THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2008 TERM

NO. _____

Verizon New England Inc.,
d/b/a Verizon New Hampshire
Northern New England Telephone Operations LLC
d/b/a FairPoint Communications-NNE

APPEAL BY PETITION PURSUANT TO RSA 541:6

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APPEAL BY PETITION
PURSUANT TO RSA 541:6

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2008 TERM

Appeal of Verizon New England Inc., d/b/a Verizon New Hampshire and Northern New England Telephone Operations d/b/a FairPoint Communications-NNE

APPEAL BY PETITION PURSUANT TO RSA 541:6

NOW COME Verizon New England Inc., d/b/a Verizon New Hampshire ("Verizon New Hampshire" or "Verizon"), by and through its attorneys, Munger, Tolles & Olson LLP and McLane, Graf, Raulerson & Middleton, Professional Association, and Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint"), by and through its attorneys, Devine, Millimet & Branch, Professional Association (together "Petitioners"), and pursuant to RSA 541:6 and Supreme Court Rule 10, appeal to this Honorable Court from the New Hampshire Public Utilities Commission's order on reconsideration, Order No. 24,886, dated August 8, 2008. In support of this Petition, Verizon and FairPoint state as follows:

1. The parties and counsel are as follows:

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2. The New Hampshire Public Utilities Commission issued a final decision on reconsideration (Order No. 24,886) on August 8, 2008. Copies of that order and the following documents are contained in the Appendix filed with this Petition:

a) PUC Order
Order No. 24,837
March 21, 2008 — See Appendix p. 1

b) Verizon New Hampshire's Motion for Rehearing and/or Reconsideration
March 28, 2008 — See Appendix p. 35

c) Joint Opposition of AT&T, BayRing Communications and One Communications to Verizon's Motion for Rehearing and/or Reconsideration
April 9, 2008 — See Appendix p. 51

d) Motion for Rehearing and/or Reconsideration of Northern New England Telephone Operations LLC. d/b/a FairPoint Communications - NNE
April 21, 2008 — See Appendix p. 73

e) Joint Opposition to FairPoint's Motion for Rehearing and/or Reconsideration
April 28, 2008 See Appendix p. 85

f) Verizon New Hampshire's Reply to FairPoint Communications - NNE's Motion for Rehearing and/or Reconsideration
April 28, 2008 See Appendix p. 105

g) PUC Order on Motions for Rehearing and Motion to Intervene
Order No. 24,886
August 8, 2008 See Appendix p. 117

3. The questions presented for review are:

a. Petitioners' tariff, which has the force and effect of law, provides that the "carrier common line access charge is billed to each switched access service provided under this tariff." The Public Utilities Commission found that "switched access includes local transport." Did the Commission err in ruling that local transport is not subject to the carrier common line access charge?

b. Did the Commission err in ruling that Petitioners had an affirmative obligation to seek modification of the tariff to reflect new competitive circumstances that, in the Commission's view, warranted a change in the tariff's rate structure?

c. Did the Commission's determination that the carrier common line access charge authorized by the tariff should not be applied in light of new competitive circumstances constitute unlawful retroactive ratemaking?

4. The following constitutional provisions, statutes, ordinances, rules and regulations are involved in this case:

U.S. Const. Art. I § 10 cl. 1	See Appendix p. 128
N.H. Const. Pt. 1, Art. 23	See Appendix p. 129
RSA 378:1, 3, 7	See Appendix p. 130
RSA 541:2, 6	See Appendix p. 133
N.H. Admin. R. Ann. Puc 402.10	See Appendix p. 135

5. The following contracts and other documents are involved in this case:

Verizon New Hampshire Tariff NHPUC No. 85 See Appendix p. 136

6. Statement of the Case.

This is an appeal from a decision of the New Hampshire Public Utilities Commission (the "Commission") that exposes Verizon to the potential obligation to refund to other telecommunications carriers an amount that the Commission estimated at between $15 million and $20 million, and that exposes FairPoint to a large and growing financial burden. Unlike many appeals from Commission decisions that involve complex regulatory issues that may be within the Commission's specialized expertise, the central issue in this appeal involves the interpretation of a written instrument—a task familiar to this Court. The parties' rights are controlled by a tariff, which is a written document filed by petitioners and approved by the Commission. The Commission's decision contravenes the plain language of that tariff, concluding that petitioners are prohibited from imposing a charge on other carriers that use their local phone networks to complete toll calls, even though the tariff expressly requires petitioners to impose the charge in these circumstances. The Commission reached this unlawful result in light of changes in the telecommunications industry since the Commission approved the tariff fifteen years ago. Under well-established law, however, these considerations do not permit the Commission to disregard the plain language of the tariff or to modify it retroactively. Instead, the Commission must enforce the tariff as written and may only evaluate whether a *prospective* tariff change is appropriate.

