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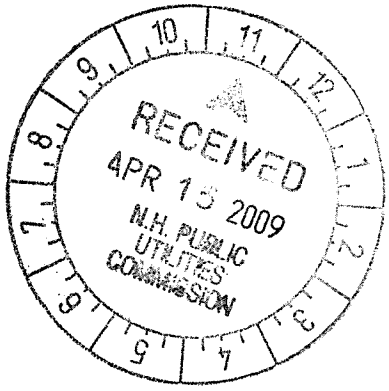
March 2, 2009



Via Hand Delivery

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, New Hampshire 03301

Re: Verizon New England Inc. d/b/a Verizon New Hampshire and Northern New England Telephone Operations d/b/a FairPoint Communications – NNE; Docket No. 2008-0645

Dear Ms. Fox:

Enclosed for filing in the above-captioned matter please find an original and 8 copies of the Brief and accompanying Appendix of Appellees Freedom Ring Communications LLC d/b/a BayRing Communications, Choice One of New Hampshire Inc., Conversant Communications of New Hampshire, LLC, CTC Communications Corp. and Lightship Telecom, all d/b/a One Communications, and AT&T Corp.

Please do not hesitate to contact me if you have any questions about this matter. Thank you for your assistance.

Very truly yours,

Susan S. Geiger

cc: Parties of Record
Kelly A. Ayotte, Attorney General
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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0645

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
From Final Order of The New Hampshire Public Utilities Commission

BRIEF OF APPELLEES BAYRING COMMUNICATIONS, ONE COMMUNICATIONS AND AT&T

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QUESTIONS PRESENTED

1. Did the New Hampshire Public Utilities Commission ("the Commission") correctly apply principles of tariff construction when it determined that, under Tariff 85, Appellants may not charge for a service they do not provide?

2. Did the Commission engage in unlawful retroactive ratemaking when it interpreted the Appellants' tariff and found that it did not authorize the Appellants' collection of the carrier common line charge when their common line was not used, and then ordered the Appellants to make restitution to the Appellees for the unauthorized charges?

STATUTES INVOLVED IN THE CASE

STATEMENT OF THE CASE

This case began when Appellant Verizon New Hampshire ("Verizon") began charging for a service it did not provide. More specifically, this case arises from relatively recent changes in Verizon's interpretation of its Tariff 85, under which it has provided to other telecommunications carriers the service of connecting them to Verizon's network and customers for in-state toll calls since 1993. Pursuant to N.H. RSA 365:1, several telecommunications carriers challenged at the New Hampshire Public Utilities Commission ("PUC" or "Commission") Verizon's decision to begin billing them a "carrier common line" ("CCL") charge for toll calls made by their customers or "end users" that do not use Verizon's carrier common line to connect to Verizon's customers (*e.g.* calls that connect to customers of other local exchange carriers or wireless carriers). Among other reasons, the carriers' challenge was based on the ground that Verizon's tariff does not permit it to charge for a service that another carrier provides (*i.e.* the service of connecting to another carrier's customer). The challenging carriers contended, among other things, that a tariff interpretation that required them to pay twice for a service (*i.e.* to pay Verizon for a service they do not receive and to pay another carrier for a service that they do receive from that carrier) is an irrational interpretation.

After a full adjudicative proceeding, the Commission correctly found that Verizon's tariff did not permit it to impose the CCL charge when the toll call did not involve a Verizon end user or use of a Verizon common line. The Appellants, Verizon and Northern New England Telephone Operations LLC d/b/a FairPoint Communications ("FairPoint") (the company that has recently acquired Verizon's former wireline operations in New Hampshire) disagree with the Commission's decision, and this appeal ensued.

Appellee Freedom Ring Communications LLC d/b/a BayRing Communications ("BayRing"), a competitive local exchange carrier ("CLEC") that also offers toll service, was the first carrier to challenge Verizon's new tariff interpretation. On April 28, 2006, BayRing filed a complaint by petition with the PUC requesting an investigation of Verizon's imposition of CCL charges on calls that are originated by BayRing's customers on BayRing's network and that do not require access to Verizon's end users because they are directed to (or "terminate" on) a wireless carrier's network. *See Appendix to Appellee's Brief ("App. to Appellees' Brief")* at 1-14. Bay Ring's petition asserted, *inter alia*, that because a call between a BayRing customer and a wireless customer does not involve a Verizon end user and thus does not involve a Verizon common line connecting that Verizon end user to the public switched network, the CCL charge should not apply. *Id.* In support of BayRing's position, the petition referenced various sections of Verizon's access tariff pursuant to which Verizon claimed the right to impose the CCL charge, and requested that the Commission order Verizon to cease billing these improper charges and to make refunds to BayRing for all such charges collected by Verizon in the past. *Id.* Verizon filed an answer to BayRing's petition asserting, *inter alia*, that one sentence in its tariff authorizes the collection of the disputed charges. *Appendix to Appeal by Petition ("App. to Appeal")*, at 2.

The Commission issued an order of notice scheduling a prehearing conference and a technical session. The order of notice also identified issues for investigation. The issues that the Commission identified mostly addressed the characterization of the telephone calls at issue and whether Verizon's tariff authorized the charges at issue. *Id.*[1] Several telecommunications

[1] The Order of Notice provided:
The filing raises, *inter alia*, the following issues: (1) whether the calls for which Verizon is billing BayRing involve switched access; (2) if so, whether Verizon's access tariff requires the payment of certain rate elements, including but not limited to CCL charges, for calls made by a CLEC customer to end-users not associated with Verizon or otherwise involving a Verizon local loop; (3) if not, whether BayRing is entitled to a refund for such charges collected by Verizon in the past and whether such services are more properly assessed under a different tariff provision; (4) to what extent reparation, if any, should be made by Verizon under the provisions of RSA

carriers, including Appellees AT&T Corp. ("AT&T") and One Communications ("One"),[2] filed timely petitions for intervention. *App. to Appeal* at 2-3. As a result of disclosures made by Verizon during a follow-up technical session held at the Commission, BayRing filed a motion to amend its petition to add "the assertion that Verizon is improperly assessing access charges to BayRing for calls originated by BayRing end user customers and terminating at wireline (as well as wireless) end user customers served by carriers other than Verizon." *App. to Appeal* at 3. Thereafter, AT&T filed a motion to expand the scope of the proceeding to include a challenge to Verizon's imposition of CCL charges on a number of other call types that do not involve or require a Verizon carrier common line. *Id.* On October 23, 2006, the Commission issued an order expanding the scope of its investigation to include Verizon's application of a CCL charge in all types of calls that do not involve a Verizon common line and adopted a schedule for discovery, testimony and an evidentiary hearing. *Id.*

Following the exchange of discovery and the submission of pre-filed direct and rebuttal testimony, the Commission held two days of evidentiary hearings on July 10 and 11, 2007. *App. to Appeal* at 119. Verizon, BayRing, AT&T and One all filed post-hearing briefs on September 10, 2007. *Id.* On March 21, 2008, the Commission issued a lengthy "Order Interpreting Tariff" reflecting the procedural history of the docket and the positions of the parties, and setting forth the Commission's analysis of the record evidence and its interpretation of Verizon's tariff. *See App. to Appeal* at 1- 34. The Commission concluded, based on its "review of the tariff language

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365:29; and (5) in the event Verizon's interpretation of the current tariffs is reasonable, whether any prospective modifications to the tariffs are appropriate.

