

DT 99-020

**INVESTIGATION OF THE CONGESTION ON THE TELEPHONE NETWORK
CAUSED BY INTERNET TRAFFIC**

**Order Denying Request of New Hampshire Internet Service Providers
Association for Compensation Pursuant To RSA 365:38-a**

O R D E R N O. 24,294

March 12, 2004

APPEARANCES: Jeff Gore and Ingersoll & Sullivan by Eugene F. Sullivan, III, Esq. for New Hampshire Internet Service Providers Association; Gregory M. Kennan, Esq. for Verizon - New Hampshire; Devine, Millimet & Branch by Frederick J. Coolbroth, Esq. for Granite State Telephone, Inc., Merrimack County Telephone Company, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Dunbarton Telephone Company, Inc., Bretton Woods Telephone Company, Inc. and Dixville Telephone Company; Robert J. Landman for the Town of North Hampton Cable TV-Broadband-Telecommunications Committee; Brian Susnock for DesTek Group, Inc.; James Monahan for Vitts Networks, Inc.; Michael W. Holmes, Esq. of the Office of Consumer Advocate for residential ratepayers; and LynMarie Cusack, Esq. for the Commission Staff

I. BACKGROUND AND PROCEDURAL HISTORY

On February 8, 1999, the New Hampshire Public Utilities Commission (Commission) opened this proceeding by Order of Notice stating that an investigation was necessary "in the interest of statewide public safety and quality of communications to investigate congestion on the public switched telephone network caused by the explosion of Internet usage."

The Commission noted that it had received complaints and data that indicated that telephone traffic patterns had changed due to increased Internet usage which resulted in delayed

or no dial tone on customers' phones and fast busy signals when customers attempted to make long distance phone calls.

The Commission ordered incumbent local exchange carriers to be mandatory parties and provided notice of this proceeding to known Internet Service Providers (ISPs).

Several parties sought intervention during February and March 1999, including nine ISPs who later indicated they joined the New Hampshire Internet Service Providers Association (NHISPA) and chose to participate in the docket as one party represented by NHISPA. *See Order No. 23,666* (March 29, 2001), page 2.

In November, 1999, after attempts to resolve issues in a collaborative effort had not been successful, the Parties and Staff agreed to move forward in a formal proceeding.

By letter dated February 1, 2000, Attorney Eugene Sullivan entered his appearance on behalf of NHISPA. In Order No. 23,395 (February 2, 2000), the Commission recognized NHISPA as a party for the first time. NHISPA filed testimony on February 17, 2000.

The Commission heard evidence on November 2 and 3, 2000. Briefs were filed on December 4, 2000, by NHISPA, Verizon-New Hampshire (Verizon), Vitts Networks, Inc. (Vitts), eight independent local exchange companies, and the Office of Consumer Advocate (OCA). On March 29, 2001, the Commission issued Order No. 23,666 ruling on the merits of the case.

Over the course of the next year, the Parties and Staff engaged in discovery and evidentiary hearings regarding a proposed solution involving "dry copper." The Commission, in Order No. 23,962 (May 3, 2002), ordered a dry copper trial and, finding it successful, the Commission approved the tariff on a permanent basis in Order No. 24,255 (December 30, 2003).

NHISPA, on May 8, 2001, filed a Request for Compensation Pursuant to the Provisions of RSA 365:38-a (Request), asking for reimbursement of reasonable professional fees incurred in this proceeding. In response, on May 17, 2001, Verizon filed an Opposition to Petition for Compensation (Opposition).

By secretarial letter dated October 22, 2001, the Commission advised NHISPA that it was being given thirty days to furnish additional information tending to demonstrate financial hardship as required by RSA 365:38-a. By letter dated October 24, 2001, Mr. Sullivan withdrew his appearance as counsel for NHISPA.¹ Jeff Gore, the Treasurer of NHISPA, faxed a memorandum response to the Commission's letter on November 26, 2001 and the same submission was received by mail on January 8, 2002.

On July 15, 2002, in response to the Commission's October 22, 2001 directive, Mr. Sullivan submitted a request for

¹He did, nevertheless, advocate NHISPA's position on the question of whether the Commission should adopt a dry copper tariff and participate in other aspects of the subsequent proceedings.

compensation that exceeded the statutory cap for attorneys' fees incurred in representing NHISPA.

