Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
Establishing Just and Reasonable Rates	)	
For Local Exchange Carriers	)	WC Docket No. 07-135

FAIRPOINT COMMUNICATIONS, INC

PETITION FOR DECLARATORY RULING

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Table of Contents

Executive Summary …….....i

Petition ……1

Introduction……..……..…1

I. Background ……...……..…2

A. Establishment of Separate ICC Transition Rules for Rate-of-Return and Price Cap LECs……2

B. Calculation of ICC Eligible Recovery for Price Cap and Rate-of-Return Carriers……..…4

C. *The Duplicate Recovery Rule*…….6

II. Argument ……...10

A. *The Commission Should Issue A Declaratory Ruling To Terminate This Controversy*……..10

B. FairPoint Is Uniquely Harmed By NECA's Unjustified Eligible Recovery Adjustment……12

C. *Commission Policy Supports the Requested Declaratory Ruling*…….16

III. Conclusion ……22

Attachment A:
Impact of ICC Transition Excluding Amount Attributable to LSS
(By Study Area)

Executive Summary

FairPoint Communications, Inc. operates local exchange carriers ("LECs) under FCC price cap regulation in three states and under rate-of-return regulation in 15 states. FairPoint's rate-of-return LECs are governed by the FCC rules for price cap carriers for purposes of the Connect America Fund ("CAF") Phase I and CAF Phase II high-cost support mechanisms, but governed by the rules for rate-of-return carriers for purposes of the inter-carrier compensation ("ICC") transition.

Legacy high-cost universal service support that flowed to price cap carriers, and rate-of-return companies affiliated with price cap carriers, was replaced by Frozen CAF Phase I Support as of January 1, 2012. Frozen CAF Phase I Support ceased as of January 1, 2015, replaced by CAF Phase II model-based support, in the 15 states where FairPoint accepted the right-of-first-refusal ("ROFR") for CAF Phase II Support and the attendant service obligations, including in 13 states where FairPoint LECs are pooling rate-of-return carriers. The FairPoint rate-of-return LECs are entitled to recover their 2011 interstate traffic-sensitive revenues, on a phased-down basis, through the ICC transition rules for rate-of-return carriers. This includes amounts formerly recovered through the Local Switching Support ("LSS"), which was eliminated by the *USF-ICC Transformation Order*. Since July 1, 2012, former LSS amounts have been replaced by the ICC transition process , a recovery mechanism governed by Section 51.917 of the FCC's rules. The Commission made clear that, because LSS had been part of the interstate revenue requirement, the elimination of LSS necessitated a corresponding transitional recovery mechanism, which it addressed through its ICC Transition rules.

Due to the FCC complexity of the new rules adopted in the *USF-ICC Transformation Order*, duplicate recovery of former LSS amounts by the FairPoint rate-

of-return LECs was possible because they were treated as price cap for high-cost support but rate-of-return for ICC purposes. To avoid this duplicate recovery of former LSS amounts through both FairPoint's CAF Phase I Frozen Support for price cap carriers and the ICC transition mechanisms for ROR carriers, since 2012 NECA has been reducing FairPoint's ICC Eligible Recovery by the former LSS amount. However, once FairPoint's CAF Phase I Frozen Support was eliminated in the states where it accepted the CAF Phase II ROFR, effective January 1, 2015, there was no longer any duplicate funding, and NECA should have discontinued the reduction of FairPoint's Eligible Recovery by former LSS amounts. Rate-of-return ICC Transition compensation, governed by Section 51.917 of the FCC's rules, and forward-looking CAF Phase II Support are two distinct mechanisms. There is no duplicate recovery.

FairPoint should not be paid twice for the funding formerly received as LSS, *but it should be paid once*, as prescribed by Section 51.917 of the FCC's rules. As administered by NECA, FairPoint currently is receiving only a portion of the compensation to which it is entitled under the Commission's rules. Effective January 1, 2015, NECA has had no authority to subtract legacy 2011 LSS amounts from FairPoint's Adjusted Base Period Revenue for study areas in states where FairPoint has accepted the ROFR. This costs FairPoint approximately $4.2 million annualized and in two states the reduction exceeds the CAF II funding resulting in FairPoint effectively receiving negative CAF II funding.

Moreover, FairPoint is the only carrier on which this hardship is imposed. In a parallel situation, the FCC is preparing to offer model-based CAF high-cost support to other rate-of-return LECs. It has never suggested that rate-of-return LECs that accept

model-based CAF would see a reduction in their CAF-ICC Transition Support amounts equal to their former LSS funding.

FairPoint seeks a ruling that NECA is not properly compensating FairPoint in accordance with Section 51.917 of the Commission's rules, and NECA should correct its Eligible Recovery calculations for the study areas where FairPoint accepted the ROFR, retroactive to January 1, 2015, and restore the affected funding to FairPoint. In light of the importance of this revenue for FairPoint's continuing voice operations and its ability to invest in infrastructure supporting advanced services, FairPoint respectfully urges the Commission (or the Wireline Competition Bureau, acting on delegated authority) to expedite action on this request.

