

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
DOCKET NO. BCD-CV-14-56

STATE OF MAINE and)
CONNECTME AUTHORITY,)
)
Plaintiffs)
)
v.)
)
BIDDEFORD INTERNET)
CORPORATION, d/b/a GREAT)
WORKS INTERNET)
)
Defendant.)

PLAINTIFFS' REPLY AND
AFFIRMATIVE DEFENSES TO
DEFENDANT'S COUNTERCLAIM

Plaintiffs State of Maine and ConnectME Authority submit the following Reply and Affirmative Defenses to the Counterclaim filed by defendant Biddeford Internet Corp., doing business as Great Works Internet ("GWI"):

COUNT I

1. This paragraph characterizes Count I of GWI's Counterclaim and does not require a response. To the extent that a response is required, the State and ConnectME Authority deny that GWI is entitled to any relief under Count I.

2. The State and ConnectME Authority deny that this Court has subject-matter jurisdiction over GWI's Counterclaim.

3. The State and ConnectME Authority admit that, from on or about May 10, 2010, to the present, GWI purchased, leased, or otherwise obtained federally supported dark fiber from Maine Fiber Company, LLC, or its predecessor, Maine Fiber Company, Inc. (collectively, "MFC"). The State and ConnectME Authority are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

4. Admitted.

5. The State and ConnectME Authority are without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

6. The State and ConnectME Authority admit that ConnectME Authority asserts that under 35-A M.R.S. § 9216, it has the authority to collect from GWI any “Broadband Sustainability Fee” (“BBSF”) that GWI has not paid to MFC, but the State and ConnectME Authority deny that 35-A M.R.S. § 9216 is the only source of authority for collecting any BBSF that GWI has not paid to MFC.

7. Denied.

8. This paragraph sets forth legal argument to which no response is required. To the extent that a response is required, the State and ConnectME Authority admit that there is a ripe controversy as to whether the ConnectME Authority has the legal authority to collect from GWI any BBSF not paid by GWI to MFC, but deny that this Court has subject-matter jurisdiction over GWI’s Counterclaim.

9. The State and ConnectME Authority admit that MFC owns strands of dark fiber located within its dark fiber cable, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

10. The State and ConnectME Authority admit that MFC is not the only person or entity in Maine from whom a person may purchase, lease, or otherwise obtain dark fiber cable and dark fiber strands, and further admit that there are incumbent local exchange carriers in Maine from whom a person may purchase, lease, or otherwise obtain dark fiber cable and dark fiber strands. The State and ConnectME Authority are without knowledge or information

sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

11. Admitted.

12. Denied.

13. The State and ConnectME Authority admit that the State's broadband policy is set forth in 35-A M.R.S. § 9202-A, but deny the remaining allegations in this paragraph.

14. Admitted.

15. Denied.

16. The State and ConnectME Authority admit that GWI transferred the 2009 Federal Grant to MFC in 2010, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

17. Admitted.

18. The State and ConnectME Authority admit that the assessment in 35-A M.R.S. § 9211(2) is one source of funds for the ConnectME Authority, but deny that is the only source of funds.

19. The State and ConnectME Authority admit that the ConnectME Fund was established pursuant to 35-A M.R.S. § 9211(1) as a nonlapsing fund administered by the ConnectME Authority for the purposes of supporting the activities and projects of the ConnectME Authority under Chapter 93. The State and ConnectME Authority deny the remaining allegations in this paragraph.

20. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9211(2), the ConnectME Authority may require every communications service provider to contribute on a competitively neutral basis to the ConnectME Fund, that the assessment may not

exceed 0.25% of the revenue received or collected for all communications services provided in this State by the communications service provider, and that a facilities-based provider of wireless voice or data retail service may voluntarily agree to be assessed by the ConnectME Authority. The State and ConnectME Authority deny the remaining allegations in this paragraph.

21. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9211(2) after receiving authorization pursuant to Title 5, section 8072 to finally adopt major substantive rules under section 9205, subsection 3 or after January 15, 2007, whichever is later, the ConnectME Authority may require every communications service provider to contribute on a competitively neutral basis to the ConnectME Fund. The State and ConnectME Authority deny the remaining allegations in this paragraph.

22. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9211(3), a communications service provider assessed pursuant to subsection 2 may recover the amount of the assessment from the provider's customers. The State and ConnectME Authority are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

23. The State and ConnectME Authority do not understand the allegations in this paragraph regarding "in this manner" and "are treated equally under the statute." The State and ConnectME Authority are without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

24. Admitted.

25. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9213, the revenues derived by the ConnectME Authority "from any assessment, transfer of funds, lease, assignment, rental agreement or other disposition or any other revenue must be used for

the purposes of Chapter 93 and applied in a competitively neutral fashion and without giving preference to any one form of technology over another.” The State and ConnectME Authority further admit that pursuant to 35-A M.R.S. § 9216(5), the ConnectME Authority established the Broadband Sustainability Fund, which is separate and distinct from any other funds held or maintained by the ConnectME Authority, and that the Broadband Sustainability Fund is to be used in accordance with 35-A M.R.S. § 9216(6). The State and ConnectME Authority deny the remaining allegations in this paragraph.

26. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9213, the revenues derived by the ConnectME Authority “from any assessment, transfer of funds, lease, assignment, rental agreement or other disposition or any other revenue must be used for the purposes of Chapter 93 and applied in a competitively neutral fashion and without giving preference to any one form of technology over another.” The State and ConnectME Authority further admit that pursuant to 35-A M.R.S. § 9216(5), the ConnectME Authority established the Broadband Sustainability Fund, which is separate and distinct from any other funds held or maintained by the ConnectME Authority, and that the Broadband Sustainability Fund is to be used in accordance with 35-A M.R.S. § 9216(6). The State and ConnectME Authority deny the remaining allegations in this paragraph.

27. The State and ConnectME Authority admit that GWI is a communications service provider, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

28. Admitted.

29. Denied.

30. The phrase “entirely consistent” is a legal argument to which no response is required. The State and ConnectME Authority admit that the 2009 Federal Grant was consistent with aspects of the State’s goals and broadband policy as set forth in 35-A M.R.S. § 9202-A, but deny the remaining allegations in this paragraph.

31. The phrase “entirely consistent” is a legal argument to which no response is required. The State and ConnectME Authority admit that MFC has used the 2009 Federal Grant to expand dark fiber infrastructure in Maine, but are without knowledge or information sufficient to form a belief as to the truth of the allegations that MFC did so “in a manner entirely consistent with the State’s goals and policies but without the need of State funding or funding from the ConnectME Fund” and therefore deny those allegations.

32. The State and ConnectME Authority admit that at least two incumbent local exchange carriers objected to the use of the 2009 Federal Grant to expand dark fiber infrastructure in unserved and underserved areas of Maine, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

33. The State and ConnectME Authority admit that 35-A M.R.S. § 9216 was enacted in 2009, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

34. Admitted.

35. Denied.

36. Admitted.

37. Admitted.

38. The State and ConnectME Authority admit that the only dark fiber provider currently in the State of Maine is MFC, but deny the remaining allegations in this paragraph.

39. Denied.

40. The State and ConnectME Authority admit that the method of assessing the BBSF differs from the method of assessment for the ConnectME Fund, but deny the remaining allegations in this paragraph.

41. The State and ConnectME Authority admit that the Maine PUC issued a 155-page “Plan to Reform Telecommunications Regulation” dated December 30, 2011, in which the PUC stated its opinion on page 64 that the BBSF was “anti-competitive,” but deny the remaining allegations in this paragraph.

42. Admitted.

43. Admitted.

44. Denied.

45. Denied.

46. The State and ConnectME Authority admit that GWI disputes that the ConnectME Authority has the valid authority to assess and collect the BBSF from GWI, but deny the remaining allegations in this paragraph.

47. Admitted.

48. Admitted.

49. The State and ConnectME Authority admit that there is no provision in Maine law for GWI to seek or obtain a refund of BBSF, but deny the remaining allegations in this paragraph.