App. to Appeal at 2.

[2] Appellee "One Communications" is comprised of Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telcom., LLC, all of which are subsidiaries of One Communications Corp. and are doing business in New Hampshire as "One Communications".

and the record developed in this proceeding" that Verizon's tariff "permits the imposition of the CCL charges only in those instances when a carrier uses the CCL services." *App. to Appeal* at 32. The Commission determined that Verizon had been impermissibly imposing the CCL charge when neither Verizon's common line nor a Verizon end user was involved in either terminating or originating calls, and that Verizon owes restitution as the result of its incorrect application of a rate under the tariff. *Id.* The Commission further ordered that a second phase of the proceeding be convened to determine the amounts of such restitution. *App. to Appeal* at 32-33.

Verizon filed a motion for rehearing on March 28, 2008. BayRing, AT&T and One Communications filed a joint opposition. *App. to Appeal* at 51-72. FairPoint also filed a motion for rehearing and a motion to intervene, claiming that it had acquired Verizon's landline operations in New Hampshire and had succeeded to the interests of Verizon. *App. to Appeal* at 33 and 127. BayRing, AT&T and One Communications filed a joint opposition to FairPoint's motion for rehearing. *App. to Appeal* at 85-104.

On August 8, 2008, the Commission denied the motions for rehearing. *See App. to Appeal*, at 117-127.[3] In so doing, the Commission found, *inter alia*, that: (1) the tariff is unambiguous and therefore the Commission's initial order did not rely upon extrinsic evidence. *App. to Appeal* at 124; (2) even if the Commission were to consider extrinsic evidence, such evidence supports rather than undermines the Commission's interpretation of the tariff. *Id.*; (3) "construing an unambiguous tariff unfavorably to a utility does not amount to making a retroactive change to the tariff". *App. to Appeal* at 126; and (4) a refund for unauthorized charges "amounts to rate enforcement rather than [retroactive] ratemaking." *Id.* Verizon and FairPoint appealed the Commission's rehearing order by jointly filing a petition pursuant to N.H. RSA 541:6 with this Court on September 8, 2008.

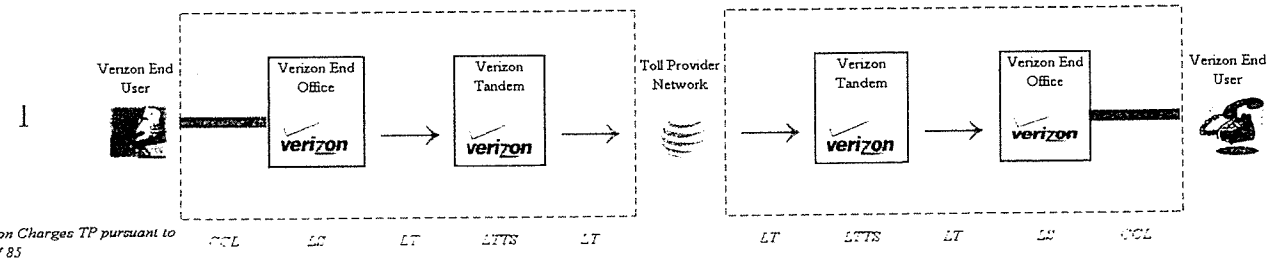
[3] The Commission granted FairPoint's intervention request. *App. to Appeal* at 127.

STATEMENT OF THE FACTS

Verizon issued Tariff 85 (formerly called Tariff 78, *see App. to Appeal* at 20) in 1993 to establish rates, terms and conditions by which interexchange telecommunications carriers ("IXCs" or "competitive toll providers") could deliver toll calls to and from Verizon's local service customers in competition with Verizon's toll service. *App. to Appeal* at 28. As the Commission correctly noted, "[t]he tariff provisions are complex and interpreting them requires a sophisticated understanding of the telecommunications industry." *App. to Appeal* at 27. Section 5 of the tariff "governs the provisioning of 'carrier common line access service.'" *App. to Appeal* at 25. "Carrier common line access service under Section 5.1.1.A 'provides for the **use of end user's Telephone Company provided common lines** [*i.e.* Verizon's common lines to Verizon end users] by customers [*i.e.*, other carriers] for access to such end users.'" *App. to Appeal* at 27 (emphasis added). At the time the tariff was adopted, there was nascent competition for *toll* telephone service in New Hampshire and only Verizon provided *local exchange* service to end users within its service territory. IXCs (competitive toll providers) wishing to carry toll calls directed to Verizon's end use customers were required to use Verizon's carrier common lines (sometimes referred to as "local loops" or just "loops"). *App. to Appeal* at 28. At that time, "Verizon provided a complete switched access service, that is, a continuous transmission path between the premises of the end-user making or receiving a call and the network of the toll provider carrying the toll portion of the call." *App. to Appellee's Brief* at 58. Section 6.1.2 A. of the tariff lists the switched access services provided under it: "originating, terminating, or two way FGA, FGB, FGD and FG2A, and 800 database access." *App. to Appeal* at 26 and 143.

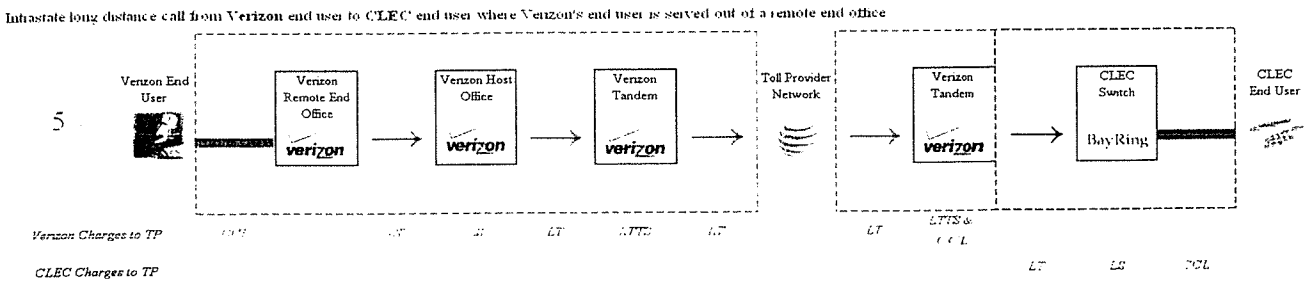
A "complete switched access service" is graphically depicted in section 6.1.2 of the tariff and is comprised of three distinct elements, "local transport", "local switching" and "common line" components. *See App. to Appeal* at 144. Section 6.1.2.D. states that, "when combined", these components provide "a complete switched access service." *App. to Appeal* at 143. The tariff also contains "individual, billable elements" that correspond to the above-named service components. *See App. to Appeal* at 26. Section 6.1.2.B. of the tariff identifies three "rate categories which apply to switched access service": "1. Local transport (described in Section 6.2.1) 2. Local switching (described in Sections 6.2.2 and 6.2.3) 3. Carrier common line (described in Section 5)." *App. to Appeal* at 143. Under the tariff structure, the carrier common line rate category relates to the carrier common line service, a separate offering provided under Section 5. During the discovery phase of the proceeding before the Commission, the parties and Commission Staff developed a number of different call flow scenarios which were submitted to the Commission. *See App. to Appellees' Brief* at 15-18. Call flow #1 shown below presents the typical situation that access service provided under Tariff 85 was intended to address.

