

**STATE OF NEW HAMPSHIRE**  
**BEFORE THE**  
**PUBLIC UTILITIES COMMISSION**

Complaint of Freedom Ring	)	
Communications, LLC d/b/a BayRing	)	DT 06-067
Communications Against Verizon New	)	
Hampshire Regarding Access Charges	)	

**BRIEF OF BAYRING COMMUNICATIONS**  
**REGARDING WHETHER FAIRPOINT'S CCL TARIFF FILING**  
**COMPLIES WITH COMMISSION ORDERS AND**  
**THE EFFECTIVE DATE OF SUCH TARIFF FILING**

**I. Introduction**

Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") files this Brief pursuant to Order No. 25, 295 issued by the New Hampshire Public Utilities Commission ("the Commission") on November 30, 2011 in the above-captioned docket. Order No. 25, 295 states that the Commission will accept briefs on two questions, i.e.: 1) Whether the changes to FairPoint's CCL tariff as proposed by FairPoint on September 10, 2009 comply with the Commission's orders requiring FairPoint to amend the CCL provisions in its tariff; and 2) Presuming the changes identified in question 1 comply, or can be made to comply with the Commission's orders, what should be the effective date of the amended language in FairPoint's switched access tariff relating to the CCL?

For the reasons explained more fully below, and for those set forth in the brief of AT&T with which BayRing concurs, BayRing submits that the first two tariff pages ("the

CCL tariff changes”)<sup>1</sup> filed by FairPoint on September 10, 2009 and bearing an effective date of October 10, 2009 do comply or can be made to comply with the Commission’s orders requiring FairPoint to cease collecting the CCL charge on calls where FairPoint does not provide a common line, and that the effective date of such tariff language changes is October 10, 2009.

**II. The CCL Tariff Changes Comply or Can Be Made To Comply With Prior Commission Orders**

FairPoint’s cover letter submitted with its tariff filing submitted to the Commission on September 10, 2009 indicates that it was filed “[i]n compliance with the New Hampshire Public Utility Commission Order Nisi in DT 06-067 dated August 8, 2009”(sic)<sup>2</sup> and that “FairPoint files revised terms and conditions to eliminate the application of the Carrier Common Line (CCL) charge to access traffic which does not originate or terminate to a FairPoint end user.” Order *Nisi* No. 25, 002 (Aug. 11, 2009) at p. 2 “directs FairPoint, pursuant to RSA 378:1 and 378:3, to modify its tariff to clarify that FairPoint shall charge CCL only when a FairPoint common line is used in the provision of switched access services.” The reason the Commission ordered this tariff revision is because the language of FairPoint’s tariff does not clearly reflect the Commission’s finding, based on the record in this docket, that FairPoint’s access tariff should permit the imposition of CCL charges only in those instances when a competitive

---

<sup>1</sup>Pursuant to Order No. 25, 295 (Nov. 30, 2011), the scope of this brief is confined to the CCL tariff language portion of FairPoint’s September 10, 2009 filing, and does not address the last two tariff pages containing new interconnection charge language and interconnection charges which the Commission has determined should be withdrawn and treated as illustrative pending further investigation.

<sup>2</sup> The Order *Nisi* to which FairPoint’s September 10, 2009 cover letter refers is dated August 11, 2009.

carrier uses FairPoint's common line and the common line facilitates the transport of calls to a FairPoint end-user. *Id.*

FairPoint's September 10, 2009 modifications to its NH PUC Tariff No. 85<sup>3</sup>, Sections 5.1, 5.4.1.A. and 5.4.1.C. appear to comply with the directives in Order *Nisi* No. 25, 002. To the extent that it is possible that the wording of those tariff changes may be susceptible to a different interpretation, the Commission should make clear in its order approving the tariff changes that they are to be interpreted as allowing FairPoint to impose a single CCL charge only when one of its common lines is used to facilitate the transport of a call to or from a FairPoint end user. In the event that the Commission determines that the language in the above-referenced tariff sections filed by FairPoint on September 10, 2009 does not comport with the Commission's directives to FairPoint in this docket, then the Commission should provide FairPoint with the precise language that should be contained in its CCL tariff and order FairPoint to submit the revised tariff wording. The Commission's express supervisory authority over FairPoint provided by RSA 374:3 compels this result.

### **III. The Effective Date of the CCL Tariff Changes is October 10, 2009.**

The CCL tariff changes filed by FairPoint on September 10, 2009 were mandated by the Commission in order to remedy the unjust and unreasonable application of CCL charges by FairPoint (i.e. billing CCL charges when no FairPoint common line was used.) The CCL tariff language change was necessary to address a determination by the New Hampshire Supreme Court that the "plain language" of FairPoint's existing tariff

---

<sup>3</sup>After the CCL tariff modifications were filed in October 2009, FairPoint renumbered its tariff which is now designated Tariff No. 3.

could be construed to permit such charges. *See Appeal of Verizon New England*, 158 N.H. 693, 700 (2009). The Court further held that “if the tariff should be amended, it should be amended as a result of regulatory process...” *Id.*

The Commission has “accepted” the portion of FairPoint’s September 10, 2009 filing covering the CCL tariff changes but has determined that those changes are “suspended in application and effect.” Order No. 25, 283 (Oct. 28, 2011) at 31. The CCL tariff filing made by FairPoint on September 10, 2009 bears an effective date of October 10, 2009. Notwithstanding that the application and effect of the CCL tariff filing has been suspended, the Commission has the authority to enter an order now that puts those changes (or alternative language as the Commission deems appropriate) into effect as of October 10, 2009.

