THE STATE OF NEW HAMPSHIRE
BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

BayRing Petition For Investigation Into Verizon New Hampshire's Practice Of Imposing Access Charges, Including Carrier Common Line (CCL) Access Charges, On Calls Which Originate On BayRing's Network And Terminate On Wireless and Other Non-Verizon Carriers' Networks	Docket No. 06- 067

JOINT MOTION OF AT&T, BAYRING COMMUNICATIONS AND ONE COMMUNICATIONS TO STRIKE VERIZON'S "REPLY" TO FAIRPOINT'S MOTION FOR REHEARING AND/OR RECONSIDERATION

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Dated: May 15, 2008

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JOINT MOTION OF AT&T, BAYRING COMMUNICATIONS AND ONE COMMUNICATIONS TO STRIKE VERIZON'S "REPLY" TO FAIRPOINT'S MOTION FOR REHEARING AND/OR RECONSIDERATION

Freedom Ring Communications LLC d/b/a BayRing Communications ("BayRing"), AT&T Corp. ("AT&T"), and One Communications ("One") (collectively "Competitive Carriers") move to strike Verizon's self-styled "reply," dated April 28, 2008 ("Verizon Reply"), to FairPoint's motion for rehearing/and or reconsideration filed on April 21, 2008 ("FairPoint Motion"). Specifically, the Competitive Carriers move to strike paragraphs 7-14 of Verizon's Reply, in which Verizon unlawfully and inappropriately raises, for the first time, claims of alleged retroactive ratemaking, which Verizon did not raise in its March 28, 2008 motion for rehearing and/or reconsideration ("Verizon Motion") — or, for that matter, at any previous time in the two-year history of this proceeding. RSA 541:4 clearly mandates that Verizon raise *every basis* on which it seeks reconsideration in its initial request; neither that statute nor Commission rules permit Verizon a second bite at the apple. In addition, the Competitive Carriers move to strike the balance of Verizon's Reply on the ground that it is actually rebuttal to the

Competitive Carriers' Joint Opposition to Verizon's Motion and, as such, is not permitted by the Commission's rules.

In the alternative, if the Commission is going to consider Verizon's arguments, which it should not, the Competitive Carriers request the opportunity briefly to respond to the new material in Verizon's Reply, as set forth below.

Finally, the Competitive Carriers respectfully urge that the Commission expeditiously deny the Verizon and FairPoint reconsideration motions and proceed forthwith to the reparations phase of this case. Verizon's and FairPoint's repetitive and meritless filings are serving only to delay the calculation of payments or credits rightfully due to the Competitive Carriers. The Commission should not countenance this unjustified dely, but should resolve the reparations issue as quickly as possible.

Argument

I. THE COMMISSION SHOULD STRIKE THOSE PORTIONS OF VERIZON'S REPLY THAT RAISE NEW MATTERS VERIZON FAILED TO RAISE IN ITS MOTION FOR RECONSIDERATION.

Verizon's March 28, 2008 motion raised a number of grounds on which it sought reconsideration. None of those, however, included the claims of alleged retroactive ratemaking Verizon raises in its Reply. New Hampshire law bars Verizon from raising new arguments in its "Reply."

A. VERIZON IS STATUTORILY PROHIBITED FROM RAISING NEW GROUNDS FOR RECONSIDERATION IN A PURPORTED "REPLY."

Having failed to raise claims of retroactive ratemaking in its motion, Verizon may not raise them for the first time in a purported "reply." New Hampshire law clearly requires that a party raise all grounds on which it seeks rehearing or reconsideration of a Commission order in a single motion. "Such motion [for rehearing] shall set forth fully

every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4 (emphasis added). The New Hampshire Supreme Court has interpreted this statutory mandate as requiring that all grounds upon which a party relies in seeking rehearing must be set forth in one motion for rehearing.

> RSA 541:4 (1974) provides that the motion for rehearing shall set forth "every ground" upon which it is claimed that the decision or order is unlawful or unreasonable, indicating that all grounds that the complaining party wishes to assert must be stated in a single rehearing motion.

Petition of Ellis, 138 N.H. 159, 161, 636 A.2d 62, 63 (1993).

In addition, such a motion for rehearing, containing every ground upon which reconsideration is sought, must be filed within thirty days after the order or decision at issue. RSA 541:3. Verizon's reply was filed thirty-eight days after the Order was issued and is therefore untimely.

Verizon gives no reason why it failed to raise its retroactive ratemaking claims in a timely motion. Verizon cites no new law, no new judicial or administrative decision, or no new fact that has come into being since it filed its Motion on March 28th. Verizon has simply decided now to assert a claim that it did not raise — but could have raised — in its Motion or earlier in the case. That is not a ground for it to violate RSA 541:4.

