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September 4, 2009

Via Electronic Mail Hand Delivery

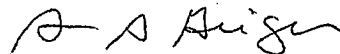
Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: BayRing Complaint Re: Access Charges, DT 06-067

Dear Ms. Howland:

Enclosed for filing with the Commission in the above-captioned matter please find an original and seven copies of a Joint Response submitted on behalf of Freedom Ring Communications, LLC d/b/a BayRing Communications and AT&T Corp. Please let me know if there are any questions about this filing. Thank you.

Very truly yours,



Susan S. Geiger

cc: Service List (via electronic mail only)
Enclosures
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THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC d/b/a
BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Re: Access Charges

JOINT RESPONSE OF BAYRING COMMUNICATIONS AND AT&T TO
FAIRPOINT'S COMMENTS

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") and AT&T Corp. ("AT&T"), and pursuant to the August 11, 2009 Order *Nisi* issued by the New Hampshire Public Utilities Commission ("the Commission") in the above-captioned docket, respond to the Comments and Conditional Request for Hearing filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint's Comments") by stating as follows:

1. BayRing and AT&T support FairPoint's agreement to file tariff revisions that "restrict billing of the CCL to situations in which the FairPoint local loop is employed..." FairPoint's comments, p. 1. However, BayRing and AT&T respectfully request that the tariff revisions, while going into effect immediately, be subject to an expedited process under which the parties to this proceeding are given an opportunity review and submit comments on them in the event that any adjustment may be required to avoid future controversies over their meaning.

2. FairPoint has offered no good reason for the Commission to change the effective date of the Order *Nisi*. The Commission has correctly determined that Tariff 85

should be modified; thus, the Order *Nisi* should become effective on September 10, 2009 as stated therein. To the extent that FairPoint requests that the Commission delay the effective date of the Order *Nisi* to consider FairPoint's claims regarding its alleged need for rate relief, BayRing and AT&T object. Any claims that FairPoint is not earning sufficient revenues to cover its costs is a separate matter, which FairPoint must take up in accordance with applicable statutes and regulations. FairPoint's assertions concerning the financial pressures it is facing, as well as its financial, regulatory and other obligations are irrelevant to the issues in the instant proceeding and therefore should be disregarded by the Commission.

3. In the event that the Commission were to decide to consider FairPoint's claims concerning rate relief, for the reasons discussed below, BayRing and AT&T object to FairPoint's proposal to institute a "separate charge" or increase other access rate elements to recover revenue that FairPoint alleges is "lost" as the result of the elimination of the CCL charge on calls that do not employ FairPoint's common line/local loop. As FairPoint notes, it is presently subject to a cap on its rates for wholesale and special access services. FairPoint Comments, p. 6. Thus, insofar as FairPoint's access rate adjustment proposal involves any increase in existing access rates or the institution of a new "separate charge," the proposal is barred by FairPoint's settlement agreement in Docket DT 07-011 which was approved with conditions by this Commission. *See* Order No. 24,823 (February 25, 2008), p. 31.

4. FairPoint is not entitled to a "revenue neutral" rate adjustment to recover alleged joint and common costs that it asserts are reflected in the disputed CCL charges. The Commission has determined that in a competitive marketplace, it is inappropriate to

set access rates to guarantee revenues at any particular level. *See* 74 NH PUC 283, 287 (June 10, 1993) (“An effectively competitive marketplace is totally at odds with any notion that NET’s total revenues can be ‘guaranteed’ to remain at any particular level.”) Thus, it would be anticompetitive and inconsistent with the Commission’s prior determinations to address FairPoint’s claim of inadequate revenues by either raising wholesale or access rates or taking any other action that causes FairPoint’s competitors to pay any more than they currently do for services they receive from FairPoint or to pay for a service that FairPoint does not provide. Accordingly, FairPoint is not entitled to other rate adjustments as compensation for revenues it does not receive as the result of eliminating the CCL charge in those cases where no FairPoint common line is used.

5. In addition, despite FairPoint’s numerous assertions to the contrary, the CCL charge does not recover joint and common costs and the record in this case does not support that conclusion. Relying on the record before it, the Commission expressly disagreed with the contention that the CCL charge is a contribution rate element that is imposed irrespective of usage of the common line. *See* Order No. 24,837 (March 21, 2008) p. 31. FairPoint did not move the Commission for reconsideration of that finding and the Supreme Court did not disturb it. Thus, FairPoint is precluded from relitigating the issue of whether the CCL charge recovers joint and common costs. Lastly, FairPoint is flatly wrong in asserting that “[t]here 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.’” FairPoint Comments, p. 5. The April 20, 2007 Prefiled Panel Rebuttal Testimony of AT&T’s witnesses, Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, at pages 5-11, completely rebuts FairPoint’s argument that the CCL charge

recovers joint and common costs and therefore may be imposed irrespective of common line usage. As the AT&T witnesses point out, while Mr. Shepherd may have testified that Verizon's predecessor originally "designed" the CCL charge as a contribution element to recover joint and common costs along with loop costs, the Commission did not approve the as-filed rate, nor did it approve a subsequent settlement stipulation containing reduced access charges. *See* Panel Rebuttal Testimony of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, On Behalf of AT&T (April 20, 2007) p. 8. The AT&T witnesses demonstrated through their comprehensive and detailed discussion and analysis of the two dockets that led up to the institution of switched access charges (i.e. Docket Nos. 89-010 and 90-002), that the CCL charge is linked to the recovery of loop costs allocated to toll services and therefore is to be assessed only on calls that traverse the local loop. *See* Panel Rebuttal Testimony of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, On Behalf of AT&T (April 20, 2007) p. 11.

