

June 1, 2015

**BY ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90;  
*Developing a Unified Intercarrier Compensation Regime*, CC Docket  
No. 01-92 – FairPoint Petition for Limited Waiver

Dear Ms. Dortch:

On March 17, 2015, FairPoint Communications, Inc. (“FairPoint”) filed a Petition for Limited Waiver of Section 51.917(b)(7) of the Commission’s rules in the above-captioned dockets.<sup>1</sup> FairPoint’s petition fully explains why good cause exists to grant the requested waiver. No parties oppose the petition, nor were any comments filed. FairPoint respectfully urges the Commission to take up FairPoint’s Waiver Petition and expeditiously grant the requested relief. As explained below, to the extent that FairPoint is not precisely situated similarly to other carriers to whom similar relief has been granted, and if the Wireline Competition Bureau’s delegated authority does not permit it to grant FairPoint’s petition based on existing precedent, the Commission may grant the requested waiver on the independent merits of the FairPoint petition.

Overview: The Commission Should Grant FairPoint’s Petition On Its Own Merits

FairPoint is one of several local exchange carriers (“LECs”) that have suffered harm because of a systematic, fraudulent scheme by Halo Wireless (“Halo”) to use LEC access services without paying the compensation required under the LECs’ tariffs and applicable law. For some of these LECs, the unpaid Halo debts were identified prior to Halo’s bankruptcy filing; they had opportunity to obtain findings of liability in at least nine state regulatory commissions. Halo lacked the funds to pay their debts, however, and to FairPoint’s knowledge, none have been successful in recouping the charges owed by Halo.

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment on FairPoint Petition for Limited Waiver of the Commission’s Intercarrier Compensation Revenue Recovery Rules for Rate-of-Return Carriers*, Public Notice DA 15-412 (Wireline Comp. Bur. rel. April 2, 2015).

In prior orders, the Commission described Halo's systematic access charge avoidance scheme for intrastate access traffic properly terminated by the LECs and billed to Halo.<sup>2</sup> The Commission concluded that it would be unjust and would disserve FCC policy to permit the unpaid Halo debts to affect rate-of-return LECs' Base Period Revenue ("BPR") calculations – not just for 2011 or 2012 but for years following the Halo dissolution.<sup>3</sup> These Commission precedents support grant of FairPoint's Waiver Petition even if FairPoint is somewhat differently situated from the carriers to whom similar relief thus far has been granted.

Like the other carriers, FairPoint diligently pursued its claims against Halo before the U.S. Bankruptcy Court adjudicating Halo's reorganization and dissolution, but also like those carriers, FairPoint has been unable to collect the revenues it was owed. FairPoint lacked the resources of the larger carriers that pursued Halo through state and federal court and agency proceedings, but like those carriers FairPoint filed a timely claim in the bankruptcy proceeding yet came up empty-handed, not because its claim lacked merit but only because Halo lacked the funds to satisfy any of its unsecured LEC creditors. The Commission should evaluate FairPoint's petition on its own merits, and grant the requested relief in accordance with the Commission's preference for accuracy in the BPR figures of rate-of-return LECs.

#### Waiver Is Justified Due To Circumstances Beyond FairPoint's Control

FairPoint seeks permission to include in its BPR \$124,531.06 in revenues associated with intrastate access traffic that four FairPoint LECs<sup>4</sup> terminated to Halo Wireless, Inc. ("Halo") during Fiscal Year 2011, that otherwise was eligible for compensation under the Commission's rules, and for which FairPoint billed Halo but received no compensation. It is undisputed that these charges were properly incurred, and that Halo refused to pay FairPoint (like other LECs) simply because it was engaged in a systematic access charge avoidance scheme, and subsequently filed for reorganization and then liquidation under the U.S. bankruptcy code. Further, it is undisputed that FairPoint properly filed a claim with the bankruptcy court for the amounts Halo owed, but the claim was not – and will not be – satisfied.

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<sup>2</sup> *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.017(b)(7) of the Commission's Rules*, WC Docket No. 10-90, CC Docket No. 01-92, Order, FCC 14-121, paras. 4, 9, 13 (rel. Aug. 7, 2014) (the "*TDS Waiver Order*"); *Connect America Fund et al.*, 26 FCC Rcd 17663, 18041-44 (2011) (subsequent history omitted) ("*USF-ICC Transformation Order*").