Further, Verizon's apparent claim that it is merely "commenting" on FairPoint's claim[1] (Verizon Reply at 1 fn. 1) strains credibility past the breaking point. Verizon plainly claims that the Order is an unlawful exercise of retroactive ratemaking. "This is retrospective ratemaking, pure and simple." Verizon Reply at 5. "Based on these well-

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[1] In addition, there is no validly-raised claim of retroactive ratemaking for Verizon to comment upon. FairPoint lacks standing to raise a claim of retroactive ratemaking, because it has suffered no injury in fact from the Commission's decision requiring Verizon to make restitution of unlawful access charges. Competitive Carriers' Opposition to FairPoint's Motion at 10-12. Even if Verizon could raise retroactive ratemaking claims by "commenting" on FairPoint's Motion, FairPoint's claim is invalid *ab initio* and cannot form the basis for a piggy-back claim by Verizon.

established principles, the Commission cannot reach back in time and change the rates charged by Verizon under a legally enforceable tariff." *Id.* at 7. In addition, Verizon cites no fewer than ten case decisions and one statutory reference that do not appear in FairPoint's discussion of retroactive ratemaking. This is not "comment" but, rather, assertion of Verizon's own, new claims. Based on these newly-raised claims and arguments regarding alleged retroactive ratemaking, Verizon explicitly asks the Commission to reconsider its Order: "For the reasons *stated above* and in Verizon's and FairPoint's Motions, the Commission should reverse its decision in Order No. 24,837." *Id.* at 11 (emphasis added). Clearly, Verizon is asserting a "ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. But, not having raised the issue in its Motion, Verizon is prohibited by RSA 541:4 from raising the claim in its purported "reply."

B. IT IS UNFAIR AND INAPPROPRIATE TO ALLOW VERIZON TO RAISE NEW CLAIMS IN A PURPORTED "REPLY."

Even if RSA 541:4 did not prohibit Verizon from raising new claims in its "reply" (which it does), the Commission should not consider those new claims, but should strike them. It is unfair and inappropriate for Verizon to raise new claims in a "reply" that the Competitive Carriers have no opportunity to refute.

Verizon itself would agree. In a motion filed on April 28, 2008, the same day as Verizon's Reply in this case, Verizon moved to strike portions of a reply brief filed by One Communications in a Pennsylvania PUC case. Verizon complained that One Communications had made certain arguments for the first time in its reply brief; that it had no opportunity to respond to those specific arguments; and that One Communications should have made the arguments in its main brief, so that Verizon could have responded

in its reply brief. *Verizon Pennsylvania Inc. v. Choice One Communications of Pennsylvania, Inc.*, Pa. PUC Dkt. No. C-20077672, Motion of Verizon to Strike Refund Argument, or Alternatively for Leave to File a Limited Surreply Brief, at 3 (filed April 28, 2008) (copy attached). Verizon then colorfully stated:

> The One Communications Companies' unfair sandbagging of Verizon on this issue deprives Verizon of the opportunity to respond to their legal arguments. It also puts the presiding officer in the unfortunate position of having to decide the issue without benefit of both sides' arguments.

Id. at 4.

Any number of old sayings fit this situation — the pot should not call the kettle black, practice what you preach, etc. Verizon should not be permitted to practice in New Hampshire the same conduct it condemns elsewhere. The Commission should strike those portions of Verizon's Reply that contain claims of retroactive ratemaking. Alternatively, the Commission should permit the Competitive Carriers to respond to Verizon's new claims as set forth below.

Indeed, it is especially egregious for Verizon to seek to insert a new argument now, when Verizon could have and should have raised the argument *from the outset of this case, not merely after the Commission's decision*. From the outset of this case, the amount of any reparations that Verizon may be required to make has been on the table. Indeed, Verizon has repeatedly sought to have the Commission take into account the amount of reparations at the time that the Commission makes its decision on the tariff interpretation *in order to influence that decision*. For example, at the November 3, 2006, prehearing conference in this case, Verizon made clear its objection to a bifurcation of the liability and reparations issues in this case. Verizon counsel stated:

> [Y]ou should be aware of what it means to this company were you to adopt [bifurcation], and we're being asked not to explore the ***reparations*** *part of that, which could be many millions of dollars over the past two or three years*, depending on when the Commission runs the clock. . . . I have stated our intent to explore that which is set forth in the complaint. "What is it you claim *we owe you*? . . ."
>
> * * * * *
>
> I think the Commission needs to understand the financial hurt that Verizon will experience as a result of this proposed change.

November 3, 2007, Transcript at 15-16 (emphasis added). In other words, Verizon wanted the Commission to rely on the amount of reparations Verizon would be required to pay if the Commission were to rule against it.

Following that argument, the Commission issued a procedural order on November 29, 2006, in which it decided to bifurcate the case, but concluded nevertheless that its decision on the merits of the case should take into account the impact on Verizon. The Commission thus stated:

> However, as Verizon has noted, a fair assessment of the interests implicated in a proceeding of this nature warrants some consideration of the magnitude of the potential financial impact involved. We therefore direct each party that seeks *reparations* pursuant to RSA 365:29 to submit an estimate of the general order of magnitude of the disputed charges. We also direct Verizon to provide an estimate of the potential financial impact to it, if it were ultimately decided that Verizon had not properly applied the tariff.

