STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges	)))))	DT 06-067

BRIEF OF AT&T CORP. ON EFFECTIVE DATE OF CCL TARIFF

AT&T Corp. ("AT&T") files this brief pursuant to Order No. 25,295 issued by the New Hampshire Public Utilities Commission on November 30, 2011. AT&T welcomes the opportunity to obtain more complete implementation of the Commission's August 2009 order that explicitly directed Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE ("FairPoint") to file tariff pages that would allow FairPoint to levy the Carrier Common Line ("CCL") charge only when it actually provided the CCL. Order *Nisi* No. 25,002 at 2 (Aug. 11, 2009). The Commission's directive reflects both good policy and common sense. FairPoint has sought to escape compliance with this directive, and the Commission's November 30, 2011, order sets the stage to end this noncompliance.

Order No. 25,295 asks the parties to brief two questions regarding the revisions to FairPoint's CCL tariff submitted on September 10, 2009:

> 1) Do the changes to FairPoint's CCL tariff as proposed by FairPoint on September 10, 2009, comply with the Commission's orders requiring FairPoint to amend the CCL provisions in its tariff?; and
>
> 2) Presuming the changes identified in question 1 comply, or can be made to comply, with the Commission's orders, what should be the effective date of the amended language in FairPoint's switched access tariff relating to the CCL?

Order No. 25, 295 at 4 (Nov. 30, 2011). The Commission provided additional context for the second question in Order No. 25,284, stating that it will hear arguments on whether, "in light of the unique circumstances of FairPoint's bankruptcy," the CCL tariff changes "should be reconciled to the date of FairPoint's original submissions in 2009, to January 24, 2011, when FairPoint emerged from bankruptcy, to the Commission's supplemental order on May 4, 2011, or to some other appropriate date." Order No. 25,284 at 2 (Oct. 28, 2011).

For the reasons explained more fully below, AT&T answers the two questions as follows:

1) Yes. The CCL tariff changes – i.e., the first two tariff pages filed by FairPoint on September 10, 2009, and bearing an effective date of October 10, 2009[1] – do comply or can be made to comply with the Commission's orders requiring FairPoint to amend the CCL provisions of its tariff.

2) The effective date of FairPoint's CCL tariff changes is October 10, 2009.

ARGUMENT

I. The CCL Tariff Changes FairPoint Submitted on September 10, 2009, Comply with Prior Commission Orders.

On August 11, 2009, the Commission ordered FairPoint "to modify its tariff to clarify that it may charge CCL only when a FairPoint common line is used in the provision of switched access services." Order *Nisi* No. 25,002 at 1-2 (Aug. 11, 2009). On September 10, 2009, FairPoint filed new tariff pages that amended the CCL provisions in a manner that appears to comply with the Commission's directive.

In support of its position, AT&T concurs in the arguments on this issue set forth in the Brief of BayRing Communications Regarding Whether FairPoint's CCL Tariff Filing Complies

[1] Pursuant to Order No. 25,295, the scope of this brief is confined to the CCL tariff language portion of FairPoint's September 10, 2009, filing, and does not address the last two tariff pages submitted on that date, which contain new Interconnection Charge language and impose an Interconnection Charge. The Commission has determined that those two pages should be withdrawn and treated as illustrative pending further investigation. *See* Order No. 25,301 at 2-3 (Dec. 14, 2011).

with Commission Orders and the Effective Date of Such Tariff Filing, submitted to the Commission on December 19, 2011.

II. The Effective Date of the CCL Tariff Changes Is October 10, 2009.

The tariff filing made by FairPoint on September 10, 2009, specified an effective date of October 10, 2009. Although the Commission "accepted" the portion of the September 10 filing covering the CCL tariff changes, it also recently stated that those changes are "suspended in application and effect." Order No. 25,283 at 31 (Oct. 28, 2011). In a procedural order issued the same day, however, the Commission stated that the tariff changes could be "reconciled to the date of FairPoint's original submissions in 2009," among other possible dates. Order No. 25,284 at 2 (Oct. 28, 2011).

The Commission should find that the CCL tariff changes went into effect on October 10, 2009, the date specified by FairPoint when it submitted those changes, and its billing of CCL charges should be reconciled back to that date. The Commission's broad statutory authority and obligation to ensure that customers are charged only just and reasonable rates give it ample basis to prescribe that effective date for the CCL tariff changes. Moreover, the reasons that the Commission previously provided for finding that those tariff changes had not already gone into effect do not prevent it from concluding today that the changes went into effect on October 10, 2009.

A. The Commission Should Conclude that FairPoint's CCL Tariff Changes Were Effective as of October 2009.

The Commission first found in 2008 that the imposition of CCL charges in situations where no FairPoint common line was involved constituted an improper practice, and it ordered Verizon, FairPoint's predecessor in interest, to stop imposing CCL charges in such situations. Order No. 24,837 at 32, 33 (Mar. 21, 2008). Following the New Hampshire Supreme Court's

review of the matter, the Commission again concluded that FairPoint's CCL billing practices were improper and directed FairPoint to modify its tariff "to clarify that FairPoint shall charge CCL only when a FairPoint common line is used." Order *Nisi* No. 25,002 at 2 (Aug. 11, 2009). Pursuant to the Order *Nisi*, FairPoint filed changes to its CCL tariff on September 10, 2009, with an effective date of October 10, 2009, which eliminated its clearly unjust and unreasonable practice regarding the CCL charge. As a result, the Commission can and should find that those tariff changes became effective on October 10, 2009, and thus reconcile the current situation in a manner consistent with the Commission's statutory authority and prior orders in this docket.

It is well established that the Commission has extensive flexibility to deal with matters within its statutory authority. As the New Hampshire Supreme Court has recognized, "[t]he statutory scheme for public utility regulation mandated by the Legislature... clearly expresses an intent that the Commission be afforded wide parameters within which to exercise its judgment." *Legislative Util. Consumers' Council v. Public Service Co.*, 119 N.H. 332, 352, 402 A.2d 626, 639 (1979). The court also has recognized that the Commission "has broad discretion to act in the public interest" (*id.* at 331, 402 A.2d at 339), and that, because "'it is the duty of the commission to establish just and reasonable rates, there is no statutory limitation which confines (it) to filed rates.'" *Id.* at 353, 402 A.2d at 353 (citations omitted).

These broad powers have allowed the Commission, as necessary, to fashion effective, and sometimes equitable, relief to deal with situations that may not fit exactly within the precise provisions of the public utilities statute. For example, the Supreme Court found that the Commission's broad authority includes the power "to award restitution if one has been unjustly enriched at the expense of another." *Appeal of Granite State Electric Co.*, 120 N.H. 536, 539, 421 A.2d 121, 123 (1980) ("*Granite State Electric*"). The court found that the use of such

authority did not constitute improper retroactive ratemaking and thus upheld the Commission's decision to order a utility to refund revenues collected under rates that the Commission had originally imposed but that were found on appeal to be improper. *Id.* at 540, 421 A.2d at 123. Along similar lines, the Supreme Court upheld a Commission order that established the utility's then-current rates as temporary rates, pending the conclusion of a proceeding to set new permanent rates. *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394, 396, 173 A.2d 728, 730 (1961) ("*New England Telephone*"). Such a "temporary" classification would allow the Commission to order a refund to customers if the new permanent rates were lower than the utility's current rates. *See id.* at 396, 173 A.2d at 730; *cf.* RSA 378:30 (allowing Commission to require utility to post bond to secure repayment of higher temporary rates to customers).[2]

Although the situation that the Commission confronts now is different in its particulars from those it faced in *Granite State Electric* and *New England Telephone*, each involves the same larger issue: how to provide a remedy in a situation where it has been determined that the utility has been charging rates that are improper. This case law confirms that the Commission has the authority – and if necessary, the flexibility – to provide a solution that eliminates an unjust and unreasonable billing practice, especially where, as here, the practice is in conflict with prior Commission orders.

The CLECs participating in this case have been waiting for years for the Commission to put a definitive stop to FairPoint's practice of billing them for CCL charges when FairPoint provides no carrier common line. By finding that the mandated changes to the CCL tariff

[2] *See Commonwealth Gas Pipeline Corp. v. Anheuser-Busch Companies, Inc.*, 233 Va. 396, 355 S.E.2d 605 (1987) (upholding corporation commission order classifying utility's current rates as "interim" and thus allowing possible future refund, and finding that utility's initiation of docket seeking rate decrease was admission that current rates were not just and reasonable).

became effective on October 10, 2009, the Commission can finally end FairPoint's unjust and unreasonable practice and charges.

B. The Commission Is Not Precluded from Finding that the CCL Tariff Changes Were Effective as of October 2009.

The Commission gave two reasons in Order No. 25,283 (Oct. 28, 2011) for concluding that the mandated changes to the CCL tariff did not go into effect in October 2009: 1) FairPoint's bankruptcy filing suspended the procedural schedule in this docket; and 2) the hearing that FairPoint requested on the matter had not been held. *See* Order No. 25,283 at 31. Neither reason is sufficient to prevent the Commission from concluding that the CCL tariff change should be reconciled back to the effective date of the filing: i.e., October 10, 2009.

As to the first reason, FairPoint's bankruptcy filing on October 26, 2009, does not pose an impediment to the Commission's ability to make October 10, 2009, the effective date for the changes to the CCL tariff that it ordered FairPoint to make in 2009. The federal bankruptcy court for this state has described the problem succinctly in addressing another utility's bankruptcy:

> A debtor is not entitled to come into a bankruptcy court and overcharge its customers, where the debtor is subject to regulatory activity, and then take the position that the overcharge cannot be recovered because the regulatory authority was stayed from doing anything about it.

In re Public Service Co., 98 B.R. 120, 122 (Bankr. D.N.H. 1989). This principle also applies here. Although the Commission may have believed that it could not take action in this docket during the pendency of FairPoint's bankruptcy,[3] the suspension of the procedural schedule does not foreclose it from determining now that the mandated change to the CCL tariff should be

[3] Despite the automatic stay arising from the bankruptcy filing, the Commission arguably had authority to proceed with this docket under an exception for proceedings to enforce the regulatory powers of a government unit. *See* 11 U.S.C. §362(b)(4); *cf. Public Service Co., supra*, 98 B.R. at 126 (allowing Commission to continue "ordinary and routine regulatory oversight and supervision" of bankrupt utility, including certain ratemaking functions).

effective as of October 2009. *See id.*, 98 B.R. at 126 (enjoining Commission from pursuing involuntary rate case against utility but recognizing Commission's right to impose rates retrospectively once injunction is ended).

The second reason is also insufficient. When FairPoint made its conditional request for hearing in response to the Order *Nisi* No. 25,002, it stated that, "if the Commission does not intend for FairPoint to recover its [access] costs through other means," the Commission should "conduct a hearing in accordance with RSA 378:7 so that FairPoint may be properly heard on this issue." FairPoint Comments and Conditional Request for Hearing at 6 (filed Aug. 28, 2009). The Commission has cited FairPoint's hearing request in several orders as a reason why the mandated CCL tariff revisions could not have gone into effect. *E.g.*, Order No. 25,283 at 30, 31 (Oct. 28, 2011); Order No. 25,295 at 1 (Nov. 30, 2011). However, after several CLECs (including AT&T) filed their Motion for Hearing last month, FairPoint stated that no hearing was necessary on "the CCL question" (FairPoint Response to Motion for Hearing at 2 (filed Nov. 21, 2011)), and agreed with the CLECs that the effective date of the CCL tariff language was "ripe for adjudication by the Commission." *Id.* at 3.

In short, FairPoint requested a hearing on its CCL tariff filing in August 2009, the Commission found that this tariff filing could not go into effect because of FairPoint's hearing request, and FairPoint then disclosed in November 2011 that there was actually no need for a hearing on "the CCL question." The unmistakable conclusion is that, for more than two years, FairPoint has sandbagged consideration of the effectiveness of its CCL tariff revisions – all the while continuing to bill the CLECs access charges under a tariff that the Commission had found to be improper and had ordered FairPoint to change. Given this chain of events, and the Commission's duty to ensure that "the public will not pay higher rates than are required…" (*New*

England Telephone & Telegraph Co. v. State, 113 N.H. 92, 95, 302 A.2d 814, 817 (N.H. 1973)), it is perfectly appropriate for the changes to FairPoint's CCL tariff to be deemed effective October 10, 2009, and for FairPoint's billing of CCL charges to be reconciled back to that date.

CONCLUSION

The essence of the Commission's Order *Nisi* in August 2009 was that it was unreasonable for FairPoint to impose CCL charges when it did not provide a local loop or line. Having made this policy determination, the Commission should not condone FairPoint's continuation of this unjust and unreasonable billing practice for several additional years. AT&T continues to be subject to these improper CCL charges, and it urges the PUC to bring this matter to an end by finding that the appropriate language changes to FairPoint's CCL tariff were effective October 10, 2009.

WHEREFORE, for all of the foregoing reasons, AT&T respectfully requests that the Commission:

1) Enter an order approving FairPoint's CCL tariff changes as compliant with the Commission's August 11, 2009, order and enforcing the terms of those tariff changes with an effective date of October 10, 2009;

2) In the alternative, if the Commission determines that the CCL tariff changes submitted by FairPoint do not comply with the Commission's instructions to FairPoint, enter an order containing the Commission's preferred tariff language and directing FairPoint to file that compliant tariff language with an effective date of October 10, 2009; and

3) Enter an order granting such further relief as it deems appropriate.

Date: December 19, 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of December 2011, I have forwarded a copy of the foregoing brief to the parties listed on the Service List, either by first class mail, postage prepaid, or by electronic mail.

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