

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

In the Matter of)	
)	
FREEDOM RING COMMUNICATIONS, LLC)	DT 06-067
D/B/A BAYRING COMMUNICATIONS)	
)	
Complaint Against Verizon New Hampshire)	
Re: Access Charges)	

OBJECTION TO VERIZON’S MOTION TO STRIKE

Global Crossing Telecommunications, Inc. (“Global Crossing”) hereby objects to Verizon’s “Motion to Strike Reply to Verizon’s Response to Petitions to Intervene” dated October 22, 2008 (“Motion”).

I. Introduction

On September 23, 2008, Global Crossing filed a Petition to Intervene in Phase 2 of this proceeding as an interexchange carrier that had been assessed certain Verizon carrier common line (“CCL”) charges that the Commission deemed to be illegal in Phase 1. On October 6, 2008, Verizon filed with the Commission “Verizon New Hampshire’s Response to Global Crossing Telecommunications, Inc. and XO Communications, Inc.’s Petitions to Intervene” (“Response”). In that Response, Verizon did not object to the intervention petitions of Global Crossing or XO Communications. It did, however, include two sentences stating that any reparations owed to Global Crossing and XO should go back two years from the date of the intervention petitions and not, as RSA 365:29 requires, two years from the date of the Commission’s June 23, 2006 order of notice. Global Crossing then filed a Reply on October 13 to correct Verizon’s misstatement concerning the time-frame for reparations and to protect Global Crossing’s rights and interests with regard to the issues raised in Verizon’s response.

On October 22, Verizon filed a “Motion to Strike” Global Crossing’s Reply, complaining that Global Crossing was not entitled to correct Verizon’s erroneous discussion of RSA 365:29. Verizon’s motion also contained a response to the merits of the arguments in Global Crossing’s Reply. Notwithstanding the new discussion of RSA 365:29 and issues of retroactivity in Verizon’s Motion, Verizon continues to be wrong in its assertion that Global Crossing is only entitled to restitution dating back two years from the date of Global Crossing’s petition to intervene. This, and the procedural issues in Verizon’s Motion, are addressed more fully below.

II. The Commission Should Not Strike Global Crossing’s Reply, But if it Does it Must Also Strike Verizon’s Response.

In its Motion, Verizon cites two orders from the *City of Nashua* proceeding in DW 04-048 in support of the proposition that Global Crossing’s Reply to Verizon’s Response should be struck. Those orders deal with multiple pleadings that were made in response to objections to motions, not replies (like Global Crossing’s) to responses (like Verizon’s) to petitions to intervene. *See* Order No. 24,555, 90 NH PUC 568 (2005), and Order No. 24,488, 90 NH PUC 297 (2005). The Commission limited its consideration in *City of Nashua* to the relevant motions and to objections to those motions, as provided for in PUC 203.07(e). The Commission decided not to consider certain responses and replies to objections to motions, nor did it consider motions to strike like the one Verizon has filed in this proceeding. *See* Order No. 24,555, 90 NH PUC at 570; Order No. 24,488, 90 NH PUC at 300.

Parties are of course permitted to object to motions pursuant to PUC 203.07(e), as Global Crossing is doing here. *See* Order No. 24,488, 90 NH PUC at 300 n.4 (“[P]ursuant to our general rule regarding Motions, it is fair to allow objections to motions.”). And PUC 203.15(d)(2) says that during a prehearing conference the Commission will consider “any petitions for intervention and any objection filed thereto.” Pleadings like Verizon’s Response

that merely comment on petitions to intervene, as opposed to actual objections, are not mentioned. Verizon claims that titling its October 6 pleading a “Response” and not an “Objection” is a “distinction without a difference.” Verizon Motion at 2, ¶ 2. But, in addition to its not being titled an “Objection,” Verizon’s pleading does not actually *object* to the grant of the petitions to intervene and cannot in any way be described as an objection.¹ The Commission is therefore under no obligation to consider it.²

Nevertheless, Verizon now expects the Commission to consider its Response, as well as its new Motion to Strike, but not Global Crossing’s Reply. Based on the extra-procedural nature of Verizon’s Response, if the Commission decides to strike Global Crossing’s Reply it must also strike Verizon’s Response and, in light of the *City of Nashua* decisions, *see* Order No. 24,555, 90 NH PUC at 570; Order No. 24,488, 90 NH PUC at 300, not consider the substantive arguments in its Motion to Strike.³ Conversely, if the Commission considers Verizon’s Response it should also consider Global Crossing’s Reply. Equity requires such a result.⁴ If the Commission strikes Global Crossing’s Reply and Verizon’s Response, then it need not decide the issue that has been raised concerning RSA 365:29. If it is not addressed now, however, this is certainly an issue on

¹ The term “objection” is defined as “a reason or argument offered in disagreement, opposition, refusal, or disapproval.” Dictionary.com Unabridged (v 1.1), Random House, Inc., Oct. 27, 2008, *available at* <http://dictionary.reference.com/browse/objection>. Clearly Verizon’s Response does not qualify as an objection.

² BayRing, AT&T, One Communications and Sprint have also pointed out the procedural infirmity of Verizon’s Response in their letter of October 14, 2008, in this proceeding.

³ Ironically, Verizon is using a motion to strike a pleading as an opportunity to file itself yet another pleading addressing the substance of the pleading that it seeks to strike. This would seem to negate any concern Verizon has expressed for procedural discipline. *See* Verizon Motion at 1-2, ¶ 2 (quoting the Commission’s statement in *City of Nashua*, Order No. 24, 488, at 6 n.4, that “multiple rounds of pleadings are not favored”).

⁴ This is illustrated by the argument Verizon makes in its Motion that Global Crossing should have anticipated the issue of how far back RSA 365:29 requires restitution and addressed it in its Petition to Intervene. *See* Verizon Motion at 2, ¶ 3. The statute is clear on this matter, and but for Verizon’s raising this issue in its Response, there was no reason for Global Crossing to raise it preemptively. Moreover, if Verizon’s logic is correct, then Verizon itself should have anticipated the arguments in Global Crossing’s Reply and should not be entitled to respond with the retroactivity issues it raises for the first time in its Motion to Strike.

which the Commission will ultimately need to rule. If the Commission decides the matter at this time, and grants whatever leave is necessary for the Response and Reply pleadings to be considered, then the Commission will also need the benefit of a discussion of Global Crossing's position concerning the issue raised in Verizon's Motion — i.e., the applicability of the current and prior versions of RSA 365:29 to Global Crossing's Petition to Intervene and how far back Verizon must make restitution. That discussion is provided below.

III. RSA 365:29 Requires that Verizon Make Restitution To Global Crossing at Least Back to June 23, 2004.

In its Motion, Verizon argues that reparations should not extend back two years from the date of the Commission's order of notice of this docket because an amendment to RSA 365:29 took effect on August 31, 2008, after this proceeding had commenced. Verizon instead would have the reparations extend back only two years from the date on which Global Crossing filed its Petition to Intervene in this proceeding, based on the original language of RSA 365:29.⁵ In order to reach this conclusion, Verizon argues that using the amended language in RSA 365:29 would constitute a retrospective application of a statute in violation of the New Hampshire Constitution, Part I, Article 23. Verizon, however, misreads the case law interpreting the application of Pt. I, Art. 23 of the New Hampshire Constitution prohibiting retrospective laws.

As the New Hampshire Supreme Court has stated on numerous occasions, the Legislature may change existing laws at its pleasure, but in doing so it may not deprive a person of a property right acquired under existing law. *In re Estate of Sharek*, 156 N.H. 28, 31 (2007). The property right at issue here is Global Crossing's right to pay only charges that are legal and authorized and, if it has paid any unauthorized charges, to be reimbursed for the payments that it

⁵ Verizon is not necessarily correct that the prior version of RSA 365:29 requires that reparations be limited to two years before the date of Global Crossing's Petition to Intervene. Global Crossing, as noted below, reserves the right to make further arguments concerning this matter.

made, with interest. Verizon's argument seems to be that it has some property right to avoid having to pay back monies that it collected impermissibly. Because Verizon has no such property right to impose and collect an impermissible charge, requiring Verizon to pay reparations back to two years before the notice of hearing in this docket, as the amendment to law that took effect on August 31, 2008 provides, would not be a violation of Pt. 1, Art. 23.

As the Court held in *Sharek*, a mere expectancy of a future benefit or a contingent interest in property founded on anticipated continuance of existing laws is not a vested right protected from retroactive application of the statute. 156 N.H. at 31. Verizon had no right to expect that the reparations law should continue as it was, or at least as Verizon thinks it should be interpreted, in order to avoid having to pay reparations based on an impermissible charge. To be vested and protected from retroactive application of a statute, a right must be more than a mere expectation based on anticipation of the continuance of existing law. *Id.*

The New Hampshire Supreme Court, when it analyzes cases under this article of the state constitution, distinguishes new laws that affect substantive rights and liabilities from those that solely affect procedures or remedies enforcing those rights. *See In re Goldman*, 151 N.H. 770, 772 (2005); *Lozier v. Brown Company*, 121 N.H. 67, 70 (1981); *Peping v. Beaulieu*, 102 N.H. 84, 89-90 (1959); *Wallace v. Stearns*, 96 N.H. 367, 369 (1957). RSA 365:29 provides remedies for customers, not for Verizon. This statute is about the procedures for those remedies; the rights at stake under this statute are those of customers like Global Crossing, not utilities like Verizon. Because Verizon has already collected the impermissible charges, RSA 365:29 provides a mechanism for making sure that customers who have paid impermissible charges are fairly reimbursed. As the Court found in *Goldman*, when a statute is remedial or procedural in nature, it may be applied to cases pending at the time of the enactment. 151 N.H. at 772. As noted

above, RSA 365:29 is clearly remedial and procedural in nature, so it would be appropriate and not in violation of Pt. 1, Art. 23 for the Commission to utilize the amended RSA 365:29 for this docket, which was pending at the time of the enactment of the amendments to this statute. Moreover, the reparations procedure provided in the amended RSA 365:29 is not oppressive or unjust in any way; it simply provides a time limit for reparations and a mechanism for making sure utilities do not keep revenues they obtain from impermissible charges. *See In re Franklin Lodge of Elks No. 1280 BPOE*, 151 N.H. 565, 568 (2004) (a statute does not contravene the state constitution's prohibition on retrospective laws if it affects the remedy only and is not oppressive or unjust). There is clearly no barrier in applicable case law to applying the amended statute to Global Crossing's Petition to Intervene.

Verizon argues that there is no legislative history suggesting that the changes to RSA 365:29 should apply retrospectively. In fact, the legislative history does suggest that the amendments were designed "to actually strengthen the Commission's ability to handle a situation where a rogue utility may be overcharging a consumer or a particular customer." Testimony of Sen. Deborah Reynolds, the prime sponsor of the bill, before the Senate Committee on Energy, Environment and Economic Development on October 16, 2007. When this is read in conjunction with the case law cited above, it is clear that, even if the prior version of RSA 365:29 did not support reparations for intervenors going back two years before the date of BayRing's complaint or the order of notice,⁶ it would be appropriate to utilize the amended RSA 365:29 for the purposes of this docket and Global Crossing's filing.⁷

⁶ See *supra* note 5.

⁷ Verizon also argues that Global Crossing "should not be permitted to benefit from its own dilatory behavior." *See* Verizon Motion at 4, ¶ 8. By making this argument Verizon attempts to turn the positions of the respective parties to this docket upside down. It is Verizon that should not be allowed to benefit from its illegal behavior in collecting a charge that was contrary to its tariff. Global Crossing is merely exercising the rights that it has as a customer of a public utility in New Hampshire.

The Commission may wish to consider the issue concerning RSA 365:29 raised by these pleadings more formally and thoroughly later in this proceeding. Global Crossing has made this pleading, as it made the earlier Reply, to protect its rights and to avoid having a lack of response to Verizon's arguments be misconstrued as agreement with those arguments. To the extent the Commission decides to address this issue at a later point, Global Crossing reserves its right to raise any additional arguments and/or to further flesh out the arguments contained in this pleading regarding the extent of reparations to which it is entitled.

IV. Conclusion

For the foregoing reasons, the Commission should not strike Global Crossing's Reply and should make it clear that Verizon is required to make restitution to Global Crossing for damages going back at least to June 23, 2004.

Respectfully submitted,



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October 30, 2008

Certificate of Service

I hereby certify that, on the date written below, I caused the foregoing to be sent by electronic mail to the persons on the Commission's service list in this docket.

October 30, 2008



R. Edward Price