November 29, 2006, Procedural Order, at 6-7 (emphasis added).

Verizon did not seek reconsideration of that procedural order on grounds of retroactive ratemaking or anything else. Instead, Verizon pursued a strategy of emphasizing the impact that an award of reparations would have upon it. Pursuant to that procedural order, on February 8, 2007, Verizon and the other parties filed estimates of the amounts in dispute for which reparations would be due if the ruling were in favor of the

Competitive Carriers. At the hearing in July 2007, Verizon again raised the issue by introducing its reparations estimate into evidence. *See*, Exhibit 15 (Testimony of Peter Shepherd), at 29-30. Verizon once more emphasized the impact of a potential reparations award in its post trial brief. *See*, Verizon New Hampshire's Post-Hearing Brief, at 17. ***Never***, throughout this entire case until its Reply, has Verizon even hinted at the possibility that the Commission cannot award reparations in this case. On the contrary, Verizon has played on the fears of the impact of such an award.

Having strategically sought to put before the Commission the amount of reparations that it would be required to pay if the ruling were against it, Verizon cannot now argue that reparations are unlawful or otherwise not available. Yet, as we explain in detail below, that is precisely what Verizon is doing when it argues that any requirement by the Commission that Verizon give back the improperly imposed CCL charges is barred as retroactive ratemaking. Having failed to raise any claim that reparations are barred each time it has had the opportunity, and indeed, having sought the benefits of stressing the potential financial impact of reparations, it would be inappropriate and unfair to permit Verizon to seek to introduce its reparations claim after the Commission has made its decision in the case (and, indeed, even after Verizon has moved for reconsideration and the Competitive Carriers have responded). The Commission should strike Verizon's "retroactive ratemaking" argument.

II. THE COMMISSION SHOULD STRIKE THE REMAINDER OF VERIZON'S REPLY AS AN UNAUTHORIZED ATTEMPT, OUTSIDE THE COMMISSION'S RULES, TO RESPOND TO THE COMPETITIVE CARRIERS' OPPOSITION TO VERIZON'S REHEARING MOTION.

Verizon's Reply is also a transparent attempt to respond to the Competitive Carriers' joint opposition to Verizon's Motion filed on April 9, 2008 (sometimes "Joint

Opposition"), when no such response is permitted by the rules, and when no permission was even sought by Verizon, much less granted by the Commission.

In its purported "reply" to FairPoint's April 21, 2008 rehearing motion, Verizon cites to the Competitive Carriers' April 9, 2008 opposition to Verizon's rehearing motion in virtually every paragraph not devoted to its new "retroactive ratemaking" arguments. In paragraph 3 of Verizon's Reply, Verizon quotes two different statements from the Competitive Carrier's Joint Opposition. In paragraph 4, Verizon quotes three other statements made in the Competitive Carriers' Joint Opposition, and continues to focus on the Competitive Carriers' arguments in paragraphs 5 and 6. Following the new "retroactive ratemaking" arguments in paragraphs 7 through 14, Verizon promptly returns to an attack on the arguments of the Competitive Carriers in all of the remaining paragraphs (¶¶ 15-17), save the concluding paragraph (¶18).

Procedurally, and as a matter of fundamental fairness, Verizon's attempt to circumvent the rules is "out of bounds." The Commission's rules do not call for replies to oppositions to motions for rehearing. PUC Rule 203.07(f). Verizon neither sought nor received the Commission's permission to reply to the Competitive Carriers' Joint Opposition. Verizon should not be allowed to circumvent the rules in order to clutter the record with additional, repetitious argument. The Commission should strike the remainder of Verizon's reply.

III. IN THIS CASE THE COMMISSION SIMPLY INTERPRETED VERIZON'S EXISTING TARIFF; THERE HAS BEEN NO RETROACTIVE RATEMAKING.

Verizon and FairPoint seem to believe that if they say "retroactive ratemaking" often enough, the Commission will believe it. As the Competitive Carriers showed in our oppositions to the Verizon Motion and the FairPoint Motion, the Commission's Order

was not an exercise of ratemaking at all (retroactive or otherwise). Instead, it was an act of interpretation of Verizon's existing tariff. The title of the Order, "Order Interpreting Tariff", makes this point clear. As explained in Sections II. and III. of the Competitive Carriers' Joint Opposition to Verizon's Motion and in Section II. of the Competitive Carriers' Joint Opposition to FairPoint's Motion, the Commission interpreted Verizon's tariff and correctly determined that *under the terms of that tariff,* Verizon was not entitled to impose or collect the CCL charge when no Verizon end user or local loop was involved. There was no ratemaking, retroactive or otherwise. The Commission did not reset, reduce, or in any other way adjust the rate that must be paid when the CCL charge is properly assessed (*i.e.* when carriers use Verizon's common line or local loop for calls involving a Verizon end-use customer). Therefore, given the absence of ratesetting in this case, any claim of retroactive ratemaking fails on the merits.

