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' OBJECTION TO FAIRPOINT'S EMERGENCY MOTION FOR ENFORCEMENT OF COMMISSION ORDER

The Competitive Carriers[1] object to FairPoint's Emergency Motion for Enforcement of the Commission's Order No. 25,319 (the "Emergency Motion"). In Order No. 25,319 ("2012 CCL Order"), the Commission concluded, among other things, that the revisions to FairPoint's tariff[2] on the application of the carrier common line ("CCL") charge went into effect on January 21, 2012.

The Emergency Motion is flawed in numerous ways. First, the 2012 CCL Order is not yet final and, in any event, does not even impose the payment obligation that FairPoint seeks to enforce, so that the Motion is essentially an improper second motion for reconsideration of the Order. Second, FairPoint has not set forth the legal standard governing its Motion and has failed to show that any harm it may suffer is irreparable or that FairPoint itself is not responsible for creating the "emergency" here. Third, the Motion violates the Competitive Carriers' due process rights. Finally, FairPoint misleads the Commission with regard to the financial effect of the FCC

[1] Freedom Ring Communications, LLC, d/b/a BayRing Communications ("BayRing"); AT&T Corp.; and Sprint Communications Company, L.P. and Sprint Spectrum, L.P.

[2] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint") took the place of Verizon New Hampshire ("Verizon") in this docket after it purchased Verizon's New Hampshire franchise and network. *See In re Verizon New England et al. – Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823 (Feb. 25, 2009). As part of its transaction with Verizon, FairPoint adopted Verizon's New Hampshire tariffs.

order that FairPoint claims is the impetus for the Motion. Accordingly, for the reasons set forth below, the Commission should deny the Emergency Motion.

BACKGROUND[3]

This docket began on April 28, 2006, when BayRing filed a Petition requesting that the Commission investigate Verizon's practice of billing CCL charges for calls that did not involve a Verizon end user or a Verizon-provided local loop. On June 23, 2006, the Commission issued an Order of Notice announcing its determination that BayRing's complaint warranted further investigation and stating that, if the challenged interpretation of the CCL tariff were found reasonable, it would investigate whether prospective modifications were warranted. Over the next 21 months, the matter was fully litigated, including discovery, Staff-led technical sessions, extensive evidentiary submissions, a multi-day hearing, and post-hearing briefs from multiple parties. The Commission also granted petitions to intervene submitted by AT&T Corp., CRC Communications of Maine, Inc., Earthlink Business (and its constituent companies), Global Crossing Telecommunications, Inc. (a Level 3 company), Otel Telekom, Inc., Qwest Communications Co., segTEL, Inc., RNK, Inc d/b/a RNK Telecom, XO Communications, Inc., Sprint Communications Company, L.P. and Sprint Spectrum, L.P.[4]

On March 21, 2008, the Commission entered Order No. 24,837, finding that the CCL rate element was intended to recover the cost of the local loop (or common line) and determining that Verizon's imposition of CCL charges on calls not involving a Verizon end user or Verizon-provided local loop was "impermissible." Order No. 24,837 at 31, 32 ("March 2008 Order"). The Commission ordered Verizon to cease billing CCL charges for such calls. March 2008

[3] The Competitive Carriers note that the background provided herein is not intended to be comprehensive, but instead highlights those events relevant to the Commission's consideration of the current motion.
[4] RNK, Inc. and XO Communications, Inc. subsequently sought to withdraw their intervention in the docket. Neither carrier is mentioned in the Emergency Motion.

Order at 33. Accordingly, Verizon's practice of billing CCL charges for calls not involving a Verizon end user or Verizon-provided local loop was precluded as of March 21, 2008. The Commission also found that Verizon owed refunds to customers who had been billed the inappropriate CCL charges and that the extent of those refunds would be determined in Phase II of the docket. March 2008 Order at 32-33.

