STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire re: Access Charges	DT 06-067

COMPETITIVE CARRIERS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ON INTERCONNECTION CHARGE ISSUE

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 Business; Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc., a Level 3 company (collectively, the "Competitive Carriers") move to dismiss or for summary judgment on that portion of this docket addressing the proposal of Northern New England Telephone Operations, LLC, d/b/a FairPoint Communications – NNE ("FairPoint") to increase the Interconnection Charge imposed on intrastate switched access services in New Hampshire.

As of December 29, 2011, federal law caps all of FairPoint's intrastate switched access rate elements at the levels in effect on that date. 47 C.F.R. § 51.907(a); *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 801 & Fig. 9 (released Nov. 18, 2011) (*"Connect America Fund Order"* or *"Order"*). Accordingly, FairPoint's proposal to increase the Interconnection Charge

is prohibited by federal law. The Commission, therefore, should dismiss or enter summary judgment rejecting FairPoint's proposed increase.

Introduction

Nearly four years ago, the Commission determined that FairPoint's predecessor, Verizon New England Inc. ("Verizon"), was not entitled to collect Carrier Common Line ("CCL") charges as an element of its switched access rates when a Verizon common line was not utilized in the provision of a call. Order Interpreting Tariff, Order No. 24,837 (Mar. 21, 2008). The New Hampshire Supreme Court, based on a strict reading of the language in FairPoint's access tariff, disagreed with the Commission's rationale for eliminating the charge on the calls at issue, and reversed the Commission's decision. *Appeal of Verizon New England*, 158 N.H. 693 (2009). Subsequently, in the August 11, 2009 Order *Nisi* (Order No. 25,002), the Commission directed FairPoint, which had taken over Verizon's New Hampshire operations by then, to file tariff revisions eliminating the CCL charge when no FairPoint common line is used in the call.

On September 10, 2009, FairPoint filed two proposed amendments to its switched access tariff. FairPoint claimed that the first amendment eliminated the CCL charge when no FairPoint common line was involved, in purported compliance with the Order *Nisi*. In the second amendment, FairPoint proposed to revive a long-dormant switched access rate element called the Interconnection Charge, increasing the rate from $0.000000 to approximately one cent per minute on all switched access services that FairPoint provides. Procedural disagreements followed, and on October 12, 2009, FairPoint purported to withdraw both tariff filings and have them treated as illustrative. *See* Order No. 25,283 (Oct. 28, 2011) at 3, 31; Order No. 25,301 (Dec. 14, 2011) at 1-2.

FairPoint's bankruptcy intervened. Following FairPoint's emergence from bankruptcy in early 2011, the Commission issued a series of procedural orders in this docket. The current status of FairPoint's proposed amendments is:

- Regarding the proposed tariff amendments to eliminate the CCL charge, the issues of whether the proposed amendments comply with the Order *Nisi* and the effective date of those amendments have been briefed and are awaiting a decision by the Commission. Order No. 25,295 (Nov. 30, 2011) at 4.

- The proposed tariff amendments increasing the Interconnection Charge have been withdrawn at FairPoint's request. Order No. 25,283 at 31; Order No. 25,301 at 1. Also at FairPoint's request, the amendments related to the Interconnection Charge are being treated as illustrative and are under investigation by the Commission pursuant to the procedural schedule established in Order No. 25,295 (granting FairPoint's request for an extension of the previously-established schedule).

On November 18, 2011, the Federal Communications Commission ("FCC") released the *Connect America Fund Order*. As described in detail below, among many other actions, the FCC adopted rules capping all intrastate switched access rate elements at the levels in effect on December 29, 2011. On that date, FairPoint's Interconnection Charge was $0.000000. FairPoint Tariff NHPUC No. 3, § 30.6.6.[1]

Legal Standard

When the Commission's rules do not provide a specific procedure to govern the conduct of a docket, the Commission typically looks by analogy to New Hampshire Superior Court rules and procedures. *See, e.g., In re Warner Village Water District — Petition of Peter St. James et al.,* DW 06-001, Order Following Pre-Hearing Conference, Order No. 24,625, at 6 (May 18, 2006) (analogizing to motion for preliminary injunction); *In re Pennichuck Water Works, Inc. — Petition for Permanent and Temporary Rate Increase,* DW 06-073, Order on Motion to Compel

[1] http://www.puc.nh.gov/Regulatory/Tariffs/FairPoint/TARIFF%203/NH%20TRF%20ACCESS%20PUC%2003%20FAIRPOINT%20SECTION%207%20-%2031%20FINAL.pdf

Discovery, Order No. 24,725, at 6-7 (Jan. 12, 2007) (applying standards of Superior Court Rule 35(c) to discovery dispute).