Verizon's arguments fail in several respects. Verizon resorts to the same *non-sequitur* that FairPoint used in arguing that the Commission had engaged in retroactive ratemaking: the charges were not illegal; therefore RSA 365:29 does not apply; therefore what the Commission did was retroactive ratemaking. *Id.* But, just as with FairPoint and with Verizon's earlier Motion, the essence of Verizon's "Reply" claim is that it disagrees with the Commission's decision. The Commission did find that it was illegal to impose the CCL charge when no Verizon end user was involved. That Verizon disagrees with the result does not turn the Commission's acts of tariff interpretation and award of reparation (which are legitimate adjudicative functions, *see Appeal of Granite State Electric Company,* 120 N.H. 536, 539 (1980)), into an instance of ratesetting (a separate

and distinct legislative function). *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 565 (1980).

Second, at least one of the cases that Verizon cites shows why the Commission's decision interpreting Verizon's tariff is not retroactive ratemaking. Verizon quotes the Maine Supreme Court as follows: "[T]he rule [against retroactive ratemaking] prohibits a utility commission from making a retrospective inquiry to determine whether a prior rate was reasonable and imposing . . . a refund when rates were too high." *Public Advocate v. Public Utilities Commission,* 718 A.2d 201, 204 (Me. 1998) (citation omitted). That, of course, in not what the Commission did in this case. Here, the Commission never invoked its authority under RSA 378 to *set* rates and never engaged in the ratemaking process. Instead, the Commission adjudicated the Competitive Carriers' complaints made pursuant to RSA 365:1, interpreted the tariff, and determined that the tariff did not permit Verizon to impose the CCL charge when no Verizon end-user or common line was involved. The Commission then found that because Verizon's tariff did not permit it to assess the CCL charge in certain circumstances, "Verizon owes restitution." In so doing, the Commission noted, with citation to applicable case law, "that refunds are an appropriate means for providing restitution for improperly applied charges." *Order* at 32, citing *Appeal of Granite State Electric Company,* 120 N.H. 536 (1980). The Commission further noted, correctly, that RSA 365:29 permits "reparations covering payments made within two years prior to the date of filing a petition for any illegally or unjustly discriminatory rate, fare, charge or price demanded and collected by a public utility." *Id.* Thus, the determinations made by the Commission in this case regarding refunds of an improperly applied charge are very different from determining that a rate is too high,

"reaching back" to reset the rate retroactively, and then ordering a refund. It is important to note that the Commission did not completely invalidate the CCL charge or adjust the rate "to zero" as asserted by Verizon. The CCL charge remains in the tariff at the originally established rate. Verizon (and now FairPoint) can continue to impose the charge in appropriate circumstances, *i.e.,* when the CCL service is actually provided.

Verizon's reliance on *Appeal of Pennichuck Water Works,* 120 N.H. 562 (1980), in support of its retroactive ratemaking argument is misplaced. That decision dealt with the Commission's ratesetting function and the date upon which temporary rates (which are later reconciled with permanent rates through customer refunds or surcharges) could lawfully be established. That case simply has no application to the situation here, where the Commission is invoking its authority under RSA 365:29 to order reparations for improperly assessed charges.

IV. THE COMMISSION HAS THE AUTHORITY TO ORDER REPARATIONS WHEN A UTILITY IMPOSES CHARGES IN A MANNER INCONSISTENT WITH ITS TARIFF.

Verizon has no qualms about arguing for refunds when it stands to benefit from the argument. In the Pennsylvania litigation cited above, Verizon stated:

> The One Communications Companies argue that they should not be required to provide refunds under Section 1312(a) because their "access rates were included in lawfully-filed, Commission-accepted tariffs." (One Communications Reply Br. at 36). Refunds under Section 1312(a) are not limited to cases where rates are untariffed, or in excess of tariffed rates. To the contrary, the Legislature gave the Commission broader authority, stating that the Commission may direct a refund where the rate collected was "unjust or unreasonable, ***or*** was in violation of any regulation or order of the commission, ***or*** was in excess of the applicable rate contained in an existing and effective tariff of such public utility." 66 Pa. C.S. § 1312(a) (emphasis supplied). The plain language of Section 1312(a) allows the Commission to direct a refund if it finds that the rate collected was "unjust or unreasonable," (in this case it was in violation of a statutory limitation), even if the rate was tariffed.

Verizon Pennsylvania v. Choice One of Pennsylvania, Verizon Surreply Brief Limited to the Issue of Refund at 2 (Apr. 28, 2008) (emphasis in original) (copy attached).

