THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

NO. _____

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications NNE

APPENDIX TO APPEAL BY PETITION PURSUANT TO RSA 541:6 AND SUPREME COURT RULE 10

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APPENDIX TO APPEAL BY PETITION
PURSUANT TO RSA 541:6

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DT 06-067

FREEDOM RING COMMUNICATIONS, LLC d/b/a BAYRING COMMUNICATIONS

Complaint Against Verizon, New Hampshire Re: Access Charges

Procedural Order

ORDER NO. 24,705

November 29, 2006

APPEARANCES: Orr and Reno, P.A. by Susan S. Geiger, Esq. on behalf of BayRing Communications; Gregory M. Kennan, Esq. on behalf of One Communications; Mary E. Burgess, Esq. on behalf of AT&T Communications of New England, Inc.; Devine Millimet & Branch, P.A. by Frederick J. Coolbroth, Esq. on behalf of the New Hampshire Telephone Association; Victor D. Del Vecchio, Esq. on behalf of Verizon New Hampshire; and Lynn Fabrizio, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On April 28, 2006, Freedom Ring Communications LLC d/b/a BayRing Communications (BayRing) filed with the New Hampshire Public Utilities Commission (Commission) a petition requesting that the Commission investigate Verizon New Hampshire's (Verizon's) practice of imposing switched access charges, including carrier common line (CCL) access charges, on calls that originate on BayRing's network and terminate on a wireless carrier's network. BayRing took the position that calls between carriers using Verizon as an interim carrier do not involve switched access, and that, in any event, CCL charges are associated with "access" to a Verizon end-user via Verizon's local loop. However, according to BayRing, a call between a BayRing customer and a wireless customer does not involve a Verizon end-user or a Verizon local loop and therefore CCL charges should not apply. BayRing further contended in its filing that if the Commission determines that a charge should apply to such a transaction, it should be deemed chargeable as tandem transit service under Tariff No. 84 and not as switched access under Tariff No. 85.

On May 12, 2006, the Commission transmitted a copy of BayRing's complaint to Verizon with instructions to file a response. On May 31, 2006, Verizon filed an answer disputing BayRing's complaint and contending that Tariff No. 85 provides that "all switched access services will be subject to carrier common line access charges." Verizon further stated, among other things, that tandem transit service is "not available to BayRing for the application at issue here."

On June 23, 2006, the Commission issued an order of notice scheduling a prehearing conference for July 27, 2006, and a technical session for August 11, 2006, making Verizon a mandatory party, and determining that further investigation was warranted. In its order of notice, the Commission established the following issues for review in this docket: (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 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.

Petitions to intervene were filed by RNK Inc. d/b/a RNK Telecom (RNK) on July 17, 2006, by AT&T Communications of New England, Inc. (AT&T) on July 20, 2006, by One Communications on July 24, 2006, by Otel Telekom, Inc. (Otel) on July 26, 2006, and by segTEL, Inc. on July 28, 2006.

A prehearing conference was held on July 27, 2006, during which the pending petitions for intervention were granted. The parties and Staff met in a technical session on August 11, 2006. A follow-up technical session was conducted by conference call on September 29, 2006. In response to disclosures made during the technical sessions, BayRing filed a motion on October 6, 2006, to amend its initial petition by adding the assertion that Verizon is improperly assessing access charges to BayRing for calls originated by BayRing end-user customers and terminating at wireline end-user (as well as wireless) customers served by carriers other than Verizon. In its motion, which effectively requested an expansion of the scope of the docket, BayRing requested further notice and opportunity for comment pursuant to N.H. Code Admin. Rules Puc 203.10(b). On October 10, 2006, AT&T filed a motion to clarify or amend the scope of the proceeding, outlining various call scenarios and corresponding charges levied by Verizon warranting review in this docket and not yet covered in BayRing's initial and amended complaints.

On October 12, 2006, Staff filed a report of the technical session held via conference call on September 29, 2006. In its report, Staff recommended alternate schedules for proceeding to an evidentiary hearing or, in the alternative, for proceeding to briefings and a decision on the papers.

On October 23, 2006, the Commission issued Order No. 24,683, which expanded the scope of this investigation and adopting a schedule for proceeding to discovery, testimony and an evidentiary hearing. The scope was expanded to include any other CLEC or CTP carriers affected by the relevant tariff applications, and to review calls made or received by both wireless and wireline end-users. Accordingly, the first two issues were revised as follows:

(1) whether calls made or received by end-users which do not employ a Verizon local loop involve Verizon switched access; and

(2) if so, whether Verizon's access tariff requires the payment of certain rate elements, including but not limited to CCL charges.

Thus, the scope now includes calls made or received by either wireless or wireline end-users of carriers other than Verizon, which do not employ a Verizon local loop. The Commission issued a supplemental order of notice on October 23, 2006, scheduling a prehearing conference on the expanded scope of the proceeding.

On October 31, 2006, the New Hampshire Telephone Association filed a petition to intervene.

The prehearing conference took place as scheduled on November 3, 2006. At the prehearing conference, BayRing asked the Commission to bifurcate the issues of "liability" (i.e., the proper interpretation and application of the Verizon tariffs) and "damages"(i.e., calculation of any refunds and/or reparations due from Verizon) in this proceeding. Verizon opposed BayRing's request. Staff convened a technical session on November 14, 2006, and thereafter submitted a written report noting a lack of agreement with respect to bifurcation and asking the Commission to push back the approved procedural schedule two weeks upon the issuance of a decision on bifurcation. On November 17, 2006, AT&T filed a letter stating its support for bifurcation. On November 20, 2006, Verizon filed a response to AT&T's letter with comments in opposition of bifurcation. On November 21, 2006, BayRing filed comments reiterating its arguments for bifurcation.

II. PRELIMINARY POSITIONS OF THE PARTIES AND STAFF

A. Freedom Ring Communications LLC d/b/a BayRing Communications

BayRing recommends this proceeding be divided into two phases in the interest of judicial economy. Under this proposal, a first phase would concern the proper interpretation of Verizon's tariff, with inquiry limited to the question of whether refunds should be allowed, with

a second phase conducted to determine the exact amount of such refunds. According to BayRing, it would be inefficient to calculate, with specificity, the charges it believes are owed by Verizon, if the Commission decides the charges are not owed at all.

B. Verizon

Verizon opposes bifurcation, characterizing the CLECs' position with regard to the tariff interpretation and application as a significant rate design change. According to Verizon, reparations on the scale contemplated by BayRing could cost the company many millions of dollars. According to Verizon, data regarding the revenue generated by the current application of the tariff is necessary for the Commission's full understanding of why Verizon has applied the particular charges as it has. Verizon further asks the Commission to keep in mind the magnitude of the financial impact of both the proposed application change(s) and any ultimately required reparations as the Commission considers the proper interpretation and application of the tariff language in question.

C. AT&T Communications of New England, Inc.

In its November 17, 2006 letter, AT&T supported BayRing's recommendation for bifurcation of the proceeding. According to AT&T, at issue is the alleged misapplication of a single, existing tariffed rate; that the question before the Commission is what the tariff has required since it was adopted and what it continues to require today. AT&T does not support the consideration of damages in the first phase of this docket. AT&T stated that due process requires a fair adjudication of whether the language in the tariff allows Verizon to apply CCL charges in the manner it is applying them.

Further, AT&T disagreed with Verizon's statement that the issues in this case constitute tariff changes or rate redesign. According to AT&T, none of the parties have proposed a tariff

change but, rather, the Commission is being asked to determine whether the existing tariff is being properly applied. AT&T suggested that the charges in question are a relatively recent development that are not based on historical revenue requirement considerations, and that to review the issue of tariff interpretation in concert with a consideration of the financial implications of the tariff's application would amount to single-issue ratemaking.