The tariff at issue governs the local telephone company's provision of "switched access" services to other telephone companies in New Hampshire. Verizon was the incumbent local telephone company in most of New Hampshire until March 31, 2008, when FairPoint acquired the New Hampshire wireline-based telecommunications facilities and franchise from Verizon. Verizon had provided switched access services pursuant to the tariff prior to this transaction, and

FairPoint continues to provide switched access services pursuant to the same tariff. Switched access is a collection of wholesale services provided to other telephone carriers, known as "toll providers," see N.H. Admin. R. Ann. Puc 402.10, Appendix ("App.") at 135, that in turn provide toll calling services to their retail customers. Switched access enables toll providers to use parts of the local telephone company's network to enable those carriers' retail customers to make toll calls within New Hampshire.

The tariff states clearly that "each switched access service provided under this tariff" is to be billed the Carrier Common Line Access Charge ("CCL Access Charge"), a fee designed to help recover the costs of operating the local phone network as a whole, including costs that cannot be directly attributed to any particular service that petitioners provide. Despite this tariff provision, the Commission ruled that the CCL Access Charge applies only to calls that were made or received by a Verizon (now FairPoint) end-user, meaning a customer who uses Verizon (now FairPoint) for local telephone service. The tariff contains no such limitation. The Commission's decision contradicts the plain language of the tariff and finds no support in the facts of the case or in the law.

Summary of Tariff NHPUC No. 85

Tariff NHPUC No. 85 ("Tariff 85") "contains regulations, rates, and charges applicable to switched access services and other miscellaneous services" provided "to interexchange carriers and wireless carriers, including resellers or other entities engaged in the provision of public utility common carrier services which utilize [Verizon's] network. . . ." App. at 137. "Switched access services" allow toll providers to use Verizon's (now FairPoint's) network to connect toll calls between end-users within New Hampshire. Telephone customers place toll calls through their chosen toll providers, but such calls typically also traverse the networks of

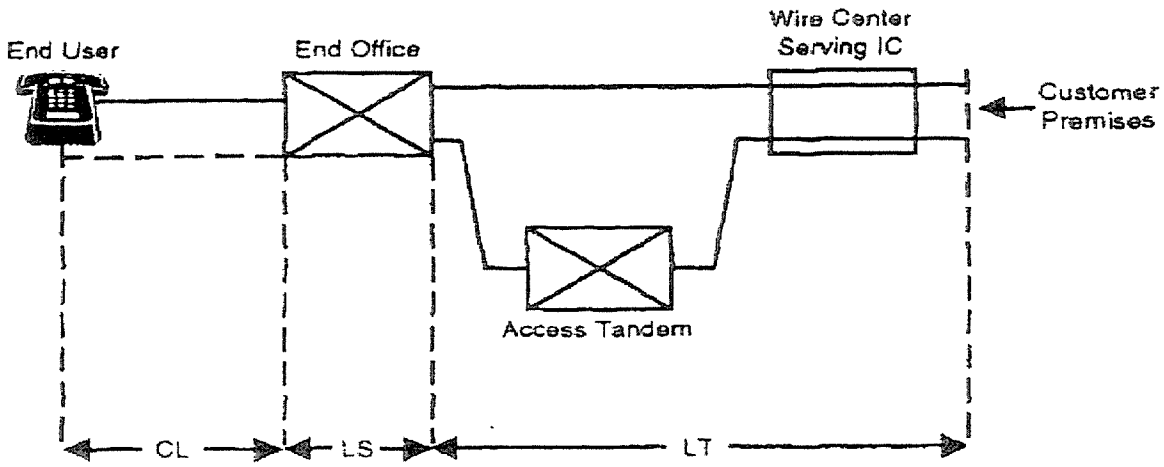
local phone companies such as Verizon and FairPoint to be completed. To complete a toll call using the Verizon (now FairPoint) network, the toll provider must purchase one or more switched access services under Tariff 85.

There are three network components that individually or combined constitute switched access service: the use of the local loop, local switching, and local transport. These components can be illustrated using the simple example of a FairPoint local customer who places a toll call within New Hampshire:

1. FairPoint transports the call from the caller's premises to a FairPoint local switch (known as a wire center or end office) along a "local loop," which is also called a "common line."

2. The FairPoint end office "switches," or routes, the call in the desired direction. This is called "local switching."

3. FairPoint then transports the call from the end office to a FairPoint end office that serves the caller's chosen toll provider. This is known as "local transport." There, the call is handed off to the toll provider, which carries the call on its network to the end office that serves the called party's premises. At this point the toll provider hands the call to the called party's local telephone company, which completes the call by providing local switching and the use of the local loop. The following diagram from Tariff 85 illustrates FairPoint's switched access services by showing the flow of a call from the end user over the common line, through local switching and local transport up to delivery to the toll provider:



Local Transport (LT)
Local Switching (LS)
Common Line (CL)

See App. at 144. (In this diagram, "IC" refers to interexchange carrier, another name for a toll provider, and the phrase "customer premises" refers to the physical facilities of the toll provider.)

