

May 27, 2011

VIA EMAIL & OVERNIGHT UPS

Ms. Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

**Re: Docket No. 4242
RNK Inc. v. Verizon New England Inc.**

Dear Ms. Massaro:

Enclosed for filing in the above matter, please find attached an original and nine (9) copies of RNK's response to Verizon's Motion to Dismiss, or, in the Alternative, to Stay This Proceeding. An electronic version is being sent to counsel and the Commission contemporaneously with this filing.

Please contact me with any questions or concerns.

Regards,



Michael Tenore
Acting General Counsel
781-613-6119
mtenore@rnktel.com

Enclosures

cc: Service List

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION**

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| RNK Inc. d/b/a RNK Telecom |) | |
| |) | |
| v. |) | Docket No. 4242 |
| |) | |
| Verizon New England Inc. |) | |
| d/b/a Verizon Rhode Island |) | |
| _____ |) | |

**OBJECTION OF RNK INC. D/B/A RNK TELECOM TO MOTION OF VERIZON
RHODE ISLAND TO DISMISS OR IN THE ALTERNATIVE,
TO STAY THIS PROCEEDING**

Pursuant to Rule 1.15(d) of the Commission’s Rules of Practice and Procedure, RNK Inc. d/b/a RNK Telecom (“RNK”), hereby objects to Motion of Verizon New England Inc., d/b/a Verizon Rhode Island (“Verizon”) to Dismiss or in the Alternative, To Stay This Proceeding (“Motion”).¹ As grounds therefore, RNK states as follows.

Introduction

The Commission should see through Verizon’s transparent attempts to obscure the simple and distinct contract and tariff issues that RNK brings before the Commission for resolution. The crux of these claims has little to do with the litigation that Verizon so desperately relies on in a vain attempt to convince the Commission to “punt.” Rather, these claims simply relate to: (1), whether or not Verizon must pay undisputed charges under RNK’s intrastate switched access tariff and the interconnection agreement between

¹ In addition to the reasons set forth herein, Verizon’s Motion should be denied as it was not timely filed in accordance with the Public Utilities Commission Rules of Practice and Procedure. Verizon should have responded on May 17, 2011, however, RNK did not receive the response until May 18, 2011 when it received an electronic version and the Commission was not served with the response until the same day. Verizon’s Motion should therefore be denied as it was not timely filed as should any Answer to RNK’s Complaint.

the parties; and (2), whether Verizon may, unilaterally and without amendment or court order, change the terms of the contract and impose a rate other than that reflected in the ICA. Accordingly, Verizon's Motion should be denied.

Adjudication Of The Complaint Does Not Depend On The Outcome Of The Federal Suit

1. In Verizon's Motion, Verizon incorrectly asserts that adjudication of RNK's Complaint filed with the Commission depends on the outcome of the federal suit brought by Verizon in 2008 requesting that the Federal Court determine the proper Virtual Foreign Exchange ("VFX") rate ("Federal Suit"); rather, the claims presented before the Commission concern Verizon's failure to pay the *undisputed* amounts due under RNK's lawfully filed switched access tariff and the interconnection agreement between the parties, Verizon's unlawful resort to self-help by withholding all payments for reciprocal compensation charges and escrowing those amounts and Verizon's unilateral resetting of the filed and approved VFX percentage located in the interconnection agreement. Contrary to Verizon's assertions, these matters are not intertwined in the litigation, except to the extent that Verizon seeks to inflict further distress on RNK.²

2. RNK's claims are simple matters of applying the tariff and the ICA as written, not how Verizon believes the contract will be written once (and if) the court acts, assuming such acts are in its favor. This Commission ordering Verizon to pay amounts it freely admits are not in dispute can hardly be said to be interfering or impacting the litigation in any way, shape or form as these matters have never been brought before the

² While Verizon makes much of the amounts RNK supposedly owes it, Verizon somehow neglects to mention that RNK similarly has over 20 million dollars in claims against Verizon. Verizon has paid nothing on these claims to RNK. Yet, unlike Verizon, RNK is not seeking to set off these amounts.

court and are separate and distinct from the issues currently being litigated. It is not difficult to “extract” claims for the litigation when they are not part of the litigation.

