**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 OBJECTION TO MOTION FOR REHEARING BY NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC d/b/a FAIRPOINT COMMUNICATIONS – NNE AND CONDITIONAL WITHDRAWAL OF TARIFF FILING

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") and AT&T Corp. ("AT&T"), and respectfully request that the New Hampshire Public Utilities Commission ("the Commission") deny the Motion for Rehearing and Conditional Withdrawal of Tariff Filing filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications ("FairPoint").

## I. Introduction

On August 11, 2009, this Commission issued its Order *Nisi* Directing FairPoint to Revise Tariff. The Order says: "[W]e direct FairPoint . . . to modify its tariff to clarify that FairPoint shall charge CCL [Carrier Common Line charge] only when a FairPoint common line is used in the provision of switched access services." The Order is based on the Commission's prior, straightforward finding – which was not disturbed on appeal – that the common line charge "was intended to recover . . . a portion of the costs of the local loop or common line," just as the name "common line charge" implies. Order No. 24,837, *Re Freedom Ring Communications, LLC dba Bayring Communications*, DT 06-067, 2008 WL 904488, at *18 (N.H. Pub. Utils. Comm'n, Mar. 21, 2008).

Under RSA 541:3, FairPoint had 30 days after the August 11, 2009 Order to apply for rehearing. It did not. Instead, on September 10, 2009, FairPoint filed tariff pages that purported to carry out the Commission's Order – but in reality sought to nullify the Commission's Order. Although FairPoint's revised tariff pages provided that FairPoint would charge for use of the CCL only when a carrier actually sent traffic over a FairPoint common line, as the Commission directed, FairPoint's filing also tried to do something the Commission most certainly did not authorize: to unilaterally recreate the long-abandoned "Interconnection Charge" and thus negate the effect of the Commission's Order *Nisi* (or to use FairPoint's term, make the Order "revenue neutral"). In this way, FairPoint sought to achieve the exact same result it would have achieved if it had simply crossed its arms and refused to obey the Commission's Order.

Nothing in the Commission's Order *Nisi*, or any other Order for that matter, even mentions (much less authorizes FairPoint to reinstate) the "Interconnection Charge" as a way to recover the same revenues from the same wholesale customers that the Commission already has told FairPoint it is not entitled to collect. Nothing in any Commission order endorses FairPoint's underlying view that it is somehow entitled to a "revenue neutral" offset when the Commission corrected FairPoint's misapplication of its CCL. In fact the opposite is true: in docket DE 90-002, the Commission expressly determined that in a competitive intra-LATA toll market it would be inappropriate to set access rates to guarantee any particular revenue requirement. *See* 74 NH PUC 283, 287 (June 10, 1993) ("An effectively competitive marketplace is totally at odds with any notion that [FairPoint predecessor] NET's total revenues can be 'guaranteed' to remain at any particular level.")

It appears that FairPoint used the Interconnection Charge for a purely cosmetic purpose: so that it could say it was "increasing" a charge rather than creating a new one. But FairPoint's

semantics are fruitless. Resurrecting an old, long-dead charge (a relic of which was technically left on the tariffs at a rate of zero) is no better than creating a new one. In fact, it's worse. The Interconnection Charge itself was eliminated years ago, and with good reason. The Interconnection Charge was first implemented in the 1980s when then-New England Tel restructured its intrastate Local Transport rates to match its interstate Local Transport Rate structure. The restructuring, which was largely a national initiative, was necessary to eliminate subsidies that had been embedded in intrastate transport rates that were causing a good deal of uneconomic "bypass" (*i.e.*, customers and carriers constructing alternate transport arrangements to avoid paying the subsidies, even though economically priced local carrier-provided transport arrangements were more efficient). As part of the restructure, a number of states moved the transport subsidies into a "Residual Interconnection Charge," or sometimes just "Interconnection Charge," and then phased out the "Interconnection Charge" over a few years. There was never any function associated with the Interconnection Charge. It never had any basis in cost. It did not reflect any service being provided. It was simply a transitional mechanism for eliminating uneconomic subsidies, and that transition was completed years ago. Re-implementing that subsidy "plug" rate element now would be a huge step *backwards* in implementing appropriate wholesale pricing.

FairPoint made its tariff filing with an October 10, 2009 effective date. The revised tariff pages correcting FairPoint's application of the CCL pursuant to the Commission's Order *Nisi* took effect on that day. FairPoint cannot now unilaterally withdraw those now-effective tariff pages, any more than any other utility can unilaterally withdraw effective tariff pages.

FairPoint's attempt to unilaterally reinstate the "Interconnection Charge" is another story. Those tariff pages were never authorized by the Commission, were suspended from taking effect,

and are currently under investigation. On September 23, 2009, the Commission initiated proceedings to review those portions of FairPoint's tariff filings – in part due to "comments" and a "conditional request for hearing" that FairPoint itself filed. In accordance with the schedule the Commission established, FairPoint supplemented its tariff filing and filed direct testimony on September 28, 2009. Pursuant to the Commission-established schedule, AT&T and other parties filed discovery requests on October 11, 2009. Among other things, AT&T asked FairPoint to provide whatever legal basis it had – if any – for its "Interconnection Charge" and its underlying theory that the Order *Nisi* was supposed to be "revenue neutral."