D. NHTA

The NHTA took no position regarding bifurcation of the proceeding.

III. COMMISSION ANALYSIS

In light of the expanded scope of this investigation and the intervention of several additional carriers, we agree with BayRing and AT&T that, in the interest of judicial efficiency, it is appropriate to bifurcate the issues of tariff interpretation and reparations. We thus will conduct the proceeding in two phases, first determining the proper interpretation of the relevant tariff or tariffs and then deciding to what extent, if any, reparations are due. For purposes of Phase II, we will treat petitions for intervention in this docket as petitions for reparation under RSA 365:29, upon request of the intervenor. We further find that the consideration of prospective modifications to Verizon's tariff will be removed from the present proceeding and designated for resolution in a separate proceeding to be initiated at a later date if necessary.

However, as Verizon has noted, a fair assessment of the interests implicated in a proceeding of this nature warrants some consideration of the magnitude of the potential financial impact involved. We therefore direct each party that seeks reparations pursuant to RSA 365:29 to submit an estimate of the general order of magnitude of the disputed charges. We also direct Verizon to provide an estimate of the potential financial impact to it, if it were ultimately decided that Verizon had not properly applied the tariff. That estimate should include a total amount, and

to the extent practicable, individual calculations of the charges at issue which have been billed to BayRing and each intervenor. Finally, we require Verizon to provide an estimate of the annual impact to Verizon if the disputed revenue is no longer collected.

The required estimates may be submitted in the form of a range of dollar values and should include (1) a description of the methodology used in calculating the estimate, (2) an explanation of any assumptions made in the calculations, and (3) worksheets that illustrate how the calculations were made. There will be no discovery on those estimate calculations during Phase I of the proceeding, which will be limited to tariff interpretation. Finally, we adopt a revised schedule for this proceeding as requested in Staff's November 16, 2006 report.

Accordingly, we revise the procedural schedule as follows, so as to provide for the conduct of Phase I:

Dec. 15, 2006	Discovery served on all parties
Jan 12, 2007	Discovery responses due from all parties
Feb 9, 2007	Prefiled testimony from all parties due
Feb. 23, 2007	Discovery served on all parties
Mar. 9, 2007	Discovery responses due from all parties
Mar. 23, 2007	Rebuttal testimony due from all parties
Apr. 6, 2007	Discovery served on all parties
Apr 20, 2007	Discovery responses due from all parties

We will schedule a merits hearing on Phase I, as well as Phase II as necessary, at a later date.

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule as set forth above is APPROVED; and it is

FURTHER ORDERED, that each party that intends to seek reparations pursuant to RSA 365:29 submit a calculation of the estimated financial impact of the disputed charges on or before January 12, 2007. Such calculations should include a description of the calculation methodology used, an explanation of any assumptions made, and worksheets illustrating how the calculation was determined; and it is

FURTHER ORDERED, that on or before January 12, 2007, Verizon submit (1) an estimate of the total financial impact on Verizon of the charges at issue in this proceeding, (2) to the extent practicable, individual estimates of the disputed charge totals billed to BayRing and any intervenors, and (3) an estimate of the annual impact on Verizon if the disputed revenue is no longer collected, as set forth more fully above. By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of November, 2006.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Lori A. Normand
Assistant Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Re: Access Charges

Order *Nisi* Directing FairPoint to Revise Tariff

ORDER NO. 25,002

August 11, 2009

On March 21, 2008, the Commission issued Order No. 24,837, concluding that the carrier common line (CCL) charge contained in NHPUC Tariff No. 85 of Northern New England Telephone Operations LLC, d/b/a FairPoint Communications – NNE (FairPoint) is properly imposed when: (1) Verizon[1] provides the use of its common line and (2) it facilitates the transport of calls to a Verizon end user. Based on the evidence, the Commission further decided 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. Order No. 24,837 at 27. As previously stated, the tariff provisions are complex and understanding them requires a sophisticated understanding of the telecommunications industry and the history of such charges. *Id.* The Commission's interpretation of the tariff was based on the evidence presented at hearing combined with its understanding of the industry and the purpose of the tariff charges.

On May 7, 2009, the New Hampshire Supreme Court reversed the Commission's decision in Order No. 24,837, finding, based on a *de novo* review, that the plain language of the tariff did not comport with the Commission's interpretation of the language. *Appeal of Verizon New England*, No. 2008-0645, slip op (N.H. May 7, 2009). With regard to the Commission's

[1] Verizon was authorized to transfer its assets to FairPoint by Order No. 24,823, dated February 25, 2008, and FairPoint adopted the former Verizon tariff on April 1, 2008.

interpretation of the tariff in light of the evolution of the telephone industry since the tariff was first adopted, the Court stated "[w]ere we to review the PUC's tariff interpretation deferentially for mere reasonableness or rationality, we might find this argument persuasive." *Id.* at 7.

The order of notice in this proceeding established that in the event Verizon's interpretation of the current tariffs was found to be reasonable, the Commission would decide whether any prospective modifications to the tariffs are appropriate. Based upon the record developed in this proceeding, the Commission found that FairPoint's access tariff should permit the imposition of CCL charges only in those instances when a carrier uses FairPoint's common line and the common line facilitates the transport of calls to a FairPoint end-user. Order No. 24,837 at 27. Because the language of the tariff does not clearly reflect this finding, we direct FairPoint, pursuant to RSA 378:1 and 378:3, to modify its tariff to clarify that FairPoint shall charge CCL only when a FairPoint common line is used in the provision of switched access services. Such modifications shall include at a minimum, revisions to, or removal of, the following tariff provisions:

> Section 5: "Carrier common line access service is billed to each switched access service provided under this tariff in accordance with the regulations set forth herein and in Section 4.1, and at the rates and charges contained in Section 30.5."
>
> Section 5.4. 1.A: "General - Except as set forth herein, all switched access service provided to the customer will be subject to carrier common line access charges."
>
> Section 5.4. 1.C: "The switched access service provided by the Telephone Company includes the switched access service provided for both interstate and intrastate communications. The carrier common line access rates and charges will be billed to each switched access service provided under this tariff in accordance with Section 4.1 and Section 5.4.2."

Based upon the foregoing, it is hereby

ORDERED *NISI*, that subject to the effective date below, FairPoint file revisions to its NHPUC Tariff No. 85 as outlined above, within 30 days from the date of this order; and it is

FURTHER ORDERED, that the Executive Director shall cause a copy of this Order *Nisi* to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such publication to be no later than August 21, 2009 and to be documented by affidavit filed with this office on or before September 11, 2009; and it is

FURTHER ORDERED, that all persons interested in responding to this Order *Nisi* be notified that they may submit their comments or file a written request for a hearing which states the reason and basis for a hearing no later than August 28, 2009 for the Commission's consideration; and it is

FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than September 4, 2009; and it is

FURTHER ORDERED, that this Order *Nisi* shall be effective September 10, 2009, the Commission provides otherwise in a supplemental order issued prior to the effective date.

By order of the Public Utilities Commission of New Hampshire this eleventh day of August, 2009.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Procedural Order and Supplemental Order of Notice

ORDER NO. 25,219

May 4, 2011

I. PROCEDURAL HISTORY

This docket involves the propriety of Verizon New Hampshire (Verizon) billing for carrier common line (CCL) charges that do not involve a Verizon end user or a Verizon-provided local loop. On March 21, 2008, the Commission issued Order No. 24,837 directing Verizon to cease billing for CCL under those circumstances.[1] *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order 24,837 (Mar. 21, 2008) at 33. Following the denial of a motion for rehearing, *see Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,886 (August 8, 2008), FairPoint appealed the Commission's order to the New Hampshire Supreme Court.

