

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

BayRing Petition For Investigation Into
Verizon New Hampshire's Practice Of
Imposing Access Charges, Including Carrier
Common Line (CCL) Access Charges, On
Calls Which Originate On BayRing's Network
And Terminate On Wireless and Other Non-
Verizon Carriers' Networks

Docket No. DT 06-067

**COMPETITIVE CARRIERS' MOTION
TO COMPEL RESPONSES TO DISCOVERY**

Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business¹; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc. (a Level 3 company) (collectively, the "Competitive Carriers") move that the Commission overrule the objections of Northern New England Telephone Operations, LLC, d/b/a FairPoint Communications – NNE ("FairPoint") dated November 28, 2011 to certain of the CLECs' discovery requests dated November 17, 2011.²

¹ The EarthLink Business entities formerly did business as One Communications.

² Counsel for FairPoint and the Competitive Carriers met and conferred by telephone on December 13th in good-faith efforts to narrow our differences, and that process has continued by multiple email exchanges since then. Our collective efforts have succeeded in resolving disputes on a number of requests and objections. This motion concerns only the requests and objections upon which no agreement was reached.

In addition, FairPoint to date has filed only objections, but no responses, to the Competitive Carriers' requests. FairPoint's responses are due December 21st. The Competitive Carriers reserve their rights to seek further relief in the event that FairPoint's responses are inadequate, evasive, incomplete, or otherwise improper.

Introduction

FairPoint has raised meritless objections to the following data requests:

10(c)-(g);

15;

16 (incorporating FairPoint's response dated on or about October 12, 2009, to discovery request AT&T-19(e)-(h)); and

19(c) (incorporating FairPoint's response dated on or about October 12, 2009, to discovery request One Comm-11).

For the reasons discussed below, each of these requests constitutes appropriate discovery under the Commission's well-settled principles.

Legal Standard

In determining the appropriate scope of discovery, the Commission applies a well-established standard: "whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." *In re Public Service Company of New Hampshire — Petition for Approval of Power Purchase Agreement with Laidlaw Berlin BioPower, LLC*, DE 10-195, Order on Motion for Confidentiality and Motions to Compel, Order No. 25,174, at 16 (Nov. 24, 2010) ("*PSNH/Laidlaw Order*"); *In re Investigation into Whether Certain Calls Are Local*, DT 00-223, Order No. 23,658, at 5 (March 22, 2001).

Further, "New Hampshire law favors liberal discovery" *PSNH/Laidlaw Order* at 17 (citing *Yancey v. Yancey*, 119 N.H. 197, 198 (1979)). "[D]iscovery is regarded as 'an important procedure "for probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties.'"" *Id.* (citing *Johnston v. Lynch*, 133 N.H. 79, 94 (1990)). The Supreme Court of New Hampshire has explained that, for the system of justice to work properly, "each of the advocates must be fully

informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else.” *Scontsas v. Citizens Ins. Co.*, 109 N.H. 386, 388 (1969).

In light of the liberal standard for discovery in Commission proceedings, FairPoint’s objections to the discovery requests below are invalid. The Commission should overrule those objections and require FairPoint to provide full and complete answers to the Competitive Carriers’ discovery requests.

Discovery Requests and Objections at Issue

Data Request No. 10:

Mr. Skrivan's supplemental testimony at p. 6 states: "Revenue neutrality was accomplished by using the Interconnection Charge to offset the loss of Carrier Common Line revenue. This rate, previously set at \$.0000 per minute, was increased to \$0.010164 per minute. (If this tariff revision were filed today, using the updated data I referenced in the preceding answer, it would be \$.009257.)"

- a) When was the Interconnection Charge rate set at zero, i.e. \$.0000 per minute?
[NOT IN DISPUTE]
- b) In Mr. Skrivan's understanding, why was the Interconnection Charge set at zero?
[NOT IN DISPUTE]
- c) Please provide all legal authorities and all bases in the Order *Nisi* which you contend directed or entitled FairPoint to change the rate for the Interconnection Charge, of which Mr. Skrivan is aware.
- d) Please provide all legal authorities and all bases in any other Order which you contend directed or entitled FairPoint to change the rate for the Interconnection Charge, of which Mr. Skrivan is aware.
- e) Please provide all citations and references in the Order *Nisi* to the Interconnection Charge, of which Mr. Skrivan is aware.
- f) Please provide all citations and references in any Order to the Interconnection Charge, of which Mr. Skrivan is aware.
- g) Please describe all network function or functions performed by FairPoint, if any, that the proposed Interconnection Charge is designed to recover.

Objection to Request No. 10:

FairPoint objects to Data Request CLECs-10(c) – (f) on the grounds that they are argumentative and seek legal conclusions, theories or the results of legal research.