Clearly, FairPoint sees that its self-help strategy is unraveling. So, on October 12, 2009, FairPoint filed a "motion for rehearing and conditional withdrawal of tariff filing." That is, FairPoint sought to withdraw *both* (i) the portion of its September 10, 2009 tariff filing which implemented the Commission's Order *Nisi* and has already gone into effect, and (ii) the portion of its tariff filing which sought to nullify the Order *Nisi* and is under investigation, not having gone into effect.

## II. FairPoint's Motion is Procedurally Deficient.

FairPoint's motion comes long after the statutory deadline for rehearing motions has expired. The deadline for "any party" to "apply for a rehearing" is "30 days after any order or decision has been made by the commission." RSA 541:3. The Order *Nisi* was "made by the Commission" on August 11, 2009. Thus, the deadline for requesting a rehearing or reconsideration of that order was September 10, 2009 – over a month before FairPoint filed its motion for rehearing. FairPoint's assertion that the Order *Nisi* took effect on September 10, 2009 is irrelevant: the applicable statute quite plainly measures the 30-day deadline as "30 days

after any order or decision has been made" – not "30 days after any order takes effect" or "30 days after tariff pages are filed."

Moreover, FairPoint has already chosen and pursued a different, mutually exclusive course: it filed tariff language purporting to implement the Order *Nisi*. The tariff language correcting the application of the CCL is now in effect and FairPoint cannot unilaterally withdraw it at this point. Moreover, the tariff language FairPoint improperly inserted, in an attempt to reignite the long-extinguished "Interconnection Charge" and nullify the Order *Nisi,* is not in effect, but is under investigation. FairPoint itself filed comments that led the Commission to initiate the present proceeding, and FairPoint has participated in that proceeding by making a supplemental tariff filing and by submitting direct testimony. AT&T and other parties have also participated, by propounding discovery requests, and they are about to file responsive testimony due October 19, 2009. It is far too late for FairPoint to turn back the clock, or retroactively pursue a different path, in a manner that is at odds with Commission orders, detrimental to justice and injurious to the rights of other parties.

FairPoint's complaints about due process are unfounded. FairPoint has not been deprived of any process.[1] It has received notice and will receive a hearing on the issues raised by its proposal to revivify the Interconnection Charge and wipe out the Order *Nisi*. And it has already begun to participate in the process established by the Commission. That notice, and the opportunity to be heard, are all the "process" that FairPoint is "due."

[1] It is utterly disingenuous for FairPoint to feign due process concerns, after FairPoint tried to slip a substantial rate increase into a compliance tariff and thus trampled the requirement that it provide adequate notice of rate increases to its captive wholesale customers.

## III. FairPoint's substantive arguments are makeweight and simply wrong.

There is no basis for FairPoint's claim that the Order *Nisi* is barred by the Settlement Agreement adopted in conjunction with the FairPoint-Verizon merger order. First, FairPoint's argument is based on the faulty premise that the Order constitutes a rate decrease. The Order *Nisi* does not constitute a decrease in the CCL rate or in any wholesale rate. It simply says that FairPoint is not to *apply* a common line charge, regardless of the rate, to traffic that does not originate or terminate at a FairPoint end user, *i.e.* over a FairPoint common line.

In any event, FairPoint's argument fails even if one assumes for the sake of argument that the Order *Nisi* did constitute a rate decrease. Paragraph 4(h) of the Settlement Agreement states that "[n]otwithstanding anything herein to the contrary, FairPoint shall have the same rights and obligations as Verizon in connection with and arising out of *any* final order which may be issued within NHPUC Docket 06-067." *See* Order No. 24,823, *Verizon New England, Inc.*, DT 07-011, at 75. The Commission's order approving the merger explains that "We understand the agreement . . . to mean that FairPoint will honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis." *Id.* Thus the Settlement Agreement does not serve as some sort of bar to the Commission's order; instead, it is expressly subordinate to (and exempts) a Commission order in this proceeding, "notwithstanding anything herein to the contrary."[2]

Likewise, there is no basis for FairPoint's claim that the Order *Nisi* is somehow contrary to the Supreme Court mandate reversing Order No. 24,837. The Court's opinion expressly states that "[i]f the tariff should be amended, it should be amended as a result of regulatory process."

[2] More fundamentally, even if the Commission had breached the Settlement Agreement, FairPoint does not have the extraordinary power to unilaterally impose whatever charges *it* deems reasonable to enforce *its* own view of the Settlement.

*Appeal of Verizon New England, Inc.*, 158 N.H. 693, 700 (2009). The Order *Nisi* follows that instruction.

Should the Commission decide to entertain FairPoint's arguments, AT&T and BayRing reserve all rights to provide a further response. For now, though, the conclusive point is that the Commission should not and cannot entertain FairPoint's arguments, as the statutory deadline for the "rehearing" that FairPoint now seeks has long since expired and likewise FairPoint cannot unilaterally withdraw the CCL tariff pages that have already gone into effect. FairPoint is, of course, free to withdraw its proposed "Interconnection Charge" tariff pages because they have not gone into effect and are under investigation.

## IV. Conclusion

WHEREFORE, for the reasons discussed above, BayRing and AT&T respectfully request that the Commission deny FairPoint's Motion for Rehearing and Conditional Withdrawal of Tariff Filing.

Date: October 16, 2009

Respectfully submitted,

**AT&T CORP.**

By its attorneys,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Opposition has on this 16th day of October, 2009 either been mailed first class postage prepaid or e-mailed to the parties named on the Service List in the above-captioned matter.

Kimberly J. Gold