

**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

**AT&T'S RESPONSE TO VERIZON'S MOTION TO FILE
SUPPLEMENTAL DISCOVERY**

Introduction

On August 9, 2007, Verizon filed a motion that it styled as a "Motion For Leave To File Supplemental Discovery Reply To The Extent Necessary" ("VZ motion"). Although styled as a request to supplement a discovery reply, it is in fact a motion to reopen the record. In its motion, Verizon asks that a "Third Supplemental Reply" to Staff's information request 1-19 be added to Exhibit 17. AT&T does not oppose the introduction of this new evidence.

Nevertheless, AT&T files this detailed response to "draw a line in the sand" by emphasizing that it does not waive its right to object to any further effort by Verizon to supplement the record with untested information in surreptitious ways, whether on the basis of a purported "agreement" that does not exist, or by any other means, including extrarecord assertions of fact.

AT&T is authorized to state that BayRing concurs in this response.

Background

On July 25, and thus after the hearings and after the record was closed, Verizon filed the Third Supplemental Reply. Purportedly based on an agreement between the parties at the hearing to the effect that supplements to information requests in Exhibit 17 should be

included in Exhibit 17, Verizon requested in its July 25 filing letter that the third supplement be included in Exhibit 17 as well.

Separately, and for unrelated reasons, the Commission expected AT&T to file a complete copy of Exhibit 17. *See*, Tr. 2 (July 11, 2007), at 54-55. On August 2, AT&T filed a complete copy of Exhibit 17. AT&T did not include a copy of the Third Supplemental Reply, because it was not part of Exhibit 17 (and indeed did not even exist) at the time that Mr. Shepherd testified that Exhibit 17 as it then existed was true and accurate. Tr. 2 (July 11, 2007), at 58, lines 7-9. In its cover letter filing Exhibit 17, AT&T explained that, contrary to Verizon's July 25 assertions, it (AT&T) had not agreed "to *additional* supplements that did not then exist, had not been filed, and of which it had no knowledge." August 2, 2007, AT&T filing letter, at 1 (emphasis in original) (copy attached). AT&T also noted that Verizon's duty to supplement discovery, upon which Verizon relied, does not allow Verizon to unilaterally reopen the record after it has been closed, to introduce unsworn testimony or evidence. AT&T noted that N.H. Admin. Rules, Puc 203.30 specifies the procedure for determining whether the record should be reopened.

Discussion

I. AT&T WILL OBJECT TO ANY FURTHER ACTIONS BY VERIZON TO INTRODUCE UNTESTED FACTUAL ASSERTIONS OR DOCUMENTS INTO THE RECORD BY WAY OF DISCOVERY SUPPLEMENTS, A PURPORTED "AGREEMENT" OR THROUGH ANY OTHER MECHANISM.

A. A PARTY'S DUTY TO SUPPLEMENT PRE-TRIAL DISCOVERY RESPONSES CANNOT BE USED AS A BASIS FOR REOPENING THE RECORD.

Verizon's claim that *discovery* must be supplemented under the Commission's rules is not applicable to answers provided at the hearing under oath in response to cross examination. At the hearing, Verizon Witness Shepherd testified under oath that the responses that had been given to the information requests contained in Exhibit 17 as of that date were true and accurate to the best of his belief. Tr. 2 (July 11, 2007), at 58, lines 7-9. If Verizon believes

that its witness' answers at the hearing were inaccurate or incomplete and wishes to correct the evidentiary record, the proper procedure requires it to petition the Commission to reopen the record for such purpose. *See*, N.H. Admin. Rules, Puc 203.30. The rule requiring Verizon to supplement discovery responses does not give it the unilateral right to reopen the record to submit evidence that has never been tested by discovery or cross examination.

B. THE CONTEXT INDICATES AND THE TRANSCRIPT CLEARLY SHOWS THAT THE "AGREEMENT" DOES NOT INCLUDE A RIGHT TO INCLUDE FUTURE SUPPLEMENTS IN EXHIBIT 17.