On May 7, 2009, the New Hampshire Supreme Court released its opinion in *In re Verizon New England, Inc.*, 153 N.H. 693, 697-98 (2009), where it held that under the terms of its tariff FairPoint could assess CCL charges even when a FairPoint end user was not involved or a FairPoint-provided common line was not used. Accordingly, the New Hampshire Supreme

[1] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint) is the successor to Verizon's utility franchise and for simplicity further references in this order shall solely be to FairPoint.

Court reversed the Commission's decision regarding FairPoint's tariff. The Supreme Court further concluded:

> The petitioners urge us to uphold the PUC's interpretation of Tariff No. 85 because, they contend, it is reasonable in light of the evolution of the telephone industry since the tariff was first adopted. Were we to review the PUC's tariff interpretation deferentially for mere reasonableness or rationality, we might find this argument persuasive. We review the PUC's tariff interpretation *de novo*, however, and although we approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence, we are obliged to give effect to the plain language used in the tariff. . . . If the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court.

Id. at 700 (quotations and citations omitted).

Following the issuance of the Supreme Court's opinion, on a *nisi* basis the Commission issued Order No. 25,002, which stated "The Commission's interpretation of the tariff was based on the evidence presented at hearing combined with its understanding of the industry and the purpose of the tariff charges." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,002 (Aug. 11, 2009) at 1. Further, the Commission stated:

> Based upon the record developed in this proceeding, the Commission found that FairPoint's access tariff should permit the imposition of CCL charges only in those instances when a carrier uses FairPoint's common line and the common line facilitates the transport of the calls to a FairPoint end-user. Order No. 24,837 at 27. Because the language of the tariff does not clearly reflect this finding, we direct FairPoint, pursuant to RSA 378:1 and 378:3, to modify its tariff to clarify that FairPoint shall charge CCL only when a FairPoint common line is used in the provision of switched access services.

Id. at 2. Accordingly, the Commission ordered FairPoint to modify its tariff to comport with the Commission's finding.

On August 28, 2009, FairPoint filed comments and conditional request for rehearing. In that filing, FairPoint maintained its position on the purpose and propriety of the CCL charges and

argued that there was no basis to revise the tariff. Further, FairPoint contended that if the Commission still intended for the tariff to be revised, any revisions must be made in a "revenue neutral" manner. FairPoint's contention was that not allowing a "revenue neutral" revision would deprive it of substantial money to which it is entitled and would be a breach of the agreement that allowed FairPoint to acquire its New Hampshire business, or would raise constitutional concerns. FairPoint concluded by stating, "[t]o ensure a just and reasonable result in such a situation, FairPoint respectfully requests that if the Commission does not intend for FairPoint to recover its costs through other means, that it conduct a hearing in accordance with RSA 378:7 so that FairPoint may be properly heard on this issue." Comments and Conditional Request for Rehearing of FairPoint at 6.

On September 3, 2009, Global Crossing responded to FairPoint's comments and on September 4, 2009 BayRing and AT&T jointly responded to FairPoint's comments. Each of these responses contended, among other things, that FairPoint was required to revise its tariff and that it was not permitted to do so in a "revenue neutral" manner. On September 10, 2009, FairPoint filed new tariff pages which amended the CCL charge as directed by the Commission. In addition, to achieve "revenue neutrality," FairPoint's proposed new tariff pages also increased interconnection charges.

On September 23, 2009, the Commission issued Order No. 25,016, wherein the Commission concluded that, "an evidentiary hearing is necessary to address the issues raised by FairPoint's August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers' September 4 filings." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,016 (Sept. 23, 2009) at 3. That order noted that the

issues raised by the parties' filings included: "whether FairPoint's proposed tariff revisions are just and reasonable; whether the proposed interconnection charge is consistent with paragraph 9.1 of the Settlement Agreement in DT 07-011 approved by Order No. 24,823 (Feb. 25, 2008); whether the filing is properly considered under RSA 378:6, I or IV; and whether RSA 378:17-a III applies." *Id.* at 3-4. The order then set a schedule for testimony and discovery and a hearing for November 4, 2009.

On October 2, 2009, BayRing and AT&T filed a joint motion to clarify Order No. 25,016. In that motion, BayRing and AT&T sought clarification that the proposed changes to the CCL charge would be effective immediately, and that the schedule set by the Commission applied only to the interconnection charge filing. On October 12, 2009, FairPoint filed a motion for rehearing and for conditional withdrawal of its new tariff pages and sought rehearing of Order No. 25,002, as well as Order No. 25,016. FairPoint also requested that its new tariff pages be formally withdrawn and treated as "illustrative." On October 12, 2009, FairPoint objected to the joint motion to clarify and on October 19, 2009, BayRing, AT&T, One Communications, and Global Crossing all objected to FairPoint's October 12, 2009 motion for rehearing.

On October 16, 2009, the Commission issued a Secretarial Letter suspending the schedule as set in Order No. 25,016 while it considered the parties' motions. On November 2, 2009, Staff filed a memorandum recommending that action on various dockets, including the instant docket, be suspended for a period to permit FairPoint to focus on its bankruptcy restructuring. On November 6, 2009, Staff filed a new recommendation to extend the stay in this and other dockets. On November 10, 2009, the Commission issued a Secretarial Letter partially granting a stay and stating that an extension of the stay would be taken up at a later date. No

further Commission action occurred in this docket during the pendency of FairPoint's bankruptcy, from which it emerged on January 24, 2011.

On March 10, 2011, FairPoint filed a letter requesting that the Commission reactivate this proceeding and set a scheduling conference. According to FairPoint the following items are outstanding: (1) FairPoint's motion for rehearing of Order No. 25,002; (2) the suspended revised tariff; and (3) BayRing and AT&T's motion for clarification. On April 25, 2011, AT&T filed a letter requesting that the Commission rule on the two pending motions prior to scheduling further activity in the docket.

II. COMMISSION ANALYSIS

We begin by addressing FairPoint's August 28, 2009 comments and conditional request for rehearing and its October12, 2009 motion for rehearing and conditional withdrawal of its tariff pages. As noted above, on August 11, 2009, the Commission issued Order No. 25,002 as a *nisi* order requiring FairPoint to revise its tariff to comport with the Commission's understanding of the purpose of the CCL charge and, on August 28, 2009, FairPoint requested that a hearing be held on the need for a "revenue neutral" change. On September 23, 2009, the Commission issued Order No. 25,016, which concluded that a hearing was needed and which outlined the scope of the hearing. Because Order No. 25,002 was issued on a *nisi* basis, it permitted FairPoint, or others, the opportunity to request that a hearing be held. On August 28, 2009, FairPoint made such a request. By issuing Order No. 25,016, the Commission concluded that a hearing was needed. In effect, therefore, FairPoint's motion for a hearing was granted, though a hearing was never held due to FairPoint's bankruptcy filing. We conclude that there is no basis

to grant rehearing of Order No. 25,002 because Order No. 25,016 already granted the relief sought by FairPoint relative to Order 25,002.

As to FairPoint's additional request that it be permitted to withdraw its tariff pages, we note that FairPoint disputes the applicability of certain statutory timing requirements concerning its tariff filing. We also note that by Secretarial Letter on October 16, 2009, the Commission suspended the procedural schedule established in Order No. 25,016. That suspension continues and therefore the tariff filing never went into effect. As a result, FairPoint's concerns about the statutory timing requirements are moot. We now grant FairPoint's request to withdraw its tariff pages and have them treated as illustrative so that they may form the basis for further investigation and proceedings without invoking the statutory timing constraints of RSA 378:6.

