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May 17, 2011

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

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

RECEIVED
2011 MAY 18 AM 10:06
PUBLIC UTILITIES COMMISSION

Dear Ms. Massaro:

Enclosed for filing in the above-referenced matter are the original and nine copies of Verizon Rhode Island's Motion to Dismiss or, in the Alternative, to Stay This Proceeding. We apologize for the late filing.

Thank you for your assistance.

Sincerely,

Alexander W. Moore (P6T)

Alexander W. Moore

Enclosures
cc: Service List

The Commission should also dismiss because it does not have authority to adjudicate the claims RNK asserts in the Complaint, alleging breach of contract, or authority to grant the relief sought – a judgment for money damages and an injunction.

Should the Commission decline to dismiss the Complaint, it should nevertheless stay the proceeding pending resolution of the Federal Suit, in the interest of conserving scarce Commission resources. RNK has offered no reason why the Commission should devote itself to adjudicating claims that: (1) arise out of the same transaction being litigated by the same parties in court; (2) can be brought to the court; and (3) will be mooted by entry of judgment in the Federal Suit. As further grounds for this motion, Verizon RI states the following:

Adjudication Of The Complaint Depends On The Outcome Of The Federal Suit

1. In 2008, Verizon RI brought the Federal Suit for breach of contract, among other claims, arising from RNK's refusal to pay millions of dollars owed under the parties' interconnection agreement ("ICA") and RNK's submission of false bills to Verizon RI for amounts that were not owed. RNK filed a counterclaim asserting breach by Verizon RI and seeking millions of dollars in damages. (Copies of Verizon RI's Amended Complaint, RNK's Answer and Counterclaims and Verizon RI's Answer to Counterclaims of RNK in the Federal Suit are attached hereto.) The parties have conducted massive discovery in the Federal Suit, amounting to hundreds of thousands of pages of documents and including 22 depositions of fact and expert witnesses. In late 2010, the parties briefed cross-motions for summary judgment, which now await a decision.

2. RNK has carefully crafted the Complaint to portray its claims here as distinct from those before the federal court, focusing on Verizon RI's alleged "unilateral" action in

withholding allegedly “undisputed” amounts due under the ICA and RNK’s tariff beginning in December of 2010. *See e.g.* Complaint, ¶¶20-35. Whether RNK’s claims themselves are distinct from those in the Federal Suit is only part of the analysis, however, because the Commission cannot grant the relief RNK seeks without considering Verizon RI’s affirmative defenses and counterclaims to RNK’s claims. Here, Verizon RI has an affirmative defense of recoupment and/or a counterclaim for set-off. In other words, Verizon RI is entitled to set-off any amounts it owes RNK against the much larger amounts RNK owes to Verizon RI, as pled in the Federal Suit.

3. Under Rhode Island law, a party owing a debt to another is entitled to satisfy the debt, in whole or in part, by crediting against it a debt owed to it by the second party. Under the common law doctrine of recoupment, “a defendant can recoup from the damages claimed by a plaintiff by showing an adverse claim which arose out of or was connected with the same transaction.” *DiChiaro v. Spirito*, 89 R.I. 50 at 58, 150 A.2d 637 at 641 (1959). The policies underlying the doctrine are particularly noteworthy for the instant proceeding:

This doctrine of recoupment tends to promote justice and prevent needless litigation. It avoids circuity of action and multiplicity of suits. It adjusts by one action adverse claims growing out of the same subject-matter. Such claims can generally be much better settled in one proceeding than in several.

Id. (citations omitted). Similar to recoupment, the right of set-off allows adjustment of mutual debts even when they arise from separate transactions. The advent of the Rules of Civil Procedure in 1966 replaced the former statutory right of set-off in Rhode Island with Rule 13, providing for counterclaims. *See Abedon v. Providence Redevelopment Agency*, 115 R.I. 512, 513-514, 348 A.2d 720, 721 (1975).

4. Thus, Verizon RI is not required to pay RNK any amounts otherwise due under the ICA or RNK’s tariff because Verizon RI has claims back against RNK for, among other

things, millions of dollars in unpaid access charges for V/FX traffic due under the ICA. Those claims and RNK's counterclaims are the subject matter of the Federal Suit. The issues are complex, depend on analysis of mounds of discovery, depositions, and expert reports, and are already teed up for decision by the court. RNK has offered no basis for the Commission to undertake its own investigation of the same issues and materials.

5. RNK asserts that “[c]harges for services provided under the Tariff are due ... without offset.” RNK likewise claims that Verizon RI is not entitled to withhold payment and place it in escrow under the ICA. *See e.g.* Complaint ¶ 67. But Verizon RI's rights to set-off and recoupment do not arise from the tariff or the ICA but from the common law and the rules of pleading. While parties to a contract are arguably free to agree in the contract not to assert such rights, that is not the case here; the ICA is silent on such issues. Similarly, nothing in the tariff purports to eliminate the rights of set-off and recoupment. Consequently, the tariff and ICA do not preclude Verizon RI from setting its debts to RNK off against the much larger debts RNK owes Verizon RI.¹

6. RNK asserts that Verizon RI cannot withhold payment under the ICA based on the court's expected finding that the proper V/FX percentage under the ICA is far higher than 20%, and alleges that Verizon RI has breached the ICA “by unilaterally imposing a VFX percentage other than the 20 percent found in the ICA.” *See* Complaint ¶¶ 76, 77. RNK is wrong. Verizon MA has demonstrated in the Federal Suit that the correct figure is at least 80% (as RNK has no basis for claiming the figure is lower) and, moreover, that under the ICA this