<sup>3</sup> *TDS Waiver Order*, paras. 17, 21-22.

<sup>4</sup> The four affected FairPoint LECs are Chouteau Telephone Company (operating in Oklahoma), FairPoint of Missouri, Inc. (operating in Missouri), GTC, Inc. (operating in Florida), and Orwell Telephone Company (operating in Ohio).

In its Petition, FairPoint explains that when it attempted to collect the unpaid access charges from Halo, Halo already had filed for protection under the U.S. bankruptcy laws. As a small company, having recently emerged from bankruptcy itself, FairPoint must weigh the cost of litigation against the likelihood of recovery. In this case, by the time Halo's debt to FairPoint became overdue, in the latter part of 2011, the only economic forum available to FairPoint was the U.S. Bankruptcy Court, where Halo had sought protection from its creditors while it attempted to reorganize. Rather than throw good money after bad through state filings that would not have been acted upon, FairPoint duly filed its claim for the amount owed by Halo in the U.S. Bankruptcy Court, as demonstrated in the Petition.<sup>5</sup> FairPoint's claim was allowed by the court. However, as contingent creditors, FairPoint and the other LECS whom Halo had defrauded through its access avoidance scheme ultimately were denied satisfaction because of Halo's lack of funds.

In July 2012, Halo determined that it had no viable avenue for reorganization that would dispose of pending claims by various LECs for unpaid access charges.<sup>6</sup> It thereupon requested the court's approval to convert from reorganization to dissolution. In so doing, Halo observed that, by order of the bankruptcy court, the state regulatory commissions were *not* permitted to liquidate any amounts owed by Halo, only to determine whether Halo was liable.<sup>7</sup> At least nine states, including Florida and Missouri, did make findings of liability against Halo.<sup>8</sup> However, because the charges owed by Halo would "*far exceed Halo's assets by many orders of magnitude,*" it made no economical sense for any parties to pursue further claims of liability in the states, nor litigate the amounts owed by Halo.<sup>9</sup>

Other carriers did attempt to pursue further legal redress in the bankruptcy court, but these were unavailing. For example, AT&T, CenturyLink and TDS filed additional motions in the bankruptcy proceedings, pursuing the Halo debt as an administrative expense claim. While the court allowed this (and CenturyLink's motion was granted pursuant to an agreed order to which Halo itself consented), the LECs have been unable to collect on its Halo debt because Halo's bankruptcy petition already had been converted

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<sup>5</sup> FairPoint Waiver Petition at 5 & n. 16 (citing Declaration of Michael T. Skrivan & Letter from Susan L. Sowell to the Clerk of the U.S. Bankruptcy Court).

<sup>6</sup> Halo Wireless, Inc. Emergency Motion for Section 105 Status Conference In Order To Establish Procedures For Conversion to Chapter 7 (filed July 13, 2012), para. 9, Case No. 11-42464-btr-11 (U.S.B.C., E.D. Tex.) ("Halo Motion") (attached).

<sup>7</sup> *Id.*, para. 10.

<sup>8</sup> *See TDS Waiver Order*, para. 14.

<sup>9</sup> Halo Motion, *supra*, para. 5 ("no obvious benefit to the Debtor or its creditors" to prove or quantify claims of liability); *id.*, para. 11 ("it would be a waste of resources, both for Halo and for the contingent [LEC] creditors, to continue pursuing the state commission cases during the process of conversion").

to a Chapter Seven case, and Halo's debts "far exceeded" Halo's assets.<sup>10</sup> At the time, FairPoint had no incentive to pursue a similar order from the court, understanding that no revenues would be recouped from Halo (and not knowing that the FCC subsequently would impose the conditions discussed below). Nevertheless, FairPoint believes that these bankruptcy court orders (as well as the state orders cited above) more than adequately support FairPoint's Waiver Petition.