The Commission has granted motions to dismiss in appropriate circumstances. *In re Lamplighter Mobile Home Park — Investigation Whether Lamplighter Mobile Home Park Is a Public Utility,* DW 09-267, Order Denying Petition and Granting Motion to Dismiss, Order No. 25,224 (May 19, 2011). In analyzing a motion to dismiss, the court (or in this case, the Commission) must consider "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Beane v. Dana S. Beane & Co., P.C.,* 160 N.H. 708, 711 (2010); *Williams v. O'Brien,* 140 N.H. 595, 597 (1995). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. *Beane,* 160 N.H. at 711; *Williams,* 140 N.H. at 597-98. "The court 'must rigorously scrutinize the complaint to determine whether, *on its face,* it asserts a cause of action.'" *Williams,* 140 N.H. at 597-98 (quoting *Jay Edwards, Inc. v. Baker,* 130 N.H. 41, 44-45, 534 A.2d 706, 708 (1987)) (emphasis in original). Dismissal is appropriate if the facts pled do not constitute a basis for legal relief. *Beane,* 160 N.H. at 711.

The standard for summary judgment is equally well established. "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. "Pursuant to RSA 491:8-a, the trial court *is obligated* to grant summary judgment when, after considering all the evidence presented in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Manchenton v. Auto Leasing Corp.,* 135 N.H. 298, 300-01 (1992) (emphasis added); *see*

Morse v. Goduti, 146 N.H. 697, 698 (2001). A disputed fact is material for purposes of summary judgment only if it affects the outcome of the litigation under applicable law. *Blagbrough v. Town of Wilton,* 145 N.H. 118, 121 (2000).

Based on these standards, the Commission must dismiss, or grant summary judgment rejecting, FairPoint's proposed tariff amendments increasing the Interconnection Charge. FairPoint's amendment proposal (which seeks a rate increase and is analogous to a complaint seeking relief in court) "is not reasonably susceptible of a construction that would permit recovery," because federal law caps all of FairPoint's intrastate switched access charges at the rates that were in effect on December 29th. Therefore, FairPoint's request for an increase to its Interconnection Charge must be dismissed. Similarly, because there is no dispute as to any material fact concerning the Interconnection Charge, and recently-adopted federal regulations bar FairPoint from increasing any intrastate access rate element, the Competitive Carriers are entitled as a matter of law to a decision rejecting the proposed Interconnection Charge increase.

Discussion

I. Federal Law Prohibits FairPoint's Proposed Increase to the Interconnection Charge.

A. Federal Regulations Cap FairPoint's Access Rates as of December 29, 2011.

FairPoint's proposal to increase the Interconnection Charge is prohibited by federal law, under regulations that became effective December 29, 2011. In the *Connect America Fund Order,* the FCC "comprehensively reform[ed] and modernize[d] the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation." *Id.,* ¶ 1. As a key part

of that effort, the FCC "adopt[ed] bill-and-keep as the default methodology for all intercarrier compensation traffic." *Id.*, ¶ 736.

To implement these determinations, the FCC adopted new regulations. *Connect America Fund Order,* Appendix A. These regulations became effective 30 days after the *Order* was published in the Federal Register. *Id.*, ¶ 1428. The Federal Register publication was issued on November 29, 2011. 76 Fed. Reg. 73830 (Nov. 29, 2011). Thus, the new federal regulations became effective on December 29, 2011.

As a first step in the transition to a bill-and-keep regime, the federal regulations capped the intrastate switched access rates of price-cap carriers like FairPoint[2] at the levels in effect on the regulations' effective date.

> Notwithstanding any other provision of the Commission's rules, on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], 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.

