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June 1, 2007

VIA HAND DELIVERY

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301



**Re: Docket DT 06-067 – Freedom Ring Communications Complaint Against
Verizon New Hampshire re Access Charges**

Dear Ms. Howland:

Enclosed are an original and six copies of Verizon New Hampshire's Motion to Compel Discovery Responses.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Victor D. Del Vecchio" followed by a circled set of initials "HMB".

Victor D. Del Vecchio

cc: Service List
Enclosure

NHPUC JUN01 07 PM 3:36

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Docket #: 06-067-1 Printed: June 01, 2007

FILING INSTRUCTIONS:

**WITH THE EXCEPTION OF DISCOVERY (SEE NEXT PAGE) FILE 1 ORIGINAL & COVER LETTER, PLUS 8 COPIES
(INCLUDING COVER LETTER) TO:**

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STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

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

Docket: DT 06-067

VERIZON NEW HAMPSHIRE'S
MOTION TO COMPEL DISCOVERY RESPONSES

In accordance with N.H. Admin. Rule Puc 203.07 and 203.09(i), Verizon New England Inc., d/b/a Verizon New Hampshire ("Verizon NH"), moves to compel Freedom Ring Communications d/b/a BayRing Communications and AT&T Communications, Inc., (the "Carrier" or "Carriers") to provide full and complete responses to the data requests propounded by Verizon NH on May 4, 2007. Specifically, Verizon NH seeks to compel answers by BayRing to VZ 3-4, VZ 3-6, VZ 3-12, VZ 3-13 and VZ 3-14. Verizon NH also seeks to compel AT&T to answer VZ 3-9.

The information Verizon NH seeks is reasonably calculated to allow it to fully develop and present its case in this proceeding, and the Carriers' failure to provide the information will result in a denial of due process unless the Commission takes corrective action.

I. STANDARD OF REVIEW

Discovery in Commission proceedings is guided by the principles and procedures set forth in New Hampshire Superior Court Rule 35(b)(1), which states in pertinent part that "[p]arties may obtain discovery regarding any matter, not privileged, which is

relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party....” *Re Investigation into Whether Certain Calls Are Local*, Docket DT 00-223, Order No. 23,658, 86 NH PUC 167, 168 (Mar. 22, 2001). While “discovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence,” the Commission will deny a motion to compel discovery only when it “can perceive of no circumstances in which the requested data will be relevant.” *Lower Bartlett Water Precinct*, Docket DW 99-166, Order No. 23,471 at 4-5 (May 9, 2000); *see also Re Public Service of New Hampshire*, 86 NH PUC 730, 731-732 (2001); *Re Public Service Company of New Hampshire*, 89 NH PUC 226, 229 (2004). As the New Hampshire Supreme Court has held, a party in a legal proceeding in New Hampshire is entitled to “be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponents and whether the evidence is in the possession of his opponent or someone else.” *Scontsas v. Citizens Insur. Co.*, 109 N. H. 386, 253 A. 2d 831, 833 (1969).

The scope of discovery in Commission proceedings is thus broad, the Commission recognizing the “liberality of the applicable discovery rule.” *Re Public Service of New Hampshire*, 86 NH PUC at 732. The underlying purpose of discovery in legal proceedings is to reach the truth. *See Scontsas*, 109 N.H. at 388, *citing Hartford Accident &c. Co. v. Cutter*, 108 N.H. 112, 113 (1967). “If a party is surprised [at trial] by the introduction of evidence or an issue or the presentation of a witness previously unknown to him, the trier of fact is likely to be deprived of having that party's side of the

issue fully presented, and the system becomes less effective as a means of discovering the truth.” *Id.*

II. DISCUSSION

A. General Comments

The purpose of this docket is to provide Verizon NH with opportunity to respond to issues raised by the New Hampshire Commission in its Order of Notice (the “*Order*”), dated November 29, 2006. In particular, the Commission is investigating Verizon NH’s “practice of imposing switched access charges, including carrier common line (CCL) access charges,” on calls that originate on the Carriers’ networks and terminate “at wireline end-user (as well as wireless) customers served by carriers other than Verizon.” *Order* at 1, 3.