When a toll provider uses *any* of these three services on a portion of the local phone network to complete a customer's toll call within New Hampshire, the local phone company (formerly Verizon and now FairPoint) provides switched access services to the toll provider under Tariff 85. See *id.* at 137. As the Commission noted in Order 24,837, "the individual, billable elements of 'switched access' are local transport, local switching, and carrier common line." *Id.* at 26; see also *id.* at 143. "Local transport" is the rate charged to carry a call from one local or tandem switching office to another along high-capacity facilities owned by the local phone company. See *id.* at 146. "Local switching" is the rate charged when a call is switched to or from the local phone company's local loop at the local phone company's local office. See *id.* at 155. In addition to these two use-specific charges, Tariff 85 also imposes a Carrier Common Line Access Charge on "all switched access service provided to the customer." See *id.* at 141.

The Carrier Common Line Access Charge

The Carrier Common Line Access Charge is a fee imposed on toll providers for each call for which petitioners provide any switched access service. *Id.* Unlike local transport and local switching, which are charged based on toll providers' use of local transport and switching facilities, the CCL Access Charge does not depend upon the use of the local loop. Rather, the charge applies whenever a toll provider uses local transport, local switching, *or* the local loop.

The CCL Access Charge is analogous to the 911 fee that many state and local governments require the cellular telephone company to add to customers' bill to fund the 911 emergency response system. Although a customer may not call 911 in any given month, that customer always has access to the 911 system and must pay the charge each month to help cover the overall costs of operating the system. Likewise, the CCL Access Charge was designed to make sure that each toll provider using Verizon's network to complete a long-distance call contributed to Verizon's joint and common costs without regard to whether each call actually traversed a common line to a Verizon end user. Tariff 85 makes perfectly clear that "[c]arrier common line access service is billed to *each* switched access service provided under this tariff" and that "*all* switched access service provided to the customer will be subject to carrier common line access charges." See *id.* at 138, 141.

Development of the CCL Access Charge

The history of the CCL Access Charge helps explain why it applies to all switched access services. After the breakup of AT&T in 1984, retail customers typically had to use local phone companies such as Verizon to place intrastate toll calls. See Exhibit 15, Testimony of Peter Shepherd, at 15, 517; 7/10/07 Tr. at 119:16-24, 142:13-143:11. Verizon designed its retail rate for intrastate toll service to exceed the direct cost of providing such services. Exhibit 15 at 16,

20-21. The purpose of this rate structure, approved by the Commission, was to have customers who made toll calls contribute to the recovery of the local telephone companies' "joint and common costs"—the costs of facilities, employees, and other expenses that support multiple services and/or the companies' overhead. *Id*; 7/11/07 Tr. at 11:11-14; see generally Alfred E. Kahn, The Economics of Regulation 77-79 (1998) (discussing common costs). By their nature, these joint and common costs cannot be attributed to any individual service. They are costs necessarily and prudently incurred to provide services, and therefore are costs that the company is constitutionally entitled to recover. See, e.g., *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603-05 (1944). Accordingly, these joint and common costs must be recoverable through charges on some services that exceed their direct costs. Toll calling, which was regarded as a discretionary service, made a significant contribution to the recovery of these joint and common costs, thereby helping keep the rates for basic local exchange service low.

In 1991, AT&T, MCI, Sprint, and other long-distance companies were allowed to compete with the local phone companies in the provision of intrastate toll service in New Hampshire. See Exhibit 18 at 1-2; 7/10/07 Tr. at 119:16-24. Because these competitive toll providers typically did not own their own local telephone facilities, they paid a fee to use the local telephone companies' networks to complete their toll offerings. See 7/10/07 Tr. at 144:21-145:8. The local telephone companies and their regulators became concerned that this dynamic threatened to erode the contribution being made by intrastate toll users to the recovery of the local telephone companies' joint and common costs. See Exhibit 15 at 20.

