STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

ONE COMMUNICATIONS' OPPOSITION TO FAIRPOINT'S MOTION FOR REHEARING OF THE ORDER NISI AND SCHEDULING ORDER

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 One Communications ("One Communications"), oppose the motion of Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE ("FairPoint") for rehearing of the August 11, 2009 Order *Nisi* (Order No. 25,002) and the September 23, 2009 Scheduling Order (Order No. 25,016) ("Rehearing Motion").

Summary

The Commission should deny the motion for rehearing of the Order *Nisi*. The motion is untimely under RSA 541:3, having been filed more than thirty days after the Commission issued the Order *Nisi*. In addition, FairPoint merely rehashes arguments that it previously made in its August 28, 2009 comments on the Order *Nisi*. Merely repeating arguments and asking for a different outcome do not constitute good grounds for rehearing under RSA 541:3.

If the Commission considers the substance of FairPoint's arguments against the Order *Nisi*, which it should not, then the Commission still should deny the motion. FairPoint has raised no meritorious argument. The Commission has the authority to consider the question of the

propriety of FairPoint's CCL charges in this Docket DT 06-067. Nothing in the Verizon/Fairpoint merger approval order prevents the Commission from eliminating the CCL charges in this docket. The Supreme Court decision reversing the March 2008 Order Interpreting Tariff, Order No. 24,837, March 21, 2008, had nothing to do with the Commission's ability to consider the appropriateness of the CCL charge on a prospective basis in this docket.

The Commission also should deny FairPoint's motion for rehearing of the Scheduling Order. Any further delay in the elimination of the CCL charge prejudices carriers that continue to be subject to the charge. The Commission correctly expedited the schedule to lessen that prejudice. If the schedule creates problems for FairPoint, the problems are of FairPoint's own making. Instead of simply complying with the Commission's directive to eliminate the CCL charge when no FairPoint end-user or common line is involved in a call, FairPoint's tariff filing improperly coupled elimination of the CCL charge with a request to raise other rates. FairPoint should not be heard to complain that it must justify such an increase on an expedited basis.

Discussion

I. FairPoint's Motion for Rehearing of the Order Nisi Is Untimely and Unjustified.

A. The Motion Is Untimely.

A motion for rehearing or reconsideration must be filed within thirty days of the date of the order. RSA 541:3. The Commission issued the Order *Nisi* on August 11; thirty days later was September 10. The deadline is past, and it is too late to seek reconsideration now.

That the Commission issued the August 11 order in *nisi* form does not affect his analysis. The statute is clear that the date from which the 30-day deadline begins to run is the date the order or decision was *made:* "Within 30 days after any order or decision has been made by the commission, any party . . . may apply for a rehearing . . . ." RSA 541:3. The Commission made

its decision to require FairPoint prospectively to eliminate the CCL charges on August 11. That the Order *Nisi* gave FairPoint another 30 days to comply with its directives does not affect this analysis.

It also does not affect the analysis that August 11 order was issued under the Commission's *nisi* practice. Consistent with the practice, as the Order *Nisi* makes clear, the Commission's decision in the Order *Nisi* stands unless the Commission countermands or modifies it. Order *Nisi* at 3. The Commission issued no such order. The Order *Nisi* remains the operative order regarding the CCL charge. The deadline for requesting rehearing has long since past.

B. FairPoint Merely Rehashes Arguments It Has Made Before.

In addition, the Commission should deny FairPoint's motion for rehearing of the Order *Nisi,* because FairPoint largely rehashes arguments it has made previously and unsuccessfully. It is well settled that the Commission will deny a motion for rehearing if the motion merely repeats arguments that a party has made before. As the Commission said earlier in this docket:

> RSA 541:3 permits the Commission to grant rehearing of an order when a petitioner's motion states good reason for such relief. Good reason may be shown by identifying specific matters that the Commission "overlooked or mistakenly conceived" in rendering its decision. *Dumais v. State,* 118 N.H. 309, 386 A.2d 1269 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003).

Order on Motions for Rehearing and Motion to Intervene, Order No. 24,886 at 7 (Aug. 8, 2008).

