concerning the interest rate in this case should be rejected.

Conclusion

For all of the reasons set forth in BayRing’s initial brief as well as those set forth above, the Commission should order Verizon to refund to BayRing all of the improperly assessed CCL charges that BayRing has paid to Verizon. In the alternative, Verizon should refund the improper CCL charges paid by BayRing since September of 2003 (for invoices dated on or after August 25, 2003). As indicated in its initial brief, Verizon should be ordered to pay BayRing interest on refunds relating to unlawful CCL payments made by BayRing since April 28, 2004, and the rate of interest should be that expressed in Tariff 85. In addition, Verizon and/or FairPoint should eliminate the improperly assessed CCL charges and any associated late payment charges and penalty fees from BayRing’s bills.

¹ At the July 17, 2006 procedural conference, counsel for Verizon stated to the Commission:

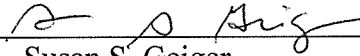
“We want an opportunity for adjudication, not on paper. We would like the typical discovery opportunities, just as we’re giving a lot of other carriers and other parties in other proceedings, and then I’d like a hearing on this, your Honor, with witnesses. We’d like an opportunity for cross-examination.”

Date: January 9, 2009

Respectfully submitted,

**FREEDOM RING
COMMUNICATIONS, LLC D/B/A
BAYRING COMMUNICATIONS**
By its Attorneys,

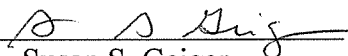
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has on this 9th day of January, 2009 either been mailed first class postage prepaid or e-mailed to the parties named on the Service List in the above-captioned matter.


Susan S. Geiger

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