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' REPLY TO FAIRPOINT'S OBJECTION AND IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The Competitive Carriers[1] respectfully file this reply in further support of their Motion to Dismiss or for Summary Judgment (the "Motion").

New facts subsequent to the filing of the Motion and of FairPoint's January 19, 2012 Objection (the "Objection") provide additional support for the Motion and undercut FairPoint's Objection. Specifically, the Commission's Order No. 25,319, issued on Friday, January 20, 2012, has eliminated the sole argument on which FairPoint based its Objection: that a purported tariff filing was pending, and that filing allows FairPoint to escape the caps on intrastate rate elements that went into effect on December 29, 2011. Even apart from the effect of Order No. 25,319, however, FairPoint's Objection was based on mischaracterizations of the *Connect America Fund Order*[2] and the federal regulations adopted in that order. FairPoint's positions set out in its Objection violate federal policy and, if adopted, would lead to absurd results. Finally, summary judgment is proper on this issue.

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[1] 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).

[2] *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).

Discussion

I. The Last Sentence in Footnote 1495 Is Inapplicable.

FairPoint's Objection hinges on one sentence in one footnote of the 759-page *Connect America Fund Order*:

> 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.

Connect America Fund Order, ¶ 801, fn. 1495, last sentence. For numerous reasons, that sentence is inapplicable to FairPoint's Interconnection Charge proposal at issue here. First, there is no factual foundation for the sentence's applicability, in that the Commission properly found in Order 25,319 (and a series of preceding orders) that FairPoint's proposed tariff amendments implementing the Interconnection Charge were illustrative only. Even if the amendments were pending, the subject sentence in footnote 1495 has no applicability to a New Hampshire tariff amendment affecting only intrastate rates.

A. There Is No Pending Tariff Amendment.

Whatever the scope of the exception created by the last sentence in footnote 1495,[3] it cannot resurrect a tariff proposal that the Commission repeatedly has rejected. At least twice, the Commission has rejected FairPoint's proposed amendment, deeming it illustrative for purposes of further investigation. Order Nos. 25,319 and 25,301. Those rulings continued a process under which the Commission would treat the Interconnection Charge tariff proposal as illustrative and investigate it pursuant to the schedule established by the Commission in this docket. Order No. 25,283 (Oct. 28, 2011).

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[3] As shown in Part I.B, that exception applies only to federal tariff filings for two categories of interstate access rate elements.

What FairPoint consistently seems to forget is that it, itself, requested that its Interconnection Charge filing be withdrawn and treated as illustrative for purposes of investigation. Objection to Joint Motion for Clarification and Expedited Relief of Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE, Oct. 12, 2009, at 4. As the Commission pointed out in Order No. 25,319, the Commission established a process and set a schedule in this docket to investigate the Interconnection Charge proposal. To implement that process, the Commission issued a number of procedural orders. One of these, in particular, granted FairPoint's request for additional time to prepare its case in support of the illustrative Interconnection Charge proposal. Order No. 25,295 (Nov. 30, 2011).

FairPoint did not seek reconsideration of any relevant procedural order. Order No. 25,319 at 9. Instead, it brazenly sought to change the rules mid-game by purporting to refile its tariff amendments outside the process the Commission established in this docket. Worse, it did so just one day after it moved to extend the procedural schedule in this docket, and on the same day that the Commission accommodated FairPoint's extension request in Order No. 25,295. The Commission correctly rejected FairPoint's November 30th filing in Order No. 25,301, but, eight days later, FairPoint refiled a substantively identical proposal.

FairPoint's serial filings of purported tariff amendments outside this docket are obvious attempts to circumvent a process that the Commission established for review of FairPoint's proposed rate increase. But FairPoint may not, to borrow its words, "mak[e] *any* tariff filing it chooses." Objection at 4 (emphasis in original). FairPoint's actions are the worst form of gamesmanship and represent precisely the sort of behavior the FCC warned state Commissions to guard against. *Connect America Fund Order,* ¶ 813.[4]

[4] FairPoint attempts to divert attention from its own gamesmanship by suggesting impropriety in the timing of the Competitive Carriers' Motion. Contrary to FairPoint's assertions, there is nothing wrong about the timing of the

