

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

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC d/b/a

BAYRING COMMUNICATIONS

COMPLAINT AGAINST VERIZON NEW HAMPSHIRE
RE: ACCESS CHARGES

PHASE II

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

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I. Procedural Background

The above-captioned matter originated on April 28, 2006 when Freedom Ring Communications, LLC d/b/a BayRing Communications (“BayRing”) filed a Petition with the New Hampshire Public Utilities Commission (“the Commission”) asserting that certain carrier common line charges (“CCL”) imposed upon BayRing by Verizon, New Hampshire (“Verizon”) were improper and unlawful. Thereafter, as summarized in Order No. 24,837 (issued March 21, 2008) and Order No. 24,886 (issued August 8, 2008), a fully litigated proceeding ensued. In Order No. 24, 837, the Commission, among other things, determined that Verizon “is, and has been, impermissibly imposing a CCL access charge in those instances where neither Verizon’s common line nor a Verizon end-user is involved for either terminating or originating calls.” *Freedom Ring Communications, LLC d/b/a BayRing Communications, Complaint Against Verizon New Hampshire Re: Access Charges*, “Order Interpreting Tariff”, Order No. 24,837 (March

21, 2008), p. 32. In that Order, the Commission further found “that Verizon owes restitution” and that Phase II of this matter would be convened “to determine the extent to which restitution should be made.” *Id.* The Commission denied Motions for Rehearing of Order No. 24,837 filed by Verizon and Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and scheduled a prehearing conference for October 1, 2008 to establish procedures for the conduct of Phase II of this proceeding. *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), p. 11.

On August 14, 2008, Intervenor Sprint/Nextel filed a request to reschedule the prehearing conference. On September 8, 2008, Verizon filed a motion to stay the proceedings in this docket pending its appeal of Order No. 24, 886 to the New Hampshire Supreme Court. That motion was opposed jointly by AT&T, BayRing, One Communications and Sprint. By Secretarial Letter dated September 24, 2008, the Commission rescheduled the October 1st prehearing conference to November 5, 2008 “pending review Verizon’s motion to stay and the joint opposition to that motion.”

Global Crossing Telecommunications, Inc. (“Global Crossing”) and XO Communications, Inc. (“XO”) filed petitions for intervention on September 26, 2008 and October 1, 2008, respectively. In addition to intervention, both petitions requested that the Commission treat the filings as petitions for reparation under RSA 365:29. Verizon filed a response to the intervention petitions on October 6, 2008 arguing, *inter alia*, that in the event the Commission accepts the petitions for reparations under RSA 365:29, the Commission should limit any potential reparations to payments made within two years

prior to the date of filing of the petitions. Global Crossing filed a reply to Verizon's response setting forth legal argument in support of its position that it is entitled to reparations going back at least to June 23, 2004, i.e. two years prior to the Commission's Order of Notice in this docket. On October 31, 2008, the Commission issued Order No. 24,913 which denied Verizon's motion stay, granted Global Crossing's and XO's petitions to intervene and deferred ruling on the issue of the appropriate reparations period for Global Crossing and Verizon's motion to strike those arguments. *See Freedom Ring Communications, LLC d/b/a BayRing Communications, Complaint Against Verizon New Hampshire Re: Access Charges*, "Order Denying Motion to Stay and Granting Petitions to Intervene", Order No. 24,913 (October 31, 2008). The Order further stated that the Commission did not intend to require payment of any reparations that may be determined are due in Phase II until the conclusion of the pending Supreme Court appeal and that a prehearing conference is not required to initiate Phase II of this docket. *Id.* at pp. 9-10. In lieu of a prehearing conference, the Commission directed Staff and parties to conduct a technical session on November 5, 2008 for purposes of establishing a procedural schedule, an agreement on how to proceed with the calculation of claims and a method for compiling documentation to support those claims. *Id.*, p. 10.

As directed in the above-referenced order, a technical session was held on November 5, 2008. Participants at the technical session agreed on a proposed procedural schedule and briefing on the issues of the applicable reparations period(s) and interest rate(s), as well as a uniform method for calculating the amounts at issue in this docket.