Halo's financial liquidation and its effect on numerous LECs may not have been foreseen by the Commission when it created the March 31, 2012 deadline for BPR adjustments for uncollected amounts.<sup>11</sup> The very purpose of a waiver is to permit the Commission to more effectively implement its policies in individual cases where enforcing the rule would create a hardship not previously foreseen by the Commission.<sup>12</sup> Where, as here, the application of a Commission rule would be unjust, and deviation from the rule would better serve the public interest and FCC policy, waiver is appropriate.

In the case of the Halo access charges, FairPoint seeks only that its BPR calculation be made as accurate as possible by including the unrecovered but properly billed amounts in the BPR. These amounts were certified by FairPoint when it filed its proof of claim with the bankruptcy court. They were certified again in the FairPoint Waiver Petition through the Declaration of Mr. Skrivan. They were allowed by the bankruptcy court. FairPoint actually terminated the traffic in question for Halo, and thus incurred the costs in question; the revenues only fail to appear in the BPR through no fault of FairPoint's but because of the fraudulent "self help" in which Halo systematically engaged.

Locking FairPoint's four affected LECs into BPRs that are unrealistically low would frustrate the Commission goal of BPR accuracy that the rule was designed to achieve.<sup>13</sup> In contrast, granting the requested waiver would serve the Commission's goal

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<sup>10</sup> The court's orders allowing the administrative expense claims covered Halo debts to LECs in numerous states, including Ohio and Oklahoma as well as Florida and Missouri, effectively finding liability on Halo's part in all of those states. *See* Order Allowing Administrative Expense Claims of Participating Claimants Pursuant to 11 U.S.C. §§503(b)(1)(A) and 507(a)(2) (July 12, 2013) (attached); Agreed Order Regarding the Motion of the CenturyLink Entities for Entry of an Order Allowing Administrative Expense Claims Pursuant to 11 U.S.C. §§503(b)(1)(A) and 507(a)(2) and the Trustee's Objection to the Motion of the CenturyLink Entities for Entry of an Order Allowing Administrative Expense Claims Pursuant to 11 U.S.C. §§503(b)(1)(A) and 507(a)(2) (August 6, 2013) (attached).

<sup>11</sup> *See USF-ICC Transformation Order*, 26 FCC Rcd at 17982. *See also* 47 C.F.R. §51.917(b)(7).

<sup>12</sup> *See* 47 C.F.R. §1.3. *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>13</sup> *TDS Waiver Order*, para. 16 ("accurate BPR calculations are critical to the successful operation of the recovery mechanisms").

by establishing a more accurate BPR for these companies, which the Commission has found to be in the public interest.

As the Commission stated in the *TDS Waiver Order*, “Absent such waivers, the unique combination of Halo’s alleged ‘re-origination’ of intrastate access traffic as CMRS-originated traffic, Halo’s refusal to pay access charges for that traffic, and Halo’s subsequent bankruptcy and corporate liquidation would result in significant reductions to Petitioners’ ICC recovery mechanism revenues. Further, as described below, this impact on recovery amounts would continue far in to the future, such that Petitioners would suffer ongoing harm because of Halo’s behavior, without some form of Commission action.”<sup>14</sup>

The Commission has found that Halo mischaracterized its traffic as intra-MTA CMRS traffic. Commission policy favors accuracy in each LEC’s BPR calculation. Therefore, FairPoint asks that it be allowed to correct its BPRs for four LECs that were disadvantaged by Halo’s self-serving behavior. The Commission should grant the requested waiver.

#### Waiver Should Not Be Conditioned On A New Finding of Liability

In the *TDS Waiver Order*, the Commission allowed several LECs to include in their BPRs intrastate access revenues that were billed to Halo but not collected, provided they certify to having obtained a court or state agency finding of liability regarding the compensation for such access traffic. This condition should be revisited in FairPoint’s case. The Commission should find that the conditions adopted in the *TDS Waiver Order* either have been sufficiently addressed or are incapable of being fully satisfied and thus may be waived in FairPoint’s case. FairPoint urges the Commission to grant its Waiver Petition on its own merits.