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PETITION FOR DECLARATORY RULING

Introduction

Pursuant to Section 1.2 of the Commission's rules,[1] FairPoint Communications, Inc. ("FairPoint") hereby seeks a ruling from the Commission, or the Wireline Competition Bureau on delegated authority, that the National Exchange Carrier Association ("NECA") should calculate and pay the transitional inter-carrier compensation ("ICC") support to which FairPoint's rate-of-return ("ROR") affiliates are entitled in accordance with Section 51.917 of the rules. As explained below, this calculation is clearly defined under the rules governing the ICC transition. However, NECA has been deducting an amount from FairPoint's CAF-ICC Adjusted Base Period Revenue that is the equivalent to FairPoint's former revenue from local switching support ("LSS"), and since January 2015 this deduction has been unjustified and in violation of the Commission's rules. The Commission should issue the requested ruling to compel NECA

[1] 47 C.F.R. §1.2 ("The Commission may…issue a declaratory ruling terminating a controversy or removing uncertainty").

to correctly compensate FairPoint for its Adjusted Base Period Revenue through a correction to its Eligible Recovery effective January 1, 2015.

I. Background

A. Establishment of Separate ICC Transition Rules for ROR and Price Cap LECs

In November 2011, the Commission released its *USF-ICC Transformation Order*[2] phasing out some existing federal universal service programs, creating the CAF high-cost support mechanism and other new universal service programs, and substantially reforming the interstate and intrastate ICC rules for telecommunications carriers. Among these changes, the FCC established CAF and ICC transition rules, with one set of rules for incumbent local exchange carriers ("ILECs") regulated at the federal level under price cap and another for ILECs regulated under cost-based rate-of-return regulation.[3] This petition concerns both CAF and ICC rules, which together govern a significant portion of ILEC revenues.

Significantly, the *USF-ICC Transformation Order* declared that ROR ILECs affiliated with price cap ILECs would be governed by the rules for price cap carriers for purposes of implementing CAF, freezing their universal service support at 2011 levels and bringing them under the CAF regime with their price cap affiliates going forward.[4] FairPoint was directly impacted by this *sua sponte* FCC decision, though FairPoint had no prior notice that such a ruling was under consideration, nor were the consequences of this

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[2] *USF-ICC Transformation Order*, 26 FCC Rcd 17663 (2011).
[3] *Id.* ¶739.
[4] *Id.* ¶129 & n. 253 ("we will, for purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which a majority of lines are regulated under price caps. That is, we will freeze their universal service support and consider them as price cap areas for the purposes of our new CAF Phase I distribution mechanism.").

ruling well understood at the time, since the Commission had not yet adopted CAF Phase II rules. The problem described in this Petition would not have arisen had the Commission continued treating the FairPoint rate-of-return ILECs as it treats other ROR ILECs for purposes of CAF Phase I and Phase II. At a minimum, the Commission ought to have given prior notice and an opportunity for FairPoint to comment regarding the potential impacts.

FairPoint ILECs operate under FCC price cap regulation in three states, and under ROR regulation in 15 states.[5] Importantly, FairPoint's ROR affiliates continue to be governed by the FCC's ICC transition rules for rate-of-return carriers, including the rules governing the Access Replacement Charge ("ARC") and the CAF-ICC recovery mechanism as described in 51.917 of the Commission's rules.[6] FairPoint's rate-of-return affiliates thus continue to participate in the National Exchange Carrier Association ("NECA") common line and traffic-sensitive pools, and NECA manages their revenue

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[5] *See* Attachment A. FairPoint currently operates in 17 states. In Maine, FairPoint has both price cap and ROR (average schedule company) operations. FairPoint has been operating under both price cap regulation and rate-of-return regulation pursuant to FCC authorization. FairPoint's study areas acquired from Verizon in Maine, New Hampshire and Vermont in 2008 operate under price cap regulation. In 2010, FairPoint received permission to convert most of its rural study areas in Maine and Vermont to price cap regulation. Twice the FCC considered the merits of permitting FairPoint to operate some but not all of its ILECs under price cap regulation, and found it to be in the public interest, based *inter alia* on their smaller size and more rural study areas where they are generally less able to adapt to revenue shifts than their larger price cap counterparts. *Petitions of Virgin Islands Tel. Co. et al.*, Order, 25 FCC Rcd 4824, 4836 (Wireline Competition Bur. 2010); *Petition of FairPoint Communications, Inc.*, WC Docket No. 07-66, Order, DA 08-169, ¶¶5-7 (Wireline Competition Bur. rel. Jan. 25, 2008).

[6] 47 C.F.R. §51.917(e)(6)(vii) ("A Price Cap Carrier with study areas that are subject to rate-of-return regulation shall recover its eligible recovery for such study areas through the recovery procedure specified in this section."). *See also USF-ICC Transformation Order* n. 203 ("This action does not require mandatory conversion for those [ROR] operating companies [affiliated with price cap carriers]").

recovery in the interstate jurisdiction through tariffing, settlements, and distribution of support. It is the activity of NECA in calculating FairPoint's ICC Eligible Recovery on which FairPoint seeks a declaratory ruling, as explained below.

B. Calculation of ICC Eligible Recovery for Price Cap and ROR Carriers

In the *USF-ICC Transformation Order* the Commission "adopted bill-and-keep as the default methodology for all intercarrier compensation" but did not impose a flash cut to bill-and-keep.[7] Rather, the Commission adopted "a gradual transition" including a transitional access recovery mechanism designed to facilitate less reliance on inter-carrier revenues and federal support and greater reliance on end-user revenues.[8]

The ICC Transition rules were intended to unify rates and facilitate the transition to bill-and-keep over a reasonable transition period. The Commission adopted separate ICC transition paths for price cap carriers and ROR carriers, with the latter given an extended glide path that is fifty percent longer than that adopted for price cap carriers.[9] The Commission also adopted "an accompanying federal recovery mechanism" to provide "certainty and predictability to carriers and investors" affected by the mandatory access charge reductions.[10] In so doing, the Commission specifically balanced the goal of inter-carrier compensation reform with the goal of minimizing the burden on consumers. Indeed, the Commission rejected a more rapid transition to bill-and-keep, saying, "such a flash cut would entail significant market disruption to the detriment of consumers and

[7] *USF-ICC Transformation Order* ¶736.
[8] *Id.* ¶847.
[9] *Id.* ¶739.
[10] *Id.* ¶790.

carriers alike."[11] Moreover, the Commission did not require that all rate elements be phased out at the same time, noting, "we are mindful of the compromises that must be made to accomplish meaningful reform in a measured and timely manner."[12] Given this mindfulness, the Commission reasonably should be expected to enforce the glide path it adopted for rate-of-return carriers.