The similarities between section 1312(a) of the Pennsylvania statutes and RSA 365:29 are many. It ill suits Verizon to argue that restitution is inappropriate in New Hampshire notwithstanding RSA 365:29, while arguing that restitution is appropriate and desirable in Pennsylvania under a statute very similar to New Hampshire's.

Verizon's argument must fail because the Legislature has expressly granted reparation authority to the Commission. RSA 365:29. The New Hampshire Supreme Court has recognized the Commission's authority to award refunds. Citing RSA 365:29, the Court has stated that is has "no doubt" of the Commission's power to order refunds "in proper circumstances". *Granite State Transmission, Inc. v. State,* 105 N.H. 454, 456 (1964). The Supreme Court has also held that a Commission "refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired." *Appeal of Granite State Electric Company,* 120 N.H. at 539-540.

In the instant action, the Commission properly exercised its quasi-judicial authority and conducted an extensive and thorough adjudicative process. That process resulted in a decision that Verizon has been improperly interpreting its tariff, erroneously applying and collecting CCL charges in certain circumstances and, therefore, owes refunds for those unlawful charges. These are certainly among the "proper circumstances" for refunds contemplated by the *Granite State Transmission* case.

Although Verizon's "Reply" cites cases from other jurisdictions in support of its argument that the Commission may not order reparations in this case, those cases are

inapposite because they involve retroactive application of *rate changes.* The situation here, by contrast, involves refunds of charges that were improperly levied. If Verizon's logic were to hold true, any time one of its customers received or paid a bill containing charges for services the customer never received, the customer would not be entitled to a credit or refund because of the prohibition against retroactive ratemaking. That conclusion would defy common sense as well as RSA 365:29. There is a clear distinction between retroactive ratemaking and refunds of payments for services that were never received. The Commission, therefore, should reject Verizon's meritless argument that the prohibition against retroactive ratemaking precludes reparations for unlawfully imposed charges.

V. THE COMMISSION SHOULD PROCEED FORTHWITH TO DETERMINE THE AMOUNT OF REPARATIONS.

The instant case was commenced over two years ago. Despite the fact that the issue of reparations/refunds was raised in BayRing's initial complaint and repeatedly mentioned in various procedural orders and filings made throughout the proceeding, not once (until Verizon's Reply filing on April 28, 2008) did Verizon ever assert a challenge to the Commission's authority to order reparations. This new challenge by Verizon is untimely, inappropriate, meritless, and a thinly-veiled attempt to delay repayment or credit of the unlawfully imposed CCL charges. The Commission should strike Verizon's Reply from the record in this case. In addition, the Commission should, without further delay, proceed expeditiously to determine the amount of reparations that Verizon owes and should require repayment or credit of such amounts as soon as possible.

Conclusion

For the foregoing reasons, the Commission should strike Verizon's Reply in its entirety. If the Commission does consider Verizon's claims, it should also consider the short response on the merits set forth above, and should reject Verizon's claims for the reasons stated above and in the Competitive Carriers' Joint Opposition to FairPoint's Motion, which is incorporated by reference as if set forth fully herein. Finally, the Commission should proceed as soon as possible to adjudicate the amounts of the reparations that the Commission has ordered Verizon to make.

Respectfully Submitted,

AT&T CORP.

By its attorney,

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Dated: May 15 , 2008

Certificate of Service

I hereby certify that a copy of the foregoing Joint Opposition has on this 15th day of May, 2008 been sent either by first class postage prepaid or by electronic mail to the parties named on the Service List in the above-captioned matter.

Susan S. Geiger

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services Inc., Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc.,	:	
Complainants	:	Docket No. C-20077672
v.	:	Docket No. C-20077674
	:	Docket No. C-20077676
Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and FiberNet Telecommunications of Pennsylvania, LLC,	:	
Respondents		

NOTICE TO PLEAD

TO: Renardo L. Hicks, Esquire
Stevens & Lee
17 North Second Street
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Harrisburg, PA 17101

Pursuant to 52 Pa. Code §§ 5.101, *et seq.,* you are hereby notified that Verizon Pennsylvania Inc., Verizon North Inc., Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively, "Verizon") have filed a Motion to which you may answer within twenty (20) days unless otherwise provided in Chapter 5 of Title 52 of the Pennsylvania Code. Your failure to answer will allow the presiding officer to rule on this Motion without a response from you, thereby requiring no other proof. All Pleadings, such as a reply to this Motion, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Verizon.

