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

OBJECTION TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

OBJECTION TO MOTION TO SUSPEND OR MODIFY PROCEDURAL SCHEDULE

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and hereby objects to the subject motions filed by the Competitive Carriers ("CLECs"), dated January 9, 2012. As FairPoint explains below, the Motion to Dismiss is based on authority that is not merely unsupportive of the CLECs' argument, but actually contradicts it. Consequently, FairPoint respectfully requests that the Commission deny the Motion to Dismiss and immediately lift the suspension of the procedural schedule.

I. MOTION TO DISMISS

In their Motion to Dismiss, the CLECs assert that effective December 29, 2011, federal law caps FairPoint's intrastate access rate elements at the levels in effect as of that date.[1] Therefore, they argue, any increase in FairPoint's Interconnection Charge is unlawful and any aspect of this proceeding that considers such an increase should be dismissed. In support of this

[1] Motion to Dismiss at 1.

assertion, the CLECs refer to the FCC's recent Report and Order in the Connect America proceeding.[2] They cite new FCC Rule 51.907(a), which requires that:

> Notwithstanding any other provision of the Commission's rules, on December 29, 2011, a Price Cap Carrier shall cap the rates for all interstate and intrastate rate elements for services contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. In addition, a Price Cap Carrier shall also cap the rates for any interstate and intrastate rate elements in the traffic sensitive basket" and the "trunking basket" as described in 47 CFR 61.42(d)(2) and (3) to the extent that such rate elements are not contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Carriers will remove these services from price cap regulation in their July 1, 2012 annual tariff filing.

The FCC provided an explanation of this rule, which the CLECs quoted in their motion and which FairPoint reproduces verbatim, with emphasis supplied, for reasons soon explained:

> [A]t the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules. . . . For price cap carriers, all intrastate rates will also be capped, and, for rate-of-return carriers, all terminating intrastate access rates will also be capped. Id., ¶ 801 *(footnotes omitted)*.[3]

Ordinarily, it would be safe to assume that omitted footnotes do not contain pertinent material and are merely omitted for the convenience of the reader. However, that is not the case here. Instead, the omitted footnotes contain language that is fatal to the CLECs' argument. Specifically, footnote 1495 to paragraph 801 of the *CAF Order* provides that:

> Specifically, we cap all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) *unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect.*[4]

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[2] *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*CAF Order*").
[3] Motion to Dismiss at 7-8 (emphasis supplied).
[4] *CAF Order* n. 1495 (emphasis supplied).

Paragraph (d)(3) of the FCC rule cited above encompasses the "residual interconnection charge" described in 47 C.F.R. § 69.155,[5] which the CLECs have emphasized is the nature of the Interconnection Charge at issue here.[6] Thus, the CLECs are flatly wrong when they assert that "[n]othing in the federal regulations grants an exception from the December 29th rate caps to proposed rate increases or illustrative filings pending on that date."[7] On the contrary, even though the December 22nd tariff filing is not yet effective (and may not be for another several months), it is pending before the Commission and is not prohibited by the FCC rules.

The question, then, is not whether the cap may be based on a pending rate -- it may. The question is whether the rate for FairPoint's Interconnection Charge is currently pending before the Commission. The CLECs argue, of course, that it is not. They assert that FairPoint's December 22nd tariff filing was not a bona fide filing, but instead merely a "back-door" attempt at reconsideration of the previous tariff filing of this charge, which the Commission had rejected on November 30th. However, this is a false analogy. Had FairPoint wanted reconsideration of the rejection order, it would have requested that, since it was well within its rights to do so. Instead, it submitted an entirely separate and distinct filing on December 22nd, with a different proposed effective date and with reference to the appropriate statutes for such a filing. Specifically, in the transmittal letter for the December 22nd tariff filing, FairPoint postulated that the Commission may have rejected the November 30th tariff filing based on the assumption that RSA 378:6, IV, passed in 1997 with industry support, completely supersedes RSA 378:6, I(b); *i.e.* that RSA 378:6, I(b), and its extended timeframe of up to eight months, could no longer

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[5] 47 C.F.R. § 61.42(d)(3) provides for "(3) A basket for trunking services as described in §§ 69.110, 69.111, 69.112, 69.125(b), 69.129, *and 69.155* of this chapter." (emphasis supplied). 47 C.F.R. § 69.155 is titled, and devoted to, the "Per-minute residual interconnection charge."

[6] Motion to Dismiss at 7.

[7] *Id.* at 10.

apply to telephone company filings *at all*. This could have led to a conclusion that, because FairPoint's filing was not a "general rate increase" under RSA 378:6, I(a), the only option was a review under RSA 378:6, IV, which had to be completed in 60 days -- shorter than the procedural schedule in this proceeding.