Intrastate long distance call from Verizon end user to Verizon end user (traditional intrastate long distance call)



See App. to Appellees' Brief at 40 and 61. In the call flow shown above, a Verizon customer is making a toll call to another Verizon customer in New Hampshire, but a competitive toll provider such as AT&T is providing the toll portion of the call transmission. It is undisputed that a Verizon CCL charge applies to each end of the call because the call is originating over the

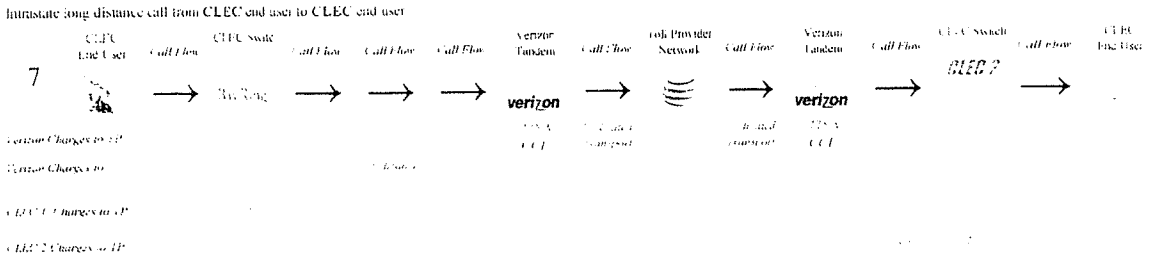
Verizon common line serving one Verizon end user/local exchange customer and terminating over the Verizon common line serving another Verizon end user/local exchange customer. The arrangement depicted above facilitated the development of toll competition in New Hampshire by allowing competitive toll providers to compete for the toll service purchased by Verizon's local exchange customers. *Id.* Thereafter, in 1996, the Verizon's local exchange market was also opened to competition when Congress passed the Telecommunications Act of 1996. *Id.* "Once CLECs entered the market, incumbents [like Verizon] no longer provided local switching and common line service to every end user." *App. to Appeal* at 29. The call flow diagrams below depict some of those situations, *i.e.* where calls do not involve a Verizon carrier common line because they originate or terminate from end users who are not Verizon customers. In call flow #5, the common line is depicted by the thick blue line on the right side between the BayRing switch and the BayRing customer receiving the call. There is no dispute that the common line is a CLEC's facility (in this example, BayRing's), not Verizon's, and there is no dispute that Verizon imposed and collected a CCL charge from the competitive toll provider in such situations.[4] *See App. to Appellee's Brief* at 49 (Tr. Day II, p. 41, l. 4-18).



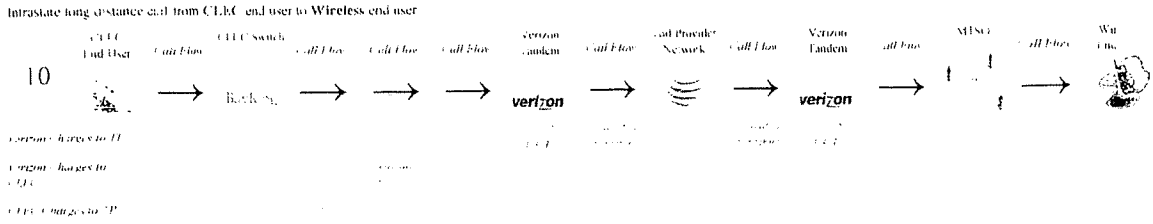
[4] The Verizon CCL charge shown in call flow #5 appears (in red) below Verizon's tandem switch because Verizon imposed its CCL charge *as a condition for the toll provider's use of the tandem switch (which is offered under the Section 6 Local Transport tariff provisions)*, there being no Verizon common line to use. Its placement under the tandem switch for this reason was a specific Verizon request during the pre-hearing technical sessions when the parties were developing agreed upon call flow scenarios. *See App. to Appellees' Brief* at 46-47. (Tr. Day I, p. 124, l. 20-24 and p. 125, l. 1-5).

See App. to Appellees' Brief at 41 and 61.

All of the other call flow scenarios in which the Appellees (*i.e.* CLECs that provide competitive toll service in addition to competitive local exchange service, and competitive toll providers or IXCs) are disputing the CCL charge reflect this same basic characteristic – a Verizon CCL charge where no Verizon CCL is involved. (The Verizon-imposed CCL charge is displayed on the call flow scenarios in red to show that it is disputed.) For example, in call flow #7, depicted below, Verizon is charging a competitive toll provider for both originating (left side of call flow) and terminating (right side) CCL service when it offers neither. As the diagram also shows, the CLEC that actually provides the CCL service charges a CCL to the competitive toll provider as well. (The CLEC charge is not disputed since the CCL service is actually provided.) Call flow #10 depicts a situation in which Verizon imposes on competitive toll providers a CCL charge for calls that it delivers to wireless carriers, where no carrier common line is involved.



See App. to Appellees' Brief at 17.



See App. to Appellees' Brief at 18.

