STATE OF 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

Order on Motions for Rehearing and Motion to Intervene

ORDER NO. 24,886

August 8, 2008

I. INTRODUCTION

Incumbent local exchange carrier (ILEC) Verizon New Hampshire (Verizon) and the successor to its utility franchise, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (FairPoint) seek rehearing of Order No. 24,837, entered in this docket on March 21, 2008. In Order No. 24,837, the Commission determined that Verizon was not authorized under its wholesale tariff to bill competitive local exchange carriers (CLECs) for certain switched access charges, referred to in the tariff as "carrier common line" (CCL) charges, for calls that involve neither a Verizon customer as the end-user nor a Verizon-provided local loop.

The proceeding commenced on April 28, 2006 upon the petition of CLEC Freedom Ring Communications LLC d/b/a BayRing Communications (BayRing), seeking an investigation. At issue were switched access charges imposed by Verizon on calls that originated on BayRing's network and terminated on the network of a wireless carrier and not Verizon.

In the course of the proceeding, the Commission granted interventions to RNK Inc. d/b/a RNK Telecom (RNK), AT&T Communications of New England, Inc., One Communications, Otel Telekom, Inc., segTEL, the New Hampshire Telephone Association, and two affiliates,

Sprint Communications Company and Sprint Spectrum. RNK ultimately withdrew its intervention. Subsequent to the pre-hearing conference, BayRing sought to amend its initial petition by adding the assertion that Verizon was improperly assessing access charges to BayRing for calls originated by BayRing end user customers and terminating at wireline (as opposed to wireless) end user customers served by carriers other than Verizon. AT&T filed a motion to clarify or amend the scope of the proceeding, outlining various call scenarios and corresponding charges levied by Verizon warranting review in this docket and not yet covered in BayRing's initial and amended complaints.

On October 23, 2006, the Commission issued Order No. 24,683, expanding the scope of the investigation and adopting a schedule for discovery, testimony and evidentiary hearings. The Commission also issued a supplemental order of notice on October 23, 2006, scheduling a second prehearing conference to consider the expanded scope of the proceeding.

The second prehearing conference took place as scheduled on November 3, 2006. BayRing asked the Commission to bifurcate the issues of "liability" (*i.e.,* the proper interpretation and application of the Verizon tariffs) and "damages" (*i.e.*, the calculation of any refunds and/or reparations due from Verizon). Verizon opposed BayRing's request. An ensuing technical session among the parties and Staff did not resolve the disagreement.

On November 29, 2006, the Commission issued Order No. 24,705, revising the procedural schedule to provide for an initial phase to determine tariff interpretation issues. The Commission directed each party intending to seek reparations pursuant to RSA 365:29 to submit calculations of the estimated financial impact of the disputed charges, and to include a description of the calculation method used, an explanation of any assumptions made, and worksheets illustrating how the calculation was determined. The Commission also directed

Verizon to submit (1) an estimate of the total financial impact on Verizon of the charges at issue in this proceeding, (2) to the extent practicable, individual estimates of the disputed charge totals Verizon had billed to BayRing and any intervenors, and (3) an estimate of the annual impact on Verizon if the disputed revenue is no longer collected. One Communications, BayRing, AT&T, Sprint/Nextel and Verizon each filed pleadings in response to Order No. 24,705.

Following the submission of pre-filed direct testimony and pre-filed rebuttal testimony, as well as the exchange of discovery materials, a hearing took place on July 10 and 11, 2007. SegTel, AT&T, One Communications, BayRing, and Verizon filed post-hearing briefs. Order No. 24,837 followed.

On March 28, 2008, Verizon submitted its timely motion for rehearing. Thereafter, BayRing, AT&T and One Communications filed a joint opposition to the Verizon motion; FairPoint filed a motion to intervene and for rehearing. Verizon submitted a pleading on April 28, 2008 that it captioned as a "reply" to the FairPoint rehearing motion. On the same date, BayRing, AT&T and One Communications filed a joint opposition to FairPoint's motion, to which FairPoint responded on April 29, 2008. On May 15, 2008, BayRing, AT&T and One Communications filed a joint motion to strike Verizon's April 28, 2008 submission. On May 27, 2008, Verizon and FairPoint each responded to the joint motion to strike.