Even a cursory reading shows that FairPoint's motion merely reiterates arguments it made in its August 28 Comments on the Order *Nisi*. For example, in both the Rehearing Motion and August 28 Comments, FairPoint argued that the Commission had removed the issue of prospective tariff modifications from this docket. Rehearing Motion at 4-5; August 28 Comments at 2. FairPoint argued in both filings that eliminating the CCL charge violated the

Verizon/FairPoint transaction approval order. Rehearing Motion at 7-8; August 28 Comments at 6. Similarly, in the Rehearing Motion, FairPoint reiterates its earlier argument that the Supreme Court upheld imposition of the CCL charge under FairPoint's tariff. Rehearing Motion at 6; August 28 Comments at 4.

Indeed, FairPoint admits that it previously made the arguments it now repeats.

> On August 28, 2009, FairPoint filed its "Comments and Conditional Request for Hearing . . .", which pointed out, among other things, that the Commission had expressly removed the issue of prospective tariff changes from this proceeding in its Order dated November 29,2006 (Order No. 24,705). . . . FairPoint further asserted that an order directing FairPoint to reduce access rates without any offset to recover lost revenues would be in violation of the settlement agreement approved in the Merger Order and would be confiscatory in contravention of the New Hampshire and Federal constitutions.

Rehearing Motion at 2-3.

The Commission rejected the arguments in the August 28 Comments when it did not countermand the Order *Nisi.* FairPoint may not base a motion for rehearing on the arguments it unsuccessfully raised before.

II. There Is No Merit to FairPoint's Arguments.

Because FairPoint's motion for rehearing of the Order *Nisi* is untimely and a rerun of previous unsuccessful arguments, the Commission need not consider the substance of its arguments. If the Commission deems it appropriate to do so, however, it should still deny the motion, for none of FairPoint's arguments has merit.

A. The Commission Properly Issued the Order *Nisi* in Docket DT 06-067.

There is no merit to FairPoint's argument that the Commission could not issue the Order *Nisi* in this docket. As a matter of administrative efficiency and economic use of the Commission's and parties' resources, it makes no sense to commence a new docket and create a

new record. The most economical and efficient way to proceed is under the existing docket, with the existing parties, and on the basis of the existing record.

FairPoint has no grounds to complain about such a course of action. When it petitioned to intervene in this docket, FairPoint agreed to accept the record "as is." Petition of Northern New England Telephone Operations LLC to Intervene, April 21, 2008, at 2. Since its intervention, FairPoint has participated fully and vigorously in the reconsideration proceedings subsequent to the Commission's Order Interpreting Tariff and in the appeal of that order to the New Hampshire Supreme Court. FairPoint should not now be allowed to complain that this docket is not the appropriate place to continue the examination of its CCL charges.

To the extent that the Commission's November 2006 procedural order determined not to undertake prospective changes to the CCL provisions of Tariff No. 85 in this docket, the Commission was free to change that decision in the Order *Nisi*. The Commission always has the authority "to 'alter, amend, suspend, annul, set aside or otherwise modify any order' [it] issue[s]." *In re Public Service Company of New Hampshire — Proposed Restructuring Settlement,* DE 99-099, Order Concluding Phase One of Proceeding, Order No. 23,346, at 9 (Nov. 16, 1999) (citing RSA 365:28). RSA 365:28 provides:

> At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it. This hearing shall not be required when any prior order made by the commission was made under a provision of law that did not require a hearing and a hearing was, in fact, not held.

This provision should be liberally construed. *Meserve v. State of New Hampshire,* 119 N.H. 149, 152 (1979). And, while a decision to amend a prior order must meet the requirements of due process and be legally correct, *id.; In Re PSNH,* Order No. 23,346 at 9-10, those criteria were easily satisfied by the procedures the Commission employed to issue the Order *Nisi*. First,

no hearing is required in connection with procedural orders of the Commission; therefore, under the second sentence of RSA 365:28, no hearing is required to amend a prior procedural order. If some sort of hearing is required on the issue whether to consider prospective modifications to Tariff No. 85 in Docket DT 06-067, the *nisi* procedure provided it. There is no requirement of an *evidentiary* hearing. As FairPoint admitted in its August 28 Comments, the Commission's November 2006 decision was a contained in a procedural order. August 28 Comments at 2. As a rule, the Commission's procedural orders are issued on briefs. FairPoint in fact briefed the issue of the propriety of the Commission's altering its prior procedural order at page 2 of its August 28 Comments. That briefing comported with the normal process accorded procedural issues, and satisfied the requirements of due process. In addition, there was nothing legally incorrect about the Commission's determination to consider further issues surrounding the CCL charge in this docket as opposed to a new docket.