II. BayRing Facts

The history of BayRing's dispute with Verizon over CCL charges is contained in Attachment A to BayRing's Petition. (A copy of said Attachment A is submitted herewith.) Attachment A shows that over seven (7) months prior to filing its Petition on April 28, 2006, BayRing began disputing the improperly billed CCL charges pursuant to the dispute resolution process set forth in Verizon's tariff. *See Verizon New England, Inc.* Tariff NHPUC No. 85, Access Service, Section 4.1.8. More specifically, on September 7, 2005, BayRing disputed the 8/25/05 Verizon NH CABS invoice. Until August 25, 2005, BayRing has paid all of the CCL charges that the Commission has determined Verizon is not authorized to impose. Thereafter, BayRing disputed the CCL charges and, for the most part, stopped paying them.¹ As BayRing's Petition reveals, BayRing made numerous attempts to resolve the issues giving rise to its Petition by contacting and meeting with Verizon representatives over the period of several months. *Petition*, ¶ 1. In addition, representatives of BayRing met with Commission Staff and Verizon jointly in an attempt to resolve the CCL charge dispute. *Id.* The Commission's orders in this docket confirm that BayRing's "disputes" referenced in Appendix A were appropriate and that Verizon's "denials" of those disputes were incorrect. Accordingly, BayRing is seeking refunds of all of the unauthorized CCL charges collected from Verizon and/or FairPoint. In addition, BayRing is seeking interest on those payments made from the period commencing April 28, 2004 (i.e. two years prior to the time that BayRing filed its Petition with the Commission.) In addition, BayRing is seeking credits (i.e. removal of all charges from its bills) from Verizon and/or FairPoint from September

¹ Although BayRing intended to cease paying the improper CCL charges altogether after August 25, 2005, it inadvertently paid a small amount of the disputed CCL charges after that time and is therefore seeking a refund of those payments.

25, 2005 for the unauthorized CCL charges, as well as any interest, penalty fees or other charges levied in connection with the improperly billed CCL charges, that were billed by Verizon/FairPoint but not paid by BayRing.

III. Reparations Period

The New Hampshire Supreme Court has recognized that the Commission's quasi-judicial authority includes the ability to award reparations. *See Appeal of Granite State Electric Company*, 120 N.H. 536, 539 (1980). When exercising such authority, the Commission "must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power." *Id.* Thus, in addition to any statutory authority to award reparations, the Commission has inherent authority "...to award restitution if one has been unjustly enriched at the expense of another." *Id.* The Commission is also authorized to order refunds in order "to prevent unreasonable prejudice or disadvantage to customers." *Granite State Gas Transmission, Inc. v. The State of New Hampshire*, 105 N.H. 454, 457 (1964) (citations omitted). This authority derives from RSA 365:29 and RSA 378:10. *Id.* RSA 378:10 prohibits a public utility from giving or making "any undue or unreasonable prejudice or disadvantage in any respect whatever" to any person or corporation. Because Verizon's collection of the unauthorized CCL charges from BayRing constitutes such an undue or unreasonable prejudice, the Commission should exercise its inherent as well as its statutory authority to provide BayRing with full refunds of all such payments.

The New Hampshire Supreme Court's holding in *Granite State Gas Transmission, Inc.*, *supra*, did not, in any way, limit the refund period. In that case, the

refunding company, Granite State Transmission, Inc. had itself received a refund from Tennessee Gas Transmission Company for payments Granite State had made to Tennessee over a five (5) year period. The Commission ordered Granite State to refund the entire amount it had received from Tennessee. The New Hampshire Supreme Court held that the refunds made by Granite State to its customers were reasonable under the circumstances and that the Commission's order requiring a total refund was "not warranted on the record." *Granite State Gas Transmission, Inc. v. The State of New Hampshire*, 105 N.H. 454, 458 (1964). Significantly, the Court expressly stated that it was not adopting the view that the Commission has no statutory authority to order such a refund. *Id.* Rather, the Court stated that the circumstances of that case did not warrant a full refund.

