

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

Applications of)	
)	
FairPoint Communications, Inc., Debtor-in-Possession,)	
Assignor,)	
)	
and)	WC Docket No. 10-126
)	
FairPoint Communications, Inc.,)	
Assignee,)	
)	
For Consent to Assign Commission Licenses)	
and Authorizations Held by Subsidiaries of)	
FairPoint Communications, Inc.)	

REPLY COMMENTS OF FAIRPOINT COMMUNICATIONS, INC.

FairPoint Communications, Inc., Debtor-in-Possession, and its operating subsidiaries (collectively, "FairPoint") hereby respond to comments filed on July 26, 2010 by Biddeford Internet Corporation; Freedom Ring Communications LLC d/b/a BayRing Communications; Mid Maine Telplus and CRC Communications of Maine, Inc. d/b/a OTT Communications; One Communications, Inc.; Otel Telekom, Inc.; and segTEL, Inc. (collectively, the "Joint Commenters") with respect to the above-referenced applications. In those applications, FairPoint requests Commission consent: (i) to assign licenses and authorizations to certain FairPoint operating subsidiaries from those subsidiaries as debtors-in-possession; and (ii) to transfer control of FairPoint and each such subsidiary from FairPoint's existing shareholders to FairPoint's existing secured lenders as the new shareholders of FairPoint (collectively, the "Proposed Transaction").

I. INTRODUCTION

As FairPoint has noted previously, the expeditious approval of the Proposed Transaction would serve the public interest by allowing FairPoint to exit bankruptcy quickly while substantially reducing its debt burden and restructuring its operations in order to continue to provide efficient and effective service to the public. Critically, no party has opposed grant of the applications. Indeed, only the Joint Commenters have submitted *any* comments with respect to the applications.¹ Notably, though, the Joint Commenters question neither the qualifications of the proposed transferees, nor the public interest benefits that would extend from allowing FairPoint to emerge from bankruptcy. In fact, the Joint Commenters identify no harm whatsoever specific to the elements of the transaction subject to the Commission's jurisdiction.

The Joint Commenters take issue with the bankruptcy process, which lies within the exclusive jurisdiction of the federal courts. More specifically, the Joint Commenters take issue with the fact that federal law permits debtors like FairPoint to reject certain executory contracts—including interconnection agreements and other intercarrier arrangements—as part of the bankruptcy process. The Joint Commenters fail to raise any issue that is justiciable by this Commission—particularly as the Joint Commenters concede that FairPoint has not rejected any interconnection agreement to date, and otherwise allege only speculative harms that are not cognizable in this forum.

FairPoint's federal statutory obligations, which are independent of any particular contractual arrangement that may be addressed through the bankruptcy process, are not in dispute. The Joint Commenters will continue to benefit from Sections 251, 252, and 271 of the

¹ In addition, Team Telecom submitted a request to defer consideration of the applications pending its review of the Proposed Transaction. FairPoint understands that this review is now complete, and that Team Telecom intends to withdraw its request.

Communications Act of 1934, as amended (the “Communications Act”), and will continue to be able to avail themselves of state and federal procedures for enforcing these provisions.

Accordingly, the Commission should reject the Joint Commenters’ claims, and grant the subject applications expeditiously and without conditions.

II. THE JOINT COMMENTERS’ COMPLAINTS ABOUT THE BANKRUPTCY PROCESS ARE BEYOND THE COMMISSION’S JURISDICTION

Title 11 of the United States Code (the “Bankruptcy Code”) specifies the substantive and procedural rules by which a party may seek bankruptcy protection in the United States.² Section 365 of the Bankruptcy Code provides that debtors-in-possession—including FairPoint—have the right to assume or reject each of their “executory” contracts before emerging from bankruptcy.³ Though there is no precise definition of what contracts are “executory,” this term generally includes contracts on which performance remains due to some extent on both sides.⁴ Undoubtedly, interconnection agreements and other intercarrier arrangements fall into this category—a point the Joint Commenters appear to acknowledge.⁵

The Bankruptcy Code incorporates well-established procedures governing when and how a debtor-in-possession may elect to assume or reject a given executory contract. These procedures reflect Congress’s attempt to carefully balance the competing interests in the bankruptcy process. To the extent that a party—including any of the Joint Commenters—takes

² See 11 U.S.C. §§ 101 *et seq.*

³ See 11 U.S.C. § 365.

