

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

BRIEF OF SPRINT
ON FAIRPOINT'S OCTOBER 10, 2009 CCL TARIFF

Sprint Communications Company, L.P. and Sprint Spectrum, L.P. (“Sprint”) hereby file this Brief in response to the New Hampshire Public Utilities Commission’s (“Commission”) Order No. 25,295, dated November 30, 2011, wherein the Commission indicated that it will accept briefs addressing whether language changes to FairPoint’s CCL tariff comply with the Commission’s Order No. 25,002, and what should be the effective date of the amended language in FairPoint’s switched access tariff relating to the CCL? Sprint’s position is, and has consistently been, that the latest logical, just and reasonable effective date for the CCL tariff is the date that tariff was to take effect: October 10, 2009.¹ Any effective date later than October 10, 2011 is legally unsupportable and leads to grossly inequitable results. As to tariff language changes, Sprint notes that the changes appear to be adequate. In support of its position, Sprint states the following.

¹ Sprint has no objection to an earlier effective date for the CCL tariff, and there is substantial legal and equitable support for an earlier date.

1. Tariff Language

The purpose and intent of the Commission's ordered tariff language changes is plain and obvious: FairPoint must 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." *Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges*, Order No. 25,002 at 2 (August 11, 2009)("Order *Nisi*"). The Commission went on to indicate those changes that it considered the *minimum* necessary to effectuate its order. Order *Nisi* at 2. The Commission should, therefore, clearly indicate that FairPoint's filed tariff changes are interpreted as allowing FairPoint to impose a single CCL charge when one of its common lines is used to facilitate the transport of a call to or from a customer of a competitive carrier. Any language or interpretation that fails to comply with the express provisions of the Order *Nisi*, the spirit of the Order *Nisi*, or which otherwise frustrates the purpose of the Order *Nisi* should not be tolerated by the Commission.

2. Effective Date

In determining the effective date of FairPoint's CCL tariff, the Commission must bear in mind its statutory obligation to protect rate payers from unjust and unreasonable rates, charges and practices. "RSA 378:7 imposes on the Commission the duty to determine the just and reasonable rates to be charged by a public utility for the services it renders. In making that determination, the commission must ensure that the public will not pay higher rates than are required ..." *New England Telephone and Telegraph Co. v. State of New Hampshire*, 302 A.2d 814, 817 (NH 1973). The Commission is statutorily precluded from tolerating continuation of unjust and unreasonable charges such as FairPoint's CCL charging scheme.

The Commission announced nearly four years ago that imposition of CCL charges in instances where no FairPoint common line is involved is an impermissible practice and ordered FairPoint's predecessor in interest, Verizon, to stop imposing such charges. *Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges*, Order No. 24,837, at 32 and 33 (March 21, 2008)("March 2008 Order"); *see also* Order *Nisi* at 2. The Commission has also precluded re-litigation of the impropriety of the CCL charging practice. *Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges*, Order No. 25,219 at 8 (May 4, 2011). Taking the Commission's orders into account, it is clear that with its March 2008 Order, the Commission began taking necessary steps to protect carriers against those charges it had determined were impermissible.

In furtherance of its duty to prevent application of unjust and unreasonable charges, the Commission acted appropriately by ordering the filing of a tariff revision to end the practice of imposing unjust and unreasonable CCL charges. *See* Order *Nisi*. In accordance with the terms of the Order *Nisi*, FairPoint filed CCL tariff changes on September 10, 2010 with an effective date of October 10, 2010 ("Compliance Filing"). Precluded from re-litigating whether it was permitted to charge CCL for calls not involving a FairPoint common line, FairPoint took an alternative approach and contemptuously muddied the waters by simultaneously filing to increase a defunct subsidy charge (the "Interconnection Charge" or "RIC") to achieve "revenue neutral" reductions. However, FairPoint failed to follow the appropriate procedures attendant to such a proposed rate increase. The Commission subsequently found that the Compliance Filing was "filed, but suspended in application and effect," while the RIC was withdrawn. *Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New*

Hampshire Regarding Access Charges, Order No.25,283, at 31 (October 28, 2011). The Commission now turns its attention to the issue of the effective date for the Compliance Filing.