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Dated: April 28, 2008

Attorneys for Verizon

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services Inc., Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc.,	:	
Complainants	:	Docket No. C-20077672
v.	:	Docket No. C-20077674
	:	Docket No. C-20077676
Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and FiberNet Telecommunications of Pennsylvania, LLC,	:	
Respondents	:	

MOTION OF VERIZON TO STRIKE
REFUND ARGUMENT, OR ALTERNATIVELY
FOR LEAVE TO FILE A LIMITED SURREPLY BRIEF

Pursuant to 52 Pa. Code § 5.103, Verizon Pennsylvania Inc., Verizon North Inc., Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively, "Verizon") respectfully submit the following Motion to Strike the discussion of the refund issue at pages 34 through 37 of the Reply Brief filed by Choice One Communications of Pennsylvania Inc. ("Choice One"), CTC Communications Corp. ("CTC"), and FiberNet Telecommunications of Pennsylvania, LLC ("FiberNet") (collectively, the "One Communications Companies"), or alternatively for leave to file the limited Surreply Brief on this issue that is attached hereto as Exhibit A.

BACKGROUND

1. On April 25, 2007, Verizon filed its Complaint against the One Communications Companies for violation of 66 Pa. C.S. § 3017(c), which forbids competitive local exchange carriers ("CLECs") from charging intrastate switched access rates that are higher than those of the incumbent local exchange carrier ("ILEC") in the corresponding service area. Verizon's Complaint also seeks refund or credit of all illegal charges to any of the Verizon companies by the One Communications Companies in violation of this statute from its effective date.

2. On October 24, 2007, December 19, 2007 and January 8, 2008, Verizon and the One Communications Companies pre-filed written testimony in this proceeding. Verizon's testimony gave notice that Verizon was requesting a refund of all overcharges in violation of the statute from its effective date and set forth Verizon's calculation of the overcharge amount. *See* Verizon St. 1.0 at 35-40; Verizon St. 1.1 at 47-48. One Communications' testimony did not address the refund issue or rebut Verizon's overcharge calculations.

3. On January 16, 2008, the Commission held hearings in this proceeding. Verizon and the One Communications Companies submitted the pre-filed testimony and cross examined witnesses during the hearings. The testimony and the transcript of those hearings, as well as certain cross-examination exhibits used at the hearings, were made part of the record in this proceeding. At the conclusion of the hearing, the presiding officer directed the parties to agree on an outline for the briefs. Tr. at 47-48; 300-301.

4. On January 23, 2008, a representative of the law firm representing the One Communications Companies transmitted the agreed-upon outline to the presiding officer via e-mail. The outline contained a section VI(C) entitled "Remedies."

5. On March 6, 2008, the parties filed their Main Briefs in this proceeding. Verizon's Main Brief contained a section VI(C) entitled "Remedies," in which Verizon argued that the Commission should require the One Communications Companies to provide a refund calculated as set forth in Verizon's testimony. The One Communications Companies' Main Brief did not contain a section VI(C) entitled "Remedies" and did not address the issue of the refund or of remedies at all.[1]

6. On April 7, 2008, the One Communications Companies filed their Reply Brief in this proceeding. The One Communications Companies' Reply Brief included a section G, which for the first time in the proceeding addressed the refund issue.

VERIZON'S MOTION

7. The One Communications Companies' Reply Brief contains legal arguments made for the first time in this proceeding as to why the companies believe the Commission cannot, or should not, exercise its discretion to issue a refund under 66 Pa. C.S. § 1312(a).

8. Because the One Communications Companies made these arguments for the first time in their Reply Brief, Verizon had no opportunity to respond to these specific arguments.

9. Given that the One Communications Companies were on notice from Verizon's complaint and testimony that a refund was being requested in this case and given that the parties agreed upon an outline for the Main Brief that specifically contemplated that they would address "Remedies," the One Communications Companies should have included their arguments on remedies in their Main Brief, so that Verizon could have responded in its Reply Brief.

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[1] In fact, One Communications Main Brief departed from the agreed-upon outline after section VI.B.

10. The One Communications Companies' unfair sandbagging of Verizon on this issue deprives Verizon of the opportunity to respond to their legal arguments. It also puts the presiding officer in the unfortunate position of having to decide the issue without the benefit of both sides' arguments.

11. The Commission should either strike the One Communications Companies' untimely arguments on the refund issue set forth at pages 34 through 37 of their Reply Brief, or in the alternative should provide leave for Verizon to file a limited Surreply Brief to answer these arguments.

12. Verizon has responded to similar arguments in its Exceptions and/or Reply Exceptions in the PTI and CTSI cases. The One Communications Companies' discussion at pages 34 through 37 appears to have been copied from the arguments PTI and CTSI made to the Commission on this issue. Verizon's arguments contained in the Surreply Brief are the same as those that Verizon made in response to these particular arguments in its briefing to the Commission in the PTI and CTSI cases. As a matter of administrative efficiency, the presiding officer should not decide the refund issue in this case without being aware of and considering those arguments.

WHEREFORE, Verizon requests that the Commission strike the discussion of the refund issue at pages 34 through 37 of the One Communications Companies' Reply Brief, or in the alternative, accept for filing the Surreply Brief attached hereto as Exhibit A.