The price cap ICC Transition began with reforms to terminating interstate and intrastate switched access charges and net reciprocal compensation. The interstate terminating switched access revenue, intrastate terminating switched access charges and net reciprocal compensation realized for the year ended September 30, 2011[13] established the "Base Period Revenue" for each price cap ILEC.[14] This Base Period Revenue amount is reduced annually pursuant to Section 51.915(d) to yield the Eligible Recovery. The Base Period Revenue is adjusted by multiplying an adjustment factor that varies according to the rules for different categories of price cap carriers to the summation of interstate and intrastate terminating access rate reductions and the adjustment of prior year true-ups for ARC revenue. Incremental changes to exogenous costs are then added to or subtracted from the calculation described above to yield the "Eligible Recovery."[15] Eligible Recovery is permitted to be collected through a combination of the ARC, a new end-user

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[11] *Id.* ¶809. As explained below, ILECs are permitted to recover the "Eligible Recovery" through a combination of a limited charge imposed directly on end-users (the ARC) and transitional CAF-ICC support. *Id.* ¶850.
[12] *Id.* ¶805.
[13] The amounts that, through 2011, had been recovered by the ILECs through access charges and reciprocal compensation, together with end-user revenues and universal service support, made up the ROR carriers' "revenue requirement" to which they were entitled based on their federal and state obligations to furnish service upon reasonable request.
[14] 47 C.F.R. §§51.915, 51.917(b)(7).
[15] 47 C.F.R. §51.915(d)

rate element, subject to limits, and (if the ARC is not sufficient to cover the Eligible Recovery) access replacement "CAF-ICC Support."[16]

For rate-of-return carriers, the "Base Period Revenue" or "Baseline" included the 2011 interstate switched access revenue requirement, intrastate terminating switched access charges and net reciprocal compensation realized for the period ending September 30, 2011. This amount is reduced by five percent per year to yield the "Adjusted Base Period Revenue." Expected interstate switched access charges, state terminating switched access charges and net reciprocal compensation are deducted from the annual Adjusted Base Period Revenue for each rate-of-return ILEC, NECA pool administrative expenses are added, and an adjustment can be made for incremental exogenous costs, to yield that year's "Eligible Recovery" for the rate-of-return carrier.[17] Eligible Recovery is recovered through the ARC, subject to limits, and (if the ARC is not sufficient to cover the Eligible Recovery) CAF-ICC Recovery support.[18] It is this series of calculations that NECA has failed to properly complete, resulting in a shortfall to FairPoint since January 2015.[19]

C. The Duplicate Recovery Rule

In its annual tariff filings for the 2014/2015 and the 2015/2016 tariff periods, NECA correctly calculated Adjusted Base Period Revenues for FairPoint, pursuant to Section 51.917 of the FCC's rules. NECA correctly applied state and interstate ICC

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[16] 47 C.F.R. §51.915(e)(f).

[17] "Rate-of-Return Eligible Recovery will be the difference between: (a) the Rate-of-Return Baseline, subject to five percent annual reductions; and (b) the revenues from the reformed intercarrier compensation rates in that year, based on actual MOUs [minutes of use] multiplied by the associated default rate for that year." *USF-ICC Transformation Order* ¶851.

[18] 47 C.F.R §51.917.

[19] As noted above, FairPoint participates in the NECA pools for its rate-of-return carriers.

charges, just as it does for all other rate-of-return carriers. However, in these two tariff filings, NECA subtracted an amount equal to the 2011 legacy local switching support ("LSS") from the Adjusted Base Period Revenue to calculate Eligible Recovery for FairPoint study areas. The rules for rate-of-return carriers' ICC Transition do not provide for such an adjustment. The reason given by NECA was that NECA might be receiving "duplicate support" if it accepted the portion of FairPoint's Frozen CAF Phase I Support formerly attributed to LSS (to which the FairPoint ILECs were entitled as price cap carriers), while also being compensated for an equivalent amount through the CAF-ICC Support under the ICC transition rules for ROR carriers.

FairPoint rate-of-return LECs are treated as price cap for high-cost support purposes, though they remain rate-of-return for ICC purposes. The Commission's rules somewhat cryptically provide:

> If a Rate-of-Return Carrier recovers any costs or revenues that are already being recovered as Eligible Recovery through Access Recovery Charges or the Connect America Fund *from another source*, that carrier's ability to recover reduced switched access revenue from Access Recovery Charges or the Connect America Fund shall be reduced *to the extent it receives duplicative recovery*. Any duplicative recovery shall be reflected as a reduction to a carrier's Eligible Recovery calculated pursuant to Section 51.917(d) of this Part.[20]

Because of FairPoint's unique status being subject to both ROR and price cap rules under the *USF-ICC Transformation Order*, NECA believed that FairPoint was receiving duplicate amounts formerly received as LSS – once through the CAF-ICC Transitional Support mechanism and a second time through Frozen CAF Phase I Support for price cap carriers. Therefore, NECA has interpreted this rule as requiring a reduction in FairPoint's

[20] 47 C.F.R. §51.917(d)(1)(iii)(D)(vii) (emphasis added).