47 C.F.R. § 51.907(a) (p. 508 of the *Order*) (italicized emphasis added; capitalized emphasis and bracketed text in original). In turn, the definition of End Office Access Services is a follows:

> (d) End Office Access Service. End Office Access Service means: (1) The switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises;
>
> (2) The routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other

[2] There is no question that FairPoint is a price-cap carrier under the FCC's regulations. *See In re China Telephone Co. et al. Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief,* WC Dkt. No. 10-47, Order, DA 10-208, 26 FCC Rcd. 4824, ¶ 5 (May 10, 2010) (FairPoint's operations that were acquired from Verizon are subject to price-cap regulation). In addition, the FCC's map at http://www.fcc.gov/encyclopedia/price-cap-resources demonstrates that FairPoint is a price-cap carrier throughout New Hampshire.

If, however, FairPoint is not subject to price-cap regulation in any relevant portion of its service territory in the state, then in that portion FairPoint is a "rate-of-return carrier" under 47 C.F.R. § 51.903(g) (p. 507 of the *Order*). In such areas, rates for terminating End Office Access Services and Tandem-Switched Transport Access Services are capped on December 29th. 47 C.F.R. § 51.909(a)(2) (p. 511 of the *Order*); *Order,* ¶ 801 and Fig. 9.

> arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or facilities used; or
>
> (3) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. End Office Access Service rate elements for an incumbent local exchange carrier include the local switching rate elements specified in §69.106 of this chapter, the carrier common line rate elements specified in §69.154 of this chapter, *and the intrastate rate elements for functionally equivalent access services. End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on local switching access minutes, including the information surcharge and residual rate elements.* End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.
>
> Note to paragraph (d): *For incumbent local exchange carriers, residual rate elements may include, for example, state Transport Interconnection Charges, Residual Interconnection Charges,* and PICCs. For non-incumbent local exchange carriers, residual rate elements may include any functionally equivalent access service.

47 C.F.R. § 51.903(d) (emphasis added) (pp. 506-07 of the *Order*).

FairPoint's proposed Interconnection Charge is unquestionably a "state Transport Interconnection Charge" or a "Residual Interconnection Charge." Therefore, it is a "residual rate element" under the Note to Subsection (d). As such, it is included within the definition of End Office Switched Access Service set forth in § 51.903(d). Section 51.907(a) caps such rates as of December 29th. To increase such rates after that date is unlawful.

The FCC's text explaining the regulations reiterated and amplified that intrastate access rate elements were capped at the rates in effect on December 29th:

> [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). Further, "The transition imposes a cap on originating intrastate access charges for price cap carriers at current rates as of the effective date of the rules." *Id.*, ¶ 805.

In addition, in Figure 9 in the *Order* the FCC "set forth [its] transition path for terminating end office switching and certain transport rate elements and reciprocal compensation charges." *Id.*, ¶ 800. Figure 9 states, plainly and simply, that for price-cap carriers, "All intercarrier switched access rate elements, including interstate and intrastate originating and terminating and reciprocal compensation rates are capped." *Id.*, ¶ 801 and Figure 9.

Nothing could be more clear. Because FairPoint's proposed increase in the Interconnection Charge is prohibited by federal law, the Commission forthwith should dismiss or enter summary judgment on that aspect of this proceeding.

B. The Federal Rules are Effective and Govern the Commission's Decision.

As noted above, the federal regulations adopted in the *Connect America Fund Order* became effective on December 29, 2011. *Connect America Fund Order,* ¶¶ 1412, 1428; 76 Fed. Reg. 73830 (Nov. 29, 2011). They set forth federal law governing the issue of FairPoint's proposal to increase the Interconnection Charge.

In the *Order,* the FCC specifically found that it had jurisdiction over (among other things) intrastate switched access rates. *Id.*, ¶¶ 760-82. The FCC further determined that it had the authority to adopt the transitional mechanism announced in the *Order,* which balances the desired intercarrier compensation reforms with the potential market disruptions to the detriment of consumers and carriers. *Id.*, ¶¶ 809-10.

In addition, the FCC specified the special role that state Commissions would play in the program of intercarrier compensation reform set out in the *Order.* In particular, the state

Commissions will "continue to oversee the tariffing of intrastate rate reductions during the transition period." *Id.*, ¶ 790; *see id.*, ¶ 796. The FCC explained at length the state Commissions' roles and responsibilities during the transition period as follows:

> Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate elements, and capping other intrastate rates, states will play a critical role implementing and enforcing intercarrier compensation reforms. In particular, state oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under our framework, rates for intrastate access traffic will remain in intrastate tariffs. As a result, to ensure compliance with the framework and to ensure carriers are not taking actions that could enable a windfall and/or double recovery, state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework; and *guard against attempts to raise capped intercarrier compensation rates,* as well as unanticipated types of gamesmanship. Consistent with states' existing authority, therefore, states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this Order. Moreover, state commissions will continue to review and approve interconnection agreements and associated reciprocal compensation rates to ensure that they are consistent with the new federal framework and transition. Thus, we will be working in partnership with states to monitor carriers' compliance with our rules, thereby ensuring that consumers throughout the country will realize the tremendous benefits of ICC reform.