⁴ See, e.g., H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 347 (1977). See also Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. R. 439, 460 (1973) (executory contracts include those “under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other”).

⁵ See Joint Comments at 7 (expressing concern that FairPoint could reject these existing intercarrier relationships through the bankruptcy process).

issue with the debtor’s right to reject a contract, that objection may be brought before the bankruptcy court.

Notwithstanding FairPoint’s clear right to reject any interconnection agreement and other intercarrier arrangements, it has not yet done so. While the Joint Commenters concede this point, they nevertheless ask the Commission to compel FairPoint to accept each of its existing interconnection agreements and other intercarrier relationships. However, the Joint Commenters offer no justification for imposing such a restrictive *ex ante* condition on FairPoint’s ability to exercise its federal rights as part of the bankruptcy process. Further, the Joint Commenters fail to explain why they could not object to FairPoint’s decision to reject an interconnection agreement or other intercarrier arrangement at the appropriate point in the bankruptcy process—like any other party. Thus, there is no cause for the Commission to insert itself into the process.

Similarly, the Joint Commenters offer no legal theory under which the Commission could ignore the provisions of the Bankruptcy Code or interfere with the bankruptcy court’s administration of FairPoint’s case. While the Joint Commenters suggest in passing that the Commission should not allow FairPoint to use “any potential friction or uncertainty regarding the relationship between bankruptcy and communications law undermine [sic] FairPoint’s duties and obligations under section [sic] 251, 252, and 271 of the Act,”⁶ no such “friction” or “uncertainty” exists in this case. In fact, the only relevant “friction” is that which would result if the Commission attempted to inject itself into the bankruptcy process via the imposition of bankruptcy-related conditions.

⁶ *Id.* at 4-5.

III. THE JOINT COMMENTERS' CLAIMS ARE SPECULATIVE AND WITHOUT FOUNDATION

Even if the Commission *could* impose the conditions requested by the Joint Commenters, they fail to identify any transaction-specific harm that would justify doing so.⁷ The Joint Commenters make only vague allegations that FairPoint has been unable to meet fully its obligations under various intercarrier arrangements and Sections 251, 252, and 271 of the Communications Act,⁸ and speculate about potential “harms” that could result if FairPoint were to take certain actions. However, they provide no specific, tangible examples of such failure. Moreover, their comments conspicuously omit any declaration or other documentary support for their claims.⁹ This omission, by itself, should lead the Commission to reject the imposition of conditions.

At bottom, the Joint Commenters offer little more than innuendo, much of it self-defeating. For example, the Joint Commenters note allegations that they made in the Verizon/FairPoint proceeding, in an apparent effort to suggest that those same issues persist—even though those allegations were rejected by the Commission.¹⁰ Further, the Joint Commenters note that they approached the Enforcement Bureau about taking action against FairPoint for its alleged failure to meet its Section 271 obligations, in an apparent effort to

⁷ See, e.g., *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13915, at ¶ 141 (2009) (conditions must be narrowly tailored to address transaction-specific harm).

⁸ See 47 U.S.C. §§ 251, 252, and 271.

⁹ Notably, the inclusion of an affidavit or declaration is a statutory requirement where a commenter asks the Commission to deny the relief requested by an applicant. See 47 U.S.C. § 309(d).