Adjusted Base Period Revenue to back out the "duplicate" LSS amounts. Thus, NECA subtracted the 2011 LSS amount from FairPoint's Adjusted Base Period Revenue to calculate Eligible Recovery for FairPoint's study areas in the past several years. However, that subtraction became unnecessary as of the acceptance by FairPoint of CAF Phase II Support, and the termination of Frozen CAF Phase I Support, effective on a retroactive basis to January 1, 2015, as explained below.

The *USF-ICC Transformation Order* did not require rate-of-return carriers to convert to price caps.[21] It did, however, require FairPoint's ROR affiliates to be treated as price cap carriers for purposes of CAF universal service support (but not inter-carrier compensation.) CAF rules for price cap carriers and rate of return carriers affiliated with price cap carriers provide for a transition from legacy universal service mechanisms for rural carriers and high-cost areas to a forward-looking mechanism intended to support broadband service in high-cost areas.

CAF Phase I was implemented effective January 1, 2012, which froze all prior forms of universal service support for rural and high-cost areas, on a study area basis, at the levels paid in 2011, and aggregated this historical support into a new mechanism termed "Frozen CAF Phase I Support."[22] This included Interstate Access Support for price cap carriers, Interstate Common Line Support ("ICLS"), high-cost model-based loop support for non-rural carriers, cost-based high-cost loop support for rural carriers ("HCLS"), and LSS. All of these universal service support programs – all of which

[21] *USF-ICC Transformation Order* n. 203 ("This action does not require mandatory conversion for those [ROR] operating companies [affiliated with price cap carriers]").
[22] *See USF-ICC Transformation Order* ¶ 872.

applied to FairPoint – were discontinued, replaced by the single Frozen CAF Phase I Support program as of January 1, 2012.[23]

Regarding LSS, the Commission specifically stated, "limited recovery of the costs previously covered by LSS should be available *pursuant to our ICC reform and the accompanying creation of an ICC recovery mechanism* through the CAF."[24] The Commission acknowledged that, because LSS had been part of the interstate revenue requirement, the elimination of LSS necessitated a corresponding transitional recovery mechanism, which it addressed through CAF-ICC Support.[25]

In August 2015, FairPoint accepted the ROFR in 15 of its 17 states, including 13 states where FairPoint has ROR ILEC operations.[26] This election was retroactive to January 1, 2015.[27] CAF Phase II Support for price cap carriers is calculated based on a forward-looking model, without regard to legacy high-cost support amounts or ICC

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[23] *USF-ICC Transformation Order* n. 212 ("frozen high-cost support will be equal to the amount of support disbursed in 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 1, 2012 … As a consequence of this action, rate-of-return operating companies that are treated as price cap carriers *will no longer be required to perform cost studies for purposes of calculating HCLS or LSS as their support will be frozen on a study area basis* as of year-end 2011.")(emphasis added).
[24] *Id.* ¶257. (emphasis added).
[25] *Id*. ("To the extent that the elimination of LSS support affects incumbent LECs interstate switched access revenue requirement, *we address that issue in the ICC context*.")..")(emphasis added). Note that the Commission established different transition timetables for ICC and CAF, aligning the recovery of LSS for rate-of-return carriers with the ICC transition. Thus, LSS payments to ILECs were frozen at 2011 levels for the period January 1, 2012 to June 30, 2012. As of July 1, 2012, when the new ICC rates took effect, LSS amounts were subsumed into the CAF-ICC recovery mechanism.
[26] Letter to Marlene H. Dortch from Paul Sunu, Chief Executive Officer, FairPoint Communications, Inc. in WC Docket No. 10-90 (filed August 18, 2015).
[27] *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order, 29 FCC Rcd 15644, ¶94 (2014) ("*CAF Phase II Final Order*") ("carriers will receive a full year of Phase II support in calendar year 2015").

Support amounts.[28] Acceptance of CAF Phase II Support causes model-based support to supersede Frozen CAF Phase I Support, and CAF Phase II obligations to supersede Frozen CAF Phase I obligations, as of January 1, 2015.[29] It has no impact on transitional ICC Support.

The implementation of CAF Phase II in states where FairPoint accepted the ROFR impacts both the 2014/2015 and the 2015/2016 tariff years. If NECA does not refile its Eligible Recovery calculations for FairPoint ROR study areas to correct NECA's improper subtraction of legacy LSS amounts from FairPoint's Eligible Recovery from January 2015 to the present, FairPoint will fail to recover its full Adjusted Base Period Revenue in accordance with FCC rule Section 51.917. The resulting deficit to FairPoint is approximately $4.2 million on an annualized basis.[30]

II. Argument

A. The Commission Should Issue A Declaratory Ruling To Terminate This Controversy

The Commission may issue a declaratory ruling to remove uncertainty or terminate a controversy. FairPoint and NECA have been unable to resolve a controversy arising under the FCC's rules, namely, the proper calculation of the FairPoint ROR ILECs' Eligible Recovery following FairPoint's election of the ROFR for CAF Phase II model-based support, retroactive to January 1, 2015, in 15 out of 17 states. FairPoint believes that NECA has been making and continues to make unauthorized adjustments to

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[28] *See, e.g., USF-ICC Transformation Order,* 26 FCC Rcd ¶156 ("To distribute this [CAF Phase II] funding, we will use a combination of competitive bidding and a new forward-looking model of the cost of constructing modern multi-purpose networks.").

