

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 06-067

Freedom Ring Communications LLC d/b/a BayRing Communications
Complaint Against Verizon New Hampshire Regarding Access Charges

**Comments and Conditional Request for Hearing
of Northern New England Telephone Operations LLC. d/b/a
FairPoint Communications - NNE**

In response to the Commission's Order *Nisi* No. 25,002 dated August 11, 2009 ("Order"), Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE ("FairPoint") hereby offers these Comments and submits its Conditional Request for Hearing.

I. INTRODUCTION

As set forth below, FairPoint remains of the position that the Carrier Common Line ("CCL") charge in its Tariff NH PUC No. 85 is valid as currently applied and that the related tariff provisions are, as the New Hampshire Supreme Court found, clear and unambiguous. Furthermore, the issues addressed in the Order are outside the scope of this proceeding. However, in the interests of bringing this matter to resolution, FairPoint intends to submit tariff pages revising the CCL provisions of its tariff in a revenue neutral manner that enables FairPoint to recover the joint and common costs that the CCL charge was designed to recover. Accordingly, FairPoint will file tariff revisions no later than September 10, 2009 that 1) restrict billing of the CCL to situations in which the FairPoint local loop is employed and 2) revise other access rates elements to compensate for the lost contributions to FairPoint's joint and common costs that the CCL provided.

II. THE ACTIONS ORDERED BY THE COMMISSION ARE OUTSIDE THE SCOPE OF THIS PROCEEDING.

In the Order, the Commission implied that its directive to modify the tariff was justified because “[t]he order of notice in this proceeding established that in the event Verizon’s interpretation of the current tariffs was found to be reasonable, the Commission would decide whether any prospective modifications to the tariffs are appropriate.”¹ However, there were subsequent Procedural Orders, one of which contracted the scope of this proceeding to exclude considerations of whether the tariff should be revised. In the Procedural Order of November 29, 2006, the Commission found that “the consideration of prospective modifications to Verizon’s tariff will be removed from the present proceeding and designated for resolution in a separate proceeding to be initiated at a later date if necessary.”² Consequently, the issue of tariff modifications is beyond the scope of the proceeding and not properly before the Commission. Any decision regarding tariff modifications is inconsistent with RSA 365:4, which requires “notice and hearing” before the Commission may take action, and is therefore invalid.

III. THE CCL CHARGE AS CURRENTLY TARIFFED IS VALID AND DOES NOT NEED TO BE REVISED.

A. The CCL Charge is not Restricted to Common Line Usage.

In the Order, the Commission stated that “[b]ased on the record developed in this proceeding . . . FairPoint’s access tariff should permit the imposition of CCL charges only in those instances when a carrier uses FairPoint’s common line and the common line facilitates the transport of calls to a FairPoint end-user.”³ However, FairPoint respectfully disagrees that the record supports this conclusion. As FairPoint has explained previously, the CCL charge was

¹ Order at 2 (referring to Order of Notice at 3 (June 23, 2006)).

² DT 06-067, Procedural Order at 6 (Nov. 29, 2006).

³ Order at 2.

designed to make sure that each toll provider using Verizon's network to complete a long distance call contributed to Verizon's joint and common costs without regard to whether each call actually traversed a common line to a Verizon end user.⁴ In this way, retail competition for toll services could flourish without undermining Verizon's right to recover its joint and common costs or shifting those costs to users of other services. Following a series of negotiations, the affected parties agreed that the CCL was a contribution element and settled on the language of the tariff, including the CCL charge, which the Commission approved in September 1993.⁵

In this proceeding, the Commission never found that the CCL charge was limited simply to the recovery of the costs of the local loop. Verizon presented un rebutted evidence that the CCL charge was designed to recover joint and common costs related to its business as a whole, which may include but are certainly not limited to loop costs.⁶ The Commission has neither rejected this evidence nor cited any opposing evidence that the CCL charge was limited to loop costs.

Furthermore, as it has previously stated, FairPoint respectfully disagrees that there is anything in the record supporting the Commission's holding that "local transport" alone does not constitute "switched access service" subject to the CCL charge. As FairPoint explained, and the Supreme Court agreed, switched access service may take multiple forms, and the CCL charge applies to each type of switched access service, and not just to the local loop.⁷

⁴ *Appeal of Verizon New England*; Docket 2008-0645, Petition for Appeal at 9 (Sep. 8, 2008) ("Petition").

⁵ DT -6-067, 7/11/07 Tr. at 17:17-21.

⁶ *See, e.g.*, DT 06-067, Testimony of Peter Shepherd at 16, 20-21; 7/11/07 Tr. at 11:11-14.

⁷ Petition at 23; *Appeal of Verizon New England*; Docket 2008-0645, Slip Op. at 7 (N.H. May 7, 2009) ("Slip Op.").