3. If the Commission were to order Verizon to comply with the written ICA until the court applies a new VFX percentage³, this would hardly impact the court’s ability to adjust the percentage as it saw fit, or apply such a percentage to a particular period at issue and order damages. Ordering Verizon to comply with the ICA would, to the contrary of Verizon’s contentions, be *preventing* Verizon from interfering in the litigation by imposing terms of its own design rather than that of the courts or the parties. Indeed, as the facts of the case demonstrate, it is Verizon, not RNK, which seeks to thwart the court’s authority by brazenly making its rulings for itself and carefully delaying its actions until the case has been fully briefed and discovery is complete.

4. In a vain attempt to link the litigation to these undisputed amounts, Verizon cites *Abedon v. Providence Redevelopment Agency*, 115 R.I. 512, 513-514, 348 A.2d 720, 721 (1975) for the premise that Rule 13, which “makes it compulsory for a pleading to state as a counterclaim any claim which the pleader has against an opposing party which arises out of the transaction forming the basis for the opposing party’s claim,” was designed to eliminate multiplicity in litigation. However, in the matter currently before the Commission, Verizon did not raise the affirmative defense of recoupment or a counterclaim for set-off in the context of withholding the undisputed reciprocal compensation and switched access charges at issue. To the contrary, Verizon was very specific with regard to its affirmative defense in the Federal Suit claiming that “RNK’s counterclaims are subject to set-off and/or recoupment in the amounts described in Verizon’s Amended Complaint.” *See* Verizon’s Seventh Affirmative Defense in

³ See Complaint at 15 (Count IV).

Verizon's Answer To Counterclaims of RNK. Those amounts described in Verizon's Amended Complaint did not include the undisputed reciprocal compensation and switched access charges that Verizon only began to withhold in December of 2010, two (2) years after Verizon filed its Complaint in the Federal Suit and conveniently after the completion of discovery and summary judgment motions had been filed.

5. Even if the Commission were to consider Verizon's claim that it was entitled to a right of set-off or recoupment, there is no basis in law for such entitlement. The long standing principal underlying the set off doctrine followed by most jurisdictions is that "[t]he subject of the set-off, must be liquidated, and the amount ascertained and settled, or ascertainable by calculation." *Bell v. Ward*, 10 R.I. 503 (1873). *See also Webber v. Johnson*, 342 Mass. 455, 174 N.E.2d 40 (1961) ("The mere fact that a specific amount is claimed does not, in and of itself, mean that the declaration in set-off is a proper pleading...The claims are comprised of demands requiring liquidation before the offset is actually made. The demands are not rendered certain and capable of calculation by the allegations..."); *McGuire v. Gerstley*, 204 U.S. 489, 27 S.Ct. 332, 51 L.Ed. 581 (1907); *Johns-Manville v. Connelly*, 144 W.Va. 498, 108 S.E.2d 836 (1959); *Lehigh Coal Co. v. Keene Coal Company*, 89 N.H. 274, 197 A. 410 (1938); *Kortz v. Union Cent. Life Ins. Co.*, 264 Ky. 750, 95 S.W.2d 611 (1936); *Kress v. Central Trust Company*, 153 Misc. 397, 275 N.Y.S. 14 (1934), *aff'd* 246 App.Div. 76, 283 N.Y.S. 467 (1935); *In re Estate of Nairn*, 215 Iowa 920, 247 N.W. 220 (1933); *Mack v. Hugger Bros. Const. Co.*, 153 Tenn. 260, 283 S.W. 448 (1925); *Suhs v. Homewood Rice Land Syndicate*, 128 Ark. 19, 193 S.W. 271 (1917); *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S.E. 835 (1906). In the matter presently before the Commission, Verizon has unilaterally recalculated the VFX

percentage back to May 2008, determined that it has overpaid RNK, and is currently applying its unilaterally determined new percentages prospectively, despite the fact that the Court in the currently pending Federal Suit has yet to determine the correct percentage that should be applied and Verizon's allegations are vigorously opposed by RNK.

