

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	

**COMMENTS OF
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

ITTA – The Voice of Mid-Size Communications Companies (“ITTA”) hereby submits its comments in support of the Petition for Declaratory Ruling (“Petition”) filed by FairPoint Communications, Inc. (“FairPoint”) in the above-captioned proceedings.¹

I. INTRODUCTION AND SUMMARY

FairPoint has asked the Commission for a declaratory ruling directing the National Exchange Carrier Association (“NECA”) to recalculate Eligible Recovery (“ER”) amounts for certain FairPoint rate-of-return (“RoR”) study areas. According to FairPoint, NECA has not been properly calculating ER amounts for the affected study areas pursuant to Section 51.917 of the Commission’s rules, which prevents double recovery of Connect America Fund (“CAF”) support, since January 1, 2015 when FairPoint began to receive model-based support under CAF

¹ FairPoint Communications, Inc. Petition for Declaratory Ruling, WC Docket Nos. 10-90, 07-135, CC Docket No. 01-92 (filed Dec. 10, 2015) (“Petition”). *Wireline Competition Bureau Seeks Comment on FairPoint Communications, Inc.’s Petition for Declaratory Ruling Regarding the Application of Section 51.917 of the Commission’s Rules*, WC Docket Nos. 10-90, 07-135, CC Docket No. 01-92, Public Notice, DA 15-1440 (rel. Dec. 17, 2015).

Phase II instead of Frozen Support under CAF Phase I.²

More specifically, NECA has continued to reduce FairPoint's Intercarrier Compensation ("ICC") Transitional Support to take into account (and ostensibly prevent double recovery of) Local Switching Support ("LSS") formerly recouped as part of CAF Phase I Frozen Support, even though CAF Phase II support amounts do not contain any compensation related to the former LSS mechanism. As a result of NECA's incorrect application of the rule against double recovery, FairPoint is not receiving the full amount of ICC Transitional Support to which it is entitled. Accordingly, ITTA agrees that the Commission should issue a declaratory ruling directing NECA to recalculate FairPoint's ER for the affected study areas so as to restore the full amount of ICC Transitional Support to which FairPoint is entitled, retroactive to January 1, 2015.

FairPoint makes a compelling case that NECA is not correctly implementing Section 51.917 of the Commission's rules. Indeed, NECA itself acknowledges that "a ruling by the Commission on this issue would be helpful."³ NECA suggests that the rules governing calculation of ER amounts are unclear as applied to FairPoint's particular circumstances. However, as explained below, this assertion is not accurate.⁴

The *USF/ICC Transformation Order* may not have addressed this specific set of circumstances, but the rules are crystal clear and easy to follow. FairPoint is entitled to its full ER, subject to the duplicate recovery rules. As of January 1, 2015 when FairPoint transitioned to CAF Phase II support, duplicate recovery no longer applies because FairPoint is no longer recovering LSS-derived amounts previously included in CAF Phase I Frozen Support. Thus,

² 47 C.F.R. § 51.917.

³ Comments of the National Exchange Carrier Association, Inc., WC Docket Nos. 10-90, 07-135, CC Docket No. 01-92 (filed Jan. 14, 2016) ("NECA Comments"), at 4.

⁴ *See id.*

under the rules, NECA has no justification for continuing to reduce FairPoint's ICC Transitional Support by such amounts because there simply is no double recovery.

The Commission should clarify that Section 51.917 of the rules requires NECA to modify its tariff and restore the ICC Transitional Support owed to FairPoint as requested in the Petition. While FairPoint is uniquely situated as a carrier that is RoR regulated for ICC purposes and price cap regulated for CAF purposes, the Commission should not allow NECA either to set new precedent by selectively interpreting the rules, or to misinterpret the rules due to uncertainty. Failure to act will result in FairPoint being treated differently from all other carriers, both RoR and price cap companies, causing undue hardship to FairPoint.

II. ARGUMENT

As detailed in the Petition, the ICC Transition recovery mechanism is calculated under Section 51.917 of the Commission's rules. Each RoR carrier's ER is computed at the start of each year in accordance with subsection 51.917(b)(iii).⁵ If revenues from intercarrier charges and the end-user Access Recovery Charge fail to yield a carrier's ER, that carrier is eligible for ICC Transitional Support.⁶ Many RoR carriers rely on ICC Transitional Support to maintain

⁵ 47 C.F.R. § 51.917(b)(iii). *See also In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 851 (rel. Nov. 18, 2011) (“*USF/ICC Transformation Order*”) (“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.”).