¹⁰ Joint Comments at 3-4.

suggest that FairPoint is not meeting those obligations—even though that approach resulted in no adverse action being taken by the Bureau.¹¹

Other aspects of the Joint Commenters’ “criticism” of FairPoint demonstrate that it has met its existing obligations. For example, the Joint Commenters assert that FairPoint has not “willingly” complied with its statutory and other obligations and has sought relief from those obligations (like most carriers faced with *obligations*)—in essence conceding that FairPoint *has* complied with those obligations.¹² Moreover, the Joint Commenters acknowledge that FairPoint has asserted that it will continue to honor its existing interconnection agreements,¹³ and that “to date nothing has relieved FairPoint” of the duties it previously accepted.¹⁴

IV. FAIRPOINT IS AND WILL REMAIN SUBJECT TO THE COMMUNICATIONS ACT AND THE COMMISSION’S RULES

As noted above, the Joint Commenters identify no concrete harm that would extend from the Proposed Transaction, and merely speculate that such harm *could* result. However, the Joint Commenters grossly exaggerate even the *potential* for such harm, because they conflate FairPoint’s right to reject *specific* interconnection agreements and intercarrier arrangements through the bankruptcy process with a non-existent “right” to reject *general* statutory obligations imposed by Sections 251, 252, and 271. FairPoint has never suggested that the latter “right” exists, and the Joint Commenters’ suggestion that it does is without foundation.

Critically, following its emergence from bankruptcy, FairPoint will continue to operate its incumbent local exchange carrier subsidiaries subject to the requirements of Sections

¹¹ *Id.* at 4.

¹² *Id.* at 5-6.

¹³ *See id.* at 6.

¹⁴ *Id.* at 5.

251 and 252 of the Communications Act.¹⁵ Moreover, in Maine, New Hampshire, and Vermont, FairPoint will continue to operate as a Bell Operating Company subject to the requirements of Section 271 of the Communications Act.¹⁶ These obligations include, among other things, the duty to interconnect with competitive local exchange carriers. Thus, even if FairPoint were to reject a *specific* interconnection agreement or other intercarrier arrangement, FairPoint would be obligated to negotiate a new arrangement, consistent with its statutory obligations. Further, FairPoint has stated that it will honor the terms and conditions of an interconnection agreement while negotiating a new interconnection agreement.¹⁷ Similarly, there is no basis for the claim that FairPoint could attempt to reject or withdraw its federal tariff without prior Commission approval.¹⁸ Moreover, FairPoint’s statutory obligations would be enforceable in the ordinary course by the states through Section 252, and by the Commission through Section 208 complaint procedures—although FairPoint intends to comply with its obligations fully in the first instance.¹⁹

In short, FairPoint could not reject its statutory obligations through the bankruptcy process, and the Joint Comments identify no example of any attempt to do so. Therefore, the

¹⁵ 47 U.S.C. §§ 251, 252.

¹⁶ *See* 47 U.S.C. § 271.

¹⁷ *See, e.g.*, Response of Lisa R. Hood, Interim Chief Financial Officer, FairPoint Communications, Inc., New Hampshire Public Utilities Commission Docket No. DT 10-025 (May 14, 2010) (“[I]n the event that FairPoint rejects an interconnection agreement with a CLEC prior to the effective date of the Plan, then FairPoint plans to continue to offer the CLEC the same services at the same rates, terms and conditions as contained in the rejected contract pending the parties' entering into to a new interconnection agreement.”).

¹⁸ *See* Joint Comments at 2.

¹⁹ *See* 47 U.S.C. §§ 208, 252.

Joint Commenters' suggestion that the Commission must take specific action to continue these obligations is unfounded.

V. CONCLUSION

For the reasons set forth above and in the subject applications, FairPoint urges the Commission to reject the Joint Commenters' claims, and grant FairPoint's applications expeditiously and without conditions in order to further the public interest.

Respectfully submitted,

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August 10, 2010

CERTIFICATE OF SERVICE

I, Jarrett S. Taubman, do hereby certify that, on this 10th day of August, 2010, I served true and correct copies of the foregoing Reply Comments of FairPoint Communications, Inc. via U.S. mail, postage prepaid, on the following:

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