[29] *CAF Phase II Final Order* ¶¶90, 94.

[30] This represents the amount of frozen CAF Phase I associated with legacy 2011 LSS in rate-of-return study areas in states where FairPoint has accepted CAF Phase II Support under the ROFR. *See* Attachment A showing the study areas and amounts.

FairPoint's Adjusted Base Period Revenue in contravention of Section 51.917 of the Commission's rules. Specifically, NECA has taken the unilateral step of subtracting an amount equal to 100% FairPoint's 2011 LSS from the Adjusted Base Period Revenue for calendar year 2015, reducing FairPoint's Eligible Recovery in its ROFR study areas by $4.2 million on an annualized basis.

Acceptance of the ROFR for CAF Phase II Support causes model-based support to supersede Frozen CAF Phase I Support retroactive to January 1, 2015.[31] Receipt of CAF Phase II Support in no way duplicates legacy support amounts or amounts received through transitional ICC Support. CAF Phase II for price cap carriers, and rate-of-return companies affiliated with a price cap carrier, is calculated based on a forward-looking model of the costs of building a hypothetical efficient network, without regard to legacy support amounts or transitional ICC Support amounts.[32] Therefore, for the 15 states where FairPoint operates as a rate-of-return carrier and accepted the ROFR, NECA should be instructed to calculate FairPoint's Adjusted Base Period Revenue and Eligible Recovery in accordance with Section 51.917 of the Commission's rules without any deduction of other support amounts.[33]

NECA cites uncertainty surrounding its obligation to correctly calculate FairPoint's Adjusted Base Period Revenue and Eligible Recovery in accordance with

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[31] *CAF Phase II Final Order*, 29 FCC Rcd ¶94 ("carriers will receive a full year of Phase II support in calendar year 2015").
[32] *USF-ICC Transformation Order*, 26 FCC Rcd ¶156.
[33] Similarly, when Frozen CAF Phase I Support is discontinued in the two states where FairPoint rejected the ROFR for model-based CAF Phase II Support, NECA should be instructed to revise its calculations of Eligible Recovery for those remaining FairPoint study areas from that point forward, as there will no longer be any possibility of duplicate support in those study areas.

Section 51.917 of the rules and the separate obligation to avoid duplicate recovery. FairPoint believes the rules clearly provide for the calculation of its Adjusted Base Period Revenue and Eligible Recovery, and there is no basis under the rules or FCC orders to deduct legacy LSS amounts. FairPoint's acceptance of CAF Phase II Support caused model-based support to supersede Frozen CAF Phase I Support as of January 1, 2015. It was not intended to have any impact on ICC transition compensation. The Commission should instruct NECA that, as of January 1, there is no duplicate recovery in the FairPoint rate-of-return ROFR states, and NECA should revise its calculations accordingly, retroactive to January 1, 2015.[34]

B. FairPoint Is Uniquely Harmed By NECA's Unjustified Eligible Recovery Adjustment

Frozen CAF Phase I Support ended for FairPoint in most of its states when it accepted CAF II funding, and the CAF Phase II rules made the election effective retroactive to January 1, 2015. For the 2015/2016 tariff year, the 2011 Baseline Revenue is reduced by about 20% in accord with the ICC Transition rules to bill-and-keep. This includes the 2011 interstate revenue requirement include in the Base Period Revenue that was, prior to the *USF-ICC Transformation Order*, partially recovered through LSS. NECA's decision to subtract 100% of historical LSS amounts from FairPoint's Adjusted Base Period Revenue results in effectively reducing FairPoint Eligible Recovery by 120% of the historical LSS amount, instead of the 20% allowed by the rules. FairPoint believes

[34] To the extent necessary to effectuate the relief requested herein, NECA also should be directed to revise its tariffs for tariff years 2014/2015 and 2015/2016, to recalculate the CAF-ICC associated with FairPoint study areas and allow FairPoint to recover the shortfall since January 1, 2015.

the impact of this improper calculation by NECA to be $4.2 million on an annualized basis.[35]

In calculating FairPoint's Eligible Recovery in this manner, NECA is taking it upon itself to interpret the Commission's rules and orders, but is selective in its interpretation. NECA claims it is abiding by the rule against "duplicative" recovery, yet NECA is ignoring the Commission's finding that LSS was determined by the Commission to be part of the interstate revenue requirement for small carriers, *intended to be recoverable during the ICC transition through transitional ICC Support.* The Commission explained:

> Historically, smaller carriers have received LSS as a subsidy for certain switching costs, effectively *satisfying a portion of their interstate switched access revenue requirement*. As discussed above, defining Eligible Recovery based on carrier's interstate switched access requirement allows us to eliminate LSS as a separate universal service support mechanism for rate-of-return carriers. *Eligible Recovery will be calculated from carriers' entire interstate switched access revenue requirement— whether it historically was recovered through access charges or LSS.* Thus, in essence, carriers receiving LSS today will be eligible to receive support as part of their Eligible Recovery.[36]

When LSS was established as a funding mechanism, the Commission considered LSS part of the *baseline interstate revenue requirement* for carriers. For the smallest study areas, LSS represented an additional amount of the local switching revenue requirement that was (and still is) assigned to the interstate jurisdiction through the dial equipment minutes ("DEM") weighting factor. LSS shifts a portion of the intrastate local

[35] *See* Attachment A.
[36] *USF-ICC Transformation Order* ¶872 (emphasis added, internal footnotes omitted).

switching revenue requirement to the interstate jurisdiction for study areas with fewer than 50,000 access lines to the interstate jurisdiction.