Id., ¶ 813 (emphasis added).

Thus, the Commission should act promptly to discharge its responsibility under federal law to ensure that the federal regulations, in particular the caps on intrastate switched access rate elements specified in the *Order,* are implemented. To do so, the Commission should reject FairPoint's proposed increase to the Interconnection Charge forthwith.

II. FairPoint's December 22nd Purported Tariff Filing Does Not Alter the Result.

On December 22, 2011, FairPoint refiled its Interconnection Charge proposal. FairPoint's action came a mere eight days after the Commission had rejected a substantively identical filing that FairPoint made on November 30, 2011. Order No. 25,301 (Dec. 14, 2011).

In Order No. 25,301, the Commission explained that the Interconnection Charge was being investigated pursuant to a schedule that already had been established in this docket, and which recently had been extended at FairPoint's request. *Id.* at 2. As the Commission noted, FairPoint has acknowledged that the Interconnection Charge is before the Commission for determination in this docket. *Id.* at 3. Accordingly, the Commission rejected FairPoint's November 30th filing without prejudice to its continued consideration under the schedule in this case. *Id.* Heedless of the Commission's decision and rationale for that decision, FairPoint refiled the identical Interconnection Charge proposal on December 22nd.

As AT&T, joined by EarthLink Business, Level 3, and BayRing, noted in its December 23rd letter, FairPoint's filing represented the kind of gamesmanship against which the FCC warned state Commissions to be vigilant. *Connect America Fund Order,* ¶ 813. But FairPoint's trick play does not fool anyone. As AT&T explained in its December 23 letter, the Commission should reject the filing immediately as a procedurally improper, back-door attempt to have the Commission reconsider its December 14 rejection of an identical tariff filing, and as violative of the procedure and schedule the Commission has established for evaluation of FairPoint's Interconnection Charge proposal.

In addition, that a rate increase proposal may be on file as of the effective date of the federal regulations is of no help to FairPoint. Nothing in the federal regulations grants an exception from the December 29th rate caps to proposed rate increases or illustrative filings pending on that date. To the contrary, the federal regulations are clear: FairPoint must cap all intrastate switched access rate elements at the rates in effect on the effective date of those regulations, December 29, 2011. 47 C.F.R. § 51.907(a).

Further, in the *Connect America Fund Order,* the FCC consistently described its rules as

imposing caps on switched access rates "in effect" on December 29th or "current" as of that date. For example:

> [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.

Connect America Fund Order, ¶ 801 (emphasis added; footnotes omitted). Also:

> The transition imposes a cap on originating intrastate access charges for price cap carriers *at current rates* as of the effective date of the rules.

Id., ¶ 805 (emphasis added). Thus rate increases that were "pending," "proposed," or "under review" on December 29, 2011 died on the vine that day.

The FCC anticipated that carriers would engage in "gamesmanship" in order to escape the rate caps and rate reductions required by the *Connect America Fund Order*. *Id.,* ¶ 813. As a result, the FCC issued a special mandate to state Commissions to be vigilant against efforts to circumvent the federal requirements. In particular, the FCC admonished state Commissions to "guard against attempts to raise capped intercarrier compensation rates . . . . Consistent with states' existing authority, therefore, states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this Order." *Id.*

Consistent with the expectation that state Commissions will require carriers to refile noncomplying intrastate tariffs, of course, is that state Commissions will reject tariff filings that violate the federal regulations. FairPoint's Interconnection Charge proposal conflicts with those regulations, and the Commission should not hesitate to reject it.

Conclusion

As explained above, FairPoint's proposed increase in the Interconnection Charge contravenes federal law. The Commission, therefore, must either dismiss or grant summary judgment rejecting FairPoint's proposal.

January 9, 2012

Respectfully Submitted,

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Certificate of Service

I certify that on this 9th day of January, 2012, copies of the foregoing Motion were served by electronic mail or by U.S. mail to the Service List.

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