Verizon cannot use a claimed "agreement" between it and AT&T as a basis for seeking to introduce additional, untested information or documents into the record. The transcript excerpt that Verizon quoted in its motion could not be any clearer: the agreement applied to supplements that had at that time been made. Verizon counsel stated, "I would simply ask that, to the extent that a request *was* revised or supplemented, that that be included in the documents provided to [the] Commission. Tr. 2 (July 11, 2007), at 55. lines 7-10 (emphasis added). In response, AT&T's counsel stated, "And, that is my intention, your Honor." *Id.*, at lines 11-12. The verb "was" is clearly stated in the past tense, and that is what the parties agreed to.

Moreover, the context of the exchange above is entirely consistent with the notion that it applied to existing supplements. Verizon had at that time already provided two supplements, so that there was a clear set of documents to which statements regarding requests that were revised or supplemented related. Moreover, and this is critical, Verizon never indicated that there was the potential for still more supplements to follow. Having already filed supplements, having expressly referenced in the past tense supplements to which the agreement referred, and having given no indication that there were further supplements

expected, Verizon gave no reason for any party to believe that Verizon intended, albeit secretly, the agreement to include further supplements unknown to any other party.¹

Indeed, in that context, it is especially troublesome that Verizon now admits in its motion – albeit obliquely – that at the time of the agreement it intended the agreement to apply to *further* supplements. Verizon Motion, at ¶ 5. Only Verizon could have known that there might be further supplements. And, indeed, it appears that Verizon in fact intended to supplement at the time of the hearing but did not say so. In its July 25 cover letter originally seeking to file the Third Supplemental Reply, Verizon said that it had been diligently working on a special study to find additional responses at the time of the hearing. *See*, page 2 and footnote 2.

AT&T will object to any future attempt by Verizon to use this alleged “agreement” as a basis for inserting additional, untested information into a closed record.

C. VERIZON’S EFFORTS TO INSERT POST-HEARING INFORMATION INTO THE RECORD IS INCONSISTENT WITH THE ORDERLY DEVELOPMENT OF A FAIR RECORD.

Staff’s information request 1-19, which Verizon now seeks to supplement, was issued *eight months ago*, on December 15, 2006, and responses were initially scheduled for January 12, 2007, later changed to January 22. Indeed, when the Commission revised the response date to January 22, it first considered the impact on the parties and found that a *ten day* delay would “not unduly delay the proceeding or adversely affect the rights of any party.” *See*, Secretarial Letter in this docket, issued January 12, 2007. It is virtually impossible to imagine that the Commission would have concluded that a *seven month delay* would not “unduly delay the proceeding or adversely affect the rights of any party.”

¹ There is a certain irony that Verizon here is seeking to use the same argument it uses in support of the tariff interpretation at issue in this case: Verizon’s intentions, although not in the operative language defining rights and obligations, trumps the language itself.

It was bad enough that Verizon filed a second supplement to Staff 1-19 only two work days prior to trial. *See*, Verizon July 6 filing of the second supplemental response. While such conduct justified an AT&T objection at the time to the introduction of such evidence in Exhibit 17, AT&T elected not to object in light of the lack of substantial materiality of the information. While AT&T will again not object to Verizon's current attempt to introduce further evidence outside of the schedule all parties are supposed to live by, AT&T will object to any continued flouting by Verizon of rules established for the orderly and fair adjudication of contested matters.

Conclusion

While AT&T does not object to Verizon's present motion, it felt compelled to file this detailed exposition of its position regarding any further attempt by Verizon to put putative facts before the Commission whether under the guise of discovery supplements, purported agreements, or bald assertions of extra-record "fact."

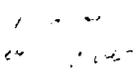
Respectfully submitted,

AT&T COMMUNICATIONS OF NEW
ENGLAND, INC.