In the instant docket, however, the circumstances are different and warrant a full refund of all of the improper charges that BayRing has paid. BayRing was a competitor of Verizon's (and now FairPoint's). The record in this case demonstrates that Verizon gained an unfair competitive cost advantage over BayRing by imposing the unauthorized CCL charges. *See Posthearing Brief of BayRing Communications*, (September 10, 2007), pp. 29-32. Accordingly, in order to avoid the unreasonable prejudice and disadvantage that has resulted from these unauthorized CCL charges, the Commission should exercise its inherent authority expressly recognized in *Appeal of Granite State Electric Company*, *supra.*, as well as its authority under the *Granite State Gas Transmission* decision and should order Verizon to make a full refund of all of those unlawful charges.

Although it may be arguable that under RSA 365:29, the refunds should be limited to those payments made by BayRing only as far back as April 28, 2004, the

holding in *Granite State Gas Transmission, Inc., supra*, indicates otherwise. The legislative history of RSA 365:29 reveals that the version of that statute in effect when BayRing filed its Petition was also in effect when the *Granite State Gas Transmission* case was decided.² However, the Court in *Granite State Gas Transmission* did not imply in any way that the Commission was limited under RSA 365:29 to ordering refunds only for the two year period described in that statute. Instead, the Court relied on the statute and on RSA 378:10 when it held that the Commission expressly had authority to order refunds. Moreover, the more recent case involving the Commission's authority to order refunds, *Appeal of Granite State Electric Company*, 120 N.H. 536 (1980), established no such temporal limitation upon the Commission's authority to order refunds. Instead, the Court noted that the Commission was endowed with important judicial responsibilities and that inherent within them is the power to order refunds if a utility has been unjustly enriched at the expense of its customers. *See Appeal of Granite State Electric Company*, 120 N.H. at 539.

To the extent that RSA 365:29 may be construed as limiting the Commission's restitution/refund authority recognized in both the *Granite State Electric* and *Granite State Gas Transmission* decisions, a reasonable interpretation of that statute in light of the above-referenced New Hampshire Supreme Court decisions is that the Commission's authority to order interest as part of reparations payments is limited to awarding interest only to those payments made two years prior to the filing of the Petition. Accordingly, while BayRing seeks full refunds for all of the improperly collected CCL charges, it seeks interest on those refunds only for payments it made to Verizon since April 28,

² The legislative history of RSA 365:29 as referenced in the statute's annotations indicates that the statute has been in effect since September 1, 1951. The *Granite State Gas Transmission* case was decided in 1964.

2004. Clearly, under the version of RSA 365:29 that was in effect at the time BayRing filed its Petition with the Commission, or the amended version currently in effect, the Commission may award interest on the refunds relating to CCL charge payments that BayRing made to Verizon going back at least two years prior to the date of the filing of the Petition (i.e. two years prior to April 28, 2006). Thus, in addition to full refunds of all improperly levied CCL charges, BayRing may collect interest on CCL charge payments made to Verizon since April 28, 2004. The appropriate interest rate that should be imposed on these refunded payments is discussed in section IV, below.

In addition to its authority to order monetary refunds, the Commission's inherent reparations powers logically must include the ability to order Verizon/FairPoint to eliminate from BayRing's unpaid bills all of the amounts associated with the unauthorized CCL charges. These amounts include the charges themselves and any late payment, penalty or interest charges that have been accruing since BayRing stopped paying the unlawful CCL charges.

Principles of fundamental fairness, equity and common sense dictate that Verizon should not be allowed to keep any funds that it was not authorized to collect and that it must adjust BayRing's bills to remove all charges relating to the improper CCL charges. Accordingly, the Commission should order Verizon to repay BayRing all of the unauthorized CCL charges that Verizon has collected. Verizon should also be ordered to pay interest on those refunds relating to payments made by BayRing since April 28, 2004. Lastly, Verizon's delay in failing to resolve the CCL disputes filed by BayRing which were ultimately resolved by the Commission in BayRing's favor should not operate to limit in any way the amount of the refunds to be made by Verizon.

IV. Interest Rate

While RSA 365:29 clearly authorizes the Commission to award interest on refunds made by a utility as part of “due reparation” to customers who have paid any illegal or unjustly discriminatory rate, fare, charge or price, the statute is silent on the rate of interest that should be paid. Thus it appears that the legislature intended that the Commission have discretion in determining the amount of interest that could be awarded to customers who are entitled to reparations. This conclusion is reasonable in light of the fact that the Commission’s authority to award reparation is inherent within its broad grant of power. *Appeal of Granite State Electric Company*, 120 N.H. at 539.