50. The State and ConnectME Authority admit that the method of assessing the BBSF differs from the method of assessment for the ConnectME Fund, but deny the remaining allegations in this paragraph.

51. Denied.

52. Denied.

53. Denied.

54. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9213, the revenues derived by the ConnectME Authority “from any assessment, transfer of funds, lease, assignment, rental agreement or other disposition or any other revenue must be used for the purposes of Chapter 93 and applied in a competitively neutral fashion and without giving preference to any one form of technology over another.” The State and ConnectME Authority further admit that pursuant to 35-A M.R.S. § 9216(5), the ConnectME Authority established the Broadband Sustainability Fund, which is separate and distinct from any other funds held or maintained by the ConnectME Authority, and that the Broadband Sustainability Fund is to be used in accordance with 35-A M.R.S. § 9216(6). The State and ConnectME Authority deny the remaining allegations in this paragraph.

55. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9216(6), the ConnectME Authority “shall provide incumbent local exchange carriers a right of first refusal to access the broadband sustainability fund established pursuant to subsection 5 in accordance with” 35-A M.R.S. § 9216(6). The State and ConnectME Authority deny the remaining allegations in this paragraph.

56. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9216(6), the ConnectME Authority “shall provide incumbent local exchange carriers a right of

first refusal to access the broadband sustainability fund established pursuant to subsection 5 in accordance with” 35-A M.R.S. § 9216(6). The State and ConnectME Authority deny the remaining allegations in this paragraph.

57. The State and ConnectME Authority admit that pursuant to 35-A M.R.S. § 9216(6), the ConnectME Authority “shall provide incumbent local exchange carriers a right of first refusal to access the broadband sustainability fund established pursuant to subsection 5 in accordance with” 35-A M.R.S. § 9216(6). The State and ConnectME Authority deny the remaining allegations in this paragraph.

58. Admitted.

59. This paragraph consists of legal argument to which no response is required. To the extent that a response is required, the State and ConnectME Authority deny the allegations in this paragraph because 35-A M.R.S. § 9216 does not refer to “customers.”

60. Admitted.

61. Denied.

62. The State and ConnectME Authority admit that GWI disputes that the ConnectME Authority has the authority to use the BBSF in the manner provided by 35-A M.R.S. § 9216(6), but deny the remaining allegations in this paragraph.

63. The State and ConnectME Authority admit that GWI has made such allegations, but deny them and deny the remaining allegations in this paragraph.

64. The State and ConnectME Authority admit that GWI has made such allegations, but deny them and deny the remaining allegations in this paragraph.

WHEREFORE, the State and ConnectME Authority request that this Court dismiss all claims against them, order GWI to pay their costs and attorneys' fees, and grant such other and further relief as the Court deems just.

COUNT II

65. The State and ConnectME Authority repeat and reassert their responses to paragraphs 1 through 64 as if fully set forth in their response to this paragraph.

66. The State and ConnectME Authority are without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph and therefore deny them.

67. The State and ConnectME Authority admit that MFC was required by 35-A M.R.S. § 9216(3) to remit to ConnectME Authority any BBSF that MFC collected from GWI. The State and ConnectME Authority are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and therefore deny them.

68. Admitted.

69. Denied.

70. Admitted.

71. Denied.

WHEREFORE, the State and ConnectME Authority request that this Court dismiss all claims against them, order GWI to pay their costs and attorneys' fees, and grant such other and further relief as the Court deems just.

AFFIRMATIVE DEFENSES

1. The Counterclaim fails to state a claim on which relief may be granted.
2. The Counterclaim is barred by the statute of limitations.
3. The Court lacks subject-matter jurisdiction over the Counterclaim.
4. GWI's claims, in whole or in part, are barred by the Eleventh Amendment and/or by sovereign immunity.
5. There is no provision in Maine law for GWI to seek or obtain a refund of BBSF.

WHEREFORE, the State and the ConnectME Authority demand judgment against GWI on its Counterclaim and for their costs, attorneys' fees, and such other and further relief as the Court deems just.

Dated at Augusta, Maine, on this 23rd day of October 2014.

Respectfully submitted,

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