⁶ 47 C.F.R. §§ 51.917(e)-(f). This calculation of ER and use of the ICC Transitional Support mechanism clearly was intended to apply to FairPoint in its RoR study areas in the same manner as it applies to other RoR carriers: “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

their operations and provide uninterrupted service, as the Commission intended, during the ICC transition to bill-and-keep.⁷

FairPoint states that, under NECA's particular interpretation of the Commission's rules, FairPoint is receiving only a portion of the compensation to which it is entitled under Section 51.917. NECA has been deducting an amount equal to former LSS received by FairPoint in the affected study areas, a deduction that as of January 1, 2015 cannot be justified under FCC rules.

FairPoint correctly states that the rules require FairPoint to receive ER in accordance with the prescribed calculations under Section 51.917. In the *USF/ICC Transformation Order* the Commission unequivocally expressed its intention that the costs previously recovered through LSS would be recovered (effective July 1, 2012) as part of the ICC Transitional Support mechanism.⁸ ER amounts previously recovered by RoR carriers through their interstate access charges or LSS now are recovered exclusively through ICC Transitional Support.⁹ NECA must follow the calculations prescribed in the rules in order to provide the transitional support the Commission intended and that FairPoint and other carriers rightfully expect. Failure to do so not only violates the Commission's rules but also is disruptive to small carriers such as FairPoint's RoR companies.¹⁰

Moreover, allowing NECA to deduct former LSS amounts from FairPoint's ICC Transitional Support imposes a unique hardship on FairPoint. FairPoint may have been in a

procedure specified in this section." 47 C.F.R. § 51.917(e)(6)(vii).

⁷ See *USF/ICC Transformation Order* at ¶ 891 (establishment of a transitional ICC recovery mechanism would provide a "greater degree of certainty for rate-of-return carriers...[and] is necessary to provide a reasonable transition from the existing intercarrier compensation system").

⁸ *Id.* at ¶ 257.

⁹ *Id.* at ¶ 872.

¹⁰ FairPoint indicates that the amount at stake is \$4.2 million annually. Petition at 12-13.

“duplicate recovery” position, as noted in the Petition, when it was receiving former LSS amounts both through the CAF Phase I Frozen Support mechanism for price cap carriers and through the ICC Transitional Support mechanism for RoR carriers.¹¹ However, that is longer the case. The Commission replaced CAF Phase I Frozen Support in its entirety with a wholly new, forward-looking model-based support mechanism, which FairPoint elected in almost all of its study areas, including those at issue here. Thus, any possibility of duplicate recovery no longer exists.

NECA takes no position on the merits of FairPoint’s argument but agrees that a declaratory ruling would be helpful in removing uncertainty.¹² NECA correctly observes that the *USF/ICC Transformation Order* is silent as to the peculiar circumstances of this case, in which FairPoint’s RoR affiliates have elected CAF Phase II model-based support in the affected study areas effective as of January 1, 2015.¹³ NECA argues that, having appropriately made a deduction to avoid “duplicate recovery” prior to January 1, 2015, and lacking specific direction under the rules whether to change this practice following the CAF Phase II election, it has continued the practice of adjusting FairPoint’s ER and thus its ICC Transitional Support.

NECA and FairPoint both make compelling cases for prompt resolution of this matter.¹⁴ While FairPoint may have been uniquely situated as a carrier that was both RoR and price cap regulated at the time the *USF/ICC Transformation Order* was adopted, the Commission’s rules should apply to all carriers as written – not selectively enforced.¹⁵ Nothing in FairPoint’s actions

¹¹ *Id.* at 14-15, 19-21.

¹² NECA Comments at 4.

¹³ *Id.*

¹⁴ NECA urges the Commission to act prior to May 1, 2016. *Id.* at n. 11.

¹⁵ *See, e.g.*, U.S. Constitution Art. IV, Section 2.

accepting price cap CAF Phase II support should have affected the calculations of FairPoint's ICC Transitional Support under Section 51.917 of the Commission's rules.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the declaratory ruling and related relief requested in the Petition. In light of the reliance of RoR carriers upon ICC Transitional Support, ITTA respectfully requests that the Commission expedite this action to avoid any further undue hardship to FairPoint and its RoR operations.

Respectfully submitted,

By: /s/ Micah M. Caldwell

Genevieve Morelli
Micah M. Caldwell
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, D.C. 20005
(202) 898-1520
gmorelli@itta.us
mcaldwell@itta.us

January 19, 2016