6. The tariff modification that FairPoint has been ordered to make does not constitute a rate decrease. The CCL charge at its current rate will remain in FairPoint's tariff and will be applied, as it properly should be, only to calls that utilize FairPoint's common line/local loop. However, for calls that do not traverse a FairPoint common line/local loop, the Commission has ordered that the language of tariff 85 be modified. The order is appropriate and necessary because it prevents the collection of unlawful rates, i.e. those that are unjust, unreasonable and discriminatory. *See* RSAs 374:2 and 378:10. As the record in this case demonstrates, the imposition of the CCL charge when no FairPoint common line/local loop is used is unjust and unreasonable (in violation of RSA 374:2) and subjects BayRing, AT&T and other competitive carriers to unreasonable

prejudice and disadvantage (in violation of RSA 378:10). Arguments and examples of record evidence demonstrating the unjustness, unreasonableness and anti-competitiveness of the disputed CCL charges are cited in BayRing's Post-Hearing Brief (September 10, 2007) at pages 29 through 32 which are incorporated herein by reference. Additional arguments and citations to record evidence that support a finding that the disputed CCL charges are unjust, unreasonable and anti-competitive are found in the post-hearing briefs of One Communications (at pages 22 through 25) and AT&T (at pages 22 through 30). In addition, the Federal Communications Commission has determined that imposition of the CCL charge when no CCL service is provided is unjust and unreasonable. *See AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 F.C.C.R. 556 at 594 (1998). For all of the foregoing reasons, the Commission has not ordered a rate decrease but, instead, has properly ordered that tariff 85 be modified to prevent the collection of an unlawful charge, i.e. one that is unjust and unreasonable in violation of RSA 374:2 and anti-competitive and discriminatory in violation of RSA 378:10.

7. Modification of FairPoint's tariff to eliminate the unjust, unreasonable and prejudicial CCL charges (i.e. those that are imposed when no FairPoint common line/local loop is used) is not confiscatory. Indeed, modification of the language in Tariff 85 simply conforms the tariff to the meaning the Commission understood it had¹, and – perhaps more significantly with respect to a confiscation claim- eliminates a windfall to FairPoint. To the extent that FairPoint's purchase price may have been based upon Verizon's revenues at a time when neither it nor its agent were collecting the vast

¹ The Commission determined, based upon the evidence, that the CCL charge may not be imposed when a Verizon (now FairPoint) common line and the presence of a Verizon (now FairPoint) end use customer are lacking. *See* Order No. 24,837, p. 27.

majority of the disputed CCL revenues, the CCL charges constitute “new revenue” and therefore are most certainly a windfall to FairPoint.

8. Moreover, at the time FairPoint commenced operations in New Hampshire, FairPoint had no reasonable expectation that it would be entitled to the revenue that it now claims is “lost.” A final order had not been issued in the instant action at the time FairPoint petitioned the Commission to acquire Verizon’s assets. Thereafter, around the time that FairPoint began operating in New Hampshire, this Commission issued Order No. 24,837 (March 21, 2008) which required the cessation of the disputed CCL charges. Because that order was never suspended, it operated to bar the collection of the disputed CCL charges. *See* RSAs 365:26 and 541:18. Thus, because FairPoint had no reasonable expectation to recover these charges, this revenue cannot properly be considered “lost” and, therefore, the elimination of the disputed CCL charges is not confiscatory.

9. The New Hampshire Supreme Court’s interpretation of Tariff 85 is based upon its understanding of the meaning of the words in that tariff and does not change or otherwise disturb the factual findings made by the Commission in this case. The Court’s decision does not change the fact that the Commission, all the competitive carriers and even Verizon by its behavior (and that of its agent) understood that the CCL charge does not apply when the CCL service is not used. Because neither the Commission nor the parties believed that the disputed charge applied, because there were no substantial revenues from those charges in the past and because it is likely that FairPoint’s purchase price did not reflect the application of the bulk of the disputed charges, as a matter of economics, FairPoint has lost nothing. Thus, there simply is no confiscation.

10. FairPoint's argument that the issue of tariff modification is beyond the scope of this proceeding elevates form over substance and overlooks the fact that the Commission may amend its prior procedural orders without a hearing. *See* RSA 365:28. Thus, as the Order *Nisi* provides sufficient notice of the tariff modification issue, it satisfies the requirements of RSA 365:28 and therefore constitutes a lawful modification of any prior procedural order which might be interpreted as indicating that the tariff modification issue would be dealt with in another proceeding or separate docket. Accordingly, the Commission may properly consider the tariff interpretation issue in the instant proceeding.

WHEREFORE, for the reasons discussed above, BayRing respectfully requests that the Commission:

- A. Permit parties to comment on any tariff modification language that initially goes into effect;
- B. Deny FairPoint's request for any changes to its existing rates;
- C. Deny FairPoint's request for a hearing;
- D. Allow the Order *Nisi* to go into effect on September 10, 2009; and
- E. Grant such further relief as it deems appropriate.

Date: September 4, 2009

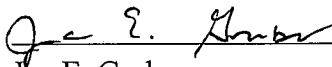
Respectfully submitted,

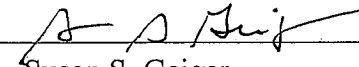
AT&T CORP.

**FREEDOM RING COMMUNICATIONS D/B/A
BAY RING COMMUNICATIONS**

By its attorney

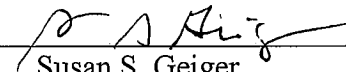
By its Attorneys,
ORR & RENO, P.A.


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has on this 4th day of September, 2009 either been mailed first class postage prepaid or e-mailed to the parties named on the Service List in the above-captioned matter.


Susan S. Geiger

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