B. The CCL Tariff Provisions are Clear on Their Face.

In the Order, the Commission has directed FairPoint to revise certain CCL provisions because they “do not clearly reflect” the Commission’s finding above. Again, FairPoint respectfully disagrees that the tariff is unclear. FairPoint, and Verizon before it, have been consistent in their position that the current language unambiguously allows FairPoint to assess the CCL charge on all switched access services, including local transport, in a manner that appropriately contributes to the recovery of its joint and common costs.⁸ This position was affirmed by the Supreme Court when it held that the tariff unambiguously states that the carrier CCL charge applies to “each” and “all” switched access service purchased under the tariff.⁹

IV. IF REVISIONS MUST BE MADE, THEN FAIRPOINT IS ENTITLED TO THE REVENUE DERIVED FROM THE CCL AS CURRENTLY APPLIED.

A. It is Undisputed that the CCL Charge Contains a Contribution Element.

Verizon designed its retail rate for intrastate toll service to exceed the direct cost of providing such services.¹⁰ The purpose of this rate structure, approved by the Commission, was to have customers who made toll calls contribute to the recovery of the local telephone companies’ “joint and common costs,” i.e. the costs of facilities, employees, and other expenses that support multiple services and/or the company’s overhead.¹¹ The CCL charge was instituted to ensure that *all* toll calls contributed to Verizon’s joint and common costs, whatever their nature. Accordingly, to the extent the CCL charge was designed in part to recover loop costs, Tariff 85 makes clear that toll providers using Verizon (now FairPoint) local transport must

⁸ Petition at 25.

⁹ Slip Op. at 4-5.

¹⁰ Shepherd Testimony at 16, 20-21.

¹¹ *Id.*; see also DT 06-067, 7/11/07 Tr. at 11:11-14; see generally Alfred E. Kahn, *The Economics of Regulation 77-79* (1998) (discussing common costs).

contribute to the recovery of those loop costs, whether or not the toll provider chooses to use the local loop.

Verizon presented uncontroverted evidence that the CCL charge was designed “solely as a contribution element,” i.e., as a means of recovering its joint and common costs generally, including loop costs.¹² There is no record support for the Commission’s conclusion that the charge may be assessed “only in those instances when a carrier uses FairPoint’s common line.” On the contrary, the uncontroverted evidence demonstrated that the charge was computed residually, based on the difference between Verizon’s overall switched access rate set by the Commission and the incremental costs of local switching and local transport.¹³ The purpose of the CCL charge was to ensure that toll providers purchasing any switched access service from Verizon would contribute to the recovery of all types of joint costs, just as Verizon’s retail toll customers traditionally had done.

B. FairPoint Must be Permitted to Recover its Joint and Common Costs.

Under the Commission’s directive, FairPoint must cease billing the CCL for the 38% of access traffic that does not use the FairPoint local loop. The impact of this change (using actual carrier access billing for the three month test period of May, June and July 2009) is a loss of \$826,925 or an annual revenue impact of approximately \$3.3 million. To compensate for this loss, FairPoint intends to reinstitute a separate charge that will provide the necessary contribution.

If, on the other hand, the Commission is contemplating that FairPoint cease billing the CCL without balancing this loss, FairPoint reiterates that this would be confiscatory act without

¹² Shepherd Testimony at 22, 11-20.

¹³ *Id.* at 26, 16-18

due process.¹⁴ The Commission would effectively be setting a rate of zero for a significant portion of FairPoint's access service at a time when the financial pressure on FairPoint is already immense. FairPoint is currently losing money while at the same time facing major financial commitments related to its acquisition of Verizon's assets. It has committed to \$200 million in capital expenditures over the next four years,¹⁵ a cap on its rates for basic local exchange, wholesale and special access services,¹⁶ a double pole removal program,¹⁷ and it is still subject to millions of dollars in penalties under the Performance Assurance Plan.¹⁸

In return, the Commission agreed not to seek a decrease in FairPoint's wholesale rates for three years following the acquisition.¹⁹ Under these circumstances, any action by the Commission to reduce its access charges would not only be a breach of this agreement, but also a confiscation that would raise state and federal constitutional concerns. To ensure a just and reasonable result in such a situation, FairPoint respectfully requests that if the Commission does not intend for FairPoint to recover its costs through other means, that it conduct a hearing in accordance with RSA 378:7 so that FairPoint may be properly heard on this issue.

V. FAIRPOINT INTENDS TO REVISE THE TARIFF IN A REVENUE NEUTRAL MANNER.

To resolve this matter and to promote clarity in its charges, FairPoint intends to revise its tariff in a revenue neutral manner by revising the application of the CCL and recovering the shortfall through increases in other access rate elements. Workpapers describing the derivation of these rates will be filed with the revised tariff pages.

¹⁴ DT 06-067, FairPoint Motion for Rehearing at 9.

¹⁵ DT 07-011, *Petition of Verizon et al. for Authority to Transfer Assets*; Order No. 24,823 Approving Settlement Agreement with Conditions at 21 (Feb. 25, 2008) ("Settlement Order").

¹⁶ Settlement Order at 28,29.

¹⁷ *Id.* at 33.

¹⁸ *Id.* at 31; *see also* DT 09-113, FairPoint Petition for Waiver.

¹⁹ Settlement Order at 31.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE
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