In response to these developments, Verizon's predecessor, New England Telephone and Telegraph Company, filed a tariff in September 1993 that is now known as Tariff 85.[1] The tariff sets wholesale rates for the use of local transport and local switching by toll providers for the purpose of providing intrastate toll service to their retail customers. The tariff also establishes the separate CCL Access Charge to assure that intrastate toll users continued to contribute to the recovery of Verizon's joint and common costs. *Id.* Just as Verizon's retail toll customers were contributing to the recovery of these costs in Verizon's toll rates, the CCL Access Charge was designed so that toll providers (and, indirectly, their retail toll customers) would make a similar contribution. *Id.* In this way, retail competition for toll services could flourish without undermining Verizon's right to recover its joint and common costs or shifting those costs to users of other services. The development of the charge as a contribution element mirrored similar tariff changes made in other New England states around the same time to address the same problem. 7/11/07 Tr. at 12:23-13:2, 14:2-5. Following a series of negotiations, the affected parties settled on the language of the tariff, including the CCL Access Charge, which the Commission approved in September 1993. *Id.* at 17:17-21.

Accordingly, the designation "Carrier Common Line Access Charge" is something of a misnomer. The CCL Access Charge was not designed to recover the direct costs of carrying traffic on a Verizon local loop. Toll providers purchasing switched access service do not pay the CCL Access Charge in exchange for using a Verizon local loop, but to ensure that their toll callers contribute to the recovery of the local phone company's joint and common costs. Tariff 85 makes clear that the fee applies to every minute of switched access service regardless of type.

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[1] The tariff was originally numbered Tariff 78 and was later refiled without substantive changes as Tariff

Evolution of the Telecommunications Landscape

When the Commission approved the tariff in 1993, Verizon faced no significant competition for local service. Most New Hampshire residents purchased local service from Verizon, and therefore most intrastate toll calls were completed using Verizon's local loops. As a result, toll providers purchasing switched access from Verizon nearly always used the Verizon local loop. See, e.g., App. at 28. The Telecommunications Act of 1996 changed this landscape by allowing Competitive Local Exchange Carriers ("CLECs") to deploy their own local networks and by requiring Verizon to interconnect with these CLECs. See 7/11/07 Tr. at 24:3-19. As a result, CLECs could complete intrastate toll calls to their own local loops or those of other CLECs, rather than Verizon's. In some cases, however, these CLECs used Verizon's local transport to complete intrastate toll calls.

In the wake of the 1996 Act, the CCL Access Charge was phased out in other New England states, with changes in rates of other services designed to offset the resulting revenue loss. See *id.* at 43:3-9. But in New Hampshire, the Commission never opened a docket to address whether Tariff 85 should be changed in light of the new competitive landscape. Verizon filed another tariff (Tariff 84) relating to the rates that CLECs pay Verizon in exchange for using its local exchange facilities for *local* calls, but had no reason to modify Tariff 85, which continued to govern the provision of switched access services used by any toll provider, including CLECs, to complete *toll* calls within New Hampshire. *Id.* at 26:5-27:6. In this way, Tariff 85 continued to assure that switched access users would contribute to the recovery of Verizon's joint and common costs.

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85. For ease of reference this petition will refer to the tariff as Tariff 85.

The Present Controversy

Consistent with Tariff 85, Verizon began billing the CCL Access Charge to toll providers in 1993. In 1996, Verizon elected to outsource the billing of certain switched access services to a third-party billing agent. See 7/11/07 Tr. at 36:2-37:23. That billing agent erroneously neglected to bill the CCL Access Charge on those calls where switched access was jointly provided by Verizon and another carrier not involving the use of a Verizon-provided local loop. See *id.* In 2006, Verizon terminated its outsourcing arrangement, brought billing for these services back in-house, and began correctly assessing the CCL Access Charge. *Id.*

Freedom Ring Communications LLC d/b/a BayRing Communications ("BayRing"), a CLEC, filed a complaint with the Commission asserting that Verizon should not assess the CCL Access Charge in the absence of a connection to a Verizon end-user using a Verizon local loop and sought a refund for CCL Access Charges previously paid. Specifically, BayRing identified circumstances in which it used Verizon's local transport but did not use local switching or a Verizon local loop. For example, if BayRing used the Verizon network to connect a toll call from its customer to the customer of another CLEC, BayRing would carry the call to the Verizon network, where Verizon would then provide local transport to the other CLEC's local loop for delivery to that CLEC's end user. BayRing conceded that in these circumstances it had to pay Verizon for local transport but claimed that it was not required to pay the CCL Access Charge.

Various other parties subject to Tariff 85 intervened in the proceeding, including RNK Inc. d/b/a RNK Telecom, AT&T Communications of New England, Inc., One Communications Corp., Otel Telekom, Inc., and SegTEL, Inc. The Commission bifurcated its investigation into two phases, the first to determine whether the charge was valid and the second, if necessary, to determine the amount of any refund.