Verizon admitted that it is imposing a terminating CCL charge for calls that do not traverse a Verizon common line or end user loop. *App. to Appellees' Brief* at 49. Tr. Day II, p. 41, l. 4-18). Verizon also admitted that for almost ten years, neither it nor its billing agent, New York Access Billing LLC ("NYAB") imposed CCL charges for toll calls from CLECs to other CLECs or from CLECs to Independent Telephone Companies ("ITCs"). *App. to Appellee's Brief,* at 51. (Tr. Day II, p. 50, l. 17-21). It was not until after BayRing filed its complaint at the PUC against Verizon relative to toll calls from CLECs to wireless carriers that Verizon began imposing the additional disputed CCL charges for calls from the Appellees' end use customers to calls made to other CLECs. *App. to Appellees' Brief,* at 44. (Tr. Day I, p. 19, l. 8-16). These new CCL charges create a substantial new source of revenue for Verizon because the majority of the disputed charges have only recently been assessed by Verizon, *i.e.* after BayRing filed its complaint with the PUC in 2006. *See App. to Appeal* at 9; *see also App. to Appellees' Brief* at 45. (Tr. Day I, p. 20, l. 3-20). "AT&T pointed out that the CCL component is by far the largest component of the access charges, representing approximately 90 percent." *App. to Appeal* at 14. AT&T has paid Verizon originating and terminating CCL charges in situations where Verizon did not provide the common line on either end of a call. *Id.* In those cases, AT&T also pays CCL charges to the CLEC(s) that actually provide the use of the originating and terminating loops. *Id.* AT&T is thus paying two CCL charges even though only one common line is being provided (by the CLEC and not by Verizon).

Verizon is not imposing CCL charges – either similar to those disputed by BayRing and the other competitive carriers, or even at all - in any other New England state. *App. to Appellees' Brief* at 50. (Tr., Day II, p. 43, l. 3-9). Verizon's CCL charge in all other New

England states has either been rated as zero or it has been eliminated. *App. to Appellees' Brief* at 50. (Tr. Day II, p. 43, l. 5-7).

SUMMARY OF THE ARGUMENT

The Commission's decision must be upheld because it comports with principles of construction that require a reading of tariff provisions as a whole rather than focusing on words and phrases in isolation. The Commission's determination that the Appellants may not impose the carrier common line charge when no common line is provided is a logical and reasonable decision that is supported by giving effect to all the associated tariff provisions and their location within the tariff. When taken together, the relevant tariff provisions establish that the CCL charge may only be imposed when the common line is actually "used". Specifically, Section 5, the tariff section upon which the Appellants rely, does more than simply authorize the imposition of a CCL charge. Section 5 also requires the Appellants to actually provide the common line. Appellants' argument that they may impose the CCL charge when they do not provide the CCL, therefore, would violate the well established principle of construction that 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, 675 (2008)(citation omitted).

In addition, Appellants' argument facially fails to meet the burden imposed by RSA 541:13. Under that statute, the Appellants must demonstrate that the Commission either committed an error of law or, by a preponderance of the evidence, made an unreasonable or unjust decision. In either case, the Appellants may not relitigate the facts found by the Commission. Yet, that is exactly what the Appellants seek to do. Indeed, their claim that the Commission committed an error of law is based on their contention that the Commission did not

accept all of Verizon's factual claims as true and made other findings of fact with which the Appellants disagree. This is a facially insufficient basis for prevailing on appeal.

Moreover, even on the merits, the Appellants' claims of factual error fail. The decision below is the product of a thorough adjudicative proceeding as evidenced by the voluminous record that was certified to this Court. Record evidence amply supports the Commission's decision. It shows that for many years, Verizon's billing behavior was inconsistent with the Appellants' recent interpretation of the tariff; that, contrary to the Appellants' bald assertions, the common line charge was tied to the recovery of common line costs as the result of prior Commission decisions; and that evidence of the historical evolution of the telecommunications industry confirms the Commission's interpretation of Tariff 85. Because the Commission's factual determinations are deemed *prima facie* lawful and reasonable, they may not be set aside lightly. Nor may they be relitigated in this appeal as the Appellants attempt.

Lastly, the Appellants' argument that the Commission engaged in impermissible retroactive ratemaking should be rejected because the Commission's decision is not ratemaking either as a matter of fact or as a matter of law. The Commission's decision was an act of rate enforcement, not ratemaking. The Commission correctly determined that because the Appellants' tariff does not permit them to collect the CCL charge when they do not provide the common line, refunds of such unauthorized charges must be made. If the Appellants' retroactive ratemaking theory were adopted, the Commission would never be able to exercise its refund authority under RSA 365:29. Such an absurd result is impermissible as it would contravene the legislature's clearly expressed intent to empower the Commission to order utilities to make due reparation to their customers who have paid "illegal or unjustly discriminatory rate[s]". RSA 365:29.

ARGUMENT

I. STANDARD OF REVIEW

The Appellants bear the burden of proof to demonstrate that the Commission's decision should be set aside or vacated. N.H. RSA 541:13. To meet this burden, the Appellants must demonstrate that the Commission committed an error of law, "or, by a clear preponderance of the evidence, that the order is unjust or unreasonable." *Appeal of Verizon New England, Inc. d/b/a Verizon New Hampshire,* 153 N.H. 50, 56 (2005). The Appellants have shown neither. In the instant appeal, the Appellants do not assert that the Commission's order is unjust or unreasonable. Rather, they argue that the order is erroneous as a matter of law. *Appellants' Brief* at 15. For the reasons discussed below, the Appellants have failed to meet their burden because the Commission's decision lawfully comports with applicable principles of construction and is supported by the record.

In their unsuccessful effort to show an "error of law", the Appellants seek to relitigate the Commission's findings of fact with which they disagree. The Appellants' attempt contravenes the requirement in RSA 541:13 that all factual findings of the Commission be deemed *prima facie* lawful and reasonable. Further, the Appellants include "facts" in their submission to this Court that were never adduced or discussed below, much less found by the Commission. This is impermissible given the well-established rule that the Commission, not the Court, "sits as the trier of fact..." *Appeal of Town of Newington,* 149 N.H. 347, 350 (2003). Moreover, because the Commission's conclusions "'are entitled to great weight and are not to be set aside lightly'" *Public Service Company of New Hampshire v. Tennercliffe Development and Recreation Company, Inc.,* 104 N.H. 339, 341 (1962) (citation omitted), the Appellants may not meet their

burden in the instant Appeal by making factual assertions that are either inconsistent with findings made by the Commission or that were never presented below.

II. THE COMMISSION'S INTERPRETATION OF TARIFF 85 IS SUPPORTED BY SOUND LEGAL REASONING.

A. THE COMMISSION CORRECTLY DETERMINED THAT THE LANGUAGE OF TARIFF 85, READ AS A WHOLE, UNAMBIGUOUSLY DOES NOT PERMIT VERIZON TO IMPOSE A CCL CHARGE WHEN IT DOES NOT PROVIDE THE CCL.

1. Section 5 of Tariff 85 Requires Verizon To Provide The Carrier Common Line Service In Order To Charge For It.

In its decision, the Commission concluded that, under Section 5 of Tariff 85, Verizon must provide its IXC customer with the use of Verizon's common line (to allow the toll provider to connect to a Verizon end user) before Verizon can properly charge the CCL permitted under Section 5 of the Tariff. *See App. to Appeal*, at *27* ("when use of Verizon's common line and the presence of a Verizon end-user are lacking, the CCL charge may not be imposed"). The Commission's reasoning was straightforward and, although unstated, based on the well-accepted principle of construction that 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, 675 (2008) (citation omitted).

