

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
FairPoint Communications, Inc.)	WC Docket No. 07-66
)	
Petition of FairPoint Communications, Inc. for)	
Waiver of Sections 61.41(b) and (c))	
of the Commission's Rules)	

**REPLY COMMENTS OF
FAIRPOINT COMMUNICATIONS, INC.**

FairPoint Communications, Inc. (“FairPoint”) hereby replies to the comments filed by the Communications Workers of America and International Brotherhood of Electrical Workers (collectively, “CWA”) opposing FairPoint’s petition for a waiver of the Commission’s “all-or-nothing” price cap rule.¹ CWA asserts that FairPoint’s waiver request is “unprecedented,”² and that the Commission “has never granted a petition that would allow an acquiring company to operate some affiliates under rate-of-return regulation and some affiliates under price caps.”³ FairPoint’s petition cites ample evidence to the contrary, and explains why grant of the requested waiver would serve the public interest. Accordingly, the waiver should be granted.

¹ See Comments of Communications Workers of America and International Brotherhood of Electrical Workers, WC Docket No. 07-66 (filed May 4, 2007) (“CWA Comments”).

² *Id.* at 6; see also *id.* at 3 (“There is no Commission precedent to justify Fairpoint’s [*sic*] waiver request.”). CWA makes the same assertion in its reply comments in support of its petition to deny FairPoint’s license transfer applications. See Reply Comments of the Communications Workers of America and International Brotherhood of Electrical Workers, WC Docket No. 07-22, at 18 (filed May 11, 2007).

³ CWA Comments at 3; see also *id.* (stating that “there is simply no instance in which the Commission has approved a waiver that would result in a partial price cap/partial rate-of-return regime within the same holding company”); *id.* at 4 (stating that the Commission has “firmly rejected” the type of relief FairPoint seeks here).

CWA's characterization of Commission precedent in this area is misleading. Not only has the Commission waived its all-or-nothing rule on numerous occasions over the last decade,⁴ but many of those decisions allowed a single company simultaneously to operate price-cap affiliates and rate-of-return affiliates,⁵ as FairPoint proposes to do. CWA's assertions to the contrary are simply wrong.⁶ More generally, the Commission long has contemplated that

⁴ See generally FairPoint Pet. at 7-9.

⁵ See, e.g., *Valor Communications Group, Inc. (New Valor); Petition for Waiver*, Order, 21 FCC Rcd 859 ¶ 1 (2006) (“*ALLTEL/New Valor Order*”) (allowing merged company to maintain properties “under the existing regulatory regime applicable to each of the local exchange companies, . . . some of which operate under price cap regulation and others that operate under rate-of-return regulation”); *Nemont Telephone Cooperative, Inc. Missouri Valley Communications, Inc. Reservation Telephone Cooperative and Citizens Telecommunications Company of North Dakota; Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission's Rules; Petition for Waiver of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission's Rules*, Order, 18 FCC Rcd 838 ¶ 2 (2003) (waiving “the price cap ‘all-or-nothing’ rule . . . to permit the Acquiring Companies to operate under rate-of-return regulation after acquiring exchanges . . . that are subject to price-cap regulation”); *ALLTEL Corporation Petition for Waiver of Section 61.41, ALLTEL Corporation Petition to Extend Interim Waiver of Section 61.41 of the Commission's Rules, CenturyTel, Inc. and CenturyTel of Alabama, LLC Petition for Waiver of Sections 61.41(b) and (c) of the Commission's Rules, CenturyTel, Inc. and CenturyTel of Missouri, LLC Petition for Waiver of Sections 61.41(b) and (c) of the Commission's Rules, Puerto Rico Telephone Company Petition for Waiver of Section 61.41 of the Commission's Rules or, in the Alternative, Request for Waiver of Section 54.303(a) of the Commission's Rules*, Memorandum Opinion and Order, 17 FCC Rcd 27694 (2002) (“*ALLTEL/CenturyTel Waiver Order*”) (permitting ALLTEL and CenturyTel to continue to operate their existing exchanges under rate-of-return regulation and to operate exchanges acquired from Verizon in Kentucky, and in Alabama and Missouri, respectively, under price caps); *CenturyTel of Central Wisconsin, LLC and GTE North Inc. Joint Petition for Waiver of Definition of “Study Area” Contained in the Appendix to Part 36 of the Commission's Rules - Glossary of the Commission's Rules, CenturyTel of Central Wisconsin, LLC Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission's Rules*, Memorandum Opinion and Order, 15 FCC Rcd 15043 ¶ 15 (2000) (“*CenturyTel Wisconsin Order*”) (granting a waiver that would “permit [CenturyTel] to be regulated under rate-of-return regulation after acquiring from GTE 42 Wisconsin exchanges that are currently under price cap regulation”).