Because Verizon has argued that its Access Charge Tariff, Tariff No. 85, authorized it to impose the improper CCL charges, it would be just and reasonable for the Commission to award interest on refunds in the amount of the “disputed amount penalty factor” set forth in section 4.1.8 of that Tariff. The Tariff was filed by Verizon and therefore reflects Verizon’s position on the rate that should apply as “interest” in access charge billing disputes. Under Tariff No. 85, Section 4.1.2 B., the late payment penalty factor is “0.0005 per day for the number of days from the payment date to and including the date that the customer actually makes payment to the Telephone Company.” Under Section 4.1.8 I. 2 of Tariff No. 85, the “disputed amount penalty factor” is “0.0005 per day for the number of days from the first date to and including the last date of the period involved.” In the instant case, BayRing asserts that the “period involved” for purposes of assessing interest, is April 28, 2004 through the date the refund is made. In other words, any payments made by BayRing to Verizon on or after April 28, 2004 for the improperly

assessed CCL charges should accrue interest in the amount of 0.0005 per day from the date of the payment through the date of the refund. Principles of fundamental fairness warrant that Verizon pay the same interest rate on refunds of improperly collected charges as that which it imposes on its customers when they unsuccessfully dispute their access charge bills.

V. Conclusion


For all of the reasons set forth above, the Commission should order Verizon to refund to BayRing all of the improperly assessed CCL charges that BayRing has paid to Verizon. The Commission should also order Verizon to pay BayRing interest on the refunded amounts that relate to payments made by BayRing on or after April 28, 2004. The amount of such interest should be 0.0005 per day commencing on the date of BayRing's payment and ending on the date of Verizon's refund to BayRing. In addition, Verizon and/or FairPoint should eliminate the improperly assessed CCL charges and any associated penalty fees from BayRing's bills.

Date: December 19, 2008

Respectfully submitted,

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

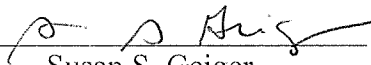
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has on this 19th day of December, 2008 either been mailed first class postage prepaid or e-mailed to the parties named on the Service List in the above-captioned matter.



Susan S. Geiger

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ATTACHMENT A

BayRing Dispute of New Hampshire CCL charges on Cellular traffic by Verizon
Time Line

09/07/05	BayRing disputes the 8/25/05 Verizon NH CABS invoice
10/06/05	8/25/06 Invoice Dispute is Denied by Verizon
10/12/05	BayRing disputes the 9/25/05 Verizon NH CABS invoice
11/09/05	9/25/06 Invoice Dispute is Denied by Verizon
11/16/05	BayRing sends 9/25/05 invoice dispute to 1st Escalation
11/16/05	BayRing disputes the 10/25/05 Verizon NH CABS invoice
12/08/05	BayRing disputes the 11/25/05 Verizon NH CABS invoice
12/14/05	10/25/06 Invoice Dispute is Denied by Verizon
12/20/05	BayRing sends 9/25/05 & 10/25/05 invoice disputes to 2nd Escalation (Christine Arruda)
01/04/06	11/25/06 Invoice Dispute is Denied by Verizon
01/04/06	9/25/05 & 10/25/05 2nd Escalation Denied by Verizon (Christine Arruda)
01/17/06	BayRing disputes the 12/25/05 Verizon NH CABS invoice
01/17/06	BayRing sends 9/25/05, 10/25/05 & 11/25/05 invoice disputes to 3rd Escalation (Kristover Lavalla)
01/31/06	12/25/05 Invoice Dispute is Denied by Verizon and added to Escalation
02/08/06	BayRing disputes the 1/25/06 Verizon NH CABS invoice
02/14/06	Conference call with Verizon (Kevin Shea, Regulatory Affairs Director)
02/17/06	1/25/06 Invoice Dispute is Denied by Verizon and added to Escalation
02/21/06	BayRing and Verizon have tech session with NHPUC staff
03/10/06	BayRing disputes the 2/25/06 Verizon NH CABS invoice
03/24/06	2/25/06 Invoice Dispute is Denied by Verizon and added to Escalation
04/10/06	BayRing disputes the 3/25/06 Verizon NH CABS invoice