On March 21, 2008, the Commission issued an order in Phase 1, holding that local transport provided alone did not constitute switched access service under Tariff 85 and that the CCL Access Charge should be imposed only where a toll provider uses a Verizon local loop to reach a Verizon end user. See App. at 1-34. Therefore toll providers that used local transport but did not actually use a Verizon local loop were not subject to the CCL Access Charge. Verizon timely moved for rehearing and/or reconsideration on March 28, 2008. *Id.*

While this case was progressing, the Commission was conducting a separate proceeding to consider the transfer of Verizon's New Hampshire wireline-based telecommunications facilities and franchise to FairPoint. See *id.* at 73-74. The Commission approved the transfer on February 25, 2008, and the parties consummated the transactions giving effect to the transfer on March 31, 2008. See *id.* FairPoint therefore has succeeded to Verizon's interest in the State of New Hampshire. Following its acquisition of the Verizon properties, FairPoint continues to provide local telephone service. FairPoint also provides switched access services to other toll providers pursuant to Tariff 85. Because the Commission's decision impairs FairPoint's ability to charge the CCL Access Charge to carriers that use switched access services but not FairPoint's local loops, FairPoint has a direct interest in the Commission's application of Tariff 85. See *id.* Accordingly, on April 21, 2008, FairPoint moved to intervene in this proceeding and filed its own motion for rehearing and/or reconsideration.

The Commission allowed FairPoint to intervene but denied both motions for reconsideration on August 8, *id.* at 117-127, and this appeal followed.

7. The jurisdictional basis of this appeal is RSA 541:6.

8. Reasons to Accept Appeal/Basis for Difference of Opinion on the Questions Presented.

Once approved by the Commission, a tariff has the "force and effect of law" and binds both the utility and its customers until it is subsequently revoked or modified. *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980). As with any other law, a tariff must be enforced according to its terms, even if the Commission believes that changes in the industry justify a different rule. In this case, however, the Commission failed to give effect to the plain language of Tariff 85, thereby modifying petitioners' rate structure so as to produce an outcome that the Commission regarded as more compatible with the current competitive landscape. The effect of the Commission's decision was not merely to "interpret" the tariff. Rather, the effect of the decision was to modify the application of the tariff to switched access services previously rendered. But the retroactive ratemaking doctrine prohibits the Commission from modifying a tariff with respect to past transactions; the Commission's authority is limited to modifying rates prospectively. By violating these legal principles, the Commission has wrongfully exposed Verizon to refund liability of $15 million to $20 million, by the Commission's estimation, and wrongfully exposes FairPoint to significant lost revenue from April 1, 2008 forward. See App. at 33.

Petitioners' appeal of the Commission's decision is ripe notwithstanding the Commission's deferral of the question of the amount of the refund to a subsequent phase of the proceedings. RSA 541:2 states that "*any* order or decision of the commission" may be the subject of a motion for reconsideration and a subsequent appeal to this Court. This Court has suggested that an administrative appeal is ripe if the issue is fit for judicial determination and the party will suffer a hardship if the court declines to hear the issue. *Appeal of State Employees' Ass'n of N.H., Inc.*, 142 N.H. 874, 878 (1998). In *Appeal of Concord Steam Corp.*, 130 N.H. 422

(1988), the Court granted review of a Commission order rejecting a public utility's meter rate and ordering a refund of excess revenues collected, despite the fact that the amount of the refund remained undecided before the Commission:

> We note at the outset that although the PUC has not yet ordered refunds on the basis of its November 1986 findings, [the utility] properly challenges the findings now, rather than later when the company might be collaterally estopped to dispute them. The issues on appeal are therefore ripe for our consideration.

Id. at 427. Likewise, the Commission has issued a final order regarding Verizon's obligation to pay refunds based upon a fully developed record that is available for this Court's review. Failure to appeal the order now could subject petitioners to a collateral estoppel claim at the end of the refund phase. The Commission's decision is ripe for review, as the issue presented is fit for judicial determination and petitioners face hardship if the Court declines to hear the case.

a. Under The Tariff's Plain Language, The CCL Access Charge Applies To All Calls That Use Local Transport

A tariff should be interpreted in the same manner as a contract or a statute. See *Re Public Serv. Co. of N.H.*, 79 N.H. P.U.C. 688 (1964). The meaning of such written instruments is determined based on "the plain meaning of the language used," if such language is not ambiguous based on the words read "as a whole." *In re State*, 147 N.H. 426, 429 (2002). In addition, written instruments must be read such that "no clause, sentence or word, shall be superfluous, void, or insignificant." *Churchill Realty Trust v. City of Dover Zoning Bd. of Adjustment*, 156 N.H. 668, 676 (2008).

Tariff 85 plainly establishes that toll providers that use local transport service thereby purchase switched access service and hence are obligated to pay the CCL Access Charge. This conclusion follows inexorably from (1) the definition of local transport service and (2) the express statement that the CCL Access Charge applies to "each" and "all" switched access services.