The 2011 interstate switched access revenue requirement, including the intrastate local switching amount that was shifted to the interstate jurisdiction, became part of the 2011 Base Period Revenue as described above. The Commission specifically provided for "limited recovery of the costs previously covered by LSS" through the transitional ICC recovery mechanism.[37] Thus, revenue requirement amounts historically recovered through LSS became part of the annual calculation of Adjusted Base Period Revenue and Eligible Recovery, impacting the amount of transitional ICC Support to which rate-of-return carriers are entitled. Because LSS had been part of the interstate revenue requirement, the Commission found that the ICC recovery mechanism should make up for those lost revenues during the ICC transition period.[38] NECA interpreted the FCC's rules as requiring an adjustment to FairPoint's Adjusted Base Period Revenue to determine the Eligible Recovery because FairPoint was receiving the amounts formerly attributed to LSS both through Frozen CAF Phase I Support (as a ROR carrier affiliated with a price cap company) and through the ICC transition calculations (as a ROR company). In 2015 FairPoint ceased receiving Frozen CAF Phase I Support in all but two states.[39] As a result

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[37] *Id*. ¶257. (emphasis added).

[38] *Id*. ("To the extent that the elimination of LSS support affects incumbent LECs interstate switched access revenue requirement, *we address that issue in the ICC context*.")..")(emphasis added). Note that the Commission established different transition timetables for ICC and CAF, aligning the recovery of LSS for rate-of-return carriers *with the ICC transition*. Thus, LSS payments to ILECs were frozen at 2011 levels for the period January 1, 2012 to June 30, 2012. As of July 1, 2012, when the new ICC rates took effect, LSS amounts were subsumed into the ICC transitional recovery mechanism.

[39] Upon implementation of CAF Phase II this year, Frozen CAF Phase I Support ceased for all price cap ILECs and rate of return carriers associated with price cap carriers (which

there is no longer any possibility of duplicate recovery. Amounts formerly received through LSS are recovered by FairPoint only through the ICC transition mechanism calculated pursuant to Section 51.917 of the Commission's rules. However, NECA has refused to change its practice.

NECA's confusion about the application of the duplicate support rule is costing FairPoint $4.2 million in much-needed Eligible Recovery (from the ARC and ICC Support) for calendar year 2015. This is not support that FairPoint has an opportunity to recover from the interstate jurisdiction in any other way nor will states allow FairPoint to recover costs assigned to the interstate jurisdiction through state rates. Base Period Revenues for ROR carriers were based on the 2011 interstate revenue requirement, including LSS. The rules state that the ARC and ICC Support are the transition mechanism to recover a revenue shortfall (but not CAF Phase II high-cost support). Rate-of-return carriers associated with a price cap carrier are eligible to recover their Adjusted Base Period Revenue *in each year* of the ICC transition in accordance with Section 51.917 of the Commission's rules.

Moreover, NECA's unilateral action treats FairPoint differently from all other ILECs. The Commission made a policy choice to provide "revenue certainty" to rate-of-

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for this purpose includes the FairPoint ROR ILECs) in any state where they accepted CAF Phase II Support under the Right of First Refusal ("ROFR") offered by the Commission on a state-wide basis. *CAF Phase II Final Order*, 29 FCC Rcd ¶94. CAF Phase II Support became effective for FairPoint in 15 of 17 states (where FairPoint accepted the terms of the ROFR). FairPoint's election is retroactive to January 1, 2015 under the CAF Phase II rules. *Id.* Price cap carriers rejecting the ROFR in any states are to continue receiving Frozen CAF Phase I Support in those states at least until the completion of the FCC competitive bidding process for the eligible portions of their service areas. *USF-ICC Transformation Order* ¶166.

return carriers through the ICC transition.[40] The Commission has said nothing in its proceedings concerning CAF Phase II Support for price cap carriers indicating any intention to modify their Eligible Recovery in connection with the change from Frozen CAF Phase I to model-based CAF Phase II Support.[41] Nor in its consideration of the ICC transition for rate-of-return carriers has the Commission indicated that amounts formerly attributed to LSS should be subtracted from Eligible Recovery for rate-of-return carriers. In fact, the rules clearly state that the calculation of the Eligible Recovery as specified in Section 51.917(e) and (f) supersedes "any other provision" in the Commission rules.[42] NECA calculates Adjusted Base Period Revenues and Eligible Recovery for FairPoint the same way it did for other ROR carriers *except for* deducting historic LSS amounts for FairPoint alone. While this made sense when FairPoint was receiving Frozen CAF Phase I Support, it no longer can be justified. The deductions NECA continues to make impose a unique hardship on FairPoint not imposed on any other price cap or rate-of-return carrier, in a manner never intended by the Commission. The Commission should promptly issue a declaratory ruling instructing NECA to correct this error.