However, this is not the case. The legislative history of HB 452, which was codified as RSA 378:6, IV, contains the testimony of Commissioner Ignatius, then General Counsel to the Commission, in which she stated that RSA 378:6, IV is intended to only apply to changes in the *terms and conditions* of services, not charges, and that some types of rate filings should continue to be handled under RSA 378:6, I(b). In short, she testified that:

> if it involves a rate change, whether it is a telephone company or anyone else, it would be under the section above [i.e. RSA 378:6, I(b)] . . . that is an existing statute that is a longer period of time to review. The 3 month review and you could have an additional 5 months.[8]

The bill before the committee at the time had language identical to that in the eventual statute. Thus, RSA 378:6, I(b) applies to the December 22nd tariff filing, which provides ample to time to review the provisions within the context of this proceeding.[9]

The Commission rejected the November 30th filing "without prejudice," and thus FairPoint is within its rights to submit another tariff, and to argue on behalf of its Interconnection Charge. There is no statute or rule that prohibits FairPoint from making *any* tariff filing it chooses, and therefore the December 22nd tariff filing is valid. Indeed, the Commission cannot reject that filing, because doing so *would* be with prejudice to FairPoint's rights to ever being able to tariff that charge.

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[8] *See* Exhibit 1, attached hereto.

[9] Of course, it should have also applied to the November 30th filing as well.

II. MOTION FOR SUMMARY JUDGMENT

By presenting an accurate depiction of the *CAF Order*, FairPoint has established that there is no legal basis for the Motion to Dismiss. Furthermore, regarding the Motion for Summary Judgment, the CLECs have not only failed to prove their argument, they have not even bothered to make one. The CLECs discuss the applicable legal standard on pages 4 and 5 of their pleading, and then abandon the subject thereafter. There is no further discussion regarding the factual record, nor any argument regarding summary judgment that is not derivative of the Motion to Dismiss. This is not surprising, since it would be impossible for the CLECs to make an argument that "there is no dispute as to any material fact concerning the Interconnection Charge"[10] in the face of almost 100 data requests that they issued to FairPoint, and their Motion to Compel, which was filed a mere three weeks before the subject motions. Thus there is no basis for the Commission to issue a summary judgment in this proceeding.

III. MOTION TO SUSPEND OR MODIFY PROCEDURAL SCHEDULE

Given that there is no support for either the Motion to Dismiss or the Motion for Summary Judgment, the Commission should lift the suspension of the procedural schedule immediately. FairPoint has simply acted according to the terms of the *CAF Order* and applicable state statutes regarding tariff filings to preserve a right that it and its predecessor have been strenuously and openly defending for over five years. Given the plain language of the *CAF Order*, the Commission cannot grant a Motion to Dismiss. Therefore, the CLECs should not be relieved of pending procedural obligations of which they have known for months.

This is in the interest of justice and fair dealing. The CLECs accused FairPoint of "gamesmanship" for filing a revised tariff in advance of the effective date of the CAF Order and

[10] Motion to Dismiss at 5.

the cap it imposes on access charge increases.[11] As it has already explained, FairPoint's filing was a legitimate exercise of its rights and no gamesmanship was behind it. For a true example of gamesmanship, the Commission should instead review the behavior of the CLECs over the six weeks preceding the filing of the subject motions. The *CAF Order* was released on November 18, 2011, at which time the CLECs became aware of the pending access charge cap, which effective date became fixed upon the November 29, 2011 publication of the synopsis in the Federal Register. Notwithstanding all of this information, the CLECs never broached the subject of modifying the procedural schedule until last week. Indeed, they stood by while FairPoint expended considerable time and expense in responding or objecting to over 100 data requests and a Motion to Compel. It was only when it became the CLECs' turn to significantly perform in this proceeding that it occurred to them that the current schedule might be "an illogical and inefficient waste of the Commission's and parties' time and resources."[12] Then, and only then, did the subject of the schedule become an issue, and one so pressing that it demanded emergency *ex parte* action by the Commission. This, and not FairPoint's filing, smacks of gamesmanship which should not be countenanced by the Commission.

[11] *Id.* at 10.
[12] Motion for Suspension at 3.

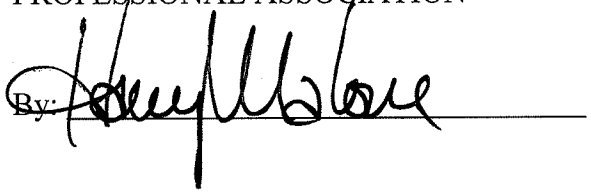
IV. CONCLUSION

FairPoint respectfully requests that the Commission deny the Motion to Dismiss and lift the current suspension of the procedural schedule.

Respectfully submitted,
NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC D/B/A FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: January 18, 2012

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing objection was forwarded this day to the parties by electronic mail.

Dated: January 18, 2012

By: _____
Harry N. Malone