II. POSITIONS OF THE PARTIES

A. NHISPA

In its Request, NHISPA describes itself as a non-profit association, operating in corporate form, comprising internet service providers and data networking companies that purchase retail services of Verizon to provide services to customers throughout New Hampshire. *Request, pages 1-2, 4.* NHISPA's only source of compensation is said to be "membership dues and the proceeds of special events such as its annual trade show."

NHISPA says its members contributed

"countless hours of time that would have been devoted to their small New Hampshire based businesses to participate in this proceeding. Unlike their national Internet access counterparts with regulatory liaisons, these participants were and are the principals of their companies vital to their successful operation and integral in the construction of their networks." *Request, page 4.*

NHISPA asserts it provided valuable testimony and input during the proceedings, some of which was not provided by any other party. *Request, pages 4-5.* Two positions advocated by NHISPA, one relating to the need to send Centrex customers appropriate economic signals regarding the full forgiveness of Centrex Schedule A charges and the other relating to how a retail offering of dry copper to its members would remove traffic from

overburdened Verizon switches, are said to have been adopted by the Commission in Order No. 23,666. *Id.*

In NHISPA's memorandum response filed on November 26, 2001 (Memorandum), Mr. Gore asserted that NHISPA's member companies are "small New Hampshire based businesses with on average between 5 and 15 employees each." *Memorandum, page 1.* Mr. Gore said the presidents of the NHISPA member companies voluntarily contributed several hundred hours in the course of participation, resulting in real as well as opportunity costs to the members, for which compensation is not being sought. *Id.*

According to NHISPA, shortly after this docket was opened in 1999, Verizon asserted that internet traffic was the primary cause of switch congestion, a claim NHISPA found too "simplistic" and that "it was important for the Commission to have as complete a picture of network congestion issues as possible." *Id.* Mr. Gore noted that the ISPs were not compelled to participate in this docket but were "invited to and complied voluntarily." *Id.*

NHISPA asserts that its participation in this docket "made a significant contribution to the proceeding and to the staff's understanding of the complex issues involved in the switch congestion problem." *Id.* NHISPA further asserts that "while it was acting to represent its interest in the proceeding it also contributed significantly to the furtherance of the

public interest by insuring that a more complete discussion of congestion issues took place." *Id* at 2.

B. Verizon

In its Opposition, Verizon argued against NHISPA's Request on a number of grounds. First, it asserts that NHISPA member businesses, in its view, are the real parties in interest and do not satisfy the requirement that NHISPA demonstrate financial hardship." *Opposition, page 1*. Verizon points out that NHISPA is not a public interest organization but rather a trade organization formed to promote the commercial interests of its members. *Id*. The positions advocated by NHISPA members in this proceeding, eliminating Centrex Schedule A charges and obtaining a dry copper loop, will serve their business interests by eliminating an expense item and enabling them to compete more effectively in the DSL and high speed data market. *Opposition, page 2*.

If the Commission does not dismiss the Request, Verizon suggests the Commission should require each NHISPA member to provide detailed financial disclosure and to submit to full discovery on the issue of hardship. *Id*. Even if the Commission determines that NHISPA itself is a proper petitioner, Verizon asserts that since the financial situation of NHISPA members directly determines the organization's financial situation, the

members' financial situation must be scrutinized. *Opposition, page 2.*

Second, Verizon argues that because the Commission did not adopt most of the NHISPA members' positions, the petition should be denied. *Opposition, page 4.* Verizon admits that the Commission mandated a waiver of remaining Centrex charges in limited situations but rejected NHISPA's call for refunds in others. *Opposition, page 3.* It further asserts that NHISPA's claim that the Commission adopted its position on dry copper is false. *Id.* If the Commission were to award any fees, Verizon argues that the Commission should substantially discount the amount requested so as to correspond to the small fraction of positions NHISPA was successful in advocating. *Id.*

Third, Verizon suggests that if the Commission does not reject the Request, it should require the petitioners to provide sufficient information to assess the reasonableness of the fee request, including detailed time and expense records that would allow an audit of the fees claimed.

Finally, Verizon notes that if the Commission allows an award of costs, it must also allow Verizon to immediately recover the award under RSA 365:38-a.