First, Tariff 85 makes clear that local transport is a switched access service. Section 2.1.1.A explains that Tariff 85 governs "switched access services and other miscellaneous services" provided "to interexchange carriers and wireless carriers, including resellers or other entities engaged in the provision of public utility common carrier services which utilize [Verizon's] network. . . ." App. at 137. Section 6 describes "Switched Access Service," which is "billed at the rates and charges set forth in Section 30." *Id.* at 143. This section sets forth three rate categories for Switched Access Service: local transport, local switching, and carrier common line. *Id.* Included within Section 6 "Switched Access Service" is Section 6.2.1, "Local Transport," which is defined as providing "the transmission facilities between the customer's premises and the end office switch(es) where the customer's traffic is switched to originate or terminate its communications." *Id.* at 146. Section 30.6 lists the rates applicable for local transport service. *Id.* at 177-81.

In other words, Section 6 of Tariff 85 lists local transport as a switched access service, and Section 30 establishes the rates for local transport. Indeed, the Commission explicitly found that "the individual, billable elements of 'switched access' are local transport, local switching, and carrier common line," *id.* at 26, and that "there is no dispute that switched access includes local transport," *id.* at 125 n.1. The Commission further found that Verizon was providing local transport to the CLECs, see *id.* at 30, a finding that the CLECs did not dispute, 7/10/07 Tr. at 73:2-23; App. at 59.

Second, Tariff 85 also clearly establishes that the CCL Access Charge applies to all switched access services offered thereunder. Section 5 of the tariff explains that "[c]arrier common line access service is billed to *each* switched access service provided under the tariff." App. at 138 (emphasis added). To emphasize the point, the tariff explains that with one

exception inapplicable here, "*all* switched access service provided to the customer will be subject to carrier common line access charges." *Id.* at 141 (emphasis added). Any toll provider that uses the Verizon network for any switched access service is required to pay the CCL Access Charge, which helps assure that all toll callers contribute to the recovery of the company's joint and common costs regardless of how, or by whom, the called party's local loop is provided.

Because the CCL Access Charge applies to all switched access service under the tariff, and local transport is a switched access service, the CCL Access Charge is properly applied to toll providers that use local transport services. The Commission erred by failing to enforce these clear provisions of the tariff as written and instead modifying the tariff under the guise of an "interpretation" that is contrary to the plain meaning of the tariff.

b. Section 5.1 Does Not Limit The CCL Access Charge To Calls That Use The Local Telephone Company's Local Loops

The Commission also erred as a matter of law in ruling that under Section 5.1, the CCL Access Charge applies only to carriers that actually *used* Verizon's or FairPoint's local loops. The Commission stated that under Section 5.1.1.A:

> carrier common line access, for which CCL access charges apply, is provided when the CLEC customer uses a Verizon-provided common line to access a Verizon end user. Accordingly, the CCL charge is properly imposed when (1) Verizon provides the use of its common line and (2) it facilitates the transport of calls to a Verizon end user. It is also reasonable to conclude the inverse to be true, that is, when the use of Verizon's common line and the presence of a Verizon end user are lacking, the CCL charge may not be imposed.

App. at 27. In fact, Tariff 85 contains no language requiring actual use of Verizon's (now FairPoint's) local loop as a condition for the applicability of the CCL Access Charge. The Commission failed to appreciate the very real distinction between the Carrier Common Line Access *Service* defined under Section 5.1 and the functionally different terms of Section 5.4,

which describes the scope of application of the CCL Access *Charge*. Section 5.4 does not condition the charge on the provision of Carrier Common Line Access Service. Rather, as noted above, the charge applies to "all switched access service provided to the customer" and "each switched access service provided under this tariff." *Id.* at 141. Because the CCL Access Charge was designed to recover Verizon's joint and common costs, there is no relationship between the provision of Carrier Common Line Access Service and the assessment of the CCL Access Charge, despite the similar nomenclature.

The Commission's reasoning is also flawed for a second, independent reason. Although the CCL Access Charge properly applies regardless of whether Carrier Common Line Access Service is provided, Verizon does in fact provide Carrier Common Line Access Service whenever a toll carrier purchases any switched access service. Section 5.1 clearly states that "[c]arrier common line access provides for the use of end users' [Verizon] provided common lines by [toll providers] *for access to such end users* to furnish intrastate communications." *Id.* at 138 (emphasis added). In other words, Carrier Common Line Access Service involves only the provision of "access"—i.e., the legal right to use the local loop—and does not depend on the actual usage of the loop by the toll provider. Accordingly, Verizon provides Carrier Common Line Access Service whenever it grants the toll provider the capability to connect toll calls to Verizon end-users over Verizon local loops, regardless of whether the toll provider chooses to take advantage of that capability. Because any toll provider that purchases a switched access service has the legal right to use Verizon's local loops to connect to Verizon end-users, Verizon necessarily provides Carrier Common Line Access Service on all switched access services sold under Tariff 85.