Among other things, the regulatory process in New Hampshire enables the Commission to accept and suspend a tariff filing, review it, and then issue an order putting the tariff change into effect retroactively. *See* RSAs 378:27, 378:29 and 378:6. In the instant case, FairPoint has filed curative tariff language which the Commission has accepted but not yet approved. In effect, the Commission has made FairPoint’s current tariff language “temporary” pending a final determination of whether the language complies with the Commission’s directives. *See State v. New England Telephone and Telegraph Co.*, 103 N.H. 394 (1961) (Commission is authorized to establish as temporary rates the current rates of a utility pending the determination of final rates in a proceeding instituted by the Commission.) As the result of the tariff suspension, FairPoint has continued to unreasonably bill CCL charges under existing tariff language which the Commission has found to be problematic. This unreasonable billing situation must end.

It is incumbent on the Commission to remedy the problem of FairPoint's improper charges, which the suspension created, by putting the CCL tariff filing into effect as of October 10, 2009 and declaring that CCL billings made under the old tariff language after October 10, 2009 are improper and cannot be collected. This result is permitted under legal principles that allow final rate changes to be reconciled back to the date when temporary rates were fixed so that, among other things, a utility customer could be protected if permanent rates prove to be lower than temporary rates. *Id.* This result is also consistent with equitable principles requiring that BayRing and other CLECs be restored to the position that they rightfully deserved to be as of October 10, 2009.

The Commission is vested with broad statutory power, and endowed with large supervisory powers over utilities, including "the power to award restitution if one has been unjustly enriched at the expense of another." *Appeal of Granite State Electric Company*, 120 N.H. 536, 539 (1980). This power carries with it "a promise, implied by law, that one will restore to the person entitled thereto that which in equity and good conscience belongs to him." *Id.* Thus, to the extent that FairPoint has accumulated revenues or accounts receivables after October 10, 2009 due to CCL billing under its existing tariff, the Commission is authorized to order a refund of those revenues and the elimination of any improperly billed charges.

The New Hampshire Supreme Court has determined that it is an abuse of the Commission's discretion to allow an injury to go unaddressed for an unreasonable length of time. "More than two years have now passed since the ... filing and well over a year since the ... order. To require the company to wait for two years for its claim at least to be considered is not only unreasonable but also unconstitutional. The PUC abused its

discretion in refusing to consider adequately the company's ...application..." *Appeal of Gas Service, Inc.*, 121 N.H. 602, 603 (1981). The holding in *Gas Service* is directly applicable to the instant case. The CLECs have been contesting FairPoint's billing practice for almost six years, and believed the matter was largely resolved by the tariff changes that FairPoint had indicated would be effective as of October 10, 2009. Due to procedural gymnastics, and the passage of time occasioned by FairPoint's bankruptcy filing (among other things), the Commission is still pondering whether language contained in two tariff pages that the Commission ordered – and which were filed over two years ago – accomplish the elimination of an impermissible billing practice. The CCL tariff was suspended because the Commission determined that a hearing requested by FairPoint was necessary. Now, ironically, all parties are in agreement that the CCL tariff revisions can be reviewed by the Commission without the need for a hearing. The Commission must now do what it should have done over two years ago – expeditiously review the two tariff pages at issue here and implement tariff revisions that eliminate the improperly imposed CCL charges as of the effective date first requested by FairPoint, i.e. October 10, 2009.

#### **IV. Conclusion**

Relief from FairPoint's anti-competitive application of the CCL charges is long overdue. The delays in considering modifications to FairPoint's CCL tariff have caused BayRing and other CLEC many years of financial uncertainty as they continue to be billed CCL charges by FairPoint when no FairPoint common line is used. These improper bills are in addition to other bills for CCL charges by carriers whose common lines are actually used; thus BayRing is still being billed two CCL charges when only

one common line was used. This essentially doubles BayRing's cost to terminate intrastate toll calls. It is important for the Commission to remember that Verizon had not been charging the erroneous CCL charges continuously from the time the original wording of Verizon's tariff was developed. In fact, Verizon created this new revenue stream starting in 2005 by imposing the erroneous CCL charges when Verizon did not provide the underlying common line service. Although FairPoint seeks sympathy and compensation for "lost" in revenues, FairPoint was well aware of the uncertainty surrounding Verizon's erroneous, absurd new revenue stream at the time FairPoint acquired Verizon's New Hampshire assets. Therefore, the Commission should not continue to reward FairPoint for Verizon's bad behavior. BayRing urges the Commission to put an end to these improper FairPoint CCL charges once and for all by requiring the appropriate language changes to FairPoint's CCL tariff to be effective October 10, 2009.

WHEREFORE, based on the foregoing, BayRing respectfully requests that:

1) The Commission enter an order approving FairPoint's CCL tariff modification for effect October 10, 2009 and interpreting such modifications as indicated herein;

2) In the alternative, if the Commission determines that the CCL tariff modifications filed by FairPoint do not comply with the Commission's directives to FairPoint, issue an order containing the Commission's preferred tariff language and directing FairPoint to file that compliant tariff language for effect October 10, 2009; and

3) Grant such further relief as it deems appropriate.

December 19, 2011

**FREEDOM RING COMMUNICATIONS, LLC  
D/B/A BAYRING COMMUNICATIONS**

By its Attorneys,

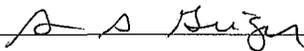
**ORR & RENO, P.A.**

By: 

Susan S. Geiger  
One Eagle Square  
P. O. Box 3550  
Concord, NH 03302-35502  
Telephone: 603-223-9154  
sgeiger@orr-reno.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of December, 2011, I have forwarded a copy of the foregoing Brief either by first class mail, postage prepaid, or by electronic mail to the parties listed on the Service List.



Susan S. Geiger

832501\_1