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August 2, 2007

VIA OVERNIGHT AND ELECTRONIC MAIL

Deborah Howland
Executive Director and Secretary
NH Public Utilities Commission
21 Fruit Street, Suite 10
Concord, NH 03301

RE: Docket No. 06-067, Bay Ring 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 Carriers' Networks

Dear Secretary Howland:

Enclosed please find five (5) complete sets of the Verizon responses that were marked on July 11, 2007, as Exhibit 17 in the hearing on this matter.¹ Because several of the responses included voluminous attachments, I was not able to supply complete copies of all of the attachments at the hearing. I indicated at the hearing that AT&T would provide complete copies of the attachments in Exhibit 17 after the hearing to the Commissioners, the clerk, and the stenographer. There was no objection. Tr. 2 (July 11, 2007), at 55.

Included in the enclosed are all supplements that Verizon filed to the responses identified herein as of the close of hearings. On July 25, and thus after the hearings and after the record was closed, Verizon filed a third supplement to Verizon's response to Staff 1-19. Purportedly based on an agreement between the parties at the hearing to the effect that supplements to information requests in Exhibit 17 should be included in Exhibit 17, Verizon requested in its July 25 filing letter that the third supplement be included in Exhibit 17 as well. AT&T has *not* included the third supplement in this complete package of Exhibit 17 documents because AT&T did not agree, nor could it have, to *additional* supplements that did not then exist, had not been filed, and of which it had no knowledge. Indeed, Verizon's proposal, to which AT&T agreed, referred to an "[information] request [that] *was* revised or supplemented" as of the day of the hearing. Tr. 2 (July 11, 2007), at 55, lines 8-12 (emphasis added). Moreover, Verizon did not indicate at the hearings that it had any intention of filing further supplements after the close of the record.

¹ Attached hereto, for the convenience of the Commission and the parties, as Appendix A is a list of the information requests and responses included in Exhibit 17.

Verizon's claim in its July 25 cover letter filing the post-hearing supplements that *discovery* must be supplemented under the Commission's rules is not applicable to answers provided at the hearing under oath in response to cross examination. At the hearing, Verizon Witness Shepherd testified under oath that the responses that had been given to the information requests contained in Exhibit 17 as of that date were true and accurate to the best of his belief. Tr. 2 (July 11, 2007), at 58, lines 7-9.² If Verizon believes that its witness' answers at the hearing were inaccurate or incomplete and wishes to correct the evidentiary record, the proper procedure requires it to petition the Commission to reopen the record for such purpose. See, N.H. Admin. Rules, Puc 203.30. The rule requiring Verizon to supplement discovery responses does not give it the unilateral right to reopen the record to submit evidence that has never been tested by discovery or cross examination. (I am authorized to represent that both BayRing and One Communications concur in the position set forth in this and the preceding paragraph.)

Please note that the attachments to Verizon's response to Staff 1-19 were filed by Verizon pursuant to a request for confidential treatment under RSA 378:43. AT&T requests that such attachments, as they are now included in Exhibit 17, also be subject to confidential treatment. The information contained in them is proprietary and competitively sensitive. It is not general public knowledge and is not available elsewhere. All carriers involved in the transactions evidenced by the attachments have taken measures to prevent dissemination of the information in the ordinary course of business. The information pertains to the provision of competitive services and also reflects Customer Proprietary Network Information under 47 U.S.C.A. § 222.

Also enclosed, for inclusion in the public record, is a redacted version of Exhibit 17 with the confidential attachments omitted.

Kindly acknowledge receipt of this filing by returning a stamped copy of this cover letter in the self-addressed, stamped envelope enclosed herewith. Thank you for your attention to this matter.

Sincerely,



Jay E. Gruber

cc: *Service List (Electronic Only)*

Enclosures

² If, at the same time Mr. Shepherd testified that the responses were true and accurate, Verizon was actively seeking to modify or supplement those responses and thus make Mr. Shepherd's testimony untrue, his testimony at the hearing was, at best, misleading. Unfortunately, such a conclusion is hard to avoid given Verizon's statement in its July 25 cover letter that it had been diligently working on a special study to find additional responses at the time of the hearing. See, page 2 and footnote 2.