C. Commission Policy Supports the Requested Declaratory Ruling

The Commission acknowledged that freezing ILEC support and mandating reductions in ICC revenues would produce significant changes for ILECs. The Commission therefore adopted CAF Phase I Frozen Support as a transitional mechanism

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[40] *USF-ICC Transformation Order* ¶902.
[41] *Cf. id.* ¶851.
[42] 51.917(d) *Eligible Recovery for Rate-of-Return Carriers*.
(1) *Notwithstanding any other provision of the Commission's rules*, a Rate-of-Return Carrier may recover the amounts specified in this paragraph through the mechanisms described in paragraphs (e) and (f) of this section. 47 C.F.R. §51.917(d)(1) (emphasis added).

for price cap carriers, and adopted a multi-year, multi-step phase-down in ICC rates. The new CAF Phase II regime similarly represents a transformational challenge for the ILECs. Upon the transition from CAF Phase I to CAF Phase II, price cap ILECs electing the ROFR in any state are required to make a binding commitment to deploy high-speed broadband to a specified number of unserved locations identified by the Commission as eligible in that state. They relinquished their Frozen CAF Phase I Support in favor of model-based CAF Phase II Support in each such state as of January 1, 2015. And they take on a number of new reporting and compliance obligations that are not part and parcel of the Frozen CAF Phase I Support. The price cap ILECs that elect CAF II are also relieved of the reporting and compliance obligations associated with Frozen CAF Phase I Support.

The Commission expressed concern that these transformational changes should not be unreasonably disruptive to the ILECs or their investors. The Commission established a transitional ICC recovery mechanism for ROR ILECs based on their interstate revenue requirement and other eligible revenues, adjusted each year, as described above.[43] The Commission specifically held that the transitional recovery, "providing [a] greater degree of certainty for rate-of-return carriers, which are generally smaller and less able to respond to changes in market conditions than are price cap carriers, *is necessary to provide a reasonable transition from the existing intercarrier compensation system*."[44] The Commission intentionally adopted a "conservative" approach to avoid harm to ROR

[43] *USF-ICC Transformation Order* ¶891.
[44] *Id.* (emphasis added).

carriers and their customers.[45] The Commission repeatedly described its goal to provide "revenue certainty, stability, and predictable support" for rate-of-return carriers.[46]

The premise of the Commission's new inter-carrier compensation regime was – and had to be—that the new rules would continue to permit all carriers, including ROR carriers affiliated with price cap carriers, an opportunity to earn a reasonable return on their investment, to avoid an unconstitutional taking of private property without just compensation.[47]

Nothing in the final rules for CAF Phase II indicates any intention to change the Commission's policy concerning ICC Transition. There is nothing in the Commission's rules or orders that indicates that the new model-based CAF Phase II Support for price cap carriers should have any effect on electing carriers' Eligible Recovery.[48] And the Commission has not indicated that rate-of-return carriers electing model-based CAF Phase II Support will have their ICC Eligible Recovery modified in any way. Put simply, CAF Phase II supersedes Frozen CAF Phase I – it is an entirely different program – but has no effect on Adjusted Base Period Revenues or the Eligible Recovery under Section 51.917 of the Commission's rules.

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[45] *See, e.g., id.* ¶¶894, 900.
[46] *E.g., id.* ¶902.
[47] *See id.* ¶924 ("we agree with commenters who maintain that the Commission has no legal obligation to ensure that carriers recover access revenues lost as a result of reform, absent a showing of a taking. We establish a rebuttable presumption that the reforms adopted in this Order, including the recovery of Eligible Recovery from the ARC and CAF, allow incumbent LECs to earn a reasonable return on their investment.") (footnotes omitted).
[48] If CAF Phase II model-based support were intended to provides LSS-type funding, the model would have assigned additional switching costs to the interstate jurisdiction for smaller study areas -- it does not do so.

NECA is selectively interpreting the Commission's rules without regard to these critical policy decisions. Prior to January 1, 2015, NECA's reduction of FairPoint's Eligible Recovery based on FairPoint's legacy LSS made sense due to FairPoint's receipt of both frozen legacy support amounts as a price cap carrier and the Adjusted Base Period Revenue requirement recovered through the ICC Transition mechanism for ROR carriers.[49] The deduction made by NECA achieved the avoidance of "duplicate recovery" prior to January 1, 2015. However, because Frozen CAF Phase I Support has been terminated effective January 1, 2015, in the FairPoint ROFR study areas, and replaced by a new, forward-looking model-based form of support, there is no longer any possibility of duplicate recovery of support in these study areas.

Former LSS amounts are not part of CAF Phase II Support, but are a substantial part of the interstate revenue requirement for rate-of-return carriers. LSS has not been replaced by CAF Phase II Support. CAF Phase II Support has no basis in historic costs but rather is based on forward-looking calculations. In contrast, former LSS amounts were subsumed into the ICC Support mechanism for interstate revenue recovery. Nothing in the Commission's orders concerning CAF Phase II require any adjustment to the ICC Support mechanism. Now that FairPoint's Frozen CAF Phase I Support payments have ceased,[50] any *ad hoc* adjustment by NECA also must cease.

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[49] FairPoint understands there is one other price cap carrier with rate-of-return affiliates, Consolidated Communications, whose rate-of-return affiliates operate outside the NECA pool.

[50] Similarly, once CAF Phase I support is discontinued in the two states where FairPoint rejected CAF II support, NECA should be instructed to revise its calculations of Eligible Recovery to be consistent with the elimination of duplicate support.

