

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

BRIEF ON CCL LANGUAGE AND EFFECTIVE DATE

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and hereby submits its Brief on the issues described in the Commission’s Order on CLEC Motion for Hearing, dated November 30, 2011. As set forth below, the September 10, 2009 tariff filing conformed to the Commission’s orders in all respects, although FairPoint continues to maintain that the tariff filing was not lawfully ordered by the Commission and has since been completely withdrawn. Furthermore, any tariff revisions related to the CCL charge can only be applied prospectively, to the extent lawful, and cannot be effective at any time prior to the Commission’s final order in this proceeding.

I. BACKGROUND

On August 11, 2009, the Commission issued Order *Nisi* No. 25,002 in the above captioned docket directing FairPoint to modify its Tariff NH PUC No. 85 (“Tariff 85”) to establish that FairPoint would charge a carrier common line access charge (CCL) only when a FairPoint common line is used in the provision of switched access services. Although the Commission had previously announced that prospective changes to Tariff 85 would be considered in a separate proceeding,¹ the Order *Nisi* nonetheless stated that the record of this

¹ Procedural Order at 6 (Nov. 29, 2006).

proceeding supported a finding that Tariff 85 should prospectively 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. Accordingly, the Commission ordered FairPoint to modify its tariff to clarify that FairPoint shall charge the CCL only when a FairPoint common line is used in the provision of switched access services. On October 12, 2009, FairPoint timely filed a Motion for Rehearing of the Order *Nisi*.

On a separate track in this proceeding, FairPoint complied with the Order *Nisi* by filing a revenue neutral revision to Tariff 85 on September 10, 2009, revising the service description of the CCL and increasing the interconnection charge. By Order No. 25,016 dated, September 23, 2009 ("2009 Procedural Order"), the Commission ordered FairPoint to complete the tariff filing and file testimony in support, suspended the tariff filing for 30 days beginning September 28, and scheduled a hearing for November 4, 2009. BayRing and AT&T filed a joint Motion for Clarification of Order No. 25,016 and further expedited relief on October 2, 2009. On October 12, 2009, FairPoint withdrew the September 10th tariff filing, to the extent that the original tariff filing had not been mandated pursuant to RSA 378:7.

On October 16, 2009, the Commission issued an order suspending the procedural schedule while it considered the arguments raised in the various parties' motions. Shortly afterward, on October 26, 2009, FairPoint voluntarily sought Chapter 11 reorganization through the United States Bankruptcy Court and all subsequent activity in this proceeding was suspended.

FairPoint emerged from bankruptcy on January 24, 2011 and on May 4, 2011, the Commission issued Order No. 25,219 ("2011 Procedural Order") as a procedural order and supplemental order of notice. Notably, the Commission stated that it would not re-litigate the

purpose or propriety of the CCL charge. Referencing Order No. 24,837, dated March 21, 2008, the Commission explained that:

We disagree [that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself.] Based on the record before us, we find that the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.²

In the 2011 Procedural Order, the Commission also:

- determined that the procedural schedule was suspended on October 16, 2009 and therefore the tariff filing *never went into effect*;³
- granted FairPoint's request to withdraw its *entire* September 10th, 2009 tariff filing;⁴
- deemed those tariff pages as illustrative and the basis for further investigation and proceedings outside of the timing constraints of RSA 378:6.⁵

On October 28, 2011, the Commission supplemented and revised these determinations in Order No. 25,283 ("Order on Motions"). In that Order, the Commission:

- held that FairPoint's two proposals in the September 10th, 2009, tariff filing (i.e. revised CCL language, increased Interconnection Charge) were intertwined and intended to be dealt with as a package;⁶
- partially reversed its grant of FairPoint's request to withdraw its September 10th, 2009, tariff filing, finding instead that the portion of the filing covering the CCL was accepted and not considered withdrawn (notwithstanding its determination that both portions constituted a single filing),⁷ but still affirmed that the CCL revisions remain *suspended in application and effect*;⁸

² 2011 Procedural Order at 7.

³ *Id.* at 6.

⁴ *Id.*

⁵ *Id.*

⁶ Order on Motions at 29.

⁷ *Id.* at 30.

⁸ *Id.* at 31.

- reiterated that although it was filed in response to a Commission directive, the September 10th, 2009, tariff filing *did not go into effect*;⁹
- emphasized that while it prohibited re-litigation of its finding that the CCL was not solely a contribution element, FairPoint was not prohibited from arguing that contribution elements are necessary to meet its financial needs.¹⁰

Finally, on November 30, 2011, the Commission issued Order No. 25,295 on the CLEC Motion for Hearing (“Hearing Motion”) in which it again reiterated that the CCL filing had not gone into effect,¹¹ and effectively bifurcated this proceeding by setting the CCL question for briefing, while noting that this decision was not intended to prejudice any other arguments about the Interconnection Charge that may be made later, nor imply that the Commission has made any determinations about the propriety of the proposed Interconnection Charge or its relationship to the CCL.¹² Consequently, the Commission requested briefs on the following two issues:

- (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.
- (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?