As to BayRing and AT&T's motion to clarify, Order No. 25,016 granted FairPoint's request for a hearing on its tariff filing and, given the time that has elapsed since this order, we cannot now say that a portion of the tariff ought to have been in effect at some prior date. Accordingly, we deny BayRing and AT&T's motion for clarification.

Going forward, we find it necessary to establish a new procedural schedule to govern the remainder of this proceeding. Accordingly, we shall set a prehearing conference and technical session to permit the parties the opportunity to present proposals for a procedural schedule for the remainder of the docket.

We do not intend to expand the scope of the docket or to re-litigate any of the issues that have already been decided. To that end, any procedural schedule will address the submission of and discovery regarding new information. By "new" information we mean any information that would have been filed relative to FairPoint's new tariff pages under the scope of the proceeding

as established in Order No. 25,016. Specifically, the scope shall include whether FairPoint's proposed tariff revisions are just and reasonable, to what degree the new tariff filing is affected by the settlement agreement in DT 07-011, and what statutory requirements cover the filing. *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,016 (Sept. 23, 2009) at 3-4. In addition, as was noted in Order No. 25,016:

> Pursuant to NH Admin. Code Puc 1605, FairPoint is required to file supporting documents with a proposed tariff change. FairPoint did not file the required information and, therefore, the filing is not complete. In addition, in order to properly evaluate the proposed change in [its] tariff, pursuant to 1605.02(c), we will require FairPoint to file the information required in Puc 1604.08(c)(9).

Id. at 4. Though we are treating the tariff filing as illustrative, we still require that FairPoint submit the required supporting information set forth in Puc 1604.08(c)(9) on or before the date of the prehearing conference.

We will not re-litigate the purpose or propriety of the CCL charge. Apart from any conclusion about the words in the tariff itself, in Order No. 24,837 we specifically found that:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. We disagree. Based on the record before us, we find 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. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 24,837 (March 21, 2008) at 31. That conclusion was not addressed or overturned by the Supreme Court, which based its analysis on the terms of the tariff alone. The Commission will not entertain further argument about this conclusion.

A new procedural schedule will comport with the intent of the Supreme Court when it stated that: "If the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court." *In re Verizon New England, Inc.*, 153 N.H. at 700. Moreover, in November 2006 the Commission found that "the consideration of prospective modifications to Verizon's tariff will be removed from the present proceeding and designated for resolution in a separate proceeding to be initiated at a later date if necessary." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,705 (Nov. 29, 2006) at 6. We implement here the substantive goal of that finding but, for administrative convenience, we will not assign a separate docket number to the proceeding. Accordingly, we will undertake an examination of the proposed modifications to FairPoint's tariff, including the propriety of increased interconnection charges.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's August 28, 2009 comments and conditional request for rehearing and October12, 2009 motion for rehearing and conditional withdrawal of its tariff pages are granted in part and denied in part as set forth above; and it is

FURTHER ORDERED, that BayRing and AT&T's October 2, 2009 motion to clarify is denied; and it is

FURTHER ORDERED, that FairPoint submit the appropriate supporting information for its illustrative tariff filing on or before the date of the prehearing conference; and it is

FURTHER ORDERED, that a prehearing conference, pursuant to N.H. Code Admin. Rules Puc 203.15, be held before the Commission located at 21 S. Fruit St., Suite 10, Concord, New Hampshire on May 25, 2011 at 10:00 a.m., at which each party will provide a preliminary

statement of its position with regard to the petition and any of the issues set forth in N.H. Code Admin. Rules Puc 203.15 shall be considered; and it is

FURTHER ORDERED, that, immediately following the prehearing conference, FairPoint, the Staff of the Commission and any Intervenors hold a Technical Session to review FairPoint's filing and allow FairPoint to provide any amendments or updates to its filing; and it is

FURTHER ORDERED, that the Commission shall notify all persons desiring to be heard at this hearing by publishing a copy of this Supplemental Order of Notice no later than May 11, 2011, by publication on the Commission's website and through electronic distribution to all carriers operating in New Hampshire; and it is

FURTHER ORDERED, that pursuant to N.H. Code Admin. Rules Puc 203.17, any party seeking to intervene in the proceeding shall submit to the Commission seven copies of a Petition to Intervene with copies sent to the Commission and the Office of the Consumer Advocate on or before May 20, 2011, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding, as required by N.H. Code Admin. Rule Puc 203.17 and RSA 541-A:32,I(b); and it is

FURTHER ORDERED, that any party objecting to a Petition to Intervene make said Objection on or before May 25, 2011.

By order of the Public Utilities Commission of New Hampshire this fourth day of May, 2011.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification

ORDER NO. 25,283

October 28, 2011

I. PROCEDURAL HISTORY

The history of this docket is set out extensively in prior orders of the Commission. Accordingly, only the history relevant to the instant motions is included here. On March 21, 2008, the Commission issued Order No. 24,837 which concluded, among other things, that Verizon New England was permitted to bill wholesale customers the carrier common line (CCL) charge only when the customer used a Verizon-provided common line or "loop".[1] *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,837 (Mar. 21, 2008) at 33. The Commission reached this conclusion based on its finding that the CCL is a charge that recovers a portion of the costs of the common line rather than a "contribution element" that generates revenue for the utility's overall operations, without also recovering some marginal costs for a service. The Commission stated this conclusion as follows:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the

[1] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint) is the successor to Verizon's utility franchise and for simplicity further references in this order shall solely be to FairPoint, unless otherwise required by the context.

> common line itself. We disagree. Based on the record before us, we find 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. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.

Id. at 31. FairPoint appealed the Commission's determination to the New Hampshire Supreme Court which, on May 7, 2009, reversed the Commission's decision by ruling, that pursuant to the plain language of FairPoint's tariff No. 85, FairPoint was permitted to bill the CCL charge even when its common line was not used. *Appeal of Verizon New England*, 158 N.H. 693, 697-98 (2009). The Court also noted that "[i]f the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court." *Id.* at 698.

In response, on August 11, 2009, the Commission issued Order No. 25,002, on a *nisi* basis, and directed FairPoint to file a revised tariff clarifying that the CCL charge would be imposed only when FairPoint's common line was used. Order No. 25,002 also provided that interested persons could request a hearing by making a submission by August 28, 2009, and that the order would become effective on September 10, 2009, unless provided otherwise in a supplemental order issued prior to the effective date. On August 28, 2009, FairPoint filed comments and a conditional request for rehearing of Order No. 25,002 and, on September 4, 2009, other parties responded to FairPoint's August 28 filing. On September 10, 2009, FairPoint filed new tariff pages which clarified the application of the CCL charge consistent with the Commission's order. In addition, to achieve the "revenue neutrality" FairPoint considered necessary, FairPoint's filing also increased a separate interconnection charge to collect its estimate of the amount previously received from wholesale customers who were interconnected to the FairPoint network but did not use a FairPoint common line.