⁶ See CWA Comments at 3 (stating that “[i]n virtually every case that Fairpoint [*sic*] cites in its Petition, the Commission granted a waiver that would convert an acquired price cap

carriers would seek waivers of the all-or-nothing rule in a variety of circumstances. As noted in the petition, the Commission has proposed to modify the all-or-nothing rule or eliminate it altogether,⁷ and ruled that all outstanding waivers will continue in effect pending a final decision on whether to retain the rule.⁸ Meanwhile, the Commission expressly has invited carriers to seek additional waivers of the rule.⁹

CWA fails to address—let alone dispute—the Commission’s established precedent holding that it generally is not appropriate to mandate price cap regulation for midsize and small

property to rate-of-return”). CWA’s further attempt to dismiss this precedent, by stating that in these cases the rate-of-return company generally purchased only “a small number of lines,” *id.*, is likewise incorrect. *See, e.g., ALLTEL/CenturyTel Waiver Order* at ¶¶ 5-6 (referencing ALLTEL’s acquisition of 100 local exchanges in Kentucky, and CenturyTel’s acquisition of 96 local exchanges in Missouri and 88 local exchanges in Alabama). CWA is also wrong that the acquiring companies in the Commission’s past decisions had more access lines than they purchased. *See ALLTEL/New Valor Order* at ¶ 1 n.3 (acquiring company had 550,000 lines, compared to 2.9 million lines in the acquired exchanges).

⁷ *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613 ¶¶ 267, 270 (2001) (seeking comment “on whether the ‘all-or-nothing’ restrictions unreasonably and unfairly limit affiliated companies from selecting regulatory options that would enable them to operate more efficiently, especially in light of the highly diverse service areas of some carriers,” and “on whether the ‘all-or-nothing’ restrictions are currently necessary to prevent cost shifting and gaming”); *see also* FairPoint Pet. at 9.

⁸ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122 ¶ 11 n.40 (2004) (“*MAG Report and Order*”) (citations omitted).

⁹ *See id.* ¶ 10 n.39 (confirming that “carriers can continue to petition for waiver of the all-or-nothing rule so that they may operate affiliates under both rate-of-return and price cap regulation”); *see also Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637 ¶ 149 n.207 (1991); FairPoint Pet. at 6.

rural carriers.¹⁰ CWA seems to believe that the Commission should impose price cap regulation on FairPoint’s legacy rural exchanges,¹¹ despite the Commission’s consistent practice of making this form of incentive regulation purely optional for operators considerably larger than FairPoint.¹² In light of the overwhelming precedent in support of FairPoint’s petition, CWA’s arguments should be rejected.

Tellingly, CWA cites only one case—involving the ALLTEL/Aliant merger in 1999—to support its reading of the applicable precedent.¹³ However, CWA’s interpretation of that case is flawed. In that case, ALLTEL had petitioned for waivers to allow its existing exchanges to

¹⁰ See generally FairPoint Pet. at 7-8; see also, e.g., *CenturyTel of Northwest Arkansas, LLC, CenturyTel of Central Arkansas, LLC and GTE Arkansas Inc., GTE Midwest Inc., GTE Southwest, Inc. Joint Petition for Waiver of Definition of “Study Area” Contained in the Part 36 Appendix – Glossary of the Commission’s Rules, CenturyTel of Northwest Arkansas, LLC and CenturyTel of Central Arkansas, LLC, Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission’s Rules*, Memorandum Opinion and Order, 15 FCC Rcd 25437 (2000) (finding that CenturyTel’s smaller size, combined with its specialization in serving rural markets and small towns, merit a waiver from mandatory price caps required for larger LECs); *CenturyTel Wisconsin Order* at ¶ 17 (ruling that because CenturyTel is “significantly smaller” than carriers subject to mandatory price caps, special circumstances supported waiver of the all-or-nothing rule); *ALLTEL Corp., Petition for Waiver of Section 61.41 of the Commission’s Rules and Applications for Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 14191 ¶ 35 (1999) (“*ALLTEL/Aliant Waiver Order*”) (granting price cap waiver in spite of the fact that ALLTEL was a “mid-sized” LEC because “ALLTEL’s properties are scattered largely in small to mid-sized towns and cities in 22 states and ALLTEL is[,] therefore, unlike any of the large BOCs, and more similar to smaller carriers”).

¹¹ See CWA Comments at 6 (stating that denial of FairPoint’s petition would “require Fairpoint [*sic*] to convert its legacy exchanges to price cap regulation”).