¹ RNK's argument that Verizon MA has “unilaterally” refused to pay undisputed amounts due under the ICA is hypocritical. RNK conveniently fails to note that RNK itself unilaterally refuses to pay Verizon MA the access charges RNK owes on the 20% of traffic that all parties agree is V/FX under the ICA. RNK has disputed in the Federal Suit the applicable rate and the number of minutes for this traffic, but even under RNK's (incorrect) theories, some amount is due. Yet RNK has paid nothing. RNK should not be heard to complain of Verizon RI putting undisputed amounts in escrow for a few months where RNK itself has neither paid nor placed in escrow the undisputed amounts it has owed to Verizon RI for at least three years.

figure is *effective as of April 2008*, the date on which Verizon MA first sought to renegotiate the percentage. See ICA Amendment No. 1, § 1.3, (providing that the new presumption “shall apply prospectively from the delivery date for the notice provided pursuant to this paragraph”). RNK is wrong that Verizon MA is powerless to act on the undisputed record evidence until the district court acts on the pending summary judgment motions. But if RNK wanted to make that claim, the proper forum for the claim is the federal court, on a motion for injunctive relief.

The Claims Presented And Relief Requested Are Not Within the Commission’s Authority

7. Even if the parties were not already litigating in the Federal Suit the substantive claims underlying the Complaint, the Commission should dismiss the Complaint because the Commission lacks authority to hear breach of contract claims as asserted in the Complaint, nor does it have authority to grant the relief RNK seeks, namely, a judgment for money damages and an injunction against Verizon.

8. Verizon RI does not dispute that state utility commissions such as the Commission can play a critical role in the creation and amendment of interconnection agreements under the federal Telecommunications Act, and that the Commission is authorized to interpret interconnection agreements and state tariffs. RNK, however, is not merely asking the Commission to interpret either the parties’ ICA or RNK’s tariff. Rather, four of the five counts of the Complaint ask the Commission to adjudicate breach of contract claims.² And Part V. of the Complaint, enumerating the relief sought, asks the Commission to: “*Order Verizon to make*

² The only count of the Complaint that does not allege breach of contract, Count II, fails to state a claim on its face. Count II asserts that Verizon RI’s failure to pay RNK’s tariffed rates violates R.I.G.L. § 39-2-2, which provides that a public utility that “charges, demands, collects or receives” different compensation from similarly situated customers “for any service rendered” shall be guilty of discrimination. By its clear terms, the statute applies only to utilities that charge a rate for a service rendered. It does not purport to limit in any way the rights of *customers*, such as Verizon RI in this instance, from withholding amounts charged by utilities. RNK’s effort to twist the statute beyond all rational meaning speaks to RNK’s desperation to find some basis for the Commission to exercise jurisdiction here.

full payment to RNK...” (Clause 2) and to “*Order Verizon to pay...*” RNK’s bills for switched access services and reciprocal compensation and any other undisputed amounts billed by RNK. *See id.*, Clauses 3, 7, 8 and 10 (emphasis added). Thus, RNK seeks a judgment for money damages. But the Commission is not a court of law, and neither the federal Act nor any Rhode Island statute authorizes the Commission to hear breach of contract claims or enter judgments for money damages.

9. RNK also asks the Commission to “*Enjoin Verizon* from its application of any VFX factor above 20% to RNK’s traffic” and “*Enjoin Verizon...*” from placing in escrow undisputed RNK charges for reciprocal compensation and switched access. *Id.*, clauses 4, 5 and 6. The Commission, however, does not have statutory authority to grant injunctive relief as sought here. Further, the V/FX percentage in the ICA determines the portion of calls that appear to be local that will be treated as toll-free originating calls (for which RNK would owe Verizon MA switched access charges), with the remaining calls to be treated as local (for which Verizon MA would owe RNK reciprocal compensation). Verizon RI has demonstrated in the Federal Suit that RNK has no basis for disputing that the actual V/FX percentage in Rhode Island is *at least* 80% (and not the 20% the parties presumed in 2004). As noted above, the corrected V/FX percentage will apply back to April 2008, when Verizon requested that the parties re-visit the V/FX percentage. *See* ICA Amendment No. 2, § 1.3. Consequently, RNK’s request to the Commission to enjoin Verizon RI from applying the correct V/FX percentage is just another way of asking for an order to Verizon RI to pay money to RNK.

Conclusion

The Commission cannot adjudicate the Complaint without also determining all of the complex claims and counterclaims that are pending in the Federal Suit. RNK’s Complaint to the

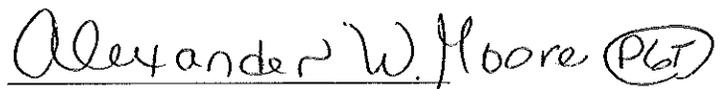
Commission is nothing more than an attempt to circumvent the court in order to obtain a payment order on a few claims arising out of the same transaction addressed in the federal suit, while the remainder of RNK's claims and all of Verizon RI's countervailing claims against RNK await decision by the court. RNK should address its request for relief to the court, which has already exercised jurisdiction over the dispute, is deeply knowledgeable about it, and indisputably has authority to provide the types of relief RNK seeks. While the Commission has expertise and authority over telecommunications issues, it does not have authority, expertise or the resources to litigate or grant relief on common breach of contract claims such as those at issue here. Even aside from whether the Commission has authority to grant the relief sought by RNK, it should decline to accept the Complaint where the court provides a more suitable forum to resolve the entire dispute between the parties.

WHEREFORE, Verizon RI respectfully requests that the Commission dismiss RNK's Complaint or, in the alternative, stay all activity in this docket until the court enters a final judgment in the Federal Suit.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorney

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Dated: May 17, 2011