On September 23, 2009, the Commission issued Order No. 25,016 finding that an evidentiary hearing was "necessary to address the issues raised by FairPoint's August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers' September 4 filings." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,016 (Sept. 23, 2009) at 3. On October 2, 2009, Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing) and AT&T Corp. jointly moved for clarification of Order No. 25,016 contending that FairPoint's September 10, 2009 filing was in fact two distinct filings – one relating to the CCL and another relating to the interconnection charge – and that the two filings should be treated separately. On October 12, 2009, FairPoint objected to the joint motion for clarification and filed its own motion conditionally revoking its tariff pages and seeking rehearing of Order No. 25,002 and Order No. 25,016. On October 26, 2009, FairPoint voluntarily sought Chapter 11 reorganization through the United States Bankruptcy Court. Before hearing and before the motions were ruled upon, activity on this and other dockets ceased while FairPoint attended to its bankruptcy restructuring. FairPoint emerged from bankruptcy on January 24, 2011.[2]

On May 4, 2011, in response to a request from FairPoint to reactivate the docket, the Commission issued Order No. 25,219 as a procedural order and supplemental order of notice. The Commission stated that it would not re-litigate the purpose or propriety of the CCL charge and reiterated its finding in Order No. 24,837 regarding the CCL charge recovering a portion of the common line charge and thus appropriately charged only when the common line was used. Order No. 25,219 also stated that the Commission would "undertake an examination of the

[2] In Re Fairpoint Communications, Inc., et al., Case No. 09-16335, Order Confirming Debtors' Third Amended Joint Plan of Reorganization, ¶_____, (Bankr. S.D.N.Y. Jan. 13, 2011).

proposed modifications to FairPoint's tariff, including the propriety of increased interconnection charges." *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,219 (May 4, 2011) at 7-8.

On May 24, 2011, FairPoint filed a motion pursuant to RSA 365:20 and New Hampshire Supreme Court Rule 9 to certify an interlocutory transfer statement. By that motion, FairPoint asked the Commission to certify three questions relative to whether the Commission should re-litigate the purpose of the CCL charge for transfer to the New Hampshire Supreme Court, and to stay the instant matter pending a ruling by the Supreme Court on the interlocutory transfer.

On May 25, 2011, the Commission held a previously-scheduled prehearing conference in this docket. At that prehearing conference FairPoint and other interested parties were given the opportunity to present their positions orally on the motion to certify. Parties were also afforded the opportunity to respond to FairPoint's motion in writing by June 3, 2011, in conformance with the Commission's rules.

On June 3, 2011, objections to FairPoint's motion were received from Global Crossing and a group of competitive carriers made up of: BayRing; Sprint Communications Company, L.P.; Sprint Spectrum; AT&T Corp.; Choice One of New Hampshire Inc.; Conversent Communications of New Hampshire, LLC; CTC Communications Corp.; and Lightship Telecom, LLC (collectively the Competitive Carriers). On June 10, 2011, FairPoint filed a motion requesting leave to reply to the Competitive Carriers' objection, as well as a reply to the objection.

Also on June 3, 2011, the Competitive Carriers filed a joint motion for rehearing, reconsideration, and clarification relative to Order No. 25,219. On June 10, 2011, FairPoint objected to the Competitive Carriers' motion for rehearing, reconsideration, and clarification.

II. MOTION TO CERTIFY INTERLOCUTORY TRANSFER STATEMENT

A. POSITIONS OF THE PARTIES

1. FairPoint

According to FairPoint, the Commission's statement in its May 4, 2011 order that it would not permit further argument on the purpose of the CCL is highly prejudicial. This is so, FairPoint argues, because the CCL charge is designed to be a contribution element and any inquiry into whether it would be just or reasonable to change it, says FairPoint, must consider the role of the CCL as a contribution element and the lost revenue if its terms are changed. FairPoint Motion to Certify Interlocutory Transfer Statement at 7. Further, FairPoint contends, because the rates in its tariff are interconnected and interdependent, and because this charge is a contribution element, the Commission cannot focus on the impact of the change to the CCL without considering other changes needed to provide the level of revenues FairPoint requires.

As to the propriety of certifying questions for interlocutory transfer, FairPoint notes that RSA 365:20 states that the Commission "may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." FairPoint then points to what it calls a two-pronged test under Supreme Court Rule 9 to determine whether to accept such a transfer from an administrative agency. Under the first prong, there must be a substantial basis for a difference of opinion on the question of law. Second, the interlocutory statement must state why interlocutory transfer: (1) may materially

advance the termination or clarify further proceedings of the litigation; (2) protect a party from substantial and irreparable injury; or (3) present the opportunity to decide, modify, or clarify an issue of general importance in the administration of justice. *See* New Hampshire Supreme Court Rule 9 (1)(d). FairPoint contends that its request for interlocutory transfer satisfies all elements of the Supreme Court's test.

As to the requirement that there be a substantial basis for a difference of opinion, FairPoint first contends that when the Supreme Court reversed the Commission's decision it nullified all findings and conclusions of the Commission in the underlying docket. This includes, according to FairPoint, the determination about the purpose of the CCL charge. Accordingly, FairPoint argues, the Commission may not now rely on any previous conclusions about the CCL charge and its purpose must be litigated anew.

In arguing that the Court's reversal without further clarification nullifies the Commission's findings, FairPoint looks to *Corliss v. Mary Hitchcock Memorial Hospital*, 127 N.H. 225 (1985). Relying on that case, FairPoint contends that in reversing the trial court the Supreme Court "restored the parties to the status quo prior to any ruling by the Court. By analytical extension, therefore, the doctrine should apply to final dispositions from any tribunal that are subsequently reversed on appeal." FairPoint Motion to Certify Interlocutory Transfer Statement at 6. FairPoint then argues that while the "law-of-the-case" doctrine prevents re-litigation of issues actually decided in prior appeals, the issue of the CCL being a contribution element was not decided by the Supreme Court. Thus, there is no basis for the Commission to apply its prior finding as law of the case. In sum, FairPoint contends that because the

Commission's findings have been nullified and the law of the case does not permit the Commission to rely on its earlier conclusions, the CCL charge must be open to re-litigation.

FairPoint also contends that the Commission's conclusion with regard to the CCL charge was not a "true" finding of the Commission, but only dicta. FairPoint Motion to Certify Interlocutory Transfer Statement at 7. FairPoint argues that the underlying proceeding was intended to determine whether the CCL charge was being lawfully applied according to the terms of the tariff, not whether modifications to the tariff should be made. Further, FairPoint contends that Verizon had provided testimony on the issue of contribution, "not as an issue to be determined, but only as evidence that the rate was not strictly designed to recover just the cost of the common line." FairPoint Motion to Certify Interlocutory Transfer Statement at 7. Thus, according to FairPoint, any finding about the CCL's purpose was dicta and not made on the basis of complete arguments about the purpose of the CCL.

Finally, FairPoint contends that there is a substantial basis for a difference of opinion because there is no support in the record for the Commission's finding that the CCL charge was not a contribution element. FairPoint argues that the evidence in the underlying proceeding was insufficient to support the Commission's conclusion and, therefore, it is entitled to be heard regarding treatment of the CCL as a contribution element.

In addition to its arguments that there is a substantial basis for a difference of opinion, FairPoint also contends that all elements of the second prong of the Supreme Court's test are met. As to whether the transfer will materially advance the termination or further clarify the proceedings, FairPoint contends that the issue of whether the CCL charge is a contribution element is central to its case in showing that its proposed tariff revisions are just and reasonable.

According to FairPoint, if it "is denied the ability to present this argument, it must appeal any final ruling by the Commission, *favorable or not*, in order that this contribution finding not be *res judicata* for any other proceeding or complaint on its tariff." FairPoint Motion to Certify Interlocutory Transfer Statement at 8-9 (emphasis in original).

Next, FairPoint contends that transfer will clarify an issue of general importance because there has been ongoing contention regarding the scope of the Supreme Court's decision in this case. FairPoint argues that a transfer will clarify the extent to which findings of fact and conclusions of law are valid following the decision. Finally, FairPoint contends that deciding this procedural issue at this stage will reduce the likelihood that the parties will incur the expense of delay and continuing litigation in this docket.