Respectfully submitted,

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Dated: April 28, 2008

Attorneys for Verizon

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services Inc., Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc.,	:	
Complainants	:	Docket No. C-20077672
v.	:	Docket No. C-20077674
	:	Docket No. C-20077676
Choice One Communications of Pennsylvania, Inc., CTC Communications Corp., and FiberNet Telecommunications of Pennsylvania, LLC,	:	
Respondents	:	

VERIZON SURREPLY BRIEF
LIMITED TO THE ISSUE OF A REFUND

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Date: April 28, 2008

As set forth in accompanying Motion of Verizon to Strike Refund Argument, or Alternatively for Leave to File a Limited Surreply Brief, Verizon[1] responds to the new arguments set forth at pages 34-37 of the Reply Brief filed by the One Communications Companies[2] regarding whether they should be required to provide a refund.[3]

A. The Fact That The One Communications Companies' Switched Access Rates Were Tariffed Is Not A Defense To A Refund Order Under 66 Pa. C.S. § 1312(a)

The One Communications Companies argue that they should not be required to provide refunds under Section 1312(a) because their "access rates were included in lawfully-filed, Commission-accepted tariffs." (One Communications Reply Br. at 36). Refunds under Section 1312(a) are not limited to cases where rates are untariffed, or in excess of tariffed rates. To the contrary, the Legislature gave the Commission broader authority, stating that the Commission may direct a refund where the rate collected was "unjust or unreasonable, ***or*** was in violation of any regulation or order of the commission, ***or*** was in excess of the applicable rate contained in an existing and effective tariff of such public utility." 66 Pa. C.S. § 1312(a) (emphasis supplied). The plain language of Section 1312(a) allows the Commission to direct a refund if it finds that the rate collected was "unjust or unreasonable," (in this case it was in violation of a statutory limitation), even if the rate was tariffed.

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1 The Complainants here include Verizon Pennsylvania Inc. ("Verizon PA"), Verizon North Inc. ("Verizon North"), Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc. (collectively "Verizon").

2 The Respondents here include Choice One Communications of Pennsylvania Inc. ("Choice One"), CTC Communications Corp. ("CTC"), and FiberNet Telecommunications of Pennsylvania, LLC ("FiberNet") (collectively, the "One Communications Companies").

3 The One Communications Companies point out that Verizon erroneously referred to the applicable provision of the Public Utility Code as 66 Pa. C.S. § 3012(a) in portions of its Main Brief. The correct citation is 66 Pa. C.S. § 1312(a). Verizon apologizes for the error.

While the limited doctrine of "commission made rates" insulates certain rates from retroactive modification, the Commonwealth Court has made clear that the simple fact that a tariff was filed and allowed to take effect without substantive investigation is not sufficient to create "commission made rates." Before this case, the Commission has never substantively reviewed the One Communications Companies' tariffed access rates, which were simply allowed to go into effect. The Commission certainly never reviewed those rates after Section 3017(c) became law. As the Commonwealth Court explained in rejecting Equitable Gas's opposition to a refund, "[w]hile it is true that 'Commission-made' rates cannot be retroactively changed, this doctrine is inapplicable to the case at bar. 'Commission-made' rates are those rates which are implemented subsequent to an exhaustive evidentiary presentation of the utility's expenses and their *reasonableness*, the fair value of the utility's property used and useful in the public service, and the return on that value to be received by companies who are subject to similar economic risks." *Equitable Gas Co. v. Penn. Pub. Util. Comm'n*, 106 Pa. Commw. 240, 258, 526 A.2d 823, 832 (1987). Like Equitable Gas, the One Communications Companies cannot "validly expect" that their intrastate switched access rates "were insulated from retroactive modification" because they "were not stamped with antecedent PUC approval. . . . No final determination as to reasonableness had been made by the PUC. Therefore, it was not error for the PUC to re-examine the . . . rates to determine justness and reasonableness."[4]

[4] *Equitable*, 106 Pa. Commw at 259, 526 A.2d at 831.

B. The One Communications Companies Have Not Demonstrated Equitable Considerations Sufficient To Avoid A Refund Order Under 66 Pa. C.S. § 1312(a)

The One Communications Companies argue that, even if the Commission ultimately decides that their rates are not cost justified, "the balance of the equities clearly do[es] not justify awarding Verizon with a refund," and that the Commission should exercise the "discretion" afforded to it under Section 1312(a) to decline to require a refund. (One Communications Companies' Reply Br. at 36). This argument presents no relevant equitable considerations. The Commonwealth Court has viewed the Commission's discretion to refrain from awarding a refund to require specific evidence that the utility's financial viability would be in jeopardy from making the refund, such as "any imminent financial collapse or service failure that would justify retaining the ratepayer's money."[5] The One Communications Companies have produced no such evidence.