6. Verizon relies on *DiChiaro v. Spirito*, 89 R.I. 50 at 58, 150 A.2d 637 at 641 (1959) to support its assertion that it is entitled to unilaterally withhold sums from RNK under the common law right of set off. However, *Dichiaro v. Spirito*, can be distinguished from the current matter before the Commission, as the Court in *Dichiaro v. Spirito* did not allow for the unilateral recoupment by one party but, rather, for recoupment based on a determination made by the superior court to *allow evidence of the amount of recoupment to be deducted*. "It is contrary to natural right and fundamental principles of common law for one to judge his own cause." *Patton v. Babson's Statistical Organization, Inc.*, 259 Mass. 424, 428 (1927), quoting from *Brocklehurst & Potter Co. v. Marsch*, 225 Mass. 3, 8 (1916). Yet, "judging its own cause" is precisely what Verizon has done here and by doing so has apparently determined that it not only has the right to withhold undisputed amounts, but that it also has the right to unilaterally rewrite the ICA upon its own terms (not surprisingly more favorable to Verizon) and impose a higher VFX percentage and insist upon RNK's owing a substantial credit. Under these circumstances, Verizon's so called "right" to set off is completely inappropriate.⁴

7. While Verizon would have this Commission believe that all of these claims are inextricably linked to the litigation, this supposition cannot be squared with the

⁴ Furthermore, Verizon's actions are in violation of Section 28.8.3 of the ICA. See Complaint at 14.

fact that Verizon is refusing to pay tariffed intrastate switched access charges. Under Rhode Island Law, when the Commission has approved a rate and pronounces that a specific rate is just and reasonable, the pronouncement has the force and effect of a statute. *Narragansett Elec. Co. v. Burke*, 122 R.I. 13, 404 A.2d 821, 827 (1979), cert denied, 444 U.S. 1079 (1980). The switched access portions of RNK's tariff have been in effect for almost 10 years and the terms of the tariff do not allow for the discriminatory set off terms that Verizon seeks to impose on RNK. Furthermore, it is unchallenged that not only is this switched access traffic undisputed, but it is also not subject to the current litigation as it is not "local traffic" or "VFX" traffic within the meaning of the ICA. See Complaint Exhibit B Section 1.3. Allowing a "right" to set off would fundamentally disturb the core of the tariffing process by allowing individualized business relationships outside of the tariff process to impact the filed rates and terms in the tariff. A Department ruling to the contrary would open the floodgates to carriers, in particular IXCs, failing to pay tariff rates due to purported "off sets."⁵

The Claims Presented And Relief Requested Are Within The Commission's Authority

8. In its Motion, Verizon argues that the Commission lacks the authority to hear the claims presented by RNK or grant the relief requested. While Verizon cites no authority in support of its argument, this Commission "is vested with the exclusive authority 'to supervise, regulate, and make orders governing the conduct of companies offering intrastate commerce energy, communication, and transportation services" to the public. Section § 39-1-1(c). (Emphasis omitted.) *Verizon New England Inc. v. Rhode*

⁵ RNK notes that tariffs are not limited to telephone companies.

Island Public Utilities Com'n, 822 A.2d 187, 194 (R.I. 2003). Moreover, Section 39-1-38 of the Rhode Island General Laws provides:

"The provisions of this title shall be interpreted and construed liberally in aid of its declared purpose. The commission and the division shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power which may be proper or necessary to effectuate their purposes. No rule, order, act or regulation of the commission and of the division shall be declared inoperative, illegal, or void for any omission of a technical nature. If any provision of this title, or of any rule or regulation made thereunder, or the application thereof to any company or circumstance, is held invalid by a court of competent jurisdiction, the remainder of the title, rule, or regulation, and the application of such provision to other companies or circumstances shall not be affected thereby. The invalidity of any section or sections or parts of any section or sections of this title shall not affect the validity of the remainder of the title."