All of the information requests in question concern Verizon NH’s ability to prepare its case for hearing. Although the Carriers generally state that the requested information calls for legal conclusions, interpretations or argument, the requests are clearly justified and seek additional factual information or positions of the Carriers. The information is relevant because the carriers frequently make reference to the tariffs and Orders but fail to provide further explanation or clarification of their position or a full factual basis in support of their position. Therefore, Verizon NH is entitled to obtain statements of the Carriers’ facts and position’s in support of their general claims. A number of Verizon NH’s data requests asked the Carriers to articulate its position. The Carriers answered some questions of this type without complaint, including Nos. BayRing VZ 3-7, and BayRing VZ 3-8. Others, however, the Carriers refused altogether

to answer on the ground that the question “seeks legal argument,” see, e.g., BayRing’s Response to VZ 3-12, or “seeks a legal opinion.” BayRing’s Response to VZ 3-6 (e).

The Carriers’ refusal to answer these information requests is misplaced, and the Commission should compel a response. Verizon NH has not asked either of the Carriers to provide or disclose its internal deliberations or thought processes or any attorney-client communications or work product. Verizon NH has asked only for the carriers to state their positions and the reasons and authorities supporting such position.

A number of objections claim the requests seek a “legal opinion” or a “legal argument, *e.g.* BayRing Responses VZ 3-6(d) and VZ 3-12. Such requests, however, are not objectionable even if they require opinions or conclusions of law, and application of law to fact is an acceptable manner to request information.¹ The parties are allowed to request admissions about a broad range of matters, including “application of law to fact.” This broad scope allows the parties to narrow the issues prior to trial. Verizon NH’s information requests are crafted to seek a narrowing of the issues presented in the case. Verizon NH’s requests do not seek purely legal conclusions, but rather, the application of law to fact – indeed many just ask about facts.

The second blanket response of the Carriers not to produce relevant information is an assertion that the information sought is outside the scope of relevant discovery matters in the rebuttal round, *e.g.* BayRing Response VZ 3-13. The information sought is

¹ The 1970 amendment to Fed. R. Civ. P. 36 permits the eliciting of such opinions. Fed. R. Civ. P. 36 Notes of Advisory Committee on 1970 amendments. “Subdivision (a).--As revised, the subdivision provides that a request may be made to admit any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be “of fact.” This change resolves conflicts in the court decisions as to whether a request to admit matters of “opinion” and matters involving “mixed law and fact” is proper under the rule.”

relevant to Verizon NH's case preparation and the Commission's investigation. For instance, Information Request VZ 3-13 to BayRing states:

Referring to page 11 of the Rebuttal Testimony of Darren Winslow and Trent Lebeck, please provide citations to Verizon's (then NET) prefiled direct, reply or rebuttal testimony or oral testimony in Docket DE 90-002 in which Verizon specifically states the contribution to be recovered in the CCL is specifically intended to recover NTS costs allocated to the incremental costs of switched access service?

The request relates directly to BayRing's Rebuttal Testimony on p. 11 and to the issue that the Commission has considered whether the CCL is a contribution versus a loop only cost recovery element.

The Carriers' continued refusal to produce the information sought by Verizon NH will unnecessarily undermine Verizon NH's ability to understand the basis for the Carriers' position, prepare its case for hearing, and present evidence responding to the Carriers' contentions. In the absence of a Commission order compelling the Carriers to provide responsive answers to the relevant data requests, Verizon NH will be denied a meaningful opportunity to conduct cross examination of key witnesses and to present testimony designed to respond to identified Commission concerns. For the reasons discussed above and as addressed more specifically below, the Carriers' failure to respond completely to the relevant data requests must be corrected. The "purpose of discovery is to develop and explore the facts at issue in a case." *City of Nashua*, Docket DW 04-048, Order No. 24,485 dated July 8, 2005 at 4. While discovery is not necessarily the time to argue policy or advocate for the final result, it is specifically designed "to seek and respond to factual matters that may lead to admissible evidence." *Id.* The Carriers' failure to respond denies Verizon NH and the Commission that opportunity in this adjudicative proceeding.