The Commission's decision provide "revenue certainty" to rate-of-return carriers[51] is wholly consistent with the decision to continue treating LSS as part of the interstate revenue requirement for small carriers, and allow ROR carriers to recover the amounts formerly associated with LSS as part of their Eligible Recovery.[52]

Today, the FCC is preparing to offer model-based CAF high-cost support to other rate-of-return carriers on a voluntary basis, in exchange for new broadband build-out commitments, much like the ROFR offered to price cap carriers for CAF Phase II Support. Nothing in that proceeding suggests that the Commission contemplates reducing ICC Transition Support for those rate-of-return carriers that accept model-based CAF. There is no evidence that the Commission regarded former LSS funding amounts that are recovered through ICC Transition Support as "duplicating" any forward-looking model-based support being offered to ILECs with new broadband deployment obligations on a going-forward basis. Just so, the CAF Phase II Support offered to price cap carriers is a forward-looking amount having no relation to the former interstate revenue requirement now being phased-down and partially recovered, on a transitional basis, through transitional ICC support.

The Commission should order NECA to treat the FairPoint rate-of-return companies as it treats the other rate-of-return companies for purposes of the ICC transition, and calculate FairPoint's Eligible Recovery without a special deduction for an amount equal to the historical LSS. None of the FCC's rules, the *USF-ICC Transformation Order* or any subsequent order provides any justification for this

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[51] *USF-ICC Transformation Order* ¶902.
[52] *USF-ICC Transformation Order* ¶872.

deduction. Duplicate recovery is no longer a possibility. Indeed, now that FairPoint's high-cost support is governed by the CAF Phase II rules, effective January 1, 2015, and FairPoint's support has been recalculated through the FCC's forward-looking cost model for price cap carriers, FairPoint faces entirely new universal service challenges having no relation to historic support rules.

Finally, the economics of CAF Phase II Support do not support NECA's actions and are inconsistent with any argument that duplicate funding continues under the CAF Phase II regime. FairPoint's CAF Phase II funding for its ROR study areas in total is significantly lower than its frozen support, declining 48% at the end of the transition from Frozen CAF Phase I Support. This hardly supports the notion that CAF Phase II funding somehow "includes" any amount for LSS. In two of the states where FairPoint accepted CAF Phase II funding, NECA is reducing FairPoint's ICC Transition compensation by *more than* the entire CAF Phase II funding amount for those states. This results in FairPoint effectively receiving negative CAF Phase II Support in Ohio and Pennsylvania, unless and until the Commission instructs NECA to compensate FairPoint for its Adjusted Base Period Revenue in accordance with Section 51.917 of the Commission's rules. It is mathematically impossible to conclude for these states that CAF Phase II model-based support includes any amount of replacement support for LSS, since the amount formerly received as LSS is larger than the entire CAF Phase II support amount. In three other study areas, two in New York and one in Maine, NECA is reducing ICC Transition compensation by more than the CAF Phase II funding for those study areas, meaning FairPoint is receiving negative CAF Phase II funding for those study areas as well. In New York and Maine, calculated at the state level, FairPoint is receiving more CAF Phase

II Support than NECA is removing from compensation, but it still is antithetical to the Commission's reasoning in adopting the CAF Phase II Support mechanism for FairPoint to receive negative CAF Phase II support for any study areas.

III. Conclusion

NECA's actions contravene Commission policy, which clearly permits rate-of-return carriers to recover their Adjusted Base Period Revenue as part of the ICC transition process in accordance with Section 51.917 of the Commission's rules. The Commission made no exception for rate-of-return carriers affiliated with price cap carriers, and the Commission should instruct NECA accordingly.

For the foregoing reasons, the Commission should declare that NECA must correct its calculations of FairPoint's Eligible Recovery under Section 51.917 of the rules, retroactive to January 1, 2015. NECA must restore the funding that NECA has been subtracting since January 1, 2015 under an erroneous interpretation of the Commission's rules. To the extent necessary, the Commission should order NECA to refile its FCC access tariffs for 2014/2015 and 2015/2016 to effectuate the correct calculations.

In light of the importance of this revenue for FairPoint's continuing voice operations and its ability to invest in infrastructure supporting advanced services, FairPoint respectfully urges the Commission (or the Wireline Competition Bureau, acting on delegated authority) to expedite action on this request.

Respectfully submitted,

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Attachment A

Impact of ICC Transition Excluding Amount Attributable to LSS

State	Study Area*	Study Area Code	LSS in CAF II Rate-of-Return Study Areas
AL	GTC, Inc. (Florala)	210291	$57,840
FL/GA	GTC, Inc. (Perry)†	210329	$73,008
FL	GTC, Inc. (St. Joe)	210339	$157,812
IL	The El Paso Telephone Company	341004	$51,792
IL	C-R Telephone Company	341009	$42,612
IL	Odin Telephone Exchange, Inc.	341065	$88,380
ME	Community Service Telephone Co.	100015	$296,016
MO	FairPoint Communications Missouri, Inc.	421472	$454,680
NY	Berkshire Telephone Corporation	150073	$284,508
NY	Chautauqua & Erie Telephone Corporation	150078	$614,676
NY	Taconic Telephone Corp.	150084	$693,996
OH	The Germantown Independent Telephone Company	300618	$159,576
OH	The Orwell Telephone Company	300649	$207,576
OH	The Columbus Grove Telephone Company	300604	$64,200
OK	Chouteau Telephone Company	431981	$109,800
PA	Bentleyville Communications Corporation	170145	$143,460
PA	Marianna and Scenery Hill Telephone Company	170185	$86,136
VA	Peoples Mutual Telephone Company	190244	$82,380
WA	Ellensburg Telephone Company	522412	$370,332
WA	YCOM Networks, Inc.	522453	$212,508
	Total CAF II rate-of-return Study Areas		$4,251,288

* Excludes FairPoint ROR study areas in Colorado and Kansas, where FairPoint declined the CAF II ROFR.
† Single study area covering parts of Georgia as well as Florida.