B. The FairPoint/Verizon Approval Order Does Not Prevent the Commission from Eliminating the CCL Charge.

Contrary to FairPoint's contention (Rehearing Motion at 7), *In re Verizon New England Inc. 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, 2008) (Settlement Approval Order), does not prevent the Commission from eliminating the CCL charge when a FairPoint common line is not involved. The Settlement Approval Order expressly found that FairPoint had agreed to be bound by any final order in this docket on a going-forward basis. *Id.* at 75.

As the Settlement Approval Order states, FairPoint's agreement was contained in a settlement stipulation between it and three CLECs (one of which was BayRing, a party to this docket). The three-CLEC stipulation states, "Notwithstanding 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." The use of the term "anything" is unqualified and absolute, and means that whatever else may be in the agreement, the agreement does not affect the Commission's ability to determine issues with respect to the CCL charges. Further, the clause makes applicable to FairPoint obligations arising out of "any" final order issued "within" DT 06-067. This means that the March 21, 2008 Order Interpreting Tariff is not the only final order covered by the exception.

It is important to note that the three-CLEC settlement did not require any of its parties to withdraw from this docket, even though BayRing, one of the signatories, was the original party to this docket. This necessarily means that CLEC parties would continue to participate in this docket, and continue advocating their respective positions, subsequent to the effectiveness of the three-CLEC stipulation. Without the participation of CLEC parties, it would be impossible for DT 06-067 to proceed. That would render the exception in the three-CLEC settlement nugatory. The Commission should not interpret the settlement in so illogical a manner.

C. The Supreme Court's Order Does Not Affect the Commission's Ability to Order Prospective Relief.

FairPoint's reliance on the Supreme Court's reversal of the Order Interpreting Tariff, *Appeal of Verizon New England Inc.,* 158 N.H. 693 (2009), is misplaced. FairPoint's interpretation of the Court's decision is unrealistically overbroad.

The Court's opinion makes clear that it was only determining the correctness of the Commission's interpretation of Tariff No. 85. "At issue is the PUC's interpretation of NHPUC Tariff No. 85 . . . . 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." *Id.* at 694, 700 (internal quotation marks omitted).

Contrary to FairPoint's contention, the Court did not foreclose the prospect of amending the tariff prospectively. To the contrary, the Court expressly stated that the tariff could be amended, if appropriate, via the Commission's regulatory process.

> 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. . . . 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. That is precisely what the Commission is doing here.

III. The Schedule Is Appropriate.

FairPoint's complaints about the schedule ring hollow, because if any problems exist, they are of FairPoint's own making.

FairPoint created its own problem when it coupled the Commission-mandated elimination of the CCL charges with its desire for increases in other rates to offset the CCL revenue reduction. Any delay in the elimination of the CCL charges when a FairPoint common line is not used, of course, prejudices carriers that will continue to be subject to the unjustified CCL charges. The Commission was right to require that the issue be decided as soon as possible.

The Commission should not permit FairPoint to file an illustrative tariff if the effect of doing so is further to delay elimination of the CCL charge. The Commission's directive was unequivocal — FairPoint was to eliminate the CCL charge when no FairPoint end user or common line was involved. If FairPoint files only an illustrative tariff, it has not eliminated the charge, and therefore has violated the Commission's order. The Commission should not

countenance that violation by allowing FairPoint to file an illustrative tariff that will take an unknown period to evaluate. Instead, the Commission should ensure that elimination of the CCL is effective at the earliest possible date. If further process is required, that process should be as expeditious as possible.

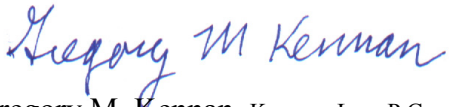
There is a simple solution to FairPoint's self-inflicted problem: immediately file tariff pages that only eliminate the CCL, as the Commission ordered. If FairPoint chooses, it may file separate pages with whatever compensation mechanism it proposes. That way, FairPoint can comply with the Commission's directive and still obtain the process that FairPoint claims it needs to justify its offsetting tariff proposal, without continuing to penalize other carriers by imposing the unjust and unreasonable CCL charge.

Conclusion

For the reasons stated, the Commission should deny the Rehearing Motion, and should require that FairPoint immediately eliminate from its tariff the CCL charge when no FairPoint end user or common line is involved in the call. Any other revisions that FairPoint plans to make in its tariff should not deter or delay the Commission in expeditiously enforcing that mandate.

October 16, 2009

Respectfully submitted,



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