II. SUMMARY OF MOTIONS AND OBJECTIONS

A. Verizon Motion for Rehearing

1. Verizon

In its motion for rehearing, Verizon contends that wholesale Tariff No. 85 clearly sets forth the right to impose carrier common line charges for all switched access, and that Order No. 24,837 reaches an erroneous conclusion that is contrary to the plain meaning of the tariff

language. Verizon also argues that the order, in effect, results in the unconstitutional confiscation of its property by precluding compensation for a service Verizon provides. Verizon further contends that the Commission's decision is internally inconsistent and contradictory by referring to Verizon "providing a component of switched access service" but denying the applicability of CCL charges when Verizon provides switched access.

2. AT&T, BayRing and One Communications

The three jointly appearing CLECs (AT&T, BayRing and One Communications) contend that Verizon's motion misstates the central issue decided in the Commission's order and challenges a decision the Commission never made, further veering away from the central issue by arguing a property confiscation claim. According to the CLECs, the only issue decided was whether Verizon can charge for a service it does not provide. It is the position of the three CLECs that even if one assumes the applicable tariff language is ambiguous, because Verizon is the author of that language it should not be permitted to exploit the ambiguity to its advantage. The CLECs further contend that Verizon should have modified its tariff if it wanted to assert an entitlement to CCL charges for calls that neither involves a Verizon end-use customer or a Verizon local loop.

According to the CLECs, Verizon's confiscation claim is without merit because it assumes a decision the Commission did not make and a confiscation that has not happened. Moreover, the CLECs contend, Verizon attributes a loss to government action when Verizon itself is responsible. The CLECs also take the position that Verizon no longer has any property to be confiscated because it has sold the underlying assets to FairPoint. Finally, the CLECs contend that the ratemaking issues Verizon raises in its discussion of confiscation are not applicable because this case involves neither the setting nor the rejection of rates.

B. FairPoint Petition to Intervene and Motion for Rehearing

1. FairPoint

FairPoint seeks to intervene as a party whose interests are directly affected by the Commission's order. FairPoint further moves for rehearing, adopting Verizon's position that the plain meaning of the tariff permits the imposition of CCL charges in the circumstances of the case and that the Commission's order amounts to an unlawful taking by ordering the cessation of billing for services provided absent compensation. FairPoint further contends that any change in an existing tariff rate should be prospective only, and that the Commission's order constitutes retroactive ratemaking to the extent that the order determined that application of the CCL charge to service rendered in the past was not just and reasonable.

2. AT&T, BayRing and One Communications

The three jointly appearing CLECs object to FairPoint's petition to intervene, arguing that FairPoint lacks standing. The CLECs assert that FairPoint's rehearing motion merely reiterates Verizon's arguments, reflecting the same flawed interpretation of the Commission's order and misconception of the scope of the underlying case. The CLECs further argue that the order does not constitute retroactive ratemaking; rather, it interprets an existing tariff to reach a conclusion about the appropriate application of previously approved tariff rates.

3. Verizon

Verizon filed a response to FairPoint's motions, supporting FairPoint's intervention as a successor-in-interest to Verizon. Verizon further concurred with FairPoint's arguments for rehearing, incorporating them by reference. Verizon elaborated on its support for FairPoint's contention that the Commission's order constitutes retroactive ratemaking, noting that the tariff

had been investigated and approved in a prior proceeding and, therefore, should not be interpreted as to require any refunds.

C. Motion to Strike Verizon Reply of AT&T, BayRing and One Communications

1. AT&T, BayRing and One Communications

The three jointly appearing CLECs filed a motion to strike Verizon's reply to FairPoint's motion for rehearing. The CLECs contend that Verizon unlawfully raised the issue of retroactive ratemaking for the first time in its reply. According to the CLECs, RSA 541:4 requires a motion for rehearing to state every ground for appeal, and that New Hampshire law bars new arguments raised for the first time in a reply to another party's filing. The CLECs assert that Verizon's reply is an unauthorized attempt to respond to the CLECs outside of the procedural framework permitted by applicable statute and rules. The CLECs further contend that, in the event the Commission does consider Verizon's claims, the Commission should accept for consideration the CLECs' arguments as set forth in their joint opposition to FairPoint's rehearing motion.