In addition, FairPoint's position regarding the purported tariff filing would lead to absurd results. Under FairPoint's convoluted theory that RSA 378:6, I(b) applies to its purported filing[5], the Commission could take eight months, or until August 22, 2012, to complete its review of the proposed Interconnection Charge increase. However, under the FCC regulations adopted in the *Connect America Fund Order,* FairPoint is obligated to significantly reduce its intrastate access rates on July 1, 2012 as the next step in the FCC's transition to a nationwide bill-and-keep regime. 47 C.F.R. § 51.907(b); *Connect America Fund Order,* ¶ 801 and Figure 9.[6] FairPoint's position would permit the Commission to authorize FairPoint to raise the Interconnection Charge access rate element seven weeks *after* the FCC deadline for a significant *reduction* in intrastate access rates. There is no point spending the Commission's and parties' time, effort, and resources on such a futile quest. The Commission properly rejected FairPoint's filings and the procedural theories on which they were based.

The Commission — *twice* — properly rejected FairPoint's purported tariff filings as violative of the Commission's directives and the procedures already in place to review FairPoint's Interconnection Charge proposal. Now, consistent with the procedures established in this docket, the Commission should reject FairPoint's Interconnection Charge proposal as contrary to federal law.

Motion. The FCC's regulations became effective on December 29, 2011. Until that date, they were subject to stay or modification by the FCC or a reviewing court. The Competitive Carriers did not think it appropriate to file a dispositive motion based on FCC regulations until those regulations had legal force. Given that the regulations' effective date was during the holiday week, the Competitive Carriers filed their Motion as soon as practicable thereafter.

[5] Note, however, that this is another expedient flip-flop in FairPoint's position. In October 2009, FairPoint contended that RSA 378:6, I did not apply to its Interconnection Charge filing. Objection to Joint Motion for Clarification and Expedited Relief of Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE, Oct. 12, 2009, at 4.

[6] Price cap carriers are obligated to reduce most intrastate terminating access rates by one-half the difference between such intrastate rates and the carrier's interstate rates. *Id.*

B. The Last Sentence in Footnote 1495 Is Inapplicable to Intrastate Tariff Amendments.

A second reason why the last sentence in footnote 1495 is no help to FairPoint is that it does not apply to the intrastate access rates at issue here. By its terms, the sentence applies only to two categories of *interstate* access rate elements contained in the "traffic sensitive basket" and the "trunking basket" described 47 C.F.R. §§ 61.42(d)(2)-(3). This provision, of course, is a regulation governing *interstate* access charges. The phrase "such rate element" refers only to the elements described in the cited federal regulations, and to *FCC* tariff filings relating to such charges. The phrase does not extend to other charges and tariff filings, particularly *state* tariff filings for *intrastate* access charges.

That the sentence in footnote 1495 refers only to interstate rate elements also is clear from the placement of the footnote in the text in which it appears. Footnote 1495 follows the first sentence in paragraph 801: "Thus, at 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.[1495]" (Emphasis added.) Only later, in the third sentence of paragraph 801 (and after another, intervening footnote) does a reference to intrastate rates appear: "For price cap carriers, all intrastate rates will also be capped . . . ."

Further, the applicable FCC regulation makes clear that FairPoint's proposed intrastate Interconnection Charge is not subject to whatever exception exists in the last sentence of footnote 1495. 47 C.F.R. § 51.907(a) states, in its entirety:

> 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. *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.

47 C.F.R. § 51.907(a) (p. 508 of the *Order*) (italicized emphasis added; capitalized emphasis in original).[7] Thus, for purposes of the rate cap in § 51.907(a), the issue of whether a rate element is within the "traffic sensitive basket" or the "trunking basket" arises only if the access service is not otherwise defined as an End Office Access Service or Tandem Switched Access Service.

As described in the Motion, however, the FCC regulations specifically include intrastate interconnection charges within the category of End Office Access Service. Motion, at 6-7. The "note to paragraph (d)" of 47 C.F.R. § 51.903 specifically lists "state Transport Interconnection Charges" and "state . . . Residual Interconnection Charges" as examples of "residual rate elements" within the definition of End Office 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*).

As an element of End Office Access Services, FairPoint's Interconnection Charge is not subject to whatever exception from rate caps that footnote 1495 might provide for *interstate* rate elements in the FCC "traffic sensitive basket" or "trunking basket."[8]

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[7] FairPoint does not make any argument that it is not a Price Cap Carrier for purposes of the FCC regulations.

[8] For the same reason, whether the Interconnection Charge is within the FCC regulations' "trunking basket" also is irrelevant if the Interconnection Charge is an element of Tandem Switched Access Service, which includes "tandem switching and common transport between the tandem switch and end office." 47 C.F.R. § 51.903(i)(1).

Moreover, even if intrastate access rate elements somehow can be brought within the scope of the interstate rate baskets set forth in 47 C.F.R. § 61.42, FairPoint's claim that its Interconnection Charge is within the interstate trunking basket is contradicted by 47 C.F.R. § 61.42(d)(1), which includes residual interconnection charges under § 69.155 in the "CMT basket."

C. FairPoint's Proposal Contravenes Federal Policy.

As noted in the Motion, the FCC has established bill-and-keep as the default methodology for all intercarrier compensation traffic. Motion at 5-6; *see Connect America Fund Order,* ¶ 736. To implement that goal, the FCC has established a multi-year step-down process for reducing intercarrier compensation rates to the bill-and-keep end point. 47 C.F.R. § 51.907; *Connect America Fund Order,* ¶ 801 & Figure 9. FairPoint's proposed increase to its Interconnection Charge contravenes that national goal, and the Commission may not sustain it.

As both the Commission and the FCC recognized, FairPoint is not without alternatives to generate additional revenue. *See* Order No. 25,319 at 13-15; *Connect America Fund Order,* ¶¶ 745-46, 750. Indeed, FairPoint recognized the potential for such an outcome in Mr. Skrivan's November 3, 2011 Supplemental Testimony, which devoted two full pages out of 18 to the issue of increasing local rates to make up the loss of CCL revenue. But, as the Commission correctly observed, FairPoint has done little to explore such alternatives. Order No. 25,319 at 13-15. Instead of continuing to tilt at the windmill of unlawful access charge increases, FairPoint should evaluate and, if appropriate, propose legally permissible revenue alternatives.

II. Summary Judgment Is Appropriate.

There is no merit to FairPoint's criticism of the Competitive Carriers' summary judgment motion. The Competitive Carriers established that, as a legal matter, the Interconnection Charge Proposal contravened federal law and policy and, further, that there is no dispute as to any material fact — i.e., one that affects the outcome of the litigation — regarding the lawfulness of increasing the Interconnection Charge in the face of the new federal rate caps. For example, there is no dispute as to the text of the Interconnection Charge proposal and of the regulations adopted in the *Connect America Fund Order,* and the effective date of those regulations.

Further, "Once the moving party has shown the absence of a genuine issue of material fact, the opposing party must set forth specific facts showing the existence of a genuine issue for trial. Mere denials or vague and general allegations of expected proof are not enough." *Blagbrough v. Town of Wilton,* 145 N.H. 118, 121 (2000) (internal quotation marks omitted). In its Objection, FairPoint did not make even a vague suggestion as to what its proof is expected to show; it merely alluded to outstanding data requests. Objection at 5.[9] FairPoint's meager proffer, therefore, is less even than what the Supreme Court in *Blagbrough* said was insufficient to defeat summary judgment. The Commission should grant the Competitive Carriers' Motion.

Conclusion

As demonstrated in the Motion and above, FairPoint's proposed increase in the Interconnection Charge contravenes federal law and policy. The Commission, therefore, should dismiss or grant summary judgment rejecting FairPoint's proposal.

January 26, 2012

Respectfully Submitted,

Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all d/b/a EarthLink Business

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[9] Pursuant to the schedule established in Order No. 25,284, the Competitive Carriers served a single, joint set of data requests on November 17, 2011, *before* the FCC released the text of the *Connect America Fund Order.*

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Certificate of Service

I certify that on January 26, 2012, copies of the foregoing Reply were served by electronic mail or by U.S. mail to the Service List.

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