On April 21, 2008, FairPoint filed a Motion for Rehearing and Petition to Intervene. In its Petition to Intervene, FairPoint agreed to take the record in the docket "as is." On August 8, 2008, the Commission granted FairPoint's Petition to Intervene but denied rehearing of the March 2008 Order. Order No. 24,886 at 11 (Aug. 8, 2008). The Commission subsequently declined to stay Phase II of the docket but found that Verizon (and potentially FairPoint) would not be required to pay any reparations that may be due to the Competitive Carriers until any appeal to the New Hampshire Supreme Court was concluded. Order No. 24,913 at 9-10 (Oct. 31, 2008).

FairPoint and Verizon appealed the March 2008 Order to the New Hampshire Supreme Court. On May 7, 2009, the Court issued its decision, which was confined to the issue of the Commission's interpretation of the Verizon/FairPoint CCL tariff. *Appeal of Verizon New England, Inc.*, 158 N.H. 693, 972 A.2d 996 (2009). The Court disagreed with the Commission's interpretation of whether the then-existing tariff allowed FairPoint to apply CCL charges when no FairPoint common line was involved. The Court stated, however, that there was no bar to the Commission amending the CCL tariff through the regulatory process. *Id.* at 700.

On August 11, 2009, the Commission issued Order No. 25,002 on a *nisi* basis ("Order *Nisi*"). The Commission ordered FairPoint to make specific modifications to the language of the CCL tariff to clarify that it would "charge CCL only when a FairPoint common line is used in

the provision of switched access services." Order *Nisi* at 2. The Commission required FairPoint to file the revised tariff pages within 30 days. *Id.* at 3. FairPoint filed the revised CCL tariff pages, in compliance with the Order *Nisi*, on September 10, 2009. FairPoint's cover letter, as well as the tariff pages themselves, specified an effective date of October 10, 2009. *See* Sept. 10, 2009 Letter of Kevin M. Shea and attachments.

FairPoint filed for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code on October 26, 2009. *In re FairPoint Communications, Inc. et al.*, Case No. 09-16335 (S.D.N.Y.). The filing caused this docket to remain inactive while the bankruptcy proceeded. FairPoint emerged from bankruptcy on January 24, 2011.

The Commission subsequently issued Order No. 25,295, directing the parties to submit briefs on what the effective date should be for the amended language in FairPoint's tariff relating to the CCL charge. Order No. 25,295 at 4 (Nov. 30, 2011). AT&T, BayRing, FairPoint, and Sprint submitted briefs responding to this question.

On January 20, 2012, the Commission issued Order No. 25,319, finding that the revisions to FairPoint's CCL tariff, which were originally submitted on September 10, 2009, complied with the Commission's prior directive (in the Order *Nisi*) to amend the tariff, and that those revisions would take effect on January 21, 2012. 2012 CCL Order at 9-10, 19.

In mid-February 2012, FairPoint sent letters to several of the Competitive Carriers demanding that those carriers pay all CCL charges owed to FairPoint by March 31, 2012. Affidavit of E. Christopher Nurse ¶ 7 ("Nurse Affidavit") (attached); Affidavit of Kevin A. Bearden at p. 2 ("Bearden Affidavit")(attached). These demand letters referred to the FCC's *Connect America Fund Order*[5] and stated that the carriers' refusal to pay the CCL charges by

[5] *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (released Nov. 18, 2011) ("*Connect America Fund Order*").

March 31 would reduce the amount of transitional recovery for which FairPoint is eligible under the FCC's order.[6] The letters also stated that the *Connect America Fund Order* establishes "a detailed formula for the calculation of the transitional recovery. Thus, FairPoint's damages if [a carrier] refuses to pay can be calculated precisely and as such are recoverable in litigation." Exhibit A to Nurse Affidavit, p. 2.[7]

On February 17, 2012, FairPoint filed a Motion for Rehearing and/or Reconsideration of the 2012 CCL Order. The Competitive Carriers also filed a Motion for Reconsideration of the order. These motions are still pending before the Commission.