As the Commission noted, Section 5 does more than simply authorize the imposition of a common line charge. Section 5 also requires Verizon to actually provide the common line. The Commission stated, "Carrier common line access service under Section 5.1.1.A 'provides for ***the use of end user's Telephone Company provided common lines*** [*i.e.*, Verizon's common lines to Verizon end users] by customers [*i.e.*, other carriers] for access to such end users.'" *App. to Appeal*, at *27*. (emphasis added). *See also* Tariff 85, Section 5.1.1. A.1., *App. to Appeal* at 138 ("The Telephone Company ***will provide*** carrier common line access service to customers in

conjunction with switched access service provided in Section 6.") (emphasis added). The Commission understood that it could not treat these provisions as "superfluous, void, or insignificant." *Churchill Realty Trust v. City of Dover Zoning Bd. of Adjustment*, 156 N.H. at 675. The Commission concluded, as a result, that it cannot selectively apply one provision in Section 5, *i.e.* the provision giving Verizon the right to impose the CCL charge, without also applying the other provisions of Section 5, such as the requirement that Verizon provide the "use of" the common line for connection to a Verizon end user. The Commission correctly concluded that "access to the common line is required to be provided in conjunction with switched access service and Verizon cannot provide access to the common line in the calls at issue here". *App. to Appeal* at 31.

The United States Supreme Court's admonishment on the interpretation of rate application in tariffs is apt here. In *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998), the Supreme Court stated, "[r]ates . . . do not exist in isolation" but "have meaning only when one knows the services to which they are attached." Here, the Commission applied that principle when it found that it cannot give effect to the part of Section 5 that imposes a rate and not also give effect to the part that requires provision of the corresponding service. The Commission correctly rejected a Verizon argument that Verizon has the right to impose a charge under Section 5 without the single most important obligation – that of providing the CCL service described in, and required to be provided by, Section 5.

This Court, like the Commission, can easily reject the Verizon argument that it satisfies its obligation to "provide" the carrier common line service in Section 5 merely by making the service "available". *Appellants' Brief* at 21. First, the tariff language does not say "available"; it says "provide." *App. to Appeal* at 138 . Second, Verizon's argument that, although toll

providers are not using the local loop in the calls at issue, Verizon is nonetheless providing the toll provider the legal right to use a local loop for access to a Verizon end user is patently false. In the disputed calls, Verizon cannot provide a legal right to connect to a Verizon end user because there is no Verizon end user originating or terminating the toll call at issue. The calls at issue are directed to customers of wireless carriers or competitive local exchange carriers. There is simply no Verizon loop and no Verizon end user to which Verizon can connect the calls at issue. Verizon, therefore, has not made a local loop "available" at all.

Although the Commission needed to look no further than the tariff provisions it cited in its decision, there is more within the four corners of the tariff that supports the order below. Section 5 specifically states that CCL services are billed "to each switched access service . . . in accordance with the regulations set forth herein and in Section 4.1 and at the rates and charges contained in Section 30.5." *App. to Appeal* at 138. Those sections, in turn, make clear that Verizon must *provide* a service in order to *bill* for it. Section 4.1 permits Verizon to bill only for services that had actually been *provided* during the billing period.[5] *See App. to Appellee's Brief* at 24, l. 5-13. Section 30.5 establishes a per minute of use charge indicating that the right to charge is conditioned upon some duration of time in which the service is used. *See App. to Appeal* at 176. Thus, when all of the relevant tariff provisions are read together as a whole, they amply support the Commission's determination that the CCL charge may only be imposed when Verizon is supplying the use of its common line or loop.

In reviewing the tariff, this Court "'must not be guided by a single sentence'" but, rather, must "'look to the provisions of the whole [tariff]'". *Richmond v. New Hampshire Supreme*

[5] Section 4.1.1.A requires that Verizon billing shall be issued only for "services *established* or *discontinued* or *provided* during the preceding billing period." *See Appendix to Appellee's Brief* at 24, l. 7-8 (emphasis added). It should go without saying that, if service is discontinued or established during the preceding billing period, it must have been provided during at least some portion of the period. Thus, this language means that Verizon must provide the CCL service during the preceding period in order to be able to bill for it.

Court Committee on Professional Conduct, 542 F.3d 913, 917 (1st. Cir.) (2008) (citations omitted). The tariff interpretation must lead to a reasonable rather than an absurd result, and entail a review of a particular provision, not in isolation, "but together with all associated sections." *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511 (2006). Accordingly, this Court must uphold the Commission's decision because it leads to the reasonable result that carriers should only pay the CCL charge when Verizon actually provides the common line service, and because the decision properly rejects Verizon's position which is based on an impermissible reading of the tariff, *i.e.* one that totally ignores all relevant sections of the tariff and, instead, merely focuses on one sentence in isolation.

Lastly, the Appellants' argument regarding the New York Public Service Commission's decision in *WilTel Commc'ns LLC v. Verizon New York Inc.*, Case 04-C-1548, 2006 WL 1479507 (N.Y. P.S.C. May 30, 2006), can easily be put to rest. As the Appellants admit in their brief, the New York tariff is different from Tariff 85. *See Appellants' Brief* at 20. Appellants' reliance upon it in support of an interpretation of Section 5 in this case, therefore, is entirely misplaced. Moreover, the Commission's order persuasively explains why the New York Public Service Commission decision is inapposite: the New York tariff language ***expressly*** allows the CCL charge to be applied to calls terminating with wireless carriers' customers. *App. to Appeal* at 31-32. Yet, notwithstanding that important distinction between the New York and New Hampshire tariffs, the Appellants nonetheless assert that the New York tariff is "[l]ike Tariff 85" and allows the company to impose the CCL charge on "**all** switched access service" (not just calls to wireless carriers). *Appellants' Brief* at 19. These assertions are factually incorrect because, as noted above, the New York tariff explicitly mentions calls to wireless carriers. Because the New Hampshire Commission properly found "there is no analogous language in

Verizon's New Hampshire tariff that explicitly permits the application of the CCL charges for calls to or from wireless end users", *App. to Appeal* at 32, the *WilTel* decision has no relevance to this case and the Appellants' argument regarding its applicability here must be rejected.

2. The Court Can Reach The Same Decision As The Commission's As A Matter Of Law If It Concludes – As The Appellees Argued Before The Commission – That Section 5 Does Not Apply To The Disputed Calls.

The Appellees argued before the Commission that Section 5 of Tariff 85 does not apply to the calls to which Verizon imposed the disputed Section 5 CCL charges because the IXCs did not require and did not request the Section 5 CCL element for those toll calls. *See, e.g., App. to Appellees' Brief* at 63-68. Rather, the Appellees only requested, and Verizon only provided, the components in Section 6 of the tariff. There is no dispute that Verizon was applying the CCL charge to calls where toll providers used *only* the local transport and local switching rate components pursuant to Section 6. *See Appellants' Brief* at 6. The terms and conditions for those components are set out in Section 6, as they should be. Nothing in Section 6, however, authorizes Verizon to charge the ***CCL*** rate as a condition for providing Section 6 local transport and local switching components. Indeed, Section 6.6.3.A. specifically states that Section 6 components must be "used" in order to be billed. *See App. to Appeal* at 169 ("[u]sage rates apply only when a specific rate element is used").

Put simply, when carriers are taking *only* Local Transport and Local Switching pursuant to Section 6 – as is the case here – the rates, terms and conditions in Section 6 apply. The only time the rates, terms and conditions in Section 5 apply is when carriers are taking services from Section 5. Appellants' contention that Section 5 rates should apply when only Section 6 rate components are ordered and used certainly violates the United States Supreme Court's canon of tariff interpretation that "[r]ates . . . have meaning only when one knows the services to which they are attached." *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. at 223. The rates in

Section 5 are attached to Section 5 services; they do not appear in Section 6 and are not attached to the Section 6 services that the toll providers are using in the disputed call flows. It is therefore unlawful for Verizon to apply them in such situations.

B. THE COMMISSION'S ALTERNATE GROUND (THAT, EVEN IF THE TARIFF WERE AMBIGUOUS, THE EXTRINSIC EVIDENCE SUPPORTS ITS TARIFF INTERPRETATION) ALSO PROVIDES LAWFUL AND SUFFICIENT SUPPORT TO UPHOLD THE COMMISSION'S DECISION.

The Commission's determination that the tariff was unambiguous and did not permit the imposition of the CCL charge on the calls at issue here was correct and forms a sufficient basis for the Court to uphold it. As an alternative ground for its decision, however, the Commission also considered the weight of extrinsic evidence to demonstrate that a finding of ambiguity (which would have necessitated a resort to extrinsic evidence) would have made no difference in the outcome of this case. This is because the extrinsic evidence fully supports the Commission's interpretation of Tariff 85.

1. Verizon's Behavior Was Inconsistent With Appellants' Interpretation Of Tariff 85.

As the Commission stated in its order on Verizon's motion for reconsideration, "even if we were to consider the extrinsic evidence proffered by Verizon, it would buttress rather than undermine our interpretation of the tariff language." *App. to Appeal* at 124. First, the Commission considered the evidence that Verizon did not begin to impose the CCL charge in the disputed call types for many years. The Commission stated:

> As noted by the jointly appearing CLECs, Verizon did not impose the charges at issue in this proceeding from the inception of local competition in 1996 until 2001 and Verizon's billing agent did likewise [failed to apply the CCL charges] through 2006. Such a course of performance is "indicative of the terms to which they believed themselves bound." *Kentucky Fried Chicken Corp. v. Collectramatic, Inc.* 130 N.H. 680, 687 (1988).

Id.. *See also App. to Appeal* at 28-29.

In their brief to this Court, the Appellants challenge the Commission's finding that past billing behavior is evidence of Verizon's understanding of the meaning of the tariff, claiming that such billing behavior "shows nothing more than a simple error by a third party." *Appellants' Brief* at 24-25. Such argument of the facts, however, provides no basis for overturning the Commission's decision, because the Commission, not the Court, "sits as the trier of fact..." *Appeal of Town of Newington*, 149 N.H. 347, 350 (2003). *See also Public Service Company of New Hampshire v. Tennercliffe Development and Recreation Company, Inc.*, 104 N.H. 339, 341 (1962) (the Commission's conclusions "'are entitled to great weight and are not to be set aside lightly'") (citation omitted). Moreover, the Commission's decision to hold Verizon responsible for the billing practices of its agent, the New York Billing Access Pool ("NYAB") cannot be challenged as a legal matter. Actions of Verizon's agent are attributable to and binding upon Verizon with respect to matters within the NYAB's responsibility. *Boucouvalas v. John Hancock Mutual Life Ins. Co.*, 90 N.H. 175 (1939) (absent fraud, principal is chargeable with knowledge of agent regarding all matters within scope of agency).

The Appellants' challenge to the Commission's fact-finding must also fail because it is based on claims that are not supported by the record evidence. In their brief, the Appellants claim that Verizon (as opposed to its third party billing agent) billed the disputed CCL charges in accordance with its present position regarding the tariff's meaning. *Appellants' Brief* at 24. The Appellants never state, but they do imply, that Verizon *always* had billed such charges in accordance with Appellants' present interpretation. The record evidence, however, does not support this implication.

In their brief, the Appellants cite to certain conclusory statements made by Verizon's witness at the hearings that Verizon billed the disputed charges for toll calls originated from or

terminated to wireless end users (where Verizon's carrier common line was not involved). *Id.* Such statements, however, make no reference to actual billing records. Record evidence reveals that Verizon did not start imposing the CCL charge on wireless calls until 2001, eight years after the tariff language on which it now relies was adopted. *See App. to Appellees' Brief* at 95 (referencing Exhibit 17 below). The Commission apparently found such evidence persuasive, since it determined that Verizon (as opposed to its billing agent) did not begin billing the disputed CCL charges until 2001. *App. to Appeal* at 124. On appeal, that finding must stand.

The Appellants also simply ignore other evidence cited by the Commission regarding its finding that Verizon's behavior was inconsistent with Verizon's tariff interpretation. In particular, in its March 21, 2008 Order Interpreting Tariff, the Commission noted that Verizon does not bill two separate carrier common line charges when both local switching and local transport from Section 6 are used to terminate or originate a call – which would be required under the Appellants' argument that "each" and "all" switched access service, including Local Switching and Local Transport, bear CCL charges. *See App. to Appeal* at 29, n. 4 citing to Tr. Day II at 102-105. Thus, Verizon's billing behavior is totally inconsistent with the Appellants' interpretation of Tariff 85 and their (misplaced and out-of-context) reliance on the Section 5 statement that "[c]arrier common line access service is billed to **each** switched access service provided under this tariff." *Appellants' Brief* at 6 (emphasis added). The Appellants offer no grounds, nor can they, for this Court to second guess the Commission's findings of fact based on record evidence.

2. The Commission's Decision Is A Reasonable Interpretation In Light of Current Circumstances That Did Not Exist At The Time That The Tariff Was Adopted.

Contrary to the Appellants' contention on page 25 of their brief, the Commission did not modify the tariff to reflect changed market conditions. Indeed, the Commission, in the first

instance, construed the tariff language without reference to extrinsic evidence such as the changes in the telecommunications industry that indisputably took place after adoption of the tariff. But even if the Commission had taken into account extrinsic evidence of such changes in the telecommunications industry, its decision is still a reasonable interpretation of how to apply the tariff in today's world, where real world changes make it impossible to give effect literally to every provision of Section 5 simultaneously.

Section 5 contains subsections that state that Verizon will provide the carrier common line, *i.e.*, local loop, in conjunction with switched access components of local switching and local transport provided pursuant to Section 6. Section 5 also contains wording that would allow Verizon to charge for the carrier common line when the Section 6 local switching and local transport components are provided, obviously on the factual assumption that the carrier common line is being provided by Verizon in conjunction with the Section 6 local transport and switching components. This was an absolute factual predicate at the time the tariff was adopted because only Verizon provided local loops in its territory before the advent of local competition in 1996. *See App. to Appeal* at 30. When other local service providers began to originate and terminate calls over their own local loops after 1996, it became impossible to require Verizon to provide its common line to an end user when no Verizon end user was involved. The Commission expressly noted that "Verizon cannot provide access to the common line in the calls at issue here." *App. to Appeal* at 31.

In resolving the problem of interpreting the tariff when new call flows not contemplated by the tariff exist, the Commission appropriately considered the historical reality and evolution of the industry, *i.e.*, the introduction of local exchange competition that eliminated Verizon's monopoly over the carrier common line, and thus its ability and responsibility to provide such

service in every case. It was also appropriate for the Commission to take into account the fact that it was always within Verizon's power, and indeed Verizon's responsibility under RSAs 378:1 and 378:2, to modify its tariff to reflect changed circumstances. It would be perverse indeed for the Commission to excuse Verizon from its Section 5 obligation to provide the common line service while continuing to permit Verizon to impose the CCL charge for calls being routed to Verizon's competitors. The Commission appropriately determined that it should not read out of the tariff the requirement to provide the CCL even though Verizon failed to change its tariff to reflect the fact that it no longer always provides it. If Verizon wished to assert a right to charge for a service it does not provide, it was incumbent upon Verizon to make this plain to its customers by its tariff. *See Komisarek v. New England Telephone & Telegraph Co.*, 111 N.H. 301, 303 (1971)(if the telephone company wished to assert a right to disconnection for non-payment of other services, "it was incumbent upon it to make this plain to its consumers by its tariff").

For all of the reasons discussed above, the Commission's order is reasonable, lawful and supported by the record. Given that the decision below constitutes a reasonable interpretation of a tariff by the agency with which it was filed, the decision should be accorded deference and therefore should be upheld. *See Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F.3d 1, 10 (1st Cir. 2007)(deference is customarily given to a state agency's reasonable interpretation of regulatory filings like a tariff).

III. APPELLANTS' ARGUMENT THAT THE COMMISSION'S DECISION IS IN ERROR IMPERMISSIBLY RELIES UPON FACTUAL ALLEGATIONS THAT ARE EITHER CONTRARY TO THE COMMISSION'S FINDINGS OR NOT IN THE RECORD.

Conclusions reached by the Commission as the result of its thorough process and record in this case "'are entitled to great weight'" and therefore should "'not be not be set aside lightly'". *Public Service Company of New Hampshire v. Tennercliffe Development and Recreation Company, Inc.*, 104 N.H. 339, 341 (1962) (citation omitted). In addition, arguments not raised in a motion for rehearing before the Commission are not preserved for review on appeal. RSA 541:4; *Appeal of Campaign for Ratepayers Rights,* 145 N.H. 671, 677 (2001).

In making their arguments regarding the Commission's interpretation of the tariff, the Appellants violate both of these requirements. First, they improperly rely upon facts that directly conflict with findings made by the Commission. For example, without any citation to the record or appendix as required by Supreme Court Rule 16(3)(d), [6] the Appellants state that the Carrier Common Line Access Charge ("CCL Access Charge") is a "fee" and "is 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." *Appellants' Brief* at 3. This statement squarely contradicts the Commission's finding, expressly made "[b]ased on the record" before it, "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." *App. to Appeal,* at 31(emphasis added). As a result of this finding, the Commission logically found "that the CCL charge may be applied only when Verizon provides the use of its common line." *Id.*

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[6] Supreme Court Rule 16 (3) (d) provides that the brief of the moving party on the merits must contain a concise statement of the case and statement of facts, material to the consideration of the questions presented, **with appropriate references to the appendix or to the record.** (Emphasis added.)

The Appellants complain that the Commission did not cite record evidence to support its conclusion that the CCL charge recovers a portion of the local loop, and claim that Verizon presented "uncontroverted evidence" that the CCL charge was designed to recover joint and common costs generally. *Appellants' Brief* at 22. These statements are patently false. AT&T's Panel Rebuttal Testimony dated April 20, 2007 contains a detailed explanation of the development of the CCL charge. This testimony shows that the Commission *rejected* Verizon's proposal to set the charge at a rate that recovers residual joint and common costs, and demonstrates that the CCL charge is tied to usage of the common line/ local loop. *See App. to Appellee's Brief* at 25-31. This rebuttal testimony unquestionably and convincingly supports the Commission's finding and refutes the Appellants' position that the CCL charge is purely a contribution element that should be imposed irrespective of common line usage.

Thus, contrary to the claim in the Appellants' brief, Verizon's contribution claim was, in fact, disputed by evidence introduced at the hearing. The Commission assessed the evidence on both sides of the question and rejected Verizon's claim. The Appellants may not re-litigate in this appeal the Commission's finding that the CCL charge recovers a portion of the cost of the local loop.[7]

Another example of Appellants' misstatements of fact appearing in their brief for which the Appellants provide no citation to the record is on page 4 of their Brief. There, the Appellants assert that "[t]here are three network components that **individually or combined** constitute switched access service: the use of the local loop, local switch, and local transport." (Emphasis

[7] In addition, even assuming, *arguendo*, that the Appellants presented unrefuted evidence below about the cost-recovery attributes of the CCL charge, (which they did not), that claim cannot form the basis for overturning the Commission's orders. The Commission "may use its own expertise in reconciling conflicting evidence or may disbelieve unrefuted evidence." *Appeal of Town of Newington*, 149 N.H. at 354 (citation omitted). This is especially so in this case where the "factual" finding is, in reality, a Commission determination based upon its analysis of its own prior orders regarding the development of the CCL charge.

added.) However, this putative statement of fact is actually the Appellants' core legal contention and not a statement of fact at all.

Yet another example of the Appellants' improperly alleged facts is the following which appears on page 6 of the Appellants Brief:

> Unlike local transport and local switching, which are charged based on toll providers' use of local transport and switching facilities respectively, 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.

Like the last example, above, this is not a statement of fact; it is the Appellant's core tariff interpretation argument. As such, it does not belong in the Statement of Facts section of the Appellants' brief. Moreover, this statement is completely at odds with the Commission's finding that the CCL charge *only* applies when Verizon provides the use of its common line. *App. to Appeal* at 31.