B. Verizon NH's Data Requests Requiring Responses by BayRing

Data Request VZ 3-4

Referring to page 7, line 19 through page 8 line 7 of the Rebuttal Testimony of Darren Winslow and Trent Lebeck, do you deny that NHPUC No. 78, Section 2.4.7 provides for the provision of switched access by Verizon for calls originated from or terminated to end-users served on the network of another carrier? If your answer is other than an unqualified no, please state the basis for your contention.

BayRing Objection: BayRing claims that the requested information calls for an interpretation of a tariff provision.

Verizon NH Response: An interpretation of the tariff provision is not being sought. Rather, Verizon NH merely seeks a statement of BayRing's position on a factual matter of whether Section 2.4.7 of Tariff No. 78 pertains to the ordering, rating, and billing of access services where more than one exchange telephone company is involved. The request merely requires an affirmation or denial that relates to fact or the application of law to fact.

Data Requests VZ 3-6

Referring to page 8, line 8 through page 9, line 3 of the Rebuttal Testimony of Darren Winslow and Trent Lebeck,

- a) Where exactly does Mr. McCluskey state that the proposed access structure absolutely would never apply for the joint provision of switched access by Verizon and another carrier for use of their networks in furnishing any other carrier's toll services? Please provide the exact language relied upon.
- b) Where exactly does Mr. McCluskey state that the proposed access structure absolutely would need further adjustments to accommodate the joint provision of switched access by Verizon and another carrier for use of their networks in furnishing any other carrier's toll services? Please provide the exact language relied upon.
- c) Is BayRing or any of its predecessors/affiliates aware that subsequent proceedings (e.g., DE 96-177, DE 96-252, DE 97-013, DE 97-171) resulted in the establishment of interconnection agreements, the Verizon NH Statement of Generally Available Terms and Conditions and the Verizon NHPUC No. 84 tariff, establishing the applicable regulations, conditions, rates and charges for use of Verizon NH's network by competitive providers of local exchange, toll and exchange access services?
- d) Does BayRing consider these proceedings to constitute instances where filings were made with the Commission to accommodate entry of competing carriers for local exchange, toll and exchange access services provided within existing ILEC service areas and the establishment of applicable terms and conditions for use of Verizon NH's network by carriers in furnishing their competitive services? If your answer is other than an unqualified yes, please state the basis for your contention.

- e) Did the Commission determine as a result of the above proceedings that any modifications to the switched access tariff provisions (originally established as a result of DE 90-002) of local exchange carriers, including Verizon NH, were necessary?

BayRing Objection: BayRing claim's that the questions call for a legal opinion.

Verizon NH Response: The Request does not seek a legal opinion. Rather, Parts A and B seeks facts concerning the proposed access structure while Parts C, D and E seeks facts regarding BayRing's knowledge and understanding of certain proceedings before the Commission. The request is factual not requiring any form of legal analysis or opinion.

Data Requests VZ 3-12

Referring to pages 9-10 of the Rebuttal Testimony of Darren Winslow and Trent Lebeck,

- a) At lines 7-10 of page 10 does BayRing deny that in the original language quoted therein, the word "all" was emphasized in bold text?
- b) Does Mr. Shepherd explicitly state therein that the CCL applied only for use of NET end-user common lines?
- c) Does BayRing deny that Mr. Shepherd's clarification was referring to a carrier's use of its (NET's) local exchange carrier switched network? If your answer is other than an unqualified no, please state the basis for your contention.