The Commission must consider several factors in concluding that the Compliance Filing should have an effective date of October 10, 2009. First, and as stated above, the Commission is statutorily obligated to prevent unjust and unreasonable rates, charges and practices.

Accordingly, it is incumbent upon the Commission to reach a conclusion that is consistent with this statutory duty. The only decision the Commission can reach that is consistent with that duty is one in which the Commission acknowledges that the tariff it ordered to be filed was effective at the earliest possible date.

Second, it is fundamentally inequitable for the aggrieved carriers – those carriers that have been petitioning for relief from FairPoint’s unjust and unreasonable billing practice for several years – to be forced to bear any consequences linked to FairPoint’s delay in timely compliance with the Commission’s Order *Nisi*. It is well established under New Hampshire law that the Commission is vested with considerable equitable powers and discretion. While the Competitive Carriers have in their previous pleadings extensively briefed their understanding of why the tariff was effective on October 10, 2009, and Sprint invites the Commission to revisit those earlier arguments, it is certainly within the Commission’s discretion and authority to exercise its equitable powers to set an effective date of October 10, 2009. Such an action by the Commission would be little different from actions it has taken in the past to award retroactive refunds when established rates were found to be unjust and unreasonable. *See Appeal of Granite State Electric Company*, 421 A.2d 121 (NH 1980).

In the case at bar the Commission found FairPoint’s billing practice unjust, unreasonable and impermissible, and ordered FairPoint to file a tariff abolishing that impermissible billing

practice. Instead of strictly complying with the Commission's order FairPoint contemporaneously filed a second tariff to increase another rate – a filing not contemplated by the Commission's order. If the filing of the second tariff, or any other event, is deemed to have delayed implementation of the Commission order and the effective date of the tariff that would effectuate that order, then the net result is that the Competitive Carriers will have suffered a cognizable, quantifiable monetary injury insofar as they will have been subject to an impermissible billing practice for over two years after the Commission ordered that billing practice to cease (and four years after the Commission originally found it impermissible). If FairPoint is allowed to profit from actions it took to avoid compliance with the Commission's earlier order, FairPoint will have been unjustly enriched. This Commission's precedent establishes that the Commission is fully empowered to remediate such an injury. *See Appeal of Granite State Electric Company*, 421 A.2d 121 (NH 1980). Accordingly, the Commission could fulfill its statutory duty to prevent application of unjust and unreasonable charges and practices by exercising its equitable authority to determine that the effective date of the tariff is the date on which it was initially set to become effective.

The Commission should also note in this regard that it has been found to be 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 ... rate 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 ... and its order must therefore be reversed." *Appeal of Gas Service, Inc.*, 431 A.2d 795, 796 (NH 1981). The holding in *Gas Service* is directly applicable to case at bar. The Competitive Carriers have been contesting FairPoint's

billing practice for years, and believed the matter was laid to rest as of October 10, 2009. Now, over two years later the Commission is still considering whether the tariff it ordered filed – and which was filed – to abolish an impermissible billing practice was effective when filed. Simply put, were the Commission to permit FairPoint to ignore the Commission’s Order *Nisi* and thereby subject the Competitive Carriers to several additional years of impermissible charges, such action would clearly constitute an abuse of discretion, lead to a terribly inequitable result, and be contrary to the Commission’s statutory duties.

3. Conclusion.

The time for the Commission to act with finality to end FairPoint’s impermissible application of CCL charges is long overdue. It has been nearly four years since the Commission, in March 2008, determined that the practice of billing CCL on calls which do not involve a FairPoint common line is impermissible. It has been over two years since FairPoint was ordered to file a tariff ending such practice. Sprint and other CLECs have dealt with years of billing determined by this Commission to be impermissible, and the time to put this matter to rest is long overdue. WHEREFORE, Sprint respectfully requests that:

1) The Commission enter an order approving FairPoint’s CCL tariff modification with an effective date of October 10, 2009;

2) The Commission announce an interpretation of such tariff consistent with the discussion herein;

3) If the Commission determines that the CCL tariff modifications filed by FairPoint fail to comply with the Order *Nisi*, it should issue an order containing specific tariff language to effectuate the Order *Nisi* and direct FairPoint to file such tariff language for effect October 10, 2009; and

4) Grant such further relief as it deems appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2011, I have forwarded a copy of the foregoing Brief by electronic mail to the parties listed on the Service List.

