

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

Freedom Ring Communications, LLC d/b/a  
BayRing Communications — Complaint  
Against Verizon New Hampshire re: Access  
Charges

Docket No. DT 06-067

**ONE COMMUNICATIONS' MEMORANDUM  
REGARDING CLAIM PERIOD AND INTEREST**

In accordance with the procedures established at the November 5, 2008 technical session, One Communications respectfully submits this memorandum concerning (1) the period when One Communications' claim for reparations begins to run and (2) how the Commission should award interest under RSA 365:29 on amounts Verizon New Hampshire is required to pay in reparations.

The applicable period for One Communications' claims begins to run on April 28, 2004, the date two years prior to the date when BayRing filed its complaint in this action. That period applies irrespective of the amendment to RSA 365:29 that became effective in August 2008. The interest rate that the Commission should require Verizon New Hampshire to pay is the rate of \$0.0005 per day that Verizon established as the "disputed amount penalty" under its own Tariff No. 85. That rate should apply both to disputed payments that fall within the parameters set by § 4.1.8 of the tariff, as well as to other payments

## Discussion

### I. One Communications' Claims Begin to Run on April 28, 2004.

#### A. Under RSA 365:29, One Communications' Claim Begins to Run Two Years Before BayRing Filed its Complaint.

One Communications' claim begins to run on April 28, 2004, the date two years before BayRing filed its complaint in this case. This conclusion results from straightforward application of RSA 365:29. That provision states:

On its own initiative or whenever a petition or complaint has been filed with the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the earlier of the date of the commission's notice of hearing or the filing of the petition for reparation.

The statute is explicit: "whenever" a petition or complaint is filed, the Commission may order reparations going back two years before the filing of the petition. The "date of . . . filing of the petition for reparation" referred to in the last sentence refers back to the only other instance of the word "petition" in the provision, that in the first line — "whenever a petition or complaint has been filed." Further, the provision refers to "the petition" — *one* petition — not multiple petitions.

In addition, the Commission is authorized to order the utility that has collected an illegal rate to make reparation "to the person who has paid" the illegal charge. Thus, any utility customer that paid an illegal charge may receive reparations of overcharges when the Commission so orders.

It is not a prerequisite that a particular person file a complaint or petition in order to obtain reparations. The Legislature did not limit the Commission's authority to order refunds

only to the person who filed the complaint. It did not, for example, say that “the Commission may order the public utility which has collected the same to make due reparation to the person who filed the complaint.” Instead, the Legislature authorized the Commission to order reparations to “the person who has paid” the unlawful rate. The only qualification to be eligible for reparation is that the person has paid a rate the Commission has found to be illegal.

To tie eligibility for reparations and/or an individual claimant’s claim period to the filing of an individual petition for reparations would defeat the purpose of the statute — to make whole customers that have paid illegal charges to public utilities. Indeed, refunds have been ordered or approved under RSA 365:29 without there being any indication that each and every recipient of reparations had filed a petition. *See Appeal of Granite State Electric Co.*, 120 N.H. 536, 541, 421 A.2d 121, 124 (1980) (petition filed by public interest group); *In re EnergyNorth Natural Gas, Inc. — Investigation into Thermal Billing Practices*, DG 06-154, Order Approving Settlement Agreement, Order No. 24,752, at 22 (May 25, 2007) (utility receives release of liability for claims under RSA 365:29 on account of refunds made to customers even though no individual customer filed a petition under RSA 365:29).

Indeed, requiring each and every claimant to file a petition for reparation as a condition of receiving a refund would serve no purpose other than to discourage reparations of unlawful overcharges by increasing the transaction costs of seeking such reparations. In particular, Verizon will suffer no prejudice from having to repay *all* unlawful overcharges, whether or not a particular customer files an individual petition. Once BayRing filed its complaint in this docket, both the Commission and Verizon were on notice that Verizon’s CCL charges might be found unlawful and that the Commission might require Verizon to make reparations. Requiring other parties to provide additional notice, by way of a petition for reparations, would not provide any

additional information that Verizon might need or want in order to defend itself against the claim.