While §39-4-10 explicitly charges the Commission with the duty and responsibility to substitute practices or acts if it finds that "any public utility is unjust, unreasonable, insufficient, preferential [or] unjustly discriminatory" and to make an order "as shall be just and reasonable, *and the power to order refunds* (emphasis added)." Specifically, §39-3-13.1 grants the power "to provide remedial relief from unjust, unreasonable, or discriminatory acts, or from any matter, at, or thing done by a public utility which...[is] prohibited or declared to be unlawful, [and] *to order the public utility to make restitution* to any party or parties, individually or as a class, injured by the prohibited or unlawful acts, *by way of a cash refund, billing credit, or rate adjustment, or any other form of relief* which the division may devise to do equity to the parties." Therefore, Verizon's assertion that the Commission is unable to grant RNK relief in the form of money damages or an injunction is completely without merit.

9. Verizon's argument would render the Commission but a "paper tiger" with scant authority over those carriers is purportedly regulates. Indeed, these is no clearer

instance where the Commission should act than where a competitor such as RNK is being unjustly treated by an incumbent such as Verizon. Verizon's suggestion that the Commission lacks the authority to order carriers to comply with the terms of a lawfully filed tariff, or to order parties to comply with the terms of an approved ICA, is inconsistent with previous actions of this Commission.⁶ Notwithstanding the fact that the Commission also has jurisdiction to interpret and resolve disputes between parties to interconnection and resale agreements, according to Sections 251 and 252 of the Act.⁷ Verizon's unsupported suggestion that this Commission lacks authority to oversee the activities and actions of the carriers it regulates is incorrect and devoid of reason and is contrary to Commission precedent and the Telecommunications Act of 1996. Accordingly, Verizon's Motion to Dismiss should be denied as the Commission has ample authority to address this matter.

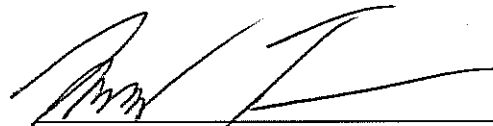
⁶ See Order No. 16056, *In Re: Complaint of Global Naps Inc. Against Bell Atlantic – Rhode Island Regarding Reciprocal Compensation* (1998) (Where the Commission ordered Bell Atlantic Rhode Island, now Verizon, to comply with the terms of the ICA between the parties and pay invoices due Global Naps in accordance therewith.).

⁷ 47 U.S.C. §252 (e) (1). *See also, Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000) (“[T]he Act’s grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.”)

Conclusion

10. Because Verizon failed to establish that adjudication of RNK's Complaint depends on the outcome of the Federal Suit brought by Verizon in 2008, failed to cite any authority for its assertion that the Commission does not have the power to provide the relief sought by RNK, has failed to timely file its Motion, and for the reasons stated herein, in the interest of justice, Verizon's Motion should be denied.

Respectfully submitted,
RNK, Inc.
By its Attorney,



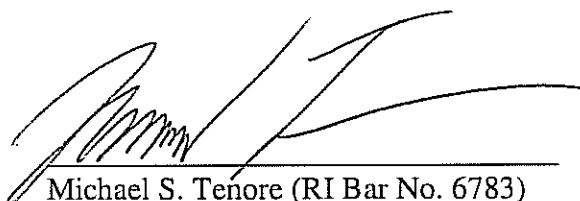
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Dated: May 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2011, I served a copy of the foregoing request on Verizon New England Inc. d/b/a Verizon Rhode Island, by delivering a copy of the same to:

Alexander W. Moore
Associate General Counsel
Verizon New England, Inc.
125 High Street, Oliver Tower 7th FL
Boston, MA 02110

A handwritten signature in black ink, appearing to read 'Michael S. Tenore', written over a horizontal line.

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