BayRing Objection: BayRing's objection to the requested information relied on the claim that the questions do not seek information or data, but rather seek legal argument.

Verizon NH Response: The request does not seek legal argument, rather it seeks fact of what Mr. Shepherd did or did not state in his testimony that BayRing has misrepresented or misinterpreted. The request is factual, seeking an affirmation or denial and not requiring any form of legal analysis or opinion. BayRing's May 18, 2007 responses to parts (b) and (c) of the request whereby it claims to believe it has accurately quoted Mr. Shepherd, is not responsive to the questions propounded.

Data Requests VZ 3-13

Referring to page 11 of the Rebuttal Testimony of Darren Winslow and Trent Lebeck, please provide citations to Verizon's (then NET) prefiled direct, reply or rebuttal testimony or oral testimony in Docket DE 90-002 in which Verizon specifically states the contribution to be recovered in the CCL is specifically intended to recover NTS costs allocated to the incremental costs of switched access service?

BayRing Objection: BayRing claim's that the question does not reference BayRing testimony.

Verizon NH Response: The request seeks facts on BayRing's understanding of the contents of testimony in DE 90-002 regarding the role of the CCL element. That BayRing did not reference that testimony in its rebuttal does not mean the question is objectionable.

Data Requests VZ 3-14

Referring to page 11 of the Rebuttal Testimony of Darren Winslow and Trent Lebeck, please provide citations to a Commission order in Docket DE 90-002 which specifically states that the Commission:

- a) Prohibited setting the CCL rates residually to provide contribution to achieve the stipulated target switched access rate levels.
- b) Prohibited recovering contribution from all switched access usage provided for a carrier's use of Verizon NH's network in the provision of the carrier's competitive service.
- c) Specified that the CCL was only applicable if and when Verizon NH provided the carrier with access to a Verizon NH end-user customer.
- d) Specified that the CCL is solely a rate element limited to specifically provide for the recovery of loop related incremental costs.

BayRing Objection: BayRing claims that the questions are argumentative.

Verizon NH Response: The request does not seek argument, but rather factual information on whether the New Hampshire Public Utilities Commission ever ordered or made specific findings in its Orders. BayRing's May 18, 2007 response that it has outlined its position on the requested parts (a)-(d) in its testimony is not responsive to the specific requests and requested citations to any Commission orders.

C. Verizon NH's Data Request Requiring a Response by AT&T

Data Requests VZ 3-9

Referring to pages 9-11 of the Panel Rebuttal Testimony of Ola Oyefusi, Christopher Nurse and Penn Pfautz, please affirm or deny that the New Hampshire Public Utilities Commission Order No. 20,082 in Docket DR 89-010 excluded toll minutes of use for toll provided to other local exchange carrier end-users on the originating, the terminating or both ends of a toll call, from the allocator used to determine "proportional use of the network by each service" for the apportionment of the balance of NTS incremental costs among all services using the distribution system.

Verizon NH Response: AT&T's May 18, 2007 response that it can neither confirm nor deny this statement without specific citation to the statement in the Commission's Order No. [2]0,082 in Docket DR 89-010 is not responsive. The "*Commission Analysis*" Section III, 13th paragraph (which is on page 22 of 29 of the Commission's html website version of the Order) contains the Commission's NTS incremental cost apportionment language.

III. CONCLUSION

For the reasons set forth above, Verizon NH respectfully requests that the Commission grant this motion to compel and order the Carriers to respond to all of the data requests discussed above. Verizon NH is entitled to such information in order to properly prepare and fully present its case before the Commission. In addition,

Verizon NH asks that the Commission suspend the procedural schedule until this discovery dispute is resolved.

Respectfully submitted,

VERIZON NEW ENGLAND D/B/A
VERIZON NEW HAMPSHIRE

By Its Attorney

Dated: June 1, 2007

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