II. THE SEPTEMBER 10, 2009, TARIFF FILING WAS FULLY COMPLIANT WITH THE COMMISSION’S ORDERS.

In the Order *Nisi*, the Commission directed FairPoint “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.”¹³ The Commission was specific in its directive, requiring *at a*

⁹ *Id.*

¹⁰ Order on Motions at 17-18.

¹¹ Hearing Order at 1-2.

¹² *Id.* at 4.

¹³ Order *Nisi* at 2.

minimum, revisions to, or removal of Sections 5.1, 5.4.1.A., and 5.4.1.C.¹⁴ The September 10, 2009 tariff filing complied, with the pertinent sections revised to read as follows (conforming language in italics):

Section 5.1:

Carrier common line access service is billed to each switched access service in those instances when a carrier uses the Telephone Company's common line and the common line facilitates the transport of calls *which originate and terminate with a Telephone Company's end-user*. This service is provided under this tariff in accordance with the regulations as set forth herein and in Section 4.1, and at the rates and charges contained in Section 30.5.

Section 5.4.1.A:

General— Except as set forth herein, switched access service provided in those instances where a carrier uses the Telephone Company's common line and the common line facilitates the transport of calls *which originate and terminate with a Telephone Company end-user* will be subject to carrier common line access charges.

Section 5.4.1.C:

The switched access service provided by the Telephone Company includes the switched access service provided for intrastate communications. The carrier common line access rates and charges will be billed to each switched access service *as described in Section 5.4.1.A* in accordance with Section 4.1 and Section 5.4.2.

Thus, the revised language related to the CCL conformed to the Commission's Order, and the Commission's intent, in every respect.

However, as the parties are well aware, this was not the full extent of the September 10, 2009, tariff filing. In addition to the CCL language, FairPoint increased its Interconnection Charge from zero to \$0.010164 per minute of use of any switched access services.¹⁵ As explained in the testimony of Michael T. Skrivan, this was necessary in order to recover the almost \$3 million in revenues that would be lost as a result of the revised application of the CCL

¹⁴ *Id.*

¹⁵ The current proposed rate is now \$0.009257 per MOU.

charge.¹⁶ As Mr. Skrivan further testified, FairPoint's 2010 ARMIS report to the FCC indicated that had a negative operating margin, before income tax benefit, of over \$100 million on its combined state and interstate regulated operations in New Hampshire.¹⁷ Thus, recovering the \$3.0 million in lost revenue caused by the CCL charge tariff revision does not lead to an over-earning situation and is nothing other than revenue neutral.

The introduction of the Interconnection Charge was wholly in conformance with the Commission's orders. The Commission's directive regarding the revised language was not exclusive or restrictive. Indeed, the changes it prescribed were required *only as a minimum*. Furthermore, nowhere in the Commission's orders has it stated or even implied that FairPoint is required to reduce its overall access revenues. Indeed, the Commission has recently emphasized that FairPoint may argue that such contribution elements are necessary to meet its financial needs.¹⁸ These arguments are reserved for another part of this proceeding and FairPoint will not belabor them here. However, FairPoint submits that the September 10, 2009, tariff filing was fully compliant with the Commission's orders, as would any similar filing. Moreover, as the Commission has explained, the interconnection charge and the CCL revisions "were intertwined and intended to be dealt with as a package."¹⁹ As such, the Commission was in error to "partially withdraw" the September 10, 2009 tariff filing in its Order on Motions, and it cannot approve the CCL revisions without also approving the Interconnection Charge. The two revisions must become simultaneously effective. To do otherwise would further contribute to

¹⁶ Supplemental Testimony Of Michael T. Skrivan at 11 (Nov. 3, 2011).

¹⁷ *Id.* at 17.

¹⁸ Order on Motions at 17-18. *See also id.* at 34. ("Clearly, the Commission has not sought to lower FairPoint's rates and thus there is no violation of that term of the settlement agreement.")

¹⁹ *Id.* at 29. Furthermore, it is FairPoint's position that the entire September 10, 2009 filing was withdrawn and thus rendered a nullity, which also makes this question moot. However, it will not further argue that position in this brief, but continues to reserves all rights.