FairPoint objects to Data Request CLECs-10(g) on the grounds that it is argumentative. The purpose of the Interconnection Charge was described in Mr. Skrivan's testimony, which speaks for itself.

Discussion:

Data requests 10(c)-(f) are designed to explore FairPoint's knowledge concerning the justification in Commission precedent for its proposal to increase the rate for the Interconnection Charge. Certainly, FairPoint had a good-faith basis in fact, law, or policy for making its proposal. Data requests 10(c)-(f) explore FairPoint's knowledge of these matters and its positions regarding the justification for its proposal to increase the charge.

Requests 10(c)-(f) are in the nature of contention interrogatories. The authoritative treatise *Moore's Federal Practice* explains that contention interrogatories are a proper form of discovery:

Contention interrogatories, as distinct from identification interrogatories, inquire into an opinion or contention that relates to fact or the application of law to fact. Contention interrogatories may, among other things, ask a party to (1) state what it contends or whether it is making a certain contention, (2) explain the facts underlying its contention, (3) assert a position or explain that position with regard to how the law applies to the facts, or (4) articulate the legal or theoretical reason for a contention.

The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response is required. Furthermore, a contention interrogatory is not objectionable merely because it calls for opinion or contention. Rather a contention interrogatory should be treated in the same manner as any other interrogatory, with the burden on the party opposing discovery to show why it cannot answer.

7-33 *Moore's Federal Practice - Civil* § 33.02[2][b] (footnotes omitted).³

Requests 10(c)-(f), therefore, are a proper form of discovery. The questions seek information relevant to the subject matter of this action. FairPoint's objections are unfounded,

³ The Competitive Carriers are aware that, strictly speaking, the Federal Rules of Civil Procedure do not govern Commission proceedings. However, New Hampshire law relating to discovery is at least as liberal as are the federal rules. *Moore's* therefore provides persuasive justification for the Commission to allow the Competitive Carriers' requests here.

and the Commission should overrule them and compel FairPoint to provide complete and responsive answers.

Regarding data request 10(g), the issue of whether a switched access rate element recovers the cost of a particular component of a switched access service has been a significant issue in this case from the beginning. The response to CLECs-10(g), therefore, is plainly relevant. It may be, as the Competitive Carriers believe, that FairPoint will claim that the CCL charge is purely a contribution element and that the proposed Interconnection Charge is solely a means to recover the revenues lost by discontinuance of the CCL for calls. If that is the case, it would be very simple for FairPoint to say so directly in response to this data request. There is no burden upon FairPoint in answering this question, and its refusal to provide a direct answer to this straightforward question is pure recalcitrance.

Data Request No. 15:

For the test period used in Mr. Skrivan's supplemental testimony (calendar year 2010), did FairPoint's New Hampshire intrastate switched access bills include:

- a) any bill credits;
- b) any adjustments of any kind;
- c) any corrections;
- d) any settlements;
- e) any uncollectible amounts;
- f) any out-of-period usage;
- g) any errors or omission of any kind; and/or
- h) any downward or other trends in volume?
- i) Separately describe, quantify, and identify all such:
 - 1. bill credits
 - 2. adjustments
 - 3. corrections
 - 4. settlements
 - 5. uncollectible amounts
 - 6. out-of-period usage
 - 7. errors or omission of any kind
 - 8. any trends.

Objection to Request No. 15:

FairPoint objects to Data Request CLECs-15 on the grounds that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Discussion:

The requested information is relevant to the issues in this case. FairPoint has proposed an interconnection charge of just under one cent per minute each and every time it provides a switched access service. The magnitude of the interconnection charge is based on the number of

access minutes provided and the amount of access charges imposed by FairPoint in a given test period. Obviously, if there are adjustments or trends to those quantities, the numbers will change, and that will affect the amount of the proposed charge.

The Competitive Carriers are among those who will be subject to those charges, which FairPoint suggests total \$3 million annually. Therefore, the Competitive Carriers are entitled to test the accuracy of FairPoint's calculations. Part of that testing involves checking the accuracy of FairPoint's numbers to see if they have changed through billing adjustments. FairPoint's billing issues since the cutover from Verizon's systems are well known to the Commission. There is a substantial likelihood that billing adjustments were made. If so, that information should be available to the Competitive Carriers and ultimately the Commission.

There also is no merit to FairPoint's burdensomeness objection. FairPoint compiled the figures. The information exists in FairPoint's computerized systems, and should be available through a computerized report.

Because the information is relevant to the issues raised by FairPoint, is uniquely in FairPoint's possession, and is not an undue burden to provide, the Commission should overrule FairPoint's objection and require it to respond to the request.

Data Request No. 16:

Please supplement and update your answer dated on or about October 12, 2009, to Data Request No. AT&T-19.

Objection To Request No. 16:

FairPoint objects to Data Requests AT&T-19(a)-(d) on the grounds that they are irrelevant, overbroad, vexatious and not reasonably calculated to lead to the discovery of admissible evidence. Mr. Skrivan's testimony is on behalf of FairPoint, for whom he is authorized to testify. Subject to and without waiving these objections, FairPoint will respond to Data Request AT&T-19(a)-(b).

FairPoint objects to Data Request AT&T-19(e)-(i) on the grounds that they seek legal conclusions and are not reasonably calculated to lead to the discovery of admissible evidence.

FairPoint objects to Data Requests AT&T-19(h)-(i) on the grounds that they are irrelevant, overbroad, vexatious and not reasonably calculated to lead to the discovery of admissible evidence. In addition, this data request requires Mr. Skrivan to provide a legal conclusion and to otherwise speak for the Commission and/or its Staff.

Data Request No. AT&T 19, referenced in CLECs-16

The testimony states at p. 6: Our objective was to calculate the loss of CCL revenues reflecting the CCL charge changes specified in the Order *Nisi* and to calculate a replacement charge to restore the lost revenue.

- a) Identify all persons comprising the "our" referenced. **[NOT IN DISPUTE]**
- b) Who established the objective? **[NOT IN DISPUTE]**
- c) When was the objective established? **[NOT IN DISPUTE]**
- d) Provide all documentation of the objective, including its development, author, and approval. **[NOT IN DISPUTE]**
- e) Please "Admit" or "Deny" that the Order *Nisi* No. 25002 referenced did not explicitly require or authorize FairPoint to introduce a replacement charge to restore or recover any lost revenue.
- f) If "Deny" in (e) above, specifically cite and provide the actual language from the order that directed that as FairPoint eliminates the application of the CCL charge when FairPoint does not perform common line function it should simultaneously introduce an interconnection charge to restore any lost revenue.

- g) Explain how FairPoint could have lost any revenue, to which it is purportedly entitled to recover, when the Order *Nisi* directed the application of the CCLC rate only to instances when FairPoint actually provided the CCLC.
- h) Since the CCLC has traditionally been used to recover common line, *e.g.*, loop costs, to the extent FairPoint did not perform any common line function, why is it reasonable that FairPoint should be paid as if it had provided a common line function?
 - i) Why does Mr. Skrivan believe that it is not anticompetitive for FairPoint to propose that it be compensation in its access rates for CCLC or loop costs in instances when competitors are supplying those loops and FairPoint is not supplying those loops?
- i) Provide Mr. Skrivan's understanding of the purpose Order *Nisi* and in particular the Commission specific directive to file *verbatim* tariff language changes, and the Commission's intended purpose in doing so. **[NOT IN DISPUTE]**

Discussion:

Much like data request CLECs-10 above, data request CLECs-16 (referencing the underlying AT&T-19(e)-(h)) is designed to elicit the justification for FairPoint's proposal of a charge to compensate it for allegedly lost CCL revenues. Clearly, such a charge cannot be imposed without legal and policy justification. This data request seeks FairPoint's position regarding such justification. It is a contention interrogatory like data request CLECs-10, and is proper for the same reason.

In the specific case of AT&T-19(g), the request seeks the basis for FairPoint's claim regarding revenues allegedly lost by the elimination of the CCL charge. The issue whether FairPoint may properly charge for a component it does not provide, *i.e.*, a common line, is one of the fundamental issues in this case from its inception. Data request AT&T-19(g) addresses this issue.

Similarly, AT&T-19(h)⁴ is designed to test the reasonableness of the underlying CCL charge and, therefore, the reasonableness of FairPoint's proposed compensatory interconnection charge. Whether the CCL charge is reasonable or not will inform the debate over whether FairPoint should be compensated for revenues lost by the elimination of that charge. The information sought, therefore, is relevant to this case or will lead to the discovery of admissible evidence. Further, AT&T-19(h) does not ask FairPoint anything about statements made by or thoughts held by the Commission or its Staff. That part of FairPoint's objection clearly is unfounded.

Because these requests seek information relevant to issues in this case, they are appropriate, and the Commission should overrule FairPoint's objection.

⁴ AT&T-19(h) includes (h)(i). The first "i" in AT&T-19 is a lower-case Roman "I" and is a sub-part to part (h). The second "i" is request 19(i) and is not in dispute.

Data Request No. 19:

Please refer to FairPoint's answer dated on or about October 12, 2009, to Data Request No. One Comm-11:

- (a) Is the merger condition that allegedly does not allow FairPoint to increase "basic service rates" still in effect? [NOT IN DISPUTE]
- (b) If so, when does it expire? [NOT IN DISPUTE]
- (c) Please respond to Data Request No. One Comm-11 using the assumption that the merger condition has expired.

Objection To Request No. 19:

FairPoint objects to Data Request CLECs-19(c) on the grounds that it calls for speculation.

Data Request One Comm-11, referred to in CLECs-19(c):

Please refer to pages 10-11 of the Testimony [Michael Skrivan's testimony dated September 28, 2009].

- (a) If FairPoint were permitted to raise basic rates to compensate for CCL revenues it is unable to collect, would that be preferable to raising other access rate components?
- (b) Please explain your answer in full detail.
- (c) Please produce all documents that refer or relate to your answer.

Relevant Portion Of FairPoint's Response to One Comm-11:⁵

This is a policy question on which Parties will disagree, depending on whether they represent the end users or the wholesale carriers. Regardless, Fairpoint is subject to merger conditions that allows [*sic.*] the filing of revenue neutral wholesale rate changes, but does not allow [*sic.*] Fairpoint to increase basic service rates except in the context of a rate proceeding based on a demonstration of low earnings.

Discussion:

FairPoint's objection that data request 19(c) calls for speculation mischaracterizes the question and is unfounded.

⁵ The entirety of One Comm-11 and FairPoint's response is attached to the end of this motion.

The issue of whether to raise basic rates to compensate for lost CCL revenues is one that FairPoint itself raised, or at least anticipated, in Mr. Skrivan's supplemental prefiled testimony. Mr. Skrivan devotes two full pages out of 18, or 22% of his testimony, to a discussion of raising basic rates to compensate for lost CCL revenue. Supplemental Testimony at 14-16. In fact, that discussion begins with Mr. Skrivan's point-blank assertion that “FairPoint [has] considered other alternatives to increasing the interconnection charge.” *Id.* at p. 14, lines 4-5.

Surely, when it considered the alternative of increasing basic local rates, FairPoint must have arrived at a position on the desirability or preferability of that alternative compared to increasing the Interconnection Charge. Data request CLECs-19(c) is simply designed to explore FairPoint’s position in this regard. It does not seek speculation, but position(s) that FairPoint has developed. The issue is clearly relevant — FairPoint itself raised the question. It ill-suits FairPoint now to claim that it would be mere speculation to respond.

The Commission faced a nearly identical situation in the *PSNH/Laidlaw* docket, DE 10-195. In that case, PSNH objected to a data request asking it to address the potential effect of future laws on its obligations, on the ground that the question called for speculation. The Commission overruled PSNH’s objection. The Commission found that the effect of “future laws” was a consideration in the contract at issue, and that “the Company likely considered what those future laws might be.” *PSNH/Laidlaw Order*, at 25-26. The Commission held that responses by PSNH to the data requests would likely lead to the discovery of admissible evidence.

The situation here is the same. FairPoint has raised the question of increases in basic local rates. However, in response to the underlying data request One Comm-11, FairPoint side-stepped the question by stating that it was precluded by the Verizon/FairPoint merger order from

raising local rates. That restriction, of course, has expired or will expire. Data request CLECs-19(c) merely asks FairPoint for information that it unquestionably possesses regarding what happens when the restriction is lifted. The information is relevant, and FairPoint should be required to provide it.

Conclusion

There is no merit to any of FairPoint's objections to the discovery requests listed above. The Commission should overrule all the listed objections and require FairPoint to provide full and complete responses to each of the Competitive Carriers' requests.

December 19, 2011

Respectfully Submitted,

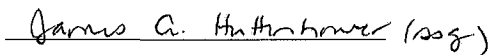
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Certificate of Service

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

Gregory M. Kennan (ssg)
Gregory M. Kennan

FairPoint Communications, Inc.
Docket No. DT 06-067

Respondent: Michael Skrivan
Title: VP Regulatory

REQUEST:

Please refer to pages 10-11 of the Testimony.

- a. If FairPoint were permitted to raise basic service rates to compensate for CCL revenues it is unable to collect, would that be preferable to raising other access rate components?
- b. Please explain your answer in full detail.
- c. Please produce all documents that refer or relate to your answer.

DATED: October 5, 2009

ITEM: One Comm-11

REPLY:

(a)-(b). FairPoint objects to Data Request One Comm-11(a)-(b) on the grounds that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. FairPoint also objects to the form of the data request. Subject to and without waiving these objections, FairPoint responds to Data Request One Comm-11(a)-(b) as follows:

That is a policy question on which Parties will disagree, depending on whether they represent the end users or the wholesale carriers. Regardless, FairPoint is subject to merger conditions that allows the filing of revenue-neutral wholesale rate changes, but does not allow FairPoint to increase basic service rates except in the context of a rate proceeding based on a demonstration of low earnings.

(c) The New Hampshire Commission's merger approval order and the associated settlement agreement between the Commission's Staff and the Joint Petitioners in Docket DT 07-011 may be found at <http://www.puc.state.nh.us/Regulatory/Docketbk/2007/07-011-3.htm>.