In addition to attempting to relitigate factual findings made by the Commission (often on the basis of misstatements regarding the evidence, as described above), the Appellants improperly make arguments that they failed to raise below. For example, on page 6 of their brief, the Appellants state that the CCL charge "is analogous to the 911 fee that many state and local governments require cellular telephone companies to add to customers' bills to fund the 911 emergency response system." This argument was never presented below; thus, it may not be raised in this appeal. *See Appeal of Campaign for Ratepayers Rights,* 145 N.H. at 677. Even if the Appellants are permitted to maintain their 911 argument in this appeal, their analogy is improper. The 911 surcharge is a statutorily-mandated charge assessed on all ***end users*** of telecommunications services to fund an important public safety ***entity***. *See* RSAs 106-H:3 and 106-H:9, I. The disputed CCL charge in this case, on the other hand, is a charge imposed on one

carrier for the benefit of another carrier with which it competes. Thus, given the dissimilarities between the 911 surcharge and the CCL tariff rate, the Appellants' 911 argument should be disregarded.

IV. THE COMMISSION DID NOT ENGAGE IN RETROACTIVE RATEMAKING

The Court should reject the Appellants' claim that the Commission engaged in unlawful retroactive ratemaking when it interpreted Verizon's tariff. Contrary to the Appellants' assertions, the Commission did not modify the tariff retroactively[8] (or at all), or set or alter any rate — retroactively or otherwise. It did not reset, reduce, or in any other way adjust the rate that must be paid when the CCL charge is properly and lawfully assessed (*i.e.* when carriers use Verizon's common line or local loop for calls involving a Verizon end user customer). The CCL charge remains in the tariff at the originally established rate. Verizon (and now FairPoint) can continue to impose the charge when they actually provide the CCL service.

Basically, the Appellants disagree with the Commission's decision. They claim that "[t]he Commission failed to interpret the tariff according to its plain language," and that "[t]he tariff is indeed unambiguous but it unambiguously establishes the right to apply the CCL Access charge to all switched access services." *Appellants' Brief* at 25- 26. That the Appellants disagree with the result, however, does not turn the Commission's act of interpretation into an instance of rate-setting, retroactive or otherwise. As the Commission accurately described it, its decision was an act of "rate enforcement rather than ratemaking." *App. to Appeal* at 126.

[8] The Commission's Order of Notice referenced in footnote 1, above, clearly establishes that interpretation, not modification, of the tariff was the issue in the first instance. Only if the Commission agreed with Verizon's interpretation would it become necessary to consider modification of the tariff for prospective effect. Further, as the Commission's Order Interpreting Tariff indicates, the Commission stated that it would initiate a separate proceeding "if tariff modifications were determined necessary as a prospective matter." *App. to Appeal* at 25. Because the Commission did not accept Verizon's interpretation, no separate proceeding ensued and no tariff modification – retrospective, prospective or otherwise- occurred.

To accomplish such rate enforcement, the Commission adjudicated the issues under RSA 541-A: 31. It interpreted Verizon's tariff and correctly determined that *under the terms of that tariff,* Verizon was not entitled to impose or collect the CCL charge when no Verizon end user or local loop was involved. Whether tariffs are quasi-legislative, contractual, or something else, the Commission performed its normal adjudicative function of interpreting the language that governs the relationship between a public utility and its customers. Therefore, because the Commission did not set or adjust any rate, Appellants' claim of retroactive ratemaking plainly fails on the merits.

Appellants' arguments also fail because they are based on a foundation that simply does not exist. That illusory foundation is that the CCL charges at issue in this case were lawful, and is based on the assumption that the Commission erred in its interpretation of the tariff. The Appellants' argument hinges on two sentences in their brief: "In this case, the rate in question was based on a straightforward application of a valid tariff. Thus, the general rule against retroactive ratemaking applies in this instance." *Appellants' Brief* at 26. Based on these incorrect assertions, the Appellants set forth arguments concerning the quasi-legislative status of tariffs and a utility's entitlement to collect lawful rates until the Commission changes those rates. *Id.* at 25-26. However, the Commission correctly found exactly the opposite of what the Appellants advocated. The Commission determined that the Appellants' tariffs unambiguously did not permit imposition of the CCL charge when no Verizon or FairPoint end user was involved, and that imposition of CCL charges on such calls was unlawful.

The Appellants' arguments about retroactive ratemaking are inapplicable to a Commission decision that interpreted a tariff and ordered reparations for charges that the tariff did not permit. The cases that the Appellants cite in support of their retroactive ratemaking

arguments are inapposite. *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980), dealt with the Commission's ratesetting function and the date upon which temporary rates (which are later reconciled with permanent rates through customer refunds or surcharges) could lawfully be established. *So. Central Bell Telephone Co. v. Louisiana Public Service Commission*, 594 So. 2d 357 (La. 1992), as the quotation in Appellants' brief makes clear, addressed lawful rates, unlike those at issue in this case. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 371 (1932), addressed a situation where the Interstate Commerce Commission had set a railroad rate, later determined that rate to be unreasonable, and ordered reparations of the excess charges. It did not address the situation here, where the Commission found that the charges at issue were not authorized by the tariff in the first instance.

If Verizon's retroactive ratemaking position were adopted, the Commission would never be able to order refunds to customers of overcharges that a utility had collected in the past under an erroneous interpretation of its tariff. That improper and unjust result would completely eviscerate RSA 365:29 which expressly grants the Commission authority to order a public utility "to make due reparation to the person who has paid . . . an illegal or unjustly discriminatory rate, fare, charge or price." That is precisely what the Commission did in this case, by ordering Verizon to make reparation of charges that are illegal because they are not authorized by Verizon's tariff. If the Commission's ability to redress illegal charges were restricted to prospective adjustments to a utility's tariffs, as Appellants suggest, the legislature's grant of authority in RSA 365:29 would be meaningless surplusage. As this Court has said, however, the legislature is presumed not to waste words. *See, e.g., Appeal of Public Service Company of New Hampshire*, 125 N.H. 46, 54 (1984) (it is a "customary presumption that the legislature does not waste words"); *Blue Mountain Forest Association v. Town of Croydon*, 117 N.H. 365, 372

(1977)(the Court is inclined to believe that the legislature would not so waste its words). Accordingly, the Court may not read the statute out of existence in the manner the Appellants suggest.

CONCLUSION

For the reasons stated above, the Appellees respectfully request that the Court affirm the orders of the New Hampshire Public Utilities Commission.

REQUEST FOR ORAL ARGUMENT

The Appellees, BayRing, One Communications and AT&T request oral argument not to exceed 15 minutes. Oral argument will be presented by Susan S. Geiger and, with the Court's permission, Jay E. Gruber. A motion pro hac vice for Mr. Gruber will be filed to obtain such permission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2009, two copies of the foregoing Brief of Respondents-Appellees have been sent by first class mail, postage prepaid to the parties of record and to the New Hampshire Attorney General.

Susan S. Geiger

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