¹² *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 ¶ 6 (1990) (“limit[ing] mandatory application of the price cap system” to the then-seven Regional Bell Operating Companies and GTE, and holding that “[f]or mid-sized and smaller LECs, price cap regulation will be optional. This decision addresses the concern that mid-sized carriers, those just below the largest eight in size, might not be able to generate productivity gains of the same magnitude as the largest LECs.”); see also FairPoint Pet. at 8. Even following the transaction, FairPoint will be smaller than the carriers for which price caps traditionally were mandatory.

¹³ CWA Comments at 4.

remain under rate-of-return regulation and to convert the exchanges being acquired from Aliant from price cap to rate-of-return regulation.¹⁴ The Commission granted that request, finding that doing so was “consistent with Commission precedent” and “in the public interest.”¹⁵ What the Commission rejected was AT&T’s request that ALLTEL’s petition be denied or that Aliant, “at a minimum, be required to operate as a structurally separate price cap company.”¹⁶ The Commission concluded that “the additional layer of regulation that AT&T suggests” would “create new administrative burdens for the Commission associated with monitoring affiliate transactions and taking appropriate enforcement action.”¹⁷

Thus, the Commission did not “firmly reject[.]” a “mixed regulatory regime” in that case, as CWA contends.¹⁸ In fact, that issue was not even presented, given that ALLTEL intended to convert the acquired exchanges to rate-of-return regulation. More to the point, since the ALLTEL/Aliant merger, the Commission has permitted several companies operating rate-of-return affiliates to acquire price cap affiliates and operate both pursuant to precisely the type of waiver FairPoint is seeking.¹⁹

CWA also fails to show why a waiver here would not serve the public interest. Its assertion that a waiver would create “opportunity and incentive” for FairPoint to engage in “cost shifting,” which in turn could lead to rate increases, is directly contradicted by Commission

¹⁴ *ALLTEL/Aliant Waiver Order* at ¶ 1.

¹⁵ *Id.* at ¶¶ 36-37.

¹⁶ *Id.* at ¶ 38.

¹⁷ *Id.*

¹⁸ CWA Comments at 4.

¹⁹ See cases cited *supra* note 5 and accompanying text.

precedent.²⁰ As FairPoint has explained, state and federal tariff processes and the Commission’s cost accounting rules will prevent cost shifting, since the price cap exchanges and rate-of-return exchanges will be operated by different affiliates.²¹

Finally, the Commission should disregard CWA’s argument that converting FairPoint’s existing exchanges to price cap regulation would have no impact on universal service.²² Asking the Commission to mandate that FairPoint lower its dividends to make up for revenue shortfalls directly contradicts both statutory and Commission mandates. FairPoint’s legacy exchanges are return-regulated. Accordingly, there are already adequate regulatory mechanisms in place to address any possible over-earning. Moreover, as the Commission once observed in rejecting a similar argument by CWA, “no Commission rule controls excess dividend policy.”²³ Further, converting rural rate-of-return companies to price caps would not, in itself, redefine the amount of high-cost support to which they are entitled—but it would subject them to a loss of Interstate Common Line Support (“ICLS”), a revenue replacement mechanism the Commission expressly put in place because of mandatory reductions in interstate access charges.²⁴ The Commission’s rules provide no obvious mechanism for new lines to be added to the capped Interstate Access Support (“IAS”) “pool” to make up this revenue shortfall.²⁵ Thus, CWA’s proposed conversion

²⁰ CWA Comments at 2-3.

²¹ FairPoint Pet. at 6; *see also* MAG Report and Order at ¶ 92 (“We tentatively conclude that existing accounting and regulatory processes should permit parties and the Commission to detect cost shifting by the rate-of-return carriers that file cost-based access tariffs.”).

²² CWA Comments at 4-6.

²³ ALLTEL/Aliant Waiver Order at ¶ 30.

²⁴ 47 C.F.R. § 54.901 (providing that ICLS support is limited to rate-of-return companies).

²⁵ *Id.* § 54.801(a) (capping support at \$650 million per year); *see also* ALLTEL/CenturyTel Waiver Order at ¶ 20 (noting that the Commission has “not explicitly address[ed] how

could cause FairPoint's legacy properties to under-earn, potentially resulting in *increased* interstate access rates—a result that likely would not be deemed in the public interest.

In sum, CWA's arguments ignore considerable precedent and provide no grounds to deny FairPoint the relief it seeks. For the reasons stated in FairPoint's petition, the Commission should waive its all-or-nothing rule, 47 C.F.R. §§ 61.41(b) and (c).

Respectfully submitted,

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entry of new carriers into price caps affects the distribution of interstate access universal service support”).

CERTIFICATE OF SERVICE

I, Brian W. Murray, hereby certify that on this 21st day of May, 2007, I served a true copy of the foregoing Reply Comments of FairPoint Communications, Inc. by electronic mail and U.S. Postal Service first class mail, postage pre-paid, upon the following:

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