On February 22, 2012, FairPoint issued an Accessible Letter to its wholesale customers regarding changes it made to its billing of CCL charges as a result of the 2012 CCL Order. *See* Exhibit B to Nurse Affidavit. The letter states, "pending any relief from the New Hampshire Supreme Court," FairPoint "effectively has reduced the carrier common line charge to zero ($0.00)" when a FairPoint common line is not used. *Id.*

ARGUMENT

1. The Emergency Motion Is Premature.

The Emergency Motion is premised on the assumption that the 2012 CCL Order is final and that the Competitive Carriers therefore are required to obey it. But FairPoint's own conduct belies the premise that the order is final.

In mid-February, FairPoint filed a Motion for Rehearing and/or Reconsideration of the 2012 CCL Order (as did several of the Competitive Carriers).[8] Until the Commission rules on

[6] A copy of the letter AT&T received, from which any confidential AT&T financial information has been redacted, is Exhibit A to the Nurse Affidavit. Similarly, the letter Sprint received is attached to the Bearden Affidavit.
[7] Identical language is contained in the letter Sprint received, and that letter is attached to the Bearden Affidavit.
[8] The Emergency Motion neglects to mention these reconsideration motions.

those motions, any rights or obligations created by the 2012 CCL Order are subject to change. The Order, therefore, cannot be deemed "final" for enforcement or appellate purposes. Moreover, FairPoint already has made clear its intention to appeal the Commission's actions to the New Hampshire Supreme Court. *See* FairPoint Motion to Certify Interlocutory Transfer Statement, Docket No. DT 06-067, at 8 (May 24, 2011) (stating that FairPoint "must appeal any final ruling by the Commission in this proceeding, *favorable or not*") (emphasis in original); *see also* FairPoint Industry Notification – Accessible Letter PRC 0138-02222012 (Feb. 22, 2012) (referring to reduction in CCL tariff required by 2012 CCL Order as effective "pending any relief from the New Hampshire Supreme Court") (attached as Exhibit B to Nurse Affidavit). It is also possible that some of the Competitive Carriers may seek to appeal the 2012 CCL Order or the Commission's eventual order on the motions for reconsideration. Given the near certainty that the 2012 CCL Order will be appealed, FairPoint is premature in seeking to enforce rights supposedly conveyed by that order.

It is noteworthy that, after Verizon and FairPoint appealed the March 2008 Order to the New Hampshire Supreme Court, the Commission found that it would "not require reimbursement [of inappropriately billed CCL charges] until after the appeal is concluded." Order No. 24,913 at 8 (Oct. 31, 2008). The Commission should act in a consistent manner with respect to FairPoint's demands for payment here.

2. The Emergency Motion Overreaches and Impermissibly Seeks Untimely Reconsideration of the 2012 CCL Order.

The Emergency Motion seeks to enforce an obligation on the Competitive Carriers that the 2012 CCL Order does not actually contain. FairPoint asks the Commission to "enforce the ... Order and direct that the competitive carriers make payment of all past due CCL charges... or

establish such other arrangements[9] as are acceptable to FairPoint." Emergency Motion at 5. However, because the 2012 CCL Order contains no language directing anyone to pay anything, there is no payment obligation for the Commission to enforce. The "Ordering" provisions at the end of the Order simply 1) provide an effective date for FairPoint's previously filed CCL tariff pages; 2) reject other tariff pages governing FairPoint's proposed Interconnection Charge; and 3) state that the Commission will address any remaining procedural matters in the future. 2012 CCL Order at 19. The Order neither discusses CCL charges that FairPoint may have billed other carriers but has not collected, nor directs any carrier to pay such charges.[10] Because the 2012 CCL Order does not even discuss – let alone impose – the payment obligation that FairPoint now seeks to enforce, the Emergency Motion must fail.

Because the 2012 CCL Order is devoid of any language imposing a payment obligation on the Competitive Carriers, it appears that FairPoint's goal in filing the motion must be to have the Commission create such an obligation now. As such, the Emergency Motion is an impermissible and untimely backdoor request for modification or clarification of the 2012 CCL Order. If FairPoint wanted the Commission to clarify that the Order imposed on other carriers an explicit obligation to pay any past due CCL charges immediately,[11] it should have included such an argument in its February 17 Motion for Rehearing and/or Reconsideration. Its failure to do so bars FairPoint from inserting a payment obligation into this case through what amounts to a second motion for rehearing of the 2012 CCL Order. *See Petition of Ellis*, 138 N.H. 159, 161

[9] BayRing has contacted FairPoint twice - as early as February 24, 2012, and subsequently- concerning FairPoint's demands for payment of disputed CCL charges. However, BayRing has received no response from FairPoint in approximately one month's time. Similarly, Sprint has received no response to the letter it forwarded to FairPoint in response to FairPoint's February 14, 2012 letter. *See* Bearden Affidavit at 3 and attached March 6, 2012 letter.

[10] *Compare Hollis Telephone, Inc. et al.*, Order Addressing Petition for Authority to Block the Termination of Traffic from Global NAPS Inc., DT 08-028, Order No. 25,043 at 26 (Nov. 10, 2009) (explicitly ordering Global NAPS to pay billing carrier's outstanding invoices within 30 days).

[11] The Competitive Carriers do not concede that the 2012 CCL Order could have included such a payment obligation, given the scope of this docket.

(1993) (noting that RSA 541:2 authorizes only one rehearing motion and that RSA 541:4 specifies that such motion must contain "every ground" on which a movant claims commission's underlying order was unjust or unreasonable).

Moreover, given that the 2012 CCL Order was issued two months ago, and that RSA 541:3 requires that a motion for rehearing be filed within 30 days of the release of the order for which rehearing is sought, the Commission must deny as untimely any new rehearing motion by FairPoint.

3. The Emergency Motion Fails to Articulate a Standard or Otherwise Establish a Need for Extraordinary Relief.

Notably absent from the Emergency Motion is any explicit discussion of the legal standard on which the motion is based. Such an omission is understandable, because a litigant seldom has the audacity to ask an adjudicator to enter a multi-million dollar judgment in its favor – in less than three weeks – without submitting credible, verified evidence such as an affidavit, prefiled testimony and/or copies of invoices substantiating the amounts it claims are owed.

FairPoint, however, does suggest that two legal concepts are pertinent to its motion: 1) whether it will suffer "irreparable harm" if it does not receive full payment from the Competitive Carriers by March 31 (Emergency Motion at 1, 2, 3); and 2) whether its request is in the public interest. *Id.* at 4.

The applicability of such concepts here is uncertain, since they appear to be drawn from situations where a party is requesting relief of limited duration, such as a temporary injunction or the stay of an order pending appeal. *See Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316 (1982) (discussing standard for issuance of injunction); *Union Fidelity Life Ins. Co. v. Whaland*, 114 N.H. 549, 550 (1974) (discussing standard for suspension of order pending appeal). In

contrast, FairPoint here is asking the Commission to make a decision ordering the Competitive Carriers to pay the CCL charges for once and for all. However, even assuming these two legal concepts are relevant to the Commission's evaluation of the Emergency Motion, FairPoint has failed to show that they support its request.

With regard to "irreparable harm," although FairPoint pussyfoots around, it never actually states that it will suffer irreparable injury if it does not receive payment by March 31. It states instead that it may suffer "possibly irreparable harm" (Emergency Motion at 1, 2), and circuitously asserts that "there is no assurance that this harm will not be irreparable." *Id.* at 3. A showing of irreparable harm is a prerequisite for extraordinary relief. *See Murphy, supra*, 122 N.H. at 316, *Union Fidelity, supra*, 114 N.H. at 550. Because FairPoint does not unequivocally assert that it will suffer such harm, the Commission should deny the Emergency Motion.

Moreover, FairPoint has stated in the collection letters sent to the Competitive Carriers that the effect of their failure to pay the past due CCL charges on the calculation of FairPoint's baseline under the *Connect America Fund Order* is "quantifiable" and that its damages "can be calculated precisely." Exhibit A to Nurse Affidavit, at 2; February 14, 2012 Letter attached to Bearden Affidavit. Where FairPoint's alleged injury is purely monetary and thus easily compensable, it would be inappropriate for the Commission to provide the extraordinary remedy sought by the Emergency Motion. *Cf. Murphy, supra*, 122 N.H. at 317 (stating that, when only monetary damage is at issue, courts should seriously consider less restrictive alternatives to injunctions).

With regard to the "public interest," FairPoint's assertions are equally shaky. The Emergency Motion states only that it is "in the public interest for the Commission to ensure that FairPoint, the carrier of last resort in much of the state, is able to recover its costs to the greatest

lawful extent." Emergency Motion at 4. However, FairPoint's status as a carrier of last resort is completely irrelevant to this docket. And the assertion that FairPoint merely wants to recover its costs to the greatest "lawful" extent is belied by the Emergency Motion's gross overstatement of the unpaid CCL charges that would be used to calculate its recoverable costs under the *Connect America Fund Order*.[12] If FairPoint were to use the $2.1 million figure set forth in Exhibit 1 in its baseline calculation, it would be attempting to set its recoverable costs at a level far greater than the FCC's order allows.

FairPoint also fails to mention that the public interest is served when a utility's rates are just and reasonable. *See* RSA 378:7; *New England Telephone & Telegraph Co. v. State*, 113 N.H. 92, 95 (1973) (stating that Commission's duty is to ensure that "the public will not pay higher rates than are required"). The Commission has repeatedly found since March 2008 that the then-existing Verizon/FairPoint CCL tariff constituted an unjust and unreasonable rate. *See* March 2008 Order at 31; Order *Nisi* at 2; Order No. 25,219 at 7 (May 4, 2011); Order No. 25,283 at 16, 17 (Oct. 28, 2011); 2012 CCL Order at 11. Enforcement of a tariff that has been found to be unjust and unreasonable cannot, as a matter of logic, be in the public interest. The Commission therefore should deny the Emergency Motion.

4. The Emergency Motion And Abbreviated Time For Objections Violate Principles of Due Process of Law.

FairPoint's lack of reasonable notice of its claims to its opponents and its failure to provide those opponents with a reasonable opportunity to defend themselves violates principles of due process of law and fundamental fairness.

[12] This overstatement is described in Section 5 of the Competitive Carriers' Objection.

Well-settled precedent establishes beyond certainty that to grant FairPoint the relief it seeks – immediate payment of funds it alleges are overdue – would deprive the Competitive Carriers of their constitutionally guaranteed right to due process under the law. The primary underpinning of this right is the notion that all citizens are entitled to fundamental fairness when the government seeks to take action which will deprive them of their property or liberty interests. *City of Claremont v. Truell*, 126 N.H. 30, 36 (1985)(internal citations omitted). *Meaningful notice* of the government's action is central to this notion of fundamental fairness. *Id.* Thus, while it is incumbent upon the Commission to provide the Competitive Carriers adequate time to respond to FairPoint's last-minute request, adequate time simply does not exist for the Commission to provide *meaningful notice* to the Competitive Carriers. The Emergency Motion would have the Commission receive the Motion and render a decision in time for payment to be made a mere sixteen (16) days after the filing of the motion. The law requires far more.

Under New Hampshire law, "it is fundamental that notice be timely": i.e., given at a time when the deprivation can still be prevented. "Otherwise, the right to notice is meaningless." *City of Claremont*, 126 N.H. at 38 (internal citations omitted). "It is well settled that "[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 35 (internal citations omitted).

In the matter at bar, FairPoint seeks an order from the Commission depriving the Competitive Carriers of substantial monies – over $2 million collectively – a mere sixteen (16) days from the date the Emergency Motion was filed. Worse still, FairPoint makes its request with absolutely no *evidence* to support its Motion other than Exhibit 1, an unverified summary statement. As described below, the procedural flaws inherent in the Emergency Motion render it

impossible for the Commission to grant FairPoint's requested relief without depriving the Competitive Carriers of their due process rights.

Precedent establishes that, for notice to be *meaningful*, potentially aggrieved parties must be afforded the opportunity to present their objections. *City of Claremont*, 126 N.H. at 35. Inherent in that opportunity is the party's ability to review such evidence as has been presented, to have access to the witnesses providing such evidence, to seek discovery, and to form arguments and defenses against the requested relief. The Commission should note, as a foundational matter, that FairPoint has failed to present *evidence* sufficient to support its claim. The Emergency Motion contains no more than legal arguments and an unverified attachment. While the Competitive Carriers do not doubt the earnestness of FairPoint's counsel, more is required to convert legal arguments and supporting attachments into cognizable evidence. The Commission's rules squarely place the burden of proof on the moving party. "Unless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence." Puc 203.25. FairPoint has utterly failed to carry its burden of proof.

It is undisputable that each carrier has the right to challenge FairPoint's allegations regarding amounts it claims may be due for CCL services provided and billed during the disputed period. The *evidence* – in the form of sworn affidavits – submitted by the Competitive Carriers rebuts the unverified attachment presented by FairPoint and illustrates the need for further examination of the issues raised in the Emergency Motion. For instance, FairPoint has presented Sprint with a claimed past due amount that includes sums which it has already paid, and FairPoint has ignored Sprint's requests to engage in a dialogue to clarify the matter.[13] Similarly, BayRing has contacted FairPoint on two occasions – February 24, 2012, and

[13] *See* Bearden Affidavit, pp. 2-3.

subsequently – concerning FairPoint's demand for payment of disputed CCL charges but has thus far received no response from FairPoint in approximately one month's time. Finally, the past due amount FairPoint asserts against AT&T is grossly inaccurate with regard to FairPoint's potential recovery under the Connect America Fund Order, and AT&T cannot reconcile it with the bills it has received.[14]

In addition to FairPoint's failure to provide evidence supporting its claims, the Emergency Motion would not accommodate the requirement of the Commission's rules that "... any persons granted intervenor status may conduct cross-examination of a witness in order to develop a full and true disclosure of the facts." PUC 203.24(a). The rule is necessary to effectuate the meaningful notice and opportunity to present objections guaranteed by the Constitution. The rule also makes all the more clear why FairPoint's Emergency Motion and unverified attachment cannot be deemed *evidence*: since FairPoint has not tendered a sworn statement attesting to the authenticity of the alleged billing summary, all other interested parties are deprived of their right to cross-examine the sponsor of that statement. Such a procedural defect cannot be ignored as it constitutes a violation of the fundamentals rights of the Competitive Carriers.

Additionally, the Commission cannot take administrative notice of the billing summary as the foundation of any subsequent decision it may issue. The Commission cannot take notice of facts and information that are neither derived from its own records nor from hearings unless all affected parties are given adequate notice, and a full and reasonable opportunity to challenge and rebut the matter(s) to be noticed by the Commission. *See Legislative Utility Consumers' Council v. Public Service Co. of New Hampshire*, 119 N.H. 332, 351 (1979). Accordingly, the Commission cannot take administrative notice of FairPoint's unverified summary

[14] *See* Nurse Affidavit ¶¶ 9-10.

contemporaneous to rendering a decision on the Emergency Motion; it must first give all affected parties the opportunity to fully investigate and contest the information to be noticed. Due process requires as much.

In view of the foregoing, it is obvious that the Commission simply cannot proceed in the manner FairPoint requests, even if the Commission so desired and FairPoint had otherwise established a right to relief (which it has not). FairPoint's Emergency Motion is supported by no actual evidence, so it is procedurally defective. In order to consider the Motion, the Commission would have to provide the Competitive Carriers an opportunity to seek discovery from FairPoint on its unverified, redacted submission, cross-examine FairPoint's non-identified witness(es), and offer their own witnesses and evidence. In sum, a rush to consider the Emergency Motion in the impossibly short time-frame created by FairPoint's election to seek relief at the eleventh hour is simply not possible without depriving the Competitive Carriers of the rights and constitutional protections to which they are entitled.

5. The Emergency Motion Is Misleading.

Putting aside whether FairPoint has met the standard for emergency relief, the Emergency Motion is substantially misleading with regard to the extent of financial harm FairPoint will supposedly suffer under the FCC's *Connect America Fund Order* if it does not get paid by March 31, 2012. The motion strongly suggests that FairPoint's inability to collect, by March 31, the entire $2.1 million set forth in Exhibit 1 to the Emergency Motion will affect its baseline revenue and thus the amount of transitional recovery for which it will be eligible under

the FCC's order.[15] In fact, the actual amount of unpaid CCL charges that would impact FairPoint's transitional recovery appears to be substantially smaller.

FairPoint is simply wrong in stating that its baseline will be calculated from access revenue "billed in" Fiscal Year 2011. Emergency Motion at 3. In reality, the *Connect America Fund Order* states that the baseline for a price cap incumbent local exchange carrier, such as FairPoint, will be derived from access revenues that "are billed *for service provided* in FY 2011." *Connect America Fund Order* ¶ 880 (emphasis added). As a result, bills for access services provided prior to October 1, 2010, or services provided after September 30, 2011,[16] do not count in calculating FairPoint's baseline.

Given FairPoint's failure to provide anything other than the total dollar amount of the unpaid charges set forth in Exhibit 1, it is difficult to state with certainty what bills are included in FairPoint's calculation. At least with regard to AT&T, it is certain that the listed unpaid balance[17] consists primarily of charges for services provided before Fiscal Year 2011, and it may also include charges for services provided after Fiscal Year 2011. If those ineligible charges are removed, AT&T's alleged unpaid balance would drop by more than 75 percent. Nurse Affidavit ¶ 10. Similarly, the difference between the amount Sprint believes is due and owing and the unpaid balance shown for Sprint on Exhibit 1 is a sum in the hundreds of thousands of dollars. Bearden Affidavit at p. 2. BayRing also cannot reconcile with its invoices from FairPoint the amount FairPoint lists in Exhibit 1 as due and owing from BayRing. Indeed, FairPoint even admits in the Emergency Motion that it is seeking to compel payment for services provided after

[15] *See* Emergency Motion at 4 (stating that without "payment of *all past due CCL charges*," FairPoint "will suffer a permanent reduction in its recoverable costs") (emphasis added).

[16] The FCC has defined "Fiscal Year 2011" as October 1, 2010, through September 30, 2011. *Connect America Fund Order* ¶ 851 n.1639.

[17] AT&T has not received the unredacted version of Exhibit 1. Counsel for FairPoint simply sent counsel for AT&T an email stating the amount in Exhibit 1 that FairPoint attributed to AT&T. FairPoint sent similar emails to Sprint and BayRing, and likewise Sprint and BayRing have not received an unredacted exhibit.

September 2011, since it complains that some carriers have failed to pay the reduced CCL rates that it imposed January 21, 2012, pursuant to the 2012 CCL Order. *See* Emergency Motion at 1.

The lack of detailed information from FairPoint also makes it difficult to know whether the $2.1 million in supposedly unpaid CCL charges includes both terminating and originating access charges, or only terminating charges. *See* Nurse Affidavit ¶ 12. The *Connect America Fund Order* provides that a price cap carrier's baseline is derived from revenues "being reduced as part of reform adopted" in the order. *Connect America Fund Order* ¶ 880. Only terminating intrastate access rates are being reduced by the FCC's order,[18] and thus only terminating intrastate access revenues can be used in the calculation of FairPoint's baseline.

The Emergency Motion is based on unsubstantiated and unreliable information regarding the financial effect that the unpaid CCL charges supposedly will have on FairPoint under the *Connect America Fund Order*. The Commission therefore should view FairPoint's claims of harm with great skepticism and should deny the Emergency Motion.

6. The "Emergency" Here Is FairPoint's Creation.

FairPoint has titled its filing an "Emergency Motion." However, if the Commission considers the history of this docket and FairPoint's conduct since the FCC issued the *Connect America Fund Order*, it is clear that FairPoint bears primary responsibility for any "emergency" it now faces as a result of the March 31 deadline.

First, the Emergency Motion fails to acknowledge the overwhelming effect that FairPoint's conduct has had on the pace of this docket. FairPoint's bankruptcy filing put resolution of the docket in limbo for more than 15 months, and its failure to follow the clear and simple instructions that the Commission provided in the Order *Nisi* in August 2009 about how to

[18] *See Connect America Fund Order* ¶ 888 (Price Cap Example) and 47 C.F.R. § 51.907(a).

revise the CCL tariff has caused the parties to file multiple rounds of briefs and the Commission to issue multiple orders.

Second, the *Connect America Fund Order* was issued on November 18, 2011 – approximately four months prior to FairPoint's request for *emergency* relief. FairPoint was clearly aware of the potential effects of the FCC's order, since it began quoting that order in its pleadings at least as early as January 18, 2012. *See* FairPoint's Objection to Motion to Dismiss or for Summary Judgment and Objection to Motion to Suspend or Modify Procedural Schedule, at 2 (Jan. 18, 2012). It thus is clear that FairPoint had reviewed that order several months before filing the Emergency Motion. Given FairPoint's awareness of the *Connect America Fund Order* and the implications of that order, it stretches credulity for FairPoint to argue now that this order creates an "emergency" situation and justifies expedited relief at the eleventh hour.[19] FairPoint should have asked the Commission months ago for whatever relief it believes is necessary to allow it to take full advantage of the FCC order.

In short, if FairPoint is now finds itself bumping up against a March 31 deadline for taking advantage of any multiplier effect on its recoverable revenue under the *Connect America Fund Order*, it is primarily to blame for that situation. Since this "emergency" was caused by circumstances largely within FairPoint's control, the Commission should deny the Emergency Motion.

CONCLUSION

For all of the reasons discussed above, the Commission must deny the Emergency Motion.

[19] Paradoxically, FairPoint's statement that it "plans to take legal action against the parties" that have not paid it (Emergency Motion at 3) shows that it anticipates that the emergency relief it seeks from the Commission cannot resolve its problems before the March 31 deadline.

March 21, 2012

Respectfully Submitted,

AT&T Corp.

By its attorney,

James A. Huttenhower (ssg)

James A. Huttenhower
AT&T Services Inc.
225 W. Randolph Street
Suite 25-D
Chicago, IL 60606
312-727-1444
jh7452@att.com

Freedom Ring Communications LLC d/b/a BayRing Communications

By its attorney,

S. Geiger

Susan S. Geiger
Orr & Reno, P.A.
One Eagle Square
Concord, NH 03302-3550
603-223-9154
sgeiger@orr-reno.com

Sprint Communications Company, L.P. and Sprint Spectrum, L.P.

By their attorney,

Benjamin J. Aron (ssg)

Benjamin J. Aron
Sprint Nextel Corporation
2001 Edmund Halley Drive, Room 208
Reston, Virginia 20191
(703) 592-7618 Tel.
(703) 592-7404 Fax
benjamin.aron@sprint.com

Certificate of Service

I hereby certify that on this 21st day of March, 2012, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.

S. Geiger

Susan S. Geiger 865253_1