In particular, the filing of petitions by other parties does not alter Verizon's ability to assess the extent of its reparation obligations. Verizon is the party that billed the CCL charges and collected the overcharges. Once on notice that there was a claim by any customer, Verizon was uniquely able to determine who paid what, and to estimate what potential reparations might amount to. Indeed, Verizon was able to do exactly that when it filed its "ballpark estimate" of potential damages in early 2007.

The result is the same under the pre-August 2008 version of the statute. Prior to its amendment by Laws of 2008, Ch. 309, RSA 365:29 said:

Whenever complaint has been made to the commission covering any rate, fare, charge, or price demanded and collected by any public utility, and the commission has found, after hearing and investigation, that an illegal or unjustly discriminatory rate, fare, charge, or price has been collected for any service, the commission may order the public utility which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment. Such order for reparation shall cover only payments made within 2 years before the date of filing the petition for reparation.

As under the current version, *whenever* a complaint has been filed, the Commission may make an order of reparation covering payments made within two years of the filing of the petition. As in the current version, the statute does not say that the reparation order may go back only two years from the date the particular party that is to be reimbursed files its own, individual petition.

**B. If the Commission Does Not Agree that One Communications' Claims Run from Two Years Prior to BayRing's Complaint, then the Commission Should Find that the Claim Runs from Two Years Prior to the Order of Notice.**

As shown above, under either the current or prior versions of RSA 365:29, One Communications' claims begin to run two years before BayRing filed its complaint in this case — that is, the claim begins to run on April 28, 2004. Since this result obtains under either the

current or pre-August 2008 versions of the statute, it is not necessary for the Commission to decide which version of the statute applies to One Communications' claims.

If the Commission disagrees, however, and determines that One Communications' claims period is not determined by the date BayRing filed its complaint,<sup>1</sup> then the Commission should determine that One Communications' claims run from June 23, 2004. That is the date two years before the earlier of the order of notice (June 23, 2006) and the filing of One Communications' petition for reparations (July 24, 2006).<sup>2</sup>

The current version of RSA 365:29, which contains the "earlier of the order of notice or the filing of the petition for reparations" language, governs the claim period in this case regardless of the fact that it was not in effect when this case was commenced. A statute may apply to cases commenced but not yet decided when it is enacted if the statute is remedial or procedural in nature. *Gelinas v. Mackey*, 123 N.H. 690, 695, 465 A.2d 498, 501 (1983). The test for whether a statute is "remedial" turns on whether its purpose is to afford a private remedy to a person injured by a wrongful act (as opposed to "penal" statutes, the purpose of which is to punish an offense against the public). *LaBarre v. Daneault*, 123 N.H. 267, 270, 461 A.2d 89, 91 (1983). The presumption is that a remedial statute is to be applied retrospectively. *Liberty Mutual Ins. Co. v. Home Ins. Indem. Co.*, 117 N.H. 269, 270, 371 A.2d 1171, 1173 (1979).

The central question is whether the amendment affects the parties' rights and obligations, not whether the outcome is altered or the party is subjected to liability that otherwise would have

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<sup>1</sup> As shown above in Part I.A., under either the current or prior versions of RSA 365:29, One Communications' claims began to run from two years prior to the date BayRing filed its complaint in this action. The arguments in this Part I.B, therefore, are contingent and apply only if the Commission disagrees with that interpretation set forth in Part I.A.

<sup>2</sup> The Commission has deemed petitions for intervention in this docket as petitions for reparations. November 29, 2006 Procedural Order, Order No. 24,705, at 6. No party sought reconsideration of that ruling. All four One Communications operating entities in New Hampshire (Choice One of New Hampshire Inc.; Conversent Communications of New Hampshire, LLC; CTC Communications Corp.; and Lightship Telecom, LLC) were included in One Communications' July 24, 2006 petition to intervene.