In any event, the One Communications Companies concede that they knew at least by August of 2005 when they received a Verizon dispute letter, if not earlier when Section 3017(c) took effect at the end of 2004, that this statute prohibited CLECs from charging higher rates than the ILEC and that any revenue they collected from rates over that statutory threshold was at risk. The Commonwealth Court has held that a utility that continues to charge rates when it is aware that the rates are subject to challenge, and may ultimately be found to be unjust and unreasonable, assumes the risk that it may be required to refund the revenue collected through those rates.[6] It is the company – not the ratepayers – that bears

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5 *See, e.g., Emporium Water Co. v. PUC*, 859 A.2d 20, 24 (Pa. Commw. 2004) ("Although the Utility properly points out that the Commission's authority to order refunds pursuant to Section 1312(a) of the Code is discretionary, . . . the Utility did not present any evidence of any imminent financial collapse or service failure that would justify retaining the ratepayer's money.")

6 *Pa. Gas & Water Co. v. Pa. Public Util. Com*, 470 A.2d 1066, 1073, 79 Pa. Commw. 416, 430 (Pa. Commw. Ct. 1984) (noting that while PGW was taking its case to the nation's highest court, it

the consequences of taking that risk if the rates in question ultimately turn out to be unjust or unreasonable. In response to an argument that it would be inequitable to require a refund, the Commonwealth Court noted that "[w]ith regard to equitable considerations, we must observe that Duquesne made the choice to proceed with" the rate increases and that "[e]quity should not intervene where those seeking its aid are at least in part responsible for the circumstances which they now contend have produced an inequitable result."[7] Here, too, the One Communications Companies are "at least in part responsible" for the fact that they never sought guidance or clarification from this Commission and continued to collect revenue from Verizon and other access customers through unlawfully high rates while opposing Verizon's attempts to enforce the statute.

C. Verizon Filed Its Complaint Well Within The Four-Year Statute Of Limitations Applicable To Refunds

The One Communications Companies argue that Verizon should not be entitled to a refund because it "waited" until April of 2007 to file a complaint. (One Communications Companies' Reply Br. at 37). The companies concede that Verizon began demanding their compliance with the statute as early as August of 2005, months after the statute took effect. The One Communications Companies' unsupported argument that Verizon somehow forfeited its right to refunds for its overpayments simply because it did not file a formal complaint immediately after Section 3017(c) took effect is contrary to the plain language of Section 1312(a). This statute specifically does ***not*** limit a customer's entitlement to a refund

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continued to charge rates that it knew were at risk of ultimate disapproval. Accordingly "PG&W must now bear the consequences of implementing those higher rates, in the form of refunds to its customers. Although this is a difficult, and perhaps unfortunate, result for PG&W, we hold that it is mandated by statute and by the facts of the case.") *Id.* at 1071, 79 Pa. Commw. at 426 ("PG&W, of course, relied upon the decisions of this Court in collecting rates which were held ultimately to be in excess of those which the PUC adjudged just and reasonable. This reliance, unfortunately for PG&W, was misplaced and PG&W must now bear the burden of compliance with the PUC refund order.")

7 *Duquesne,* 543 A.2d at 200.

to overcharges made on or after the date it filed a formal complaint with the Commission. To the contrary, the statute contemplates that the refund will go back four years ***before*** the complaint was filed, stating that the Commission has the "power and authority" to require a refund of any "excess paid" by a customer as a consequence of "unlawful" rates "within four years ***prior to the date of the filing of the complaint***." 66 Pa. C.S. § 1312(a) (emphasis added). The One Communications Companies have cited no authority to support their proposition that a customer must file a complaint immediately upon learning of its potential claim, or forfeit its right to the refund authorized by 66 Pa. C.S. § 1312(a). In fact, the One Communications Companies' interpretation would negate the authority provided to the Commission under that statute.

Verizon should not be penalized for trying to avoid litigation and encourage voluntary compliance with the law. If the Commission were to accept the argument that a customer forfeits its right to a refund under Section 1312(a) unless it immediately files a formal complaint as soon as it becomes aware of the potential claim, and that any attempts to settle the matter informally are at the customer's peril, then it will be encouraging litigation and discouraging attempts at settlement, contrary to its own regulations. *See* 52 Pa. Code § 5.231(a) ("It is the policy of the Commission to encourage settlements"). Attempting first to resolve the matter informally through dispute letters is not an attempt to "game the system," but rather is what the Commission should expect of any party before it resorts to formal litigation. Further, there is nothing unreasonable about Verizon relying on a Pennsylvania statute that clearly allows for refunds going back for four years.

CONCLUSION

The Commission should therefore issue a refund order pursuant to 66 Pa. C.S. § 1312(a) requiring Choice One and CTC to refund to Verizon all amounts paid in excess of the rate level permitted by 66 Pa. C.S. § 3017(c) from the effective date of the statute until Choice One and CTC implement lawful rates, together with interest at the legal rate, and should prohibit FiberNet from attempting to back-bill at rates above the statutory level.

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