Although the FairPoint Waiver Petition was unopposed, the Bureau may feel it is unable to grant the requested relief based on the *TDS Waiver Order* alone. In that decision, the Commission granted relief to several carriers, similar to that which FairPoint seeks, based on a finding that “the Commission’s guidance to allow carriers to include in their BPRs intrastate access revenues that ultimately would have been collected from Halo pursuant to court or regulatory order would be frustrated by a strict application of the rule.” The Commission required each petitioner, as a condition of the waiver, to certify to the satisfaction of five conditions:

- First, that it terminated all instate traffic sent to it by Halo for termination during FY 2011 that it seeks to add to its BPR calculations.

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<sup>14</sup> TDS Waiver Order, para. 4.

- Second, that it billed Halo intrastate access charges for such traffic during FY 2011 or before the close of the next regular billing cycle in Fiscal Year 2012 for the amounts to be added to BPR calculations.
- Third, that a court or state regulatory agency of competent jurisdiction has made a finding of liability regarding the compensation for such traffic.
- Fourth, that it filed a timely claim in the Halo bankruptcy case requesting compensation for such traffic, and any BPR adjustment for a study area resulting from [the waiver] does not exceed the intrastate access portion of such petition's bankruptcy claim for that study area.
- Fifth, that its BPR adjustment amounts do not include any interest, late payment fees, collection fees, or attorney fees.<sup>15</sup>

FairPoint's Waiver Petition satisfies every one of these conditions, with the possible exception of the "finding of liability regarding the compensation for such traffic" by a court or state regulatory agency. As the Commission has acknowledged, both Florida and Missouri have issued findings of liability against Halo.<sup>16</sup> Moreover, the U.S. bankruptcy court in Texas allowed claims against Halo in all four states, and many others, including in an Agreed Order joined by Halo and CenturyLink.<sup>17</sup> FairPoint urges the Commission to find that these prior rulings satisfy the condition in question.

If the Commission is not satisfied with prior findings of Halo's liability for compensation for intrastate access traffic properly terminated and billed, by both state agencies and the U.S. bankruptcy court, the Commission should waive this condition in FairPoint's case. With due respect to the Commission's reasoning in the *TDS Waiver Order*, this condition is *incapable of performance* at this point, and enforcing it now would be unjust and unreasonable, and would not serve the Commission's goals.

Commissioners Clyburn and O'Rielly supported the *TDS Waiver Order* with this condition because they felt it was "consistent with the goals of intercarrier compensation reform to provide a path away from the legacy subsidies as well as an important safeguard for consumers who contribute to the universal service fund." According to the Commission's reasoning in the *USF-ICC Transformation Order*, however, the requirement of a "decision of a court or regulatory agency of competent jurisdiction" served merely to help verify disputed amounts that were collected after the March 31, 2012, and impose a degree of discipline on carriers to collect the disputed amounts they believed were accurately billed and should be included in their BPR. Neither concern is applicable here.

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<sup>15</sup> *TDS Waiver Order*, para. 23.

<sup>16</sup> *Id.*, para. 14.

<sup>17</sup> See note 10, *supra*.

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By filing its claims with the bankruptcy court for recovery of the FY 2011 intrastate access charges that FairPoint's LECs terminated for Halo, and timely billed Halo, FairPoint has acted diligently in attempting to collect the amounts Halo owed. Halo simply had insufficient funds to pay FairPoint or any other LECs, all of whom were deemed unsecured creditors. Moreover, FairPoint has certified the amounts it billed and was unable to collect, not once but twice – to the U.S. Bankruptcy Court and to the Commission. No one has opposed FairPoint's claims.

Attempting to obtain a ruling by a state agency or court at this point would be futile, given Halo's liquidation. In these exceptional circumstances, the Commission should grant the requested relief so FairPoint's BPRs for the four affected LECs will be as accurate as possible. Failure to do so would thwart the Commission's own goals, and encourage other companies to engage in self-help in contravention of FCC rules and policies.

Please direct any questions concerning this filing to me.

Very truly yours,



Karen Brinkmann

*Counsel for FairPoint*

#### Attachments

cc: Daniel Alvarez  
Amy Bender  
Nicholas Degani  
Rebekah Goodheart  
Travis Litman  
Victoria Goldberg  
Pam Arluk  
Gregory Haledjian