2. Global Crossing

Global Crossing objected to FairPoint's motion by stating that the request is contrary to principles of judicial economy and "is merely an attempt to delay implementation of the Commission's decision, reached first in March 2008 and then again in September 2009, that FairPoint should not assess a CCL charge on traffic that does not traverse its loops because that charge was not intended – and should not be used – to recover costs not related to FairPoint's loops." Global Crossing Objection at 2-3. According to Global Crossing there is no reason to request the Supreme Court to address this matter because the Supreme Court has already found that the Commission may order FairPoint to amend its tariff on a going-forward basis. As to FairPoint's claim that the purpose of the initial phase of this proceeding was not to address the purpose of the CCL charge, Global Crossing contends that the record in the early phase contains testimony on the CCL's purpose and whether it was intended to be a contribution element. In

concluding, Global Crossing states that "[u]nder the circumstances, re-litigating those issues is unnecessary, and asking the Supreme Court whether the Commission needs to re-litigate those issues would serve no purpose." Global Crossing Objection at 3.

3. Competitive Carriers

The Competitive Carriers contend that FairPoint's motion fails to fulfill the requirements of Supreme Court Rule 9 and should be denied. First, the Competitive Carriers argue that the Commission should deny FairPoint's motion because the Supreme Court did not reverse or vacate the factual finding that the CCL is not a contribution element. According to the Competitive Carriers, the Supreme Court confirmed that the Commission's findings of fact are *prima facie* lawful and reasonable and did nothing to address those findings of fact; instead, it relied upon the terms of the tariff alone.

With respect to FairPoint's contention that the Supreme Court's order vacated all findings of the Commission, the Competitive Carriers argue that the cases cited by FairPoint in support are inapposite, distinguishable, or contrary to the contention advanced by FairPoint. In referencing *Corliss*, *supra*, the Competitive Carriers point out that the Supreme Court, in reversing the trial court in that case, was actually reversing the trial court's order of judgment notwithstanding the verdict and reinstating the jury's verdict. To the Competitive Carriers, this decision contradicts FairPoint's position and illustrates that factual findings survive appellate decisions.

The Competitive Carriers also contend that FairPoint's motion ignores the Supreme Court's standard of review which states that a party seeking to set aside the Commission's ruling has the burden of demonstrating that the order is contrary to law or is unjust or unreasonable.

According to the Competitive Carriers, because FairPoint did not appeal the Commission's finding that the CCL is not a contribution element, it presented no evidence contrary to the Commission's decision and thus the Supreme Court could not have vacated that finding.

Similarly, the Competitive Carriers argue that FairPoint is currently prevented from challenging the Commission's decision that the CCL is not a contribution element on the basis of collateral estoppel. Specifically, the Competitive Carriers contend that the current contribution issue is identical to the previously decided issue following litigation on the matter and was resolved on its merits, and that FairPoint, as a party in privity with Verizon, appeared in the prior action.

Next, the Competitive Carriers argue that the Supreme Court did not disturb the prior factual record in this case, and that by restating its prior conclusion the Commission acted consistently with the Supreme Court's mandate. According to the Competitive Carriers, even if the Commission's prior decision was vacated by the Court's ruling, nothing barred the Commission from making the same finding on the same factual record. With regard to whether the Commission's prior decision on the CCL was dicta, the Competitive Carriers contend that the Commission's failure to rest its order on a particular factual conclusion does not mean that the conclusion is without force in later proceedings. Also, the Competitive Carriers state that the Commission's prior conclusion was based on "substantial amounts of evidence, testimony, and argument by parties on both sides of the proceeding." Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 12. Thus, they contend, "FairPoint's suggestion that the Commission's proper resolution of an issue presented and discussed by the parties in the

proceeding is mere dicta is disingenuous at best." Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 12.

Lastly, the Competitive Carriers contend that transferring the question presented by FairPoint will delay, not expedite, the proceeding. Because FairPoint is likely to appeal any decision the Commission makes, the Competitive Carriers argue, it cannot suggest that the time needed to compile evidence and issue an order will be so substantial as to justify the "extraordinary remedy" of transfer to the Supreme Court. Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 13. In addition, the Competitive Carriers argue that FairPoint's suggestion that interlocutory transfer will alleviate expense and delay in this docket ignores the cost and delay imposed by the transfer itself in asking the Supreme Court to consider matters previously "briefed, considered and resolved." Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 14.

B. COMMISSION ANALYSIS

RSA 365:20 states that "The commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." Further, pursuant to New Hampshire Supreme Court Rule 9:

> The supreme court may, in its discretion, decline to accept an interlocutory transfer of a question of law without ruling by a trial court or by an administrative agency. The interlocutory transfer statement shall contain . . . (d) a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory transfer may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice; and (e) the signature of the trial court or of the administrative agency transferring the question.

Accordingly, under the authorizing statute the Commission has the discretion whether to reserve, certify and transfer questions of law, and by its rules the Supreme Court has discretion whether to accept any transfer request it receives. For the reasons that follow we decline to reserve, certify and transfer the questions presented by FairPoint and deny its motion. In addition, we deny FairPoint's motion for leave to reply to the Competitive Carriers' objection.

Addressing FairPoint's arguments, we first concentrate on its contention that there is a substantial basis for a difference of opinion on the continuing effect of the Commission's factual conclusion following the Supreme Court's order of reversal. More specifically, we address the assertion that the Commission's CCL charge finding has been nullified because the Supreme Court has reversed the Commission's decision.

The New Hampshire Supreme Court articulated its understanding of the effect of reversal when it stated "a judgment of reversal by an appellate court . . . is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." *Taylor v. Nutting*, 133 N.H. 451, 455 (1990) (quotations omitted). Thus, the Supreme Court in New Hampshire has set out a framework for evaluating the impact of its decisions. In its decision in this case, the Supreme Court did not discuss or decide anything relative to the purpose of the CCL charge; instead, the Court held that FairPoint's tariff, as it was written, allowed the charge to be applied even when FairPoint's common line was not used. The Supreme Court specifically stated:

> Accordingly, under the plain language of Tariff No. 85, it was permissible for Verizon to assess the carrier common line access charge to the local switching and local transport services it provided in connection with the calls at issue. Because we find the tariff's language to be plain and unambiguous, we will not look beyond it to determine its intent.

Verizon, 158 N.H. at 697. Thus, the Supreme Court rendered no judgment on anything other than the language of the tariff itself and we do not presume that it judged any matter beyond that conclusion. FairPoint offers the opposite conclusion; that by not supporting the Commission's conclusion, the Supreme Court has rejected it. This approach, however, reads into the Supreme Court's opinion conclusions that were not made. Further, to follow this reasoning would mean that any and every item not specifically supported by the court, is rejected. Such a result would be contrary to the principle that the Commission's factual determinations will be presumed to be *prima facie* lawful and reasonable. *See Verizon*, 158 N.H. at 695.