2. Verizon

Verizon contends there is no legal basis for the relief sought by the three jointly appearing CLECs, and that N.H. Code Admin. Rules Puc 203.07 does not define parameters for permissible pleadings or prohibit responsive comments to other parties' pleadings. Verizon points out that the objective of the rehearing process is to provide an opportunity to review and correct any errors in a decision before appeal. Verizon asserts that its contentions about retroactive ratemaking do not comprise a new argument but were integral to its previous assertions concerning Commission changes to existing tariff provisions that had been approved in a fully litigated proceeding. Verizon contends that the Commission cannot reach back in time and change the rates charged by Verizon under a legally enforceable tariff. Finally, Verizon

contends that this case does not involve the appropriate circumstances for reparations under RSA 365:29.

3. FairPoint

FairPoint objected to the CLECs' motion to strike as an untimely supplementation of their filings. FairPoint asserted that it has standing to file its motion for rehearing as the successor-in-interest to Verizon with a legal nexus to the outcome of the proceeding. FairPoint further contended that the Commission's order requiring FairPoint to provide a service absent a corresponding fee amounts to injury in fact. Accordingly, FairPoint concludes that the Commission should address the issues raised in its motion, including the retroactive ratemaking claim.

III. COMMISSION ANALYSIS

RSA 541:3 permits the Commission to grant rehearing of an order when a petitioner's motion states good reason for such relief. Good reason may be shown by identifying specific matters that the Commission "overlooked or mistakenly conceived" in rendering its decision. *Dumais v. State,* 118 N.H. 309, 386 A.2d 1269 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003).

A careful review of the Verizon and FairPoint motions leads us to conclude that the arguments raised in support of rehearing and reconsideration have been previously raised and addressed in Order No. 24,837, or are mere reformulations of previous arguments with no new, previously unavailable evidence proffered.

A. Interpretation of Tariff No. 85

In their arguments that the tariff language is clear and that the Commission reached an erroneous conclusion in its interpretation of that language, Verizon and FairPoint merely repeat arguments raised and addressed in the underlying proceeding and Order No. 24,837. We find that the scope of the underlying proceeding focused on the proper interpretation and application of the tariff language at issue. Verizon and FairPoint have simply reformulated the arguments set forth in that proceeding in an effort to seek a different outcome. As a result, we conclude that rehearing or reconsideration on that point is not warranted.

Verizon contends in its rehearing motion that extrinsic evidence supports its interpretation of Tariff 85. We did not consider extrinsic evidence in Order No. 24,837 because we concluded that the tariff is unambiguous. Nothing presented on rehearing causes us to change this determination. *See Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) (noting that tariffs "define the terms of the contractual relationship between a utility and its customers" while enjoying "the force and effect of law"), and *In re Town of Durham*, 149 N.H. 486, 487 (2003) (noting that recourse to extrinsic evidence in contract interpretation is inappropriate absent "fraud, duress, mutual mistake, or ambiguity"). Moreover, even if we were to consider the extrinsic evidence proffered by Verizon, it would buttress rather than undermine our interpretation of the tariff language. As noted by the jointly appearing CLECs, Verizon did not impose the charges at issue in this proceeding from the inception of local competition in 1996 until 2001 and Verizon's billing agent did likewise through 2006. Such a course of performance is "indicative of the terms to which they believed themselves bound." *Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 130 N.H. 680, 687 (1988). As we explained in our previous order, what occurred thereafter is that the course of performance changed unilaterally in

circumstances where it was incumbent on Verizon to modify its tariff if the existing language left it uncompensated for some portion of the services it was rendering to wholesale customers.[1]

B. Confiscation of Property

The confiscation-of-property argument that both Verizon and FairPoint make boils down to a contention that because Tariff 85 has the force and effect of law, *see Appeal of Pennichuck Water Works, supra*, it cannot be read to deprive Verizon (or FairPoint) of payment for a service provided without running afoul of the constitutional protection against uncompensated takings. In the realm of utility regulation the relevant takings jurisprudence stresses that "a regulated utility has no abstract constitutional right to make a profit" and the requirement of just and reasonable rates therefore does not equate to "plenary indemnification" to insulate investor-owned companies from business risk. *Appeal of Public Service Co. of N.H.*, 130 N.H. 748, 755 (1988). Therefore, the takings clauses of the state and federal constitutions do not require us to indemnify Verizon for failing to revise its tariff to the extent this was necessary to compensate the company for certain wholesale services provided in connection with calls that involve neither a Verizon end-user nor a Verizon local loop.