FairPoint's well-documented under earnings in New Hampshire and, as FairPoint has already argued in this proceeding, would be confiscatory.²⁰

II. ANY TARIFF REVISIONS RESULTING FROM THIS PROCEEDING CAN ONLY BE EFFECTIVE AS OF THE DATE OF COMMISSION'S FINAL ORDER AND CANNOT BE IMPLEMENTED RETROSPECTIVELY.

As its second issue for briefing, the Hearing Order asked what the effective date of the September 10, 2009, tariff filing should be, assuming it was in conformance with the Commission's orders. Commission rules and applicable New Hampshire law render this question moot, because no tariff filing can be effective retroactively to its approval by the Commission.

The Commission lacks authority to modify a tariff retroactively. Its power to fix or adjust rates is *prospective* only. RSA 378:7 provides (with emphasis added):

Whenever the commission shall be of the opinion *after a hearing* . . . that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, . . . the commission shall determine the just and reasonable or lawful rates, fares and charges to be *thereafter observed and enforced*.

As the Commission has affirmed on several occasions, no hearing was ever held on the issue of the CCL tariff revisions that had been ordered.²¹ Accordingly, until it makes a final decision in this phase of the proceeding, the ordered revisions cannot be "observed and enforced."

Further, Commission Rule Puc 1603.07(c) (Proposed Tariff, When Effective) provides that "[d]uring any periods when a proposed tariff change is suspended as referred to in this section, a utility's presently effective tariff shall then continue in effect until further order or as provided by law." The New Hampshire Supreme Court has explained that the "PUC prevent(s) the proposed new rates from going into effect by suspending their effective date pending its

²⁰ FairPoint Comments and Conditional Request for Hearing at 6 (Aug. 28, 2009).

²¹ See, e.g. Order on Motions at 31.

investigation.”²² Moreover, “it is a basic legal principle that a rate is made to operate in the future and cannot be made to apply retroactively”²³

The Commission has reiterated throughout this proceeding that the September 10, 2009 tariff filing was suspended and never effective.²⁴ Moreover, while New Hampshire law allows the effectiveness of a rate to relate back to a time prior to its final approval by the Commission, this is only in the case in which a temporary rate is fixed. “[T]he effective date of temporary rates fixes and preserves the period during which the rates allowed in the underlying permanent rate proceeding may apply”²⁵ In this case, the Commission never set a temporary rate. Consequently, the only tariff in effect now and throughout this proceeding has been Tariff 85 as it existed prior to the Order *Nisi*.²⁶ The rates in that version of the tariff have been and are the only rates that may be lawfully charged up to the date on which the Commission approves different rates.

To do otherwise would violate the filed rate doctrine. The New Hampshire Supreme Court has been very clear in this regard in stating that “[tariffs] do not simply define the terms of the contractual relationship between a utility and its customers. They have the force and effect of law and bind both the utility and its customers.”²⁷ Describing this doctrine in the federal area, the Court has explained that “common carriers, such as the defendants, are prohibited from

²² Appeal of Pennichuck Water Works, 120 N.H. 562, 564 (1980).

²³ Pennichuck, 120 N.H. at 566 (citing *Southwest Gas Corp. v. Pub. Serv. Comm'n*, 86 Nev. 662, 669, 474 P.2d 379, 383 (1970)).

²⁴ See 2011 Procedural Order at 6; Order on Motions at 31; Hearing Order at 1-2.

²⁵ Pennichuck, 120 N.H. at 564.

²⁶ At all times up to the present, FairPoint has operated under Tariff 85 as lawfully filed and effective March 7, 2001 and as resubmitted in full August 19, 2011. During that time, certain customers of FairPoint have refused to pay for some or all switched access services, claiming the authority of the Order *Nisi* as a defense.

²⁷ Pennichuck, 120 N.H. at 566.

charging rates or from providing related services other than as set forth in the applicable tariff.”²⁸ For this reason, reviewing and adjusting the rates charged for services already rendered under an existing tariff on a retroactive basis would constitute reversible error. Notwithstanding FairPoint’s claim that the September 10, 2009 tariff filing was withdrawn in its entirety, those rates could not be effective at any time prior to the present because they were suspended, not effective, and not anchored by any temporary rate.