With respect to the parties' arguments under *Corliss*, we find that case inapplicable here. In *Corliss*, the Supreme Court stated that the central issue in the underlying trial was the credibility of the witnesses to the case. *Corliss*, 127 N.H. at 226. After the jury returned a verdict for the plaintiff, the trial judge granted the defendant's motion for judgment notwithstanding the verdict (judgment n.o.v). *Id.* In the order granting the judgment n.o.v., the trial judge referred to statements made by some jurors indicating that they had relied on considerations other than the law set forth in the jury instructions, but stated that his decision to grant the judgment n.o.v. was made on his independent determination that the plaintiff was not credible. *Id.* The Supreme Court vacated the judgment n.o.v. because it determined that the trial judge, by ruling upon the credibility of the witnesses, had not applied the correct standard for granting a judgment n.o.v. *Id.* at 227-28. While the Supreme Court stated, without citation, that the "reversal of a judgment n.o.v. revitalizes the verdict of the jury," it also concluded that it could not allow the jury's verdict to stand "because we find that the court erred in failing to

inquire of the jury on the record about its deliberations after hearing the disturbing remarks of several jurors." *Id.* at 228. Thus, in *Corliss*, the Supreme Court did not, as argued by FairPoint, put the parties at the "status quo" prior to the trial court's ruling because the Supreme Court also vacated the jury's conclusions. Further, *Corliss* did not, as contended by the Competitive Carriers, reinstate the jury's verdict and findings of fact because the Supreme Court vacated the jury's verdict along with reversing the trial judge's order of judgment n.o.v. In this instance, we do not find *Corliss* to be particularly instructive with respect to the positions of any party.

As to FairPoint's argument under the law of the case doctrine, "only such issues as have actually been decided, either explicitly, or by necessary inference from the disposition, constitute the law of the case." *Saunders v. Town of Kingston*, 160 N.H. 560, 566 (2010) (quoting *Nutting*, 133 N.H. at 456). FairPoint contends that this language means that since the Supreme Court did not affirmatively decide the issue in the prior appeal, the Commission's present decision based upon its prior conclusion is invalid. This argument misinterprets the doctrine. The Supreme Court has made clear that the "question decided on the first appeal is known as the law of the case, and becomes binding precedent to be followed in successive stages of the same litigation. Thus, where an appellate court states a rule of law, it is conclusively established and determinative of the rights of the same parties in any subsequent appeal or retrial of the same case." *Merrimack Valley Wood Products, Inc. v. Near*, 152 N.H. 192, 201 (2005). Thus, the law of the case doctrine limits re-litigation of issues of law determined by the appellate court. *Cf. State v. Patterson*, 145 N.H. 462, 466 (2000) (stating that the law of the case doctrine was inapplicable because the Supreme Court had not previously "stated any rule of law in this case"). Here, the only issue determined by the Supreme Court was the interpretation of FairPoint's tariff

as it existed and, therefore, it is only that finding that is the law of the case. There is nothing in the doctrine that, in addition to preventing re-litigation of settled issues, precludes or invalidates other factual conclusions. Nor is there anything that prevents the Commission from restating its conclusion about the purpose or intent of the CCL based upon the existing record when the Supreme Court has done nothing to disturb that conclusion. For the above reasons we do not agree that there is a substantial basis for a difference of opinion on whether the Commission's finding relative to the CCL has been invalidated by the Supreme Court.

FairPoint next argues that the Commission's determination about the CCL was only dicta, and not a "valid finding of fact." FairPoint Motion to Certify Interlocutory Transfer Statement at 7. FairPoint contends that the purpose of the underlying proceeding was to determine if the CCL was being lawfully applied and was not about prospective modification. Additionally, FairPoint contends that although Verizon provided evidence about contribution it did not do so "as an issue to be determined," but as proof about the CCL not strictly being for the recovery of the cost of the common line. FairPoint Motion to Certify Interlocutory Transfer Statement at 7.

We do not have any basis to conclude that the distinction drawn by FairPoint between dicta, meaning a determination not essential to the decision, and a "valid finding of fact" has any bearing on the correctness of the decision itself. Moreover, the conclusion reached by the Commission was in response to the arguments of the parties, including Verizon, regarding whether the CCL was a contribution element justifying its application even when a Verizon-provided common line was not used. *See, e.g.,* September 10, 2007 Brief of AT&T at 31-39;

September 10, 2007 Brief of One Communications at 15-21; September 10, 2007 Brief of Verizon at 26-28; September 10, 2007 Brief of BayRing at 14-15.

Also as noted, FairPoint contends that there is no support in the record for the Commission's decision. FairPoint, however, then points out that there was testimony and evidence on the issue, while arguing that its evidence was not presented in order for the Commission to decide the issue and while disputing the meaning or context of the testimony offered by those opposing FairPoint's arguments. The Commission, as the trier of fact, heard the testimony and read the arguments of the parties and rendered a finding on an issue in dispute in the case. The fact that FairPoint disagrees with the Commission's finding is not a substantial basis for concluding that there is a difference of opinion in this case justifying interlocutory transfer.

Furthermore, whether the Commission's conclusion was dicta, or something else, is not relevant to whether it is a valid finding today. The Commission stated:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. We disagree. Based on the record before us, we find 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. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order 24,837 (Mar. 21, 2008) at 31. Thus, the Commission has specifically found that the CCL is not a contribution element, and no ruling by any other body of competent jurisdiction has undermined that finding.

While failure of the first prong of the analysis is sufficient, in itself, to deny FairPoint's motion, for completeness we address the remainder of its arguments. As to the second prong of

the analysis under Supreme Court Rule 9, we also do not find that it meets the standard for interlocutory transfer. FairPoint has made clear that it disagrees with the Commission's conclusion with regard to the CCL and that it will appeal "any final ruling by the Commission in this proceeding, favorable or not." FairPoint Motion to Certify Interlocutory Transfer Statement at 8. Because FairPoint is likely to appeal any final decision by the Commission on this matter, we do not see how granting interlocutory transfer will advance the termination or clarify further proceedings. Also, FairPoint contends that transfer will clarify the scope of the Supreme Court's decision and its mandate as well as which findings of fact and conclusions of law remain valid. Given our determination, as stated above, that by reversing the Commission the Supreme Court has said nothing undermining the Commission's prior conclusion on the CCL, we do not agree that such clarification is needed. Lastly, the added delay and expense of litigating the contribution issue before the Supreme Court with the knowledge that the outcome of that proceeding will only lead to more proceedings here convinces us that interlocutory transfer is not justified in this instance.

As a final point of emphasis we note that our determination to not re-litigate our 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 and thus should not be charged when there is no use of a common line, does not prevent FairPoint from raising other arguments that elements of contribution are necessary to meet its financial needs. The Commission has rendered a conclusion about the purpose of the CCL which, for the reasons stated above, has not been invalidated by the Supreme Court. Nevertheless, to assure that FairPoint is not prejudiced or denied due process, FairPoint may propose other changes to its tariff, including contribution

elements, that it might consider necessary for achieving the revenues it needs. For avoidance of doubt, we will allow FairPoint to introduce evidence and make argument about the extent to which the CCL rate element has historically provided some contribution to general overhead and costs, but not to argue that it was solely a contribution element or that its tariff language on a going forward basis should allow it to be charged when there is no use of a common line. As was discussed at the May 25, 2011 prehearing conference, we believe that permitting those proposals and their attendant arguments will grant FairPoint the latitude it feels necessary without reopening matters the Commission considers closed. *See* Transcript of May 25, 2011 prehearing conference at 10-18. Of course other parties will have the opportunity to introduce contrary evidence and argument.

III. MOTION FOR REHEARING, RECONSIDERATION AND CLARIFICATION

A. POSITIONS OF THE PARTIES

1. Competitive Carriers

The Competitive Carriers begin by contending that the Commission must reconsider Order No. 25,219 because it: (1) overlooked the fact that FairPoint made two distinct tariff filings on September 10, 2009; and (2) mistakenly relied upon the passage of time as affecting the Commission's ability to determine the effective date of the tariff filing. The Competitive Carriers argue that these conclusions are erroneous as a matter of law and bear upon crucial substantive and procedural issues in this docket.