The Commission's ruling is premised upon its finding that "the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line." *Id.* at 31. But the Commission failed to cite any record evidence to support this finding, and the conclusion it draws does not follow from that finding. First, the Commission never found that the CCL Access Charge was *limited* to the recovery of the costs of the local loop. Verizon presented unrebutted evidence that the CCL Access Charge was designed to recover joint and common costs related to its business as a whole, which may include but is certainly not limited to loop costs. See, e.g., Exhibit 15 at 16, 20-21; 7/11/07 Tr. at 11:11-14. The Commission neither rejected this evidence nor cited any opposing evidence that the CCL Access Charge was limited to loop costs. Second, the CCL Access Charge was instituted to assure that *all* toll calls that make use of the Verizon network contributed to Verizon's joint and common costs, whatever their nature. Accordingly, to the extent the CCL Access Charge was designed in part to recover loop costs, Tariff 85 makes clear that toll providers using Verizon (now FairPoint) local transport must contribute to the recovery of those loop costs, whether or not the toll provider chooses to use the local loop. In any case, the Commission's ambiguous (and unsupported) reference to the "inten[t]" of the CCL Access Charge is beside the point. The tariff's language clearly renders the charge applicable to carriers who use any switched access service, and the Commission was not permitted to rely upon its own conception of the "intent" behind the tariff to limit the applicability of the access charge in a way that is contrary to its plain language.

c. Under Section 5.4, The CCL Access Charge Applies To All Switched Access Services, Not Just A Subset

The Commission further erred when it concluded under Section 5.4.1.A that the CCL Access Charge applies only when "carrier common line access service" is provided. Section

5.4.1.A states that "*all* switched access service provided to the customer will be subject to carrier common line access charges." App. at 141. The Commission "interpret[ed] this section, however, to mean that a carrier will be 'subject to' CCL charges *to the extent that CCL service is provided in conjunction with switched access*." *Id.* at 31 (emphasis added).

Under the Commission's interpretation, "local transport" does not constitute "switched access service" unless it is accompanied by the full panoply of services available under Tariff 85. But the tariff uses a specific term to define the use of all three switched access services together: "Local transport, local switching, and carrier common line when combined [] provide a *complete switched access service*...." *Id.* at 143 (emphasis added). Section 5.4.1 does not use the phrase "complete switched access service." Instead, it explains that the CCL Access Charge is imposed on "all switched access service" and "each switched access service provided under this tariff." *Id.* at 141. Both clauses make plain that switched access service may take multiple forms and that the access charge applies to each type of switched access service, not just "complete" switched access service. The Commission's interpretation inserts the word "complete" into Section 5.4.1 and reads the words "each" and "all" out of the tariff completely, in violation of basic tenets of interpretation of written instruments. See *Churchill Realty*, 156 N.H. at 676.

d. Errors By Verizon's Third-Party Billing Agent Do Not Affect The Applicability Of The CCL Access Charge

The Commission repeatedly referred to Verizon's third-party billing agent's failure to collect the CCL Access Charge on toll providers that did not use Verizon's common line. The Commission suggested that this history demonstrated the inapplicability of the CCL Access Charge when toll providers used local transport but not Verizon's local loops to complete toll calls. See, e.g., App. at 28-30, 124-25. Even in a purely contractual context, however, extrinsic evidence such as the parties' performance cannot alter the plain meaning of the written

instrument. "Absent ambiguity, our search for the parties' intent here is limited to the words of the [contract]." *Concord Hosp. v. New Hampshire Med. Malpractice Joint Underwriting Ass'n*, 137 N.H. 680, 686 (1993). The rule forbidding consideration of past performance is even stronger in the context of a tariff. Under the filed rate doctrine, utilities may not deviate from the tariff's terms, and customers may not claim ignorance or estoppel to avoid the terms of the tariff. *Guglielmo v. WorldCom, Inc.*, 148 N.H. 309, 313 (2002). There are many cases in which customers were required to pay the difference between the tariffed rate and the rate expressly quoted or promised by the carrier or utility. See, e.g., *American Tel.& Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, (1998) ("[E]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff.") (citation omitted). In this case, Verizon has not re-billed toll providers for past charges that its billing agent erroneously failed to collect. It has simply ensured that any switched access services provided *after* Verizon's discovery of the billing error were properly assessed. The billing agent's erroneous failure to bill charges due for services previously rendered does not, and cannot, alter the applicability of the tariffed rate.

In addition, the history to which the Commission refers shows nothing more than a simple error by a third party. At all times, Verizon correctly assessed the CCL Access Charge on those entities that it billed directly. See 7/11/07 Tr. at 36:5-20, 50:1-9, 125:11-127:11. Once it discovered that its billing agent was not doing the same, Verizon terminated its outsourcing agreement, brought billing in-house, and correctly assessed the CCL Access Charge going forward. *Id.* Given this response, the vendor's billing error could not reasonably be attributed to Verizon, and certainly does not constitute evidence of Verizon's interpretation of the meaning of the tariff as the Commission suggested.

e. The Commission Erred In Imposing A Burden Upon Verizon To Change Its Tariff In Response To Changed Market Conditions

As noted, the Commission's conclusion is colored by its belief that Tariff 85's CCL Access Charge is ill-suited to the current competitive landscape. Despite purporting to base its ruling upon "the four corners of the tariff," the Commission's order dwells at length on changes in the marketplace that were not anticipated when Tariff 85 was approved in 1993. See, e.g., App. at 28-30, 124-25. For example, the Commission notes that "when the language of Section 5 of Tariff No. 85 was initially introduced, it was not contemplated that a carrier would use switched access without using Verizon's common line." *Id.* at 28. The Commission explains that the 1996 Act changed this market structure by spurring CLECs to install their own local loops. *Id.* at 29.

As a result, the Commission held that "[w]hen competition became a reality and multiple carriers were competing in the same franchise area. . . *it was Verizon's responsibility to seek revisions to its tariff* if it believed it was somehow not recovering its costs or if the tariff no longer fit changing market and technical conditions." *Id.* at 30 n.5 (emphasis added); see also *id.* at 125. The Commission cites no authority in support of the idea that a utility must seek tariff revisions whenever the competitive marketplace has changed, and there is no evidence that Verizon knew it was not recovering its costs or that the tariff no longer fit market conditions. Verizon never sought to change Tariff 85 because it reasonably believed, and believes, that the current language unambiguously allowed it to assess the CCL Access Charge on all switched access services, including local transport, in a manner that appropriately contributed to the recovery of its joint and common costs. The Commission's suggestion that Verizon was nevertheless obligated to initiate a tariff revision, and that the remedy for the failure to do so is

an order retroactively prohibiting Verizon from retaining charges collected pursuant to the effective tariff, is unprecedented and unlawful.

The Commission did not properly interpret the tariff, and the Commission's reasoning reveals that it based its conclusion on a determination that collecting the CCL Access Charge on "each" and "all" switched access services is no longer just or reasonable given changes in the competitive landscape. The Commission, however, lacks authority to modify a tariff retroactively. "[I]t is a basic legal principle that a rate is made to operate in the future and cannot be made to apply retroactively." *Appeal of Pennichuck Water Works*, 120 N.H. at 566 (citation omitted); see also RSA 378:7. Because a Commission-approved tariff "carr[ies] the force and effect of law and bind[s] both the utility and its customers," the utility is entitled to rely upon its terms until those terms are modified prospectively by the Commission. *Id.* Changing the terms of the tariff and applying that change to services already rendered, as the Commission has done in this case, "would be retroactively altering the law and the established contractual agreement between the parties." *Id.* "In essence, such action would be creating a new obligation in respect to a past transaction, in violation of Part 1, Article 23 of our State Constitution and, due to the retroactive application, would also raise serious questions under the Contract Clause of the Federal Constitution, U.S. Const. Art. I, 10, Cl. 1." *Id.*

To the extent that the Commission believes that "changing market and technological conditions," App. at 30 n.5, warrant a new rate structure, the proper course of action is for the Commission to open an investigation into the reasonableness of the tariff and, if appropriate, to modify rates prospectively to allow FairPoint to recover its joint and common costs in a different fashion. But switched access services rendered in the past are subject to the rates set forth in the tariff then in effect, and the Commission cannot disregard the plain language of that tariff to

avoid a result that it views as out of step with competitive developments. Petitioners therefore respectfully request that the Court grant this petition to review the Commission's order and correct the legal errors committed in pursuit of its policy ends.

9. Each issue raised in this appeal has been presented to the PUC and has been properly preserved for appellate review. See App. at 38-44, 75-83.

Respectfully submitted,

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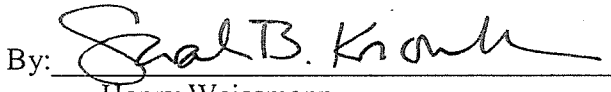
Date: September 8, 2008

By: 

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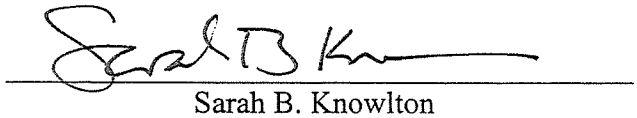
CERTIFICATION OF COMPLIANCE

I hereby certify that I have this 8th day of September 2008 forwarded a copy of the foregoing Appeal By Petition Pursuant to RSA 541:6 by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.



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