III. NO RETROACTIVE RATE CAN BE IMPOSED PRIOR TO JANUARY 24, 2011.

Even if the Commission were to find that the September 10, 2009 tariff filing was retroactively effective, no claims for refunds or reduced payments can be made for any traffic prior to the effective date of FairPoint’s emergence from Chapter 11 bankruptcy.²⁹ As to such claims by FairPoint customers, Section 13 of the Debtors’ Third Amended Joint Plan of Reorganization provided that:

Except as provided in the Plan [which did not provide for the charges at issue in this proceeding], on the Effective Date, all existing Claims against FairPoint and Old FairPoint Equity Interests shall be, and shall be deemed to be, released, terminated, extinguished and discharged, and all holders of such Claims and Old FairPoint Equity Interests shall be precluded and enjoined from asserting against Reorganized FairPoint

Upon the Effective Date, all such Persons shall be forever precluded and enjoined, pursuant to section 524 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against, or terminated Old FairPoint Equity Interest in, FairPoint.³⁰

This is in accordance with the U.S. Bankruptcy Code, which provides that:

Except as provided in subsections (d)(2) and (d)3 of [§1141] and except as otherwise provided in the plan or in the order confirming the plan, after

²⁸ Guglielmo v. Worldcom, 148 N.H. 309, 313 (2002).

²⁹ In re: FairPoint Communications, Inc., et al., Case No. 09-16335 (S.D.N.Y.).

³⁰ See Order Confirming Debtor’s Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated as of December 29, 2010, In re: Fairpoint Communications, Inc., et al., Case No. 09-16335 (S.D.N.Y.) [Document No. 2113].

confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

Consequently, whatever authority that the Commission may have to adjust any charges or claims related to the CCL charge does not reach back prior to January 24, 2011.³¹

IV. FAIRPOINT RESERVES ALL RIGHTS TO POSITIONS IT HAS TAKEN IN THIS PROCEEDING.

There are many issues involved in this proceeding to which the Hearing Order is not devoted and which are not addressed in this brief. Issues raised by the Commission include whether FairPoint's proposed tariff revisions are (or were) just and reasonable; whether the proposed Interconnection Charge is consistent with paragraph 9.1 of the Settlement Agreement in DT 07-011, and which provisions of Chapter 358 of the New Hampshire Statutes apply.³² Furthermore, FairPoint has raised other issues, including but not restricted to the Commission's authority to issue the original Order *Nisi* in the first place, the lawfulness of a the Commission's determination that the September 10, 2009, tariff filing was not completely withdrawn, and FairPoint's continuing right to argue that the CCL charge is solely a contribution element. Given that there is still no final order in this proceeding,³³ FairPoint reserves all rights to these issues. Furthermore, by briefing the Commission on the issue of whether the September 10, 2009, tariff filing conformed to the Commission's orders and the effective date of such tariff, FairPoint does not waive any argument that those orders were unlawful and that the tariff filing is a nullity.

³¹ This is consistent with the determination that the Commission has made in another proceeding involving FairPoint. *See* FairPoint Communications - NNE, Performance Assurance Plan and Carrier to Carrier Metrics, DT 11-061, Procedural Order No. 25,221 at 24 (May 6, 2011) ("We note that the Effective Date of FairPoint's reorganization was January 24, 2011. Though the audit will evaluate performance from July 1, 2010 through June 30, 2011, the Commission will not apply the results of the audit to activity prior to the Effective Date.")

³² *See* 2009 Scheduling Order at 3-4.

³³ "[T]here was not a 'final order' of the Commission regarding the CCL tariff provisions." Order on Motions at 30. "[T]here is no final order in this docket" Order on Motions at 33.

V. CONCLUSION

FairPoint's September 10, 2009 tariff filing, unlawfully ordered by the Commission and since withdrawn in its entirety, was nonetheless fully compliant with the Commission's orders in regard to revisions to FairPoint's Tariff 85 as they relate to the CCL charge. To the extent that revisions in the application of the CCL charge are appropriate, an accompanying charge like the proposed Interconnection Charge is also necessary, since FairPoint is entitled to a revenue neutral adjustment in order to avoid a loss of revenues and further under earning. Furthermore, the currently filed Tariff 85 is and has been the only valid rate for FairPoint's switched access services, including the CCL charge. Any revisions mandated by the Commission can only be applied prospectively from the date of the Commission's order imposing such revisions.

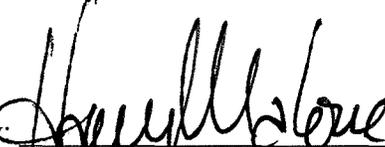
Respectfully submitted,

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Dated: December 19, 2011

By



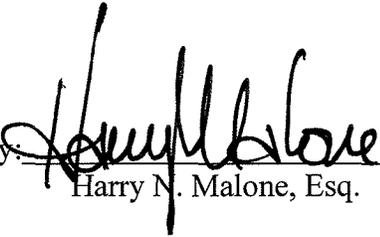
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CERTIFICATE OF SERVICE

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

Dated: December 19, 2011

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