As to the first basis raised by the Competitive Carriers, they argue that Order No. 25,002, which ordered FairPoint to revise its tariff to change the application of the CCL charge, stated that it would become effective on September 10, 2009, unless otherwise provided in a

supplemental order issued prior to the effective date, and since no supplemental order was issued, Order No. 25,002 became a final order on September 10, 2009. The Competitive Carriers argue that when FairPoint complied with this final order by making a tariff filing on September 10, 2009, it made two distinct and separable filings. The first tariff filing, they argue, was a compliance filing on the CCL pursuant to a final order. In addition, the Competitive Carriers claim, FairPoint submitted a separate tariff filing amending the interconnection charge. According to the Competitive Carriers, these filings are different and severable and should be treated differently by the Commission; specifically, by implementing the CCL change effective October 10, 2009, and withholding the implementation of the increased interconnection charge pending further review by the Commission and other parties.

The Competitive Carriers contend that it is evident that FairPoint's September 10, 2009 submission was actually two separate filings because FairPoint's own cover letter stated that the change to the CCL charge was being made pursuant to the Commission's order, but that the change to the interconnection charge was being made "in conjunction with" the change to the CCL. According to the Competitive Carriers, the use of the phrase "in conjunction with" indicates that two separate acts were occurring.

The Competitive Carriers also contend that the tariff changes must be treated separately due to the requirements of RSA 378:6 and the Commission's rules. Under RSA 378:6, IV, any tariff for services filed by a telephone utility for Commission approval becomes effective as filed 30 days after filing, unless the Commission amends or rejects it within the 30-day period. Under RSA 378:6, IV the Commission may also, in its discretion and with explanation, extend the time for its determination by up to 30 days. Pursuant to RSA 378;7, if the Commission is of the

opinion, after a hearing on its motion or a complaint, that the rates, fares or charges demanded by a utility are unjust or unreasonable, the Commission may determine just and reasonable rates, fares and charges and fix those rates, fares or charges by order.

The Competitive Carriers argue that the Commission never amended, rejected, or suspended FairPoint's CCL filing and, although it issued Order No. 25,016 within the 30-day period, "that Order is devoid of any language that could reasonably be construed as amending, rejecting or suspending" the CCL filing. Competitive Carriers' Motion for Rehearing, Reconsideration and Clarification (Carriers' Motion) at 9. Therefore, the Competitive Carriers argue, consistent with RSA 378:6, IV the change to the CCL charge became effective 30 days after it was filed, October 10, 2009. The Competitive Carriers further contend that when Order No. 25,016 stated that a hearing was necessary, that hearing was related only to the interconnection charge filing. Thus, they argue, it was only the interconnection portion of the filing that did not become effective on October 10, 2009, because it was subject to further proceedings.

As to the Competitive Carriers' argument relative to the Commission's rules, they contend that under Puc 1603.05(b)(1)a utilities are required to designate changes in tariff regulation with the letter "C" in the margin and that the CCL changes bear that mark, whereas Puc 1603.05(b)(1)c requires utilities to mark rate increases with the letter "I" in the margin and the interconnection charge change bears that mark. The Competitive Carriers argue that this difference in marking shows that "FairPoint's two separate filings sought to accomplish two separate goals that are given separate treatment under the Commission's rules: changing part of FairPoint's CCL tariff *language* ("C" designation in the right margin) and increasing a zero-rated

charge to a positive *rate* ("I" designation in the right margin)." Carriers' Motion at 10-11 (emphasis in original). Applying the same logic, the Competitive Carriers contend that if FairPoint had been reducing the rate of the CCL, rather than changing its application, it was to have designated the alterations with "D" or "R" as required by Puc 1603.05(b)(1)b and e, but it did not do so. Thus, the Competitive Carriers contend, FairPoint's change to the CCL charge is not a rate change and is to be treated differently than the rate change relating to the interconnection charge.

The Competitive Carriers argue that because the change to the CCL was a complete filing made in response to the Commission's order, and because it was not amended, rejected, or suspended, it went into effect on October 10, 2009, by operation of law. Thus it would be unlawful and unreasonable to now "retroactively suspend" that change 18 months after its effective date. Carriers' Motion at 13. They further argue that because the Commission found the filing relating to the interconnection charge to be incomplete when filed, that change never went into effect. Therefore, the Competitive Carriers argue, the Commission erred when it did not conclude that the change to the CCL charge went into effect on October 10, 2009.

The Competitive Carriers also argue that the Commission erred in not recognizing that by requesting the change to the interconnection charge, FairPoint violated *Verizon New England, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Co., Verizon Select Services, Inc. and FairPoint Communications, Inc.*, Order No. 24,823 (February 25, 2008) in Docket No. DT 07-011. Order No. 24,823 approved a settlement agreement that authorized the transfer of Verizon's assets and utility franchise to FairPoint. Order No. 24,823 notes that the underlying settlement agreement provides, at paragraph 4(h), that "[n]otwithstanding anything herein to the

contrary, FairPoint shall have the same rights and obligations as Verizon in connection with and arising out of any final order which may be issued within NHPUC Docket 06-067." *Id.* at 75. Order No. 24,823 then stated that the Commission understood "the agreement between the three CLECs and FairPoint to mean that FairPoint will honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis. However, in the event we decide Verizon was not authorized to collect the charges in dispute in Docket No. DT 06-067, and require a refund of the charges, we will require Verizon to refund the amount collected by it." *Id.*

The Competitive Carriers argue that under the terms of Order No. 24,823, the Commission reserved the right to resolve the dispute in this docket, and that it was obvious to FairPoint that such a resolution could include a prohibition on the collection of the CCL charge in certain instances. Rather than abide by this provision, the Competitive Carriers contend, FairPoint is attempting to alter the terms of the Commission's final order in the docket. The Competitive Carriers request that upon rehearing the Commission must find that FairPoint's interconnection charge increase was defective and that it never went into effect.

In addition, the Competitive Carriers state that under section 9.1 of the settlement agreement in Docket No. DT 07-011, the Commission was prevented from seeking a decrease, and FairPoint was prohibited from seeking an increase, in FairPoint's access rates for three years following the close of the transaction. According to the Competitive Carriers, there are flaws with the argument advanced by FairPoint that the Commission's order requiring it to amend its tariff violated the agreement and must be balanced by a rate increase. The Competitive Carriers state that the Commission's order did not require FairPoint to reduce its rates, only that it amend the language of the tariff to avoid the application of CCL charges in certain cases. Secondly, the

Competitive Carriers state that even if the Commission could not alter FairPoint's rates, the Commission's actions in Docket No. DT 06-067 were excepted from the agreement in Docket No. DT 07-011. Therefore, according to the Competitive Carriers, the Commission had the authority to order cessation of certain CCL billing.

Further, the Competitive Carriers argue that FairPoint did not request rehearing of Order No. 24,823. They contend FairPoint was barred from submitting the changes to the interconnection charge because the increase in that rate was proposed in violation of the settlement agreement and order. Thus, the Competitive Carriers state, "to the extent that the Commission's action allowing FairPoint to withdraw its [interconnection tariff] may be construed as a decision that the [interconnection filing] was validly made, that decision is mistaken." Carriers' Motion at 17.

The Competitive Carriers next contend that Order No. 25,219 provided no valid reason for denying their earlier motion for clarification. The Competitive Carriers agree that the passage of time was a sufficient basis to reset the procedural schedule, but argue that it is insufficient to deny the primary argument in the prior motion – that FairPoint made two distinct filings subject to differing treatment, as described above. The Competitive Carriers contend that the reason for submitting the original motion for clarification was a desire to remove uncertainty, but that the uