

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Procedural Order and Supplemental Order of Notice

ORDER NO. 25,219

May 4, 2011

I. PROCEDURAL HISTORY

This docket involves the propriety of Verizon New Hampshire (Verizon) billing for carrier common line (CCL) charges that do not involve a Verizon end user or a Verizon-provided local loop. On March 21, 2008, the Commission issued Order No. 24,837 directing Verizon to cease billing for CCL under those circumstances.¹ *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order 24,837 (Mar. 21, 2008) at 33. Following the denial of a motion for rehearing, *see Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,886 (August 8, 2008), FairPoint appealed the Commission's order to the New Hampshire Supreme Court.

On May 7, 2009, the New Hampshire Supreme Court released its opinion in *In re Verizon New England, Inc.*, 153 N.H. 693, 697-98 (2009), where it held that under the terms of its tariff FairPoint could assess CCL charges even when a FairPoint end user was not involved or a FairPoint-provided common line was not used. Accordingly, the New Hampshire Supreme

¹ Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint) is the successor to Verizon's utility franchise and for simplicity further references in this order shall solely be to FairPoint.

Court reversed the Commission's decision regarding FairPoint's tariff. The Supreme Court further concluded:

The petitioners urge us to uphold the PUC's interpretation of Tariff No. 85 because, they contend, it is reasonable in light of the evolution of the telephone industry since the tariff was first adopted. Were we to review the PUC's tariff interpretation deferentially for mere reasonableness or rationality, we might find this argument persuasive. We review the PUC's tariff interpretation *de novo*, however, and although we approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence, we are obliged to give effect to the plain language used in the tariff. . . . If the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court.

Id. at 700 (quotations and citations omitted).

Following the issuance of the Supreme Court's opinion, on a *nisi* basis the Commission issued Order No. 25,002, which stated "The Commission's interpretation of the tariff was based on the evidence presented at hearing combined with its understanding of the industry and the purpose of the tariff charges." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,002 (Aug. 11, 2009) at 1. Further, the Commission stated:

Based upon the record developed in this proceeding, the Commission found that FairPoint's access tariff should permit the imposition of CCL charges only in those instances when a carrier uses FairPoint's common line and the common line facilitates the transport of the calls to a FairPoint end-user. Order No. 24,837 at 27. Because the language of the tariff does not clearly reflect this finding, we direct FairPoint, pursuant to RSA 378:1 and 378:3, to modify its tariff to clarify that FairPoint shall charge CCL only when a FairPoint common line is used in the provision of switched access services.

Id. at 2. Accordingly, the Commission ordered FairPoint to modify its tariff to comport with the Commission's finding.

On August 28, 2009, FairPoint filed comments and conditional request for rehearing. In that filing, FairPoint maintained its position on the purpose and propriety of the CCL charges and

argued that there was no basis to revise the tariff. Further, FairPoint contended that if the Commission still intended for the tariff to be revised, any revisions must be made in a “revenue neutral” manner. FairPoint’s contention was that not allowing a “revenue neutral” revision would deprive it of substantial money to which it is entitled and would be a breach of the agreement that allowed FairPoint to acquire its New Hampshire business, or would raise constitutional concerns. FairPoint concluded by stating, “[t]o ensure a just and reasonable result in such a situation, FairPoint respectfully requests that if the Commission does not intend for FairPoint to recover its costs through other means, that it conduct a hearing in accordance with RSA 378:7 so that FairPoint may be properly heard on this issue.” Comments and Conditional Request for Rehearing of FairPoint at 6.

On September 3, 2009, Global Crossing responded to FairPoint’s comments and on September 4, 2009 BayRing and AT&T jointly responded to FairPoint’s comments. Each of these responses contended, among other things, that FairPoint was required to revise its tariff and that it was not permitted to do so in a “revenue neutral” manner. On September 10, 2009, FairPoint filed new tariff pages which amended the CCL charge as directed by the Commission. In addition, to achieve “revenue neutrality,” FairPoint’s proposed new tariff pages also increased interconnection charges.

On September 23, 2009, the Commission issued Order No. 25,016, wherein the Commission concluded that, “an evidentiary hearing is necessary to address the issues raised by FairPoint’s August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers’ September 4 filings.” *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,016 (Sept. 23, 2009) at 3. That order noted that the

issues raised by the parties' filings included: "whether FairPoint's proposed tariff revisions are just and reasonable; whether the proposed interconnection charge is consistent with paragraph 9.1 of the Settlement Agreement in DT 07-011 approved by Order No. 24,823 (Feb. 25, 2008); whether the filing is properly considered under RSA 378:6, I or IV; and whether RSA 378:17-a III applies." *Id.* at 3-4. The order then set a schedule for testimony and discovery and a hearing for November 4, 2009.

On October 2, 2009, BayRing and AT&T filed a joint motion to clarify Order No. 25,016. In that motion, BayRing and AT&T sought clarification that the proposed changes to the CCL charge would be effective immediately, and that the schedule set by the Commission applied only to the interconnection charge filing. On October 12, 2009, FairPoint filed a motion for rehearing and for conditional withdrawal of its new tariff pages and sought rehearing of Order No. 25,002, as well as Order No. 25,016. FairPoint also requested that its new tariff pages be formally withdrawn and treated as "illustrative." On October 12, 2009, FairPoint objected to the joint motion to clarify and on October 19, 2009, BayRing, AT&T, One Communications, and Global Crossing all objected to FairPoint's October 12, 2009 motion for rehearing.

On October 16, 2009, the Commission issued a Secretarial Letter suspending the schedule as set in Order No. 25,016 while it considered the parties' motions. On November 2, 2009, Staff filed a memorandum recommending that action on various dockets, including the instant docket, be suspended for a period to permit FairPoint to focus on its bankruptcy restructuring. On November 6, 2009, Staff filed a new recommendation to extend the stay in this and other dockets. On November 10, 2009, the Commission issued a Secretarial Letter partially granting a stay and stating that an extension of the stay would be taken up at a later date. No

further Commission action occurred in this docket during the pendency of FairPoint's bankruptcy, from which it emerged on January 24, 2011.

On March 10, 2011, FairPoint filed a letter requesting that the Commission reactivate this proceeding and set a scheduling conference. According to FairPoint the following items are outstanding: (1) FairPoint's motion for rehearing of Order No. 25,002; (2) the suspended revised tariff; and (3) BayRing and AT&T's motion for clarification. On April 25, 2011, AT&T filed a letter requesting that the Commission rule on the two pending motions prior to scheduling further activity in the docket.

II. COMMISSION ANALYSIS

We begin by addressing FairPoint's August 28, 2009 comments and conditional request for rehearing and its October 12, 2009 motion for rehearing and conditional withdrawal of its tariff pages. As noted above, on August 11, 2009, the Commission issued Order No. 25,002 as a *nisi* order requiring FairPoint to revise its tariff to comport with the Commission's understanding of the purpose of the CCL charge and, on August 28, 2009, FairPoint requested that a hearing be held on the need for a "revenue neutral" change. On September 23, 2009, the Commission issued Order No. 25,016, which concluded that a hearing was needed and which outlined the scope of the hearing. Because Order No. 25,002 was issued on a *nisi* basis, it permitted FairPoint, or others, the opportunity to request that a hearing be held. On August 28, 2009, FairPoint made such a request. By issuing Order No. 25,016, the Commission concluded that a hearing was needed. In effect, therefore, FairPoint's motion for a hearing was granted, though a hearing was never held due to FairPoint's bankruptcy filing. We conclude that there is no basis

to grant rehearing of Order No. 25,002 because Order No. 25,016 already granted the relief sought by FairPoint relative to Order 25,002.

As to FairPoint's additional request that it be permitted to withdraw its tariff pages, we note that FairPoint disputes the applicability of certain statutory timing requirements concerning its tariff filing. We also note that by Secretarial Letter on October 16, 2009, the Commission suspended the procedural schedule established in Order No. 25,016. That suspension continues and therefore the tariff filing never went into effect. As a result, FairPoint's concerns about the statutory timing requirements are moot. We now grant FairPoint's request to withdraw its tariff pages and have them treated as illustrative so that they may form the basis for further investigation and proceedings without invoking the statutory timing constraints of RSA 378:6.

As to BayRing and AT&T's motion to clarify, Order No. 25,016 granted FairPoint's request for a hearing on its tariff filing and, given the time that has elapsed since this order, we cannot now say that a portion of the tariff ought to have been in effect at some prior date. Accordingly, we deny BayRing and AT&T's motion for clarification.

Going forward, we find it necessary to establish a new procedural schedule to govern the remainder of this proceeding. Accordingly, we shall set a prehearing conference and technical session to permit the parties the opportunity to present proposals for a procedural schedule for the remainder of the docket.

We do not intend to expand the scope of the docket or to re-litigate any of the issues that have already been decided. To that end, any procedural schedule will address the submission of and discovery regarding new information. By "new" information we mean any information that would have been filed relative to FairPoint's new tariff pages under the scope of the proceeding

as established in Order No. 25,016. Specifically, the scope shall include whether FairPoint's proposed tariff revisions are just and reasonable, to what degree the new tariff filing is affected by the settlement agreement in DT 07-011, and what statutory requirements cover the filing. *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,016 (Sept. 23, 2009) at 3-4. In addition, as was noted in Order No. 25,016:

Pursuant to NH Admin. Code Puc 1605, FairPoint is required to file supporting documents with a proposed tariff change. FairPoint did not file the required information and, therefore, the filing is not complete. In addition, in order to properly evaluate the proposed change in [its] tariff, pursuant to 1605.02(c), we will require FairPoint to file the information required in Puc 1604.08(c)(9).

Id. at 4. Though we are treating the tariff filing as illustrative, we still require that FairPoint submit the required supporting information set forth in Puc 1604.08(c)(9) on or before the date of the prehearing conference.

We will not re-litigate the purpose or propriety of the CCL charge. Apart from any conclusion about the words in the tariff itself, in Order No. 24,837 we specifically found that:

Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. We disagree. Based on the record before us, we find that the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 24,837 (March 21, 2008) at 31. That conclusion was not addressed or overturned by the Supreme Court, which based its analysis on the terms of the tariff alone. The Commission will not entertain further argument about this conclusion.

A new procedural schedule will comport with the intent of the Supreme Court when it stated that: "If the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court." *In re Verizon New England, Inc.*, 153 N.H. at 700. Moreover, in November 2006 the Commission found that "the consideration of prospective modifications to Verizon's tariff will be removed from the present proceeding and designated for resolution in a separate proceeding to be initiated at a later date if necessary." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,705 (Nov. 29, 2006) at 6. We implement here the substantive goal of that finding but, for administrative convenience, we will not assign a separate docket number to the proceeding. Accordingly, we will undertake an examination of the proposed modifications to FairPoint's tariff, including the propriety of increased interconnection charges.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's August 28, 2009 comments and conditional request for rehearing and October 12, 2009 motion for rehearing and conditional withdrawal of its tariff pages are granted in part and denied in part as set forth above; and it is

FURTHER ORDERED, that BayRing and AT&T's October 2, 2009 motion to clarify is denied; and it is

FURTHER ORDERED, that FairPoint submit the appropriate supporting information for its illustrative tariff filing on or before the date of the prehearing conference; and it is

FURTHER ORDERED, that a prehearing conference, pursuant to N.H. Code Admin. Rules Puc 203.15, be held before the Commission located at 21 S. Fruit St., Suite 10, Concord, New Hampshire on May 25, 2011 at 10:00 a.m., at which each party will provide a preliminary

statement of its position with regard to the petition and any of the issues set forth in N.H. Code Admin. Rules Puc 203.15 shall be considered; and it is

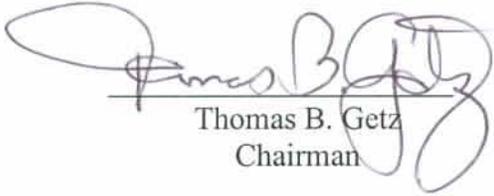
FURTHER ORDERED, that, immediately following the prehearing conference, FairPoint, the Staff of the Commission and any Intervenors hold a Technical Session to review FairPoint's filing and allow FairPoint to provide any amendments or updates to its filing; and it is

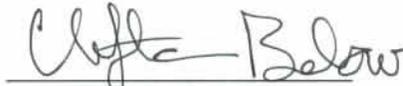
FURTHER ORDERED, that the Commission shall notify all persons desiring to be heard at this hearing by publishing a copy of this Supplemental Order of Notice no later than May 11, 2011, by publication on the Commission's website and through electronic distribution to all carriers operating in New Hampshire; and it is

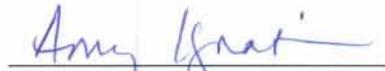
FURTHER ORDERED, that pursuant to N.H. Code Admin. Rules Puc 203.17, any party seeking to intervene in the proceeding shall submit to the Commission seven copies of a Petition to Intervene with copies sent to the Commission and the Office of the Consumer Advocate on or before May 20, 2011, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding, as required by N.H. Code Admin. Rule Puc 203.17 and RSA 541-A:32,I(b); and it is

FURTHER ORDERED, that any party objecting to a Petition to Intervene make said Objection on or before May 25, 2011.

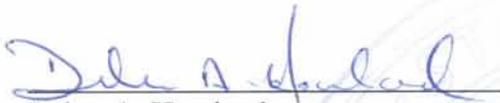
By order of the Public Utilities Commission of New Hampshire this fourth day of May,
2011.


Thomas B. Getz
Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Debra A. Howland
Executive Director