C. Office of Consumer Advocate

NHISPA states that the OCA supports compensation for NHISPA, asserting that cost recoupment will encourage voluntary

participation by such interest groups in Commission proceedings. *Request, page 5.*

D. Commission Staff

Commission Staff took no position on the request for compensation.

III. COMMISSION ANALYSIS

NHISPA seeks recovery of legal expenses incurred in connection with its participation in Docket DT 99-020. In support of its request for compensation, NHISPA invokes RSA 365:38-a which provides, *inter alia*, as follows: "The commission may allow recovery of costs associated with utility proceedings before the commission, provided that recovery of costs for utilities and other parties shall be just and reasonable and in the public interest." The statute outlines the conditions under which such cost recovery may be allowed, caps the award at \$10,000, and requires that any award be approved by the governor and council. The statute is silent as to whether attorney's fees are included within the meaning of allowable costs.

It is a well-established principle that this Commission possesses only those powers that are granted to it by the legislature. *See Appeal of Omni Communications*, 122 N.H. 860 (1982). On the specific question of whether a quasi-judicial administrative body may award attorney's fees, the New Hampshire Supreme Court has held that "(t)he remedial authority of such a

body is expressly limited by statute." *Appeal of Land Acquisition, L.L.C.*, 145 N.H. 492, 498 (2000). In *Land Acquisition*, the Court rejected a claim that the Board of Tax and Land Appeals had inherent authority to award attorney's fees in property tax abatement appeals, noting that the applicable statute, RSA 71-B:9 (Supp. 1999) permits the board to award "'costs' only". *Appeal of Land Acquisition, L.L.C.*, 145 N.H. at 497. The court distinguished the applicable statute from RSA 21-J:28-b, VI (Supp. 1999) which specifically authorizes the board to award attorney's fees in challenges to department of revenue assessments.

Turning to RSA 365:38-a, the applicable statute in this case, it is clear that the Commission is authorized to award "costs" under certain circumstances. "Costs" are not further defined. In matters of statutory interpretation, we must initially look at the plain meaning of the words used. See *Matarese v. N.H. Mun. Assoc. Prop. - Liability Ins. Trust*, 147 N.H. 396, 401 (2002). The question then becomes whether the plain meaning of the word "costs" includes attorney's fees. A strict application of the ruling in *Land Acquisition* requires that we answer the foregoing question in the negative. However, assuming that the term "costs" is ambiguous or susceptible to differing interpretations, a resort to legislative history would be in order. See *Appeal of Ann Miles Builder, Inc.*, 837 A.2d 335

(N.H. Dec. 8, 2003).

The legislative history of RSA 365:38-a reveals that the term "costs" was used throughout the debate to describe the compensation the commission would be entitled to grant if House Bill 318 were enacted into law. The term "attorney's fees" was not included in the types of expenses the legislature considered in connection with the bill and there was no discussion of reimbursement of expenses related to representation by counsel. For example, Representative Jeb Bradley's testimony before the Senate Committee on Executive Departments and Administration on House Bill 318 describes intervention costs associated with filing copies of pleadings with the Commission and providing copies to other participants in the proceeding. It generally focuses on costs incurred by "regular citizens" or "small customer groups". See Transcript of Hearing before Senate Committee on Executive Departments and Administration regarding HB 318, May 25, 1999, p. 2. A fair reading of his testimony indicates that Representative Bradley was concerned with intervention costs incurred by parties participating in commission proceedings *pro se*. Neither Representative Bradley's testimony, the report on the bill that he filed on behalf of the House Science, Technology and Energy Committee, nor the comments of Senator D'Allesandro on HB 318 which are recorded in the Senate Journal of May 27, 1999 make any mention of "attorney's

fees". Finally, we cannot consider "what the Legislature might have said or add words that the Legislature did not include." *Appeal of Routhier*, 143 N.H. 404, 406 (1999). Thus, in light of the distinction between costs and attorney's fees highlighted by the court in *Land Acquisition, supra*, and given the legislative history of the statute at issue, we find that RSA 365:38-a authorizes intervenor compensation for costs, but does not authorize compensation for attorney's fees. Therefore, we lack the authority to grant the relief requested by NHISPA.

Based on the foregoing, it is hereby

ORDERED, that the Request for Compensation is DENIED.

By Order of the Public Utilities Commission of New Hampshire this twelfth day of March, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary