STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

BayRing Petition For Investigation Into Verizon New Hampshire's Practice Of Imposing Access Charges, Including Carrier Common Line (CCL) Access Charges, On Calls Which Originate On BayRing's Network And Terminate On Wireless and Other Non-Verizon Carriers' Networks	Docket No. DT 06-067

JOINT OPPOSITION OF AT&T, BAYRING COMMUNICATIONS, ONE COMMUNICATIONS AND SPRINT TO VERIZON'S MOTION TO STAY PROCEEDINGS PENDING APPEAL

Freedom Ring Communications, LLC, d/b/a BayRing Communications ("BayRing"), AT&T Corp. ("AT&T"), One Communications ("One"), and Sprint Communications Company, L.P. and Sprint Spectrum L.P. ("Sprint") (collectively "Competitive Carriers") oppose the motion ("Motion") of Verizon New Hampshire ("Verizon") to stay Phase II of this proceeding for an indefinite amount of time while Verizon and FairPoint appeal to the New Hampshire Supreme Court the Commission's decision that Verizon had impermissibly imposed carrier common line access charges ("CCL charge") upon the Competitive Carriers and others. In Phase II, the Commission will determine the amount that Verizon must repay to the Competitive Carriers and others on account of its unlawful overcharges. Such restitution has been estimated to amount to as much as $15 to 20 million.

So long as the Commission's decision is in effect, it is the law. *See* RSA 365:26. As a result, Verizon now holds, without right and in violation of law, millions of dollars that belong to its customers, among them the Competitive Carriers. Following the Commission's decision,

Verizon has no right to such funds. Yet, in its motion to stay, Verizon claims that ***it*** — somehow — will be "irreparably harmed" if the Commission calculates the amout due and requires it to be returned to its lawful owners. It is hard to understand how Verizon will be irreparably harmed by a process that will cause it to refund monies to which it has no right. The money must be held by one side or the other in this lawsuit pending appeal. It should not be held by the party that the Commission has just determined lacks any right to it.

If Verizon's motion were granted, it would not be just the Phase II proceeding that would be stayed; the Competitive Carriers' right to a refund would, in effect, also be stayed. Verizon has delayed refund of the Competitive Carriers' money long enough. As a result of Verizon's insistence on extended evidentiary procedures in what should have been a tariff interpretation case on paper, it has now been almost two and one-half years since this docket was opened. It is the Competitive Carriers who have been harmed and who will continue to be harmed so long as Verizon retains the substantial sums of their money it now holds. Verizon's claim of "irreparable harm" rings hollow by comparison.

The public interest is served by prompt enforcement of the Commission's determination that Verizon repay millions of dollars of unlawful overcharges. Under RSA 541:18, the Legislature has expressed a clear public policy preference for prompt repayment of utility overcharges. Moreover, the ability of the Commission to enforce its own decisions could be compromised by further delay and the concommitant loss of records and memory. This is especially true in the instant case, where Verizon has sold the operations that had calculated and invoiced the charges at issue in the case. The Commission should deny Verizon's motion and should proceed promptly to determine in Phase II the amount of reparations that Verizon must pay.

Background

BayRing initially filed its complaint in April 2006. The Commission issued an order of notice in June 2006. After some preliminary exchanges, in November 2006, the Commission bifurcated this case into two phases. In the first phase, the Commission would conduct a "liability" phase in which the Commission would determine if Verizon had the right to collect the CCL charge under its tariff. Then, if the Commission determined that Verizon did not have the right to collect the CCL charge, the Commission would proceed to a second phase in which the amount of reparations would be determined.

After technical sessions, discovery, hearing, and briefing, the Commission issued the Order Interpreting Tariff, Order No. 24,837, in March 2008. The Commission found that Verizon had no legal right under its tariff to collect the CCL charge when calls were terminated to end users of wireless carriers or otherwise when the call did not traverse a Verizon local loop. The Commission 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." *Order Interpreting Tariff*, Order No. 24,837 (March 21, 2008) at 32.

In that March 2008 order, the Commission further determined to proceed with Phase II, in order to determine the amounts that Verizon must pay in restitution for its unlawful conduct.

> Verizon's misinterpretation of the provision pertaining to CCL charges under Tariff No. 85 has resulted in it impermissibly imposing CCL charges on certain customers. Therefore, we find that Verizon owes restitution. As a result, we will proceed to Phase II in order to determine the extent to which restitution should be made.

Id. The amount that Verizon owes in restitution for its unlawful overcharges has been estimated in the range of $15 to 20 million. *Id.* at 33.

Subsequently, Verizon and FairPoint filed motions for rehearing, which the Commision denied on August 8, 2008. *Order on Motions for Rehearing and Motion to Intervene*, Order No. 24,886. In that order, the Commission ordered that Phase 2 begin with a prehearing conference on October 1, 2008, *Id.* at 11.

On September 8, 2008, Verizon and FairPoint filed an appeal by petition in the New Hampshire Supreme Court, seeking to overturn Order No. 24,837. On the same day, Verizon filed the instant motion with the Commission to stay Phase II of the case pending the determination of the appeal.

Argument

I. VERIZON'S MOTION FAILS TO SATISFY THE STANDARD FOR A STAY PENDING APPEAL.

To obtain a stay pending appeal, a petitioner must satisfy two conditions.

> First, there must be a showing that the plaintiff will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect. Second, it must be clear that the harm to the plaintiff outweighs the public interest in enforcing the order for the duration of the appeal. The mere fact that an administrative decision may cause injury or inconvenience to the plaintiff is insufficient to warrant a suspension of an order.

Union Fidelity Life Insurance Co. v. Whaland, 114 N.H. 549, 550 (1974) (citations omitted). The Commission has stated the test more succinctly: to obtain a stay pending appeal, a petitioner must "show that [it] will suffer irreparable harm and that such harm outweighs the public interest." *In re Statewide Electric Utility Restructuring Plan,* Dkt. No. DR 96-150, Order No. 22, 417, 1996 WL 766462 at 2 (Nov. 18, 1996) (citing *Union Fidelity Life Insurance Co. v. Whaland,* 114 N.H. 549 (1974)).

Verizon does not satisfy either condition. The Commission, therefore, should deny the motion for a stay.

II. VERIZON WILL SUFFER NO IRREPARABLE HARM IF PHASE II PROCEEDS.

Verizon has made no showing that it will suffer irreparable harm if Phase II proceeds while Verizon pursues its appeal of the Phase I order. Verizon's only support for its claim of irreparable harm lies in its assertion that it will be forced to devote resources to the litigation that will determine the amounts that it unlawfully overcharged and must repay. *See* Motion at 2.

It is true that the parties will have to engage in litigation and expend time, effort, and money to determine the amount that Verizon must repay. But, effort, expense, inconvenience, or having to participate in legal proceedings are not sufficient bases for a finding of irreparable harm. As the New Hampshire Supreme Court explained (in a case that Verizon cites), that one will be subject to legal proceedings is not a basis for a finding of irreparable harm. *Union Fidelity Life Insurance Co. v. Whaland,* 114 N.H. at 551. Similarly, that a party will suffer inconvenience and expense does not compel a finding of irreparable harm, particularly where one party or the other will be subject to effort and expense whichever way the Commission decides. *Tilton v. Boston & Maine R.R. Co.,* 99 N.H. 503, 504 (1955) (per curiam).

In fact, it is the Competitive Carriers that are more likely than Verizon to suffer irreparable harm by stay of the Phase II proceedings. This case has been pending for nearly two and one-half years, during which time Verizon has had the use of millions of dollars of unlawful overcharges. Verizon claims that Phase II "will likely involve extensive discovery, technical sessions and ultimately, hearings to determine the amounts due." Motion at 2. If so, even if there is no stay, there is little chance that the amount of reparations will be determined soon; a more realistic estimate is a year or more. After that, it is anyone's guess when the Competitive Carriers will actually receive any money. Therefore, even if Phase II gets under way as ordered,

it could be three to four years from commencement of this case before the amount of reparations is determined.[1]

That is long enough in itself. By its motion for a stay, Verizon seeks to delay that process for another year or more while the appeal is decided.

Delay will result in irreparable harm, while enforcement of the Commission's order will not. Much can happen in a year. Witnesses may become unavailable. Memories may fade. Records may be damaged or lost. Importantly, having sold its operations in New Hampshire and abandoned the state, Verizon has no ongoing relationship with the Commission other than this case. Further delay will serve only to degrade the records and information that the Commission will need to determine the amount of appropriate restitution for Verizon's unlawful conduct.[2] The Commission's decision making ability potentially will be irreparably harmed.

Since Verizon will suffer no irreparable harm if Phase II proceeds, and, indeed, the Competitive Carriers may suffer irreparable harm by additional delay, the Commission should deny Verizon's motion.

III. WHATEVER HARM VERIZON MAY SUFFER IS OUTWEIGHED BY THE PUBLIC INTEREST IN ENFORCING THE COMMISSION'S FINDING OF LIABILITY.

In Phase I, the Commission found that Verizon had collected CCL charges when it had no legal right to do so under its tariff. To remedy that wrong, the Commission has ordered

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[1] It is not at all clear that Phase II will be complicated as Verizon suggests. For example, based on materials filed to date, AT&T sees little discrepancy between Verizon's records and its own. It is possible that the Phase II calculations can be promptly accomplished on paper and with little or no need for evidentiary hearings.

[2] That problems obtaining relevant data as a result of Verizon's departure from New Hampshire will arise is not a theoretical possibility—it is a realistic likelihood. Resolution of other billing disputes that arose with Verizon in the normal course of business has been made more difficult with the transfer of operations from Verizon to FairPoint. FairPoint has often been unable to provide needed information because such information resides with Verizon, or only Verizon knows where to find it.

further proceedings, beginning with a prehearing conference on October 1, to determine the amount of unlawful overcharges that Verizon must repay.

Verizon glosses over this fact in its motion. It was Verizon's unlawful acts that gave rise to this case. The Commission's determination of liability and its order commencing Phase II are a response to, and method of remedying, Verizon's unlawful conduct.

This case has already been prolonged at Verizon's insistence. When this case was commenced, the Competitive Carriers suggested to the Commission that the case was a matter of legal interpretation, with few controverted facts, that could be decided expeditiously, largely if not entirely on a stipulation of facts and briefs. Transcript of Prehearing Conference, July 27, 2006, at 16-18. Verizon disagreed. "We want an opportunity for an adjudication, not on paper. We would like the typical discovery opportunities, just as we're giving a lot of other carriers and other parties in other proceedings, and then I'd like a hearing on this, your Honor, with witnesses. We'd like an opportunity for cross-examination." *Id.* at 22-23. As noted above, Verizon suggests that Phase II will involve the same types of activities, presumably of a duration equivalent to Phase I.

The public interest is not served by further delay of the Commission's plan to remedy Verizon's unlawful conduct. The public has a right to expect that Commission decisions will be followed and that the Commission will swiftly and surely put its decisions into effect. Particularly where, as here, the Commission has ordered refunds of overcharges unlawfully collected, the Commission should do what is necessary to ensure that the illegal charges are refunded as quickly as possible. Delay of a year or more while the appeal is argued is antithetical to this objective.

In other words, Verizon should not benefit further from its unlawful acts by delaying the proceedings any longer. That it will incur some legal fees and other expenses and spend time defending itself in Phase II does not outweigh the public interest in swift and sure enforcement of the law. "'Whatever course is taken, inconvenience or injury may result to one party or the other,' and here [Verizon], whose conduct has caused the [C]ommission[] to issue [its] order, should bear the weight of the decision." *Union Fidelity Life Insurance Co. v. Whaland,* at 551 (quoting *Tilton v. Boston & Maine R.R. Co.,* 99 N.H. 504, 113 A.2d 543, 544 (1955)). The Commission should require Verizon to account for its wrongful actions by moving expeditiously to a decision in Phase II.

Verizon's motion disserves the public interest in another way: it contravenes the statutory requirement of prompt repayment of overcharges when the Commission determines that such overcharges have occurred. The Legislature has provided:

> No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; *but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges* over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

RSA 541:18 (emphasis added). Though directly applicable to requests to the Supreme Court to suspend Commission orders pending appeal, section 541:18 is a clear legislative statement that repayment of overcharges is a paramount concern and that delay in repayment is strongly discouraged. Verizon's motion violates both the spirit and letter of this provision. Verizon's motion proposes no means for "prompt repayment" of the unlawful excess CCL charges. What Verizon proposes is exactly the opposite — further delay before it repays the excess CCL

charges. The Commission should give effect to the public's interest in prompt repayment of Verizon's overcharges and deny Verizon's motion for stay.

The public interest also may suffer from a diminution of the Commission's ability to make decisions. As explained above, delay can result in the degradation of records and memory, potentially reducing the amount and/or quality of evidence available to the Commission. It would be unfair to the parties (even Verizon itself) if the Commission were impaired in its ability to reach a fair resolution because it lacked evidence on which to base its decision.

In addition, staying this proceeding could result in administrative inefficiency by encouraging meritless appeals. Some may see the grant of a stay in this case as useful precedent supporting a meritless appeal taken to delay the effect of adverse rulings or to preserve the bargaining power of the losing party in a possible settlement. That would embolden those on the losing end of Commission decisions to file appeals solely for purposes of delay or to preserve bargaining leverage. In the meantime, the Commission would be forced to expend resources to defend well reasoned decisions, such as the one in this case, until settlement is ultimately reached or the case is decided. The Commission's order finding Verizon liable for imposing unlawful overcharges is well-reasoned, just and reasonable, and correct. The Commission should proceed with enforcement of its finding of liability for Verizon's unlawful conduct. The Commission should proceed with Phase II notwithstanding Verizon's appeal of Order No. 24, 837.

Conclusion

Verizon has not shown that it will suffer irreparable harm if Phase II of this proceeding goes forward. In addition, the public interest in prompt enforcement of Commission orders and expeditious decision of matters before the Commission will suffer if the Commission and parties are forced to wait a year or more before even commencing to determine the amount that Verizon

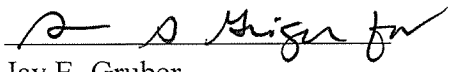
must repay on account of its unlawful collection of CCL charges. For these reasons, the Commission should deny Verizon's motion to stay and should proceed expeditiously with Phase II to determine the amount of reparations Verizon must make.

September 18, 2008

Respectfully Submitted,

AT&T CORP.

By its attorney,



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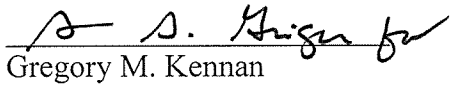

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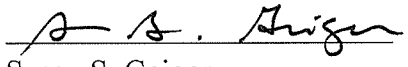

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Certificate of Service

I hereby certify that a copy of the foregoing Joint Opposition has on this 18th day of September, 2008 been sent either by first class mail, postage prepaid, or by electronic mail to the parties named on the Service List in the above-captioned matter.

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