C. Retroactive Ratemaking

We begin our discussion of retroactive ratemaking by resolving a procedural issue. In its initial rehearing motion, Verizon did not raise the issue of retroactive ratemaking; asserting it thereafter was not an effective means for Verizon to resurrect this ground for rehearing and, ultimately, appeal. *See Petition of Ellis*, 138 N.H. 159, 161 (1993) (noting that RSA 541:3

[1] In its brief, Verizon makes a factual contention to the contrary. *See* Verizon Brief of March 28, 2008 at 10 n. 5 ("Verizon never believed that it was necessary to change the Tariff because it has always understood that switched access included local transport and that as a result, the carrier common line charge must be charged to recipients of that service under its existing, legally effective Tariff"). This assertion is not of record and is itself ambiguous on the question of what Verizon understood. Moreover, there is no dispute that switched access includes local transport. The relevant question, which we answered in the negative at page 31 of Order No. 24,837, is whether local transport, standing alone, is sufficient to qualify as switched access service for purposes of the tariff. We remain convinced that it does not, based on the unambiguous language in the tariff.

authorizes only one rehearing motion and RSA 541:4 specifies that such motion must contain "every ground" on which movant claims the underlying order was unjust or unreasonable). Thus, if the issue is validly before us on rehearing, it is because FairPoint raised it. The three jointly appearing CLECs contend that FairPoint lacked standing to assert this ground for rehearing because, having only succeeded to Verizon's utility franchise well after this proceeding commenced, FairPoint cannot have suffered any injury from what it and Verizon deem to have been retroactive ratemaking. The flaw in this argument is that RSA 541:3 imposes no such issue-specific injury-in-fact requirement. Rather, the statute authorizes a party, or any person directly affected by the decision, to seek rehearing "in respect to *any* matter determined in the action or proceeding" (emphasis added).

The retroactive ratemaking argument is really just the mirror image of the uncompensated taking argument we have already rejected. As we noted in our discussion of the latter issue, the *Pennichuck* case makes plain that tariffs have the force and effect of law and also state the terms of the contract between utility and customer. The Court went on to note that, because of these dual attributes, retroactively altering the terms of a tariff would run afoul of both Part 1, Article 23 of the New Hampshire Constitution (enjoining "[r]etrospective laws") and the Contract Clause of the U.S. Constitution (precluding laws that have the effect of "impairing the obligation of contracts"). *Appeal of Pennichuck Water Works*, 120 N.H. at 566. But construing an unambiguous tariff unfavorably to a utility does not amount to making a retroactive change to the tariff. In other words, if a utility collects charges that are not authorized by and in fact are inconsistent with its tariff, any monetary relief awarded to aggrieved customers amounts to rate enforcement rather than ratemaking.

D. FairPoint's Petition to Intervene

We find that FairPoint has an interest at stake in the outcome and proper implementation of Order No. 24,837 as successor in interest to Verizon to the extent that billing for CCL where CCL is not, in fact, provided must cease, and that any payment received for CCL where CCL was not provided must be refunded. FairPoint's petition for intervention is therefore granted. In addition, we will permit and consider the various filings made subsequent to Fairpoint's petition to intervene and thus we deny the CLECs' motion to strike.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Verizon New Hampshire for rehearing of Order No. 24,837, and the motions of Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE for rehearing of Order No. 24,837 are DENIED; and it is

FURTHER ORDERED, that Fairpoint's petition to intervene is GRANTED; and it is

FURTHER ORDERED, that the CLECs' motion to strike is DENIED; and it is

FURTHER ORDERED, that a prehearing conference will be held on October 1, 2008 at 10:00 am to establish procedures for the conduct of Phase 2 of this proceeding.

By order of the Public Utilities Commission of New Hampshire this eighth day of August, 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director

KELLY ATWOOD
DEVINE MILLIMET & BRANCH PA
43 NORTH MAIN ST
CONCORD NH 03301-4934

ANNMARIE BERRY
FAIRPOINT NEW ENGLAND
155 GANNETT DR
SOUTH PORTLAND ME 04106-6942

GENT CAV
OTEL TELEKOM INC
ONE SUNDIAL AVE STE 210
MANCHESTER NH 03103

MICHELLE CONSALVO
AT&T
99 BEDFORD STREET
BOSTON MA 02110

FREDERICK J COOLBROTH
DEVINE MILLIMET & BRANCH PA
43 N MAIN ST
CONCORD NH 03301

VICTOR D DEL VECCHIO
VERIZON NEW ENGLAND
185 FRANKLIN ST 13TH FL
BOSTON MA 02110-1585

SUSAN GEIGER
ORR & RENO PC
ONE EAGLE SQUARE
PO BOX 3550
CONCORD NH 03302-3550

GARNET M GOINS
SPRINT NEXTEL
2001 EDMUND HALEY DR
RESTON VA 20191

JAY GRUBER
AT&T COMMUNICATIONS OF NE INC
99 BEDFORD ST ROOM 420
BOSTON MA 02111

MEREDITH A HATFIELD
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301

NANCY HUBERT
BRETTON WOODS TELEPHONE CO
MT WASHINGTON PLACE
BRETTON WOODS NH 03575

NANCY JACOBSON
ONE COMMUNICATIONS
24 ALBION RD STE 230
LINCOLN RI 02865

JEREMY L KATZ
SEGTEL INC
PO BOX 610
LEBANON NH 03766

GREGORY M KENNAN
ONE COMMUNICATIONS CORP
220 BEAR HILL RD
WALTHAM MA 02451

MATTHEW T KINNEY
RNK INC
333 ELM ST STE 310
DEDHAM MA 02026

SARAH KNOWLTON
MCLANE GRAF RAULERSON & MIDD
100 MARKET ST STE 301
PORTSMOUTH NH 03801

SHIRLEY J LINN
FAIRPOINT COMMUNICATIONS INC
521 E MOREHEAD ST STE 250
CHARLOTTE NC 28202

DEBRA A MARTONE
TDS TELECOM
PO BOX 337
11 KEARSARGE AVE
CONTOOCOOK NH 03229-0337

PATRICK MCHUGH
DEVINE MILLIMET & BRANCH PA
111 AMHERST ST
PO BOX 719
MANCHESTER NH 03101

MICHAEL J MORRISSEY
FAIRPOINT COMMUNICATIONS INC
521 E MOREHEAD ST STE 250
CHARLOTTE NC 28202

STEPHEN NELSON
DUNBARTON TELEPHONE CO
2 STARK HIGHWAY SOUTH
DUNBARTON NH 03045

JOHN NESTOR III
FAIRPOINT COMMUNICATIONS INC
900 ELM ST STE 1927
MANCHESTER NH 03101-2008

PENN PFAUTZ
AT&T
200 S LAUREL AVE
RM E4-3A01
MIDDLETOWN NJ 07748

CHRIS RAND
GRANITE STATE TELEPHONE
600 SOUTHSTARK HIGHWAY PO BOX
WEARE NH 03281

Docket #: 06-067 Printed: August 07, 2008

FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
21 SOUTH FRUIT STREET, SUITE 10
CONCORD NH 03301-2429

MIKE REED
TDS TELECOM
24 DEPOT SQUARE
NORTHFIELD VT 05663

DARREN R WINSLOW
UNION COMMUNICATIONS
13 CENTRAL ST
PO BOX 577
FARMINGTON NH 03901

KEVIN M SHEA
FAIRPOINT COMMUNICATIONS INC
900 ELM STREET
19TH FLOOR
MANCHESTER NH 03101

PETER L SHEPHERD
VERIZON NEW HAMPSHIRE
125 HIGH ST
BOSTON MA 02110

WILLIAM STAFFORD
GRANITE STATE TELEPHONE
600 SOUTH STARK HWY
PO BOX 87
WEARE NH 03281

MICHAEL S TENORE
RNK INC D/B/A RNK TELECOM
333 ELM ST STE 310
DEDHAM MA 02026

BEN THAYER
BAYRING COMMUNICATIONS
359 CORPORATE DR
PORTSMOUTH NH 03801-2888

ROJEAN TULK
FAIRPOINT COMMUNICATIONS INC
155 GANNETT DR
SOUTH PORTLAND ME 04106-6942

ANN WALSH
DIXVILLE TELEPHONE CO
ONE CRANBERRY HILL STE 105
LEXINGTON MA 02421