been barred. *Workplace Systems, Inc. v. Cigna Property and Casualty Insurance Co.*, 143 N.H. 322, 325, 723 A.2d 583, 585 (1999). Here, it is clear that the parties' underlying rights and obligations have not been affected. The amendment to RSA 365:29 does not affect the question whether Verizon's CCL charges were lawful or unlawful. The amendment affected (if anything, see Part I.A above) the time period during which One Communications may recover the overcharges. By altering the time period during which a claim may be asserted, the amendment to RSA 365:29 is akin to a change in the statute of limitations. Changes in statutes of limitations are remedial and may be applied retrospectively. *Workplace Systems*, 143 N.H. at 325, 723 A.2d at 585 (citing, e.g., *Norton v. Patten*, 125 N.H. 413, 416, 480 A.2d 190, 192 (1984); *State v. Preston*, 119 N.H. 877, 880-81, 409 A.2d 792, 793-94 (1979)).

Further, application of the amendment to RSA 365:29 to One Communications' claims is not a "retrospective law" prohibited by Part I, Article 23 of the New Hampshire Constitution. The constitutional prohibition against retrospective laws prevents a change in law from depriving a person of a vested property right. To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of existing law. *In re Goldman*, 151 N.H. 770, 774, 868 A.2d 278, 282 (2005). "A perfect vested right can be no other than such as is not doubtful, or depending on any contingency, but absolute, fixed and certain." *Lakeman v. Moore*, 32 N.H. 410, 413 (1855), quoted in *Goldman*, 151 N.H. at 774, 868 A.2d at 282.

Verizon has no vested property right in its desire to escape liability for unlawful charges it imposed during the period June 23 – July 24, 2004. At present, the scope of Verizon's liability is not "absolute, fixed, and certain," and it was not at the time of the statutory amendment. That is why the Commission and parties are engaged in Phase II of this case — to determine what, exactly, Verizon's liability is. To the extent that Verizon believed that it would not have to repay

One Communications the CCL charges it billed during June 23 – July 24, 2004, that belief was founded only on its expectation that the Legislature would not amend RSA 365:29. That “mere expectation based on an anticipation of the continuance of existing law” does not give rise to a vested property right. The Legislature has the power to change, modify and repeal existing law. Further, even if Verizon’s liability increases over what it expected to pay prior to the statutory amendment, there is no “implied obligation on the part of the State to protect its citizens against incidental injury occasioned by change in the law.” *Goldman*, 151 N.H. at 773, 868 A.2d at 281 (quoting *State v. Burr*, 142 N.H. 89, 93-94, 696 A.2d 1114 (1997)).

As the amendment to RSA 365:29 is remedial or procedural, it may apply retrospectively. Because the Legislature was free to amend RSA 365:29, Verizon had no vested right to anticipate that the claims period would remain unchanged. Therefore, there is no constitutional prohibition against applying the statutory amendment to One Communications’ claims here.

## **II. The Commission Should Award Interest at the Rate of \$0.0005 Per Day.**

### **A. Verizon’s Tariff No. 85 Establishes This Rate.**

The Commission should require Verizon to pay interest at a rate of \$0.0005 per day in accordance with the “disputed amount penalty” provisions under Tariff No. 85, § 4.1.8.<sup>3</sup> In general, the “disputed amount penalty” applies when a customer disputes a charge imposed under Tariff No. 85, pays the charge, and prevails in the dispute.

Section 4.1.8 sets forth a number of scenarios establishing the amount of the disputed amount penalty, which depend on the timing of the payment and of the dispute. For example, if the customer disputes the charge within three months of the payment due date and pays the charge by the due date, and prevails, then the disputed amount penalty runs from the date of

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<sup>3</sup> For the Commission’s convenience, section 4.1.8 is attached to this memorandum.

payment to the date the issue is resolved. § 4.1.8.E. If the customer disputes the charge after three months after the payment due date and pays the charge by the dispute date, then Verizon must pay the disputed penalty amount from the date of dispute to the date of resolution. § 4.1.8.H.<sup>4</sup>

**B. The Commission Should Require That Verizon Pay Interest at a Rate of \$0.0005 Per Day on Charges That Fall Outside the Terms of the Tariff.**

Even if certain of the reparations that Verizon will be required to make do not strictly fall within the “disputed payment amount” provisions of the tariff, the Commission may still use that rate to calculate interest payable on account of Verizon’s unlawful CCL overcharges.

RSA 365:29 authorizes the Commission to require a utility to make reparation to a customer that has paid unlawful charges “with interest from the date of payment.”<sup>5</sup> Thus, for any reparations for which the “disputed amount penalty” in Tariff No. 85 does not apply from the date of payment, the Commission should nonetheless order Verizon to pay interest from the date of payment.<sup>6</sup>

The statute does not specify the rate of interest that the Commission should apply. The Commission should apply Verizon’s rate of \$0.0005 in these instances as well. Verizon has determined that \$0.0005 per day is an appropriate rate to compensate those who overpaid under Tariff No. 85. In order to effectuate the remedial objectives of RSA 365:29, the Commission may look to that rate as an appropriate rate for reparations, including those that do not strictly fall within the provisions of § 4.1.8.

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<sup>4</sup> Section 4.1.8.H might apply, for instance, to payments made in the 2004-05 time frame, before the problem was understood and parties began to dispute the charges.

<sup>5</sup> This provision is identical under the current and pre-August 2008 version of the statute.

<sup>6</sup> One example where the Commission should order such interest is for the CCL charges paid in the 2004-05 time frame, before parties became aware that Verizon was unlawfully overcharging. Parties may not have disputed those charges within three months of the bill date. Thus, by strict application of § 4.1.8.H, the disputed payment amount applies only from the date of dispute. To fill the gap between the date of payment and the date of dispute, the Commission should require payment of interest under RSA 365:29.

As an alternative, if the Commission does not agree that the rate in Tariff No. 85 should apply by analogy where it does not strictly apply by the tariff's terms, then the Commission should award interest at Verizon's rate of return for wholesale services.<sup>7</sup> This is the rate at which Verizon obtains its capital elsewhere. The Commission's authority to order reparations is founded on the principle of unjust enrichment. *Granite State Elec. Co.*, 120 N.H. at 539-40, 421 A.2d at 123. To the extent that Verizon has obtained capital by unlawfully overcharging One Communications and other, similarly-situated customers, it has been unjustly enriched, because it has not had to pay its cost of capital to other investors. The Commission should require Verizon to return this unjust enrichment by paying the overcharges customers the same rate of return on the money it has held since obtaining the unlawful overcharges.

**C. Verizon Must Credit Any Late Payment Charges, Interest, or Similar Charge Assessed Against One Communications for Disputed, Unpaid CCL Charges.**

With respect to any bills for CCL charges that One Communications disputed and withheld, the Commission should ensure that any late payment charges, interest, or any other charge or fee that Verizon has imposed on account of One Communications' non-payment of any unlawful CCL charge be eliminated. Verizon must credit *any* such charge, whether imposed pursuant to Tariff No. 85, § 4.1.2 or otherwise. Thus, in addition to issuing a credit to One Communications for any CCL charges that Verizon carries on its books, Verizon must also issue full credits for any late payment charges or interest.

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<sup>7</sup> One Communications understands that that rate is set forth in a letter between Verizon and the Commission Staff dated March 4, 1998, and is approximately 10.46%. As the Commission is aware, however, in the cost of capital proceeding in 2002-03, Verizon advocated a cost of capital for wholesale services of 17.93%. *In re Verizon New Hampshire — Investigation into Cost of Capital*, DT 02-110, Order Establishing Cost of Capital, Order No. 24,265, at 5-6 (Jan. 16, 2004). That rate is roughly equivalent to the Tariff No. 85 "disputed amount penalty" on an annualized basis, and provides further support that Verizon's "disputed amount penalty" rate is the appropriate rate to apply to all overpayments at issue here, whether or not strictly within the terms of the tariff.

**Conclusion**

The Commission should determine that One Communications' claims begin to run on April 28, 2004, two years before the date BayRing filed its complaint in this action. The Commission should award interest at the rate of \$0.0005 per day on all amounts improperly charged by and paid to Verizon, from the date that the customer paid through the date that Verizon fully refunds the overcharges.

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Verizon New England Inc.

**4. Issuance, Payment and Crediting of Customer Bills**  
**4.1 Undertaking of the Telephone Company**

<b>4.1.7 Nonrecurring Charges</b>	
B. (Continued)	
3.	The reestablishment of service begins within sixty days after Telephone Company service is available. The sixty day period may be extended a reasonable period if the renovation of the original location on the premises affected is not practical within the allotted time period.

<b>4.1.8 Billing Dispute</b>	
A.	In the event that a billing dispute occurs concerning any charges billed to the customer by the Telephone Company the regulations contained in Section 4.1.8 will apply.
B.	The first day of the dispute shall be the date on which the customer furnishes the Telephone Company with the account number under which the bill has been rendered, the date of the bill and the specific items on the bill being disputed.
C.	The date of resolution shall be the date on which the Telephone Company completes its investigation of the dispute, notifies the customer of the disposition and, if the billing dispute is resolved in favor of the customer, applies credit for the correct disputed amount, the disputed amount penalty and/or late payment penalty as appropriate.
D.	If a billing dispute is resolved in favor of the Telephone Company, any payments withheld pending resolution of the dispute shall be subject to the late payment penalty. Further, the customer will not receive credit for the disputed amount or the disputed amount penalty.
E.	If a customer disputes a bill within three months of the payment date and pays the total billed amount on or before the payment date and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of payment and ending on the date of resolution. The credit for the disputed amount penalty shall be as set forth following.
F.	If a customer disputes a bill within three months of the payment date and pays the total billed amount after the payment date and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of payment and ending on the date of resolution. The credit for the disputed amount penalty shall be as set forth following. The late payment penalty (refer to Section 4.1.2) applied to the disputed amount resolved in the customer's favor will be credited.

Verizon New England Inc.

**4. Issuance, Payment and Crediting of Customer Bills**  
**4.1 Undertaking of the Telephone Company**

<b>4.1.8 Billing Dispute</b>	
<b>G.</b>	If a customer disputes a bill within three months of the payment date and does not pay the disputed amount or does not pay the billed amount (i.e., the nondisputed and disputed amount), and the billing dispute is resolved in favor of the customer, the customer will not receive a credit for a disputed amount penalty from the Telephone Company. The late payment penalty (refer to Section 4.1.2A and 4.1.2B) applied to the disputed amount resolved in the customer's favor will be credited.
<b>H.</b>	If a customer disputes a bill after three months from the payment date and pays the total billed amount on or before the dispute date, and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of dispute and ending on the date of the resolution. The credit for a disputed amount penalty shall be as set forth following. The customer shall not receive a credit for the late payment penalty.
<b>I.</b>	If a customer disputes a bill after three months from the payment date and does not pay the disputed amount or does not pay the billed amount (i.e., the nondisputed amount and disputed amount) and the billing dispute is resolved in favor of the customer, the customer will not receive a credit for a disputed amount penalty from the Telephone Company. However, if the customer pays the disputed amount or the billed amount after the date of dispute and before the date of resolution, the customer will receive a credit for a disputed amount penalty from the Telephone Company for the period starting with the date of payment and ending on the date of resolution. The credit for the disputed amount penalty shall be as set forth following. The customer will receive a credit for the late payment penalty, if applicable, from the Telephone Company. <ol style="list-style-type: none"> <li>1. The late payment penalty credit shall be the disputed amount resolved in the customer's favor times a late payment penalty factor (refer to Section 4.1.2), for the period starting with the date of dispute and ending on the date of payment of the disputed amount or the date of resolution whichever occurs first.</li> <li>2. The disputed amount penalty shall be the disputed amount resolved in the customer's favor times a penalty factor. The penalty factor shall be 0.0005 per day for the number of days from the first date to and including the last date of the period involved.</li> </ol>

<b>4.1.9 Billing Adjustments and Verification</b>	
<b>A.</b>	Adjustments for the quantities of services established or discontinued in any billing period beyond the minimum period set forth for services in other sections of this tariff will be prorated to the number of days or major fraction of days based on a thirty day month. The Telephone Company will, upon request and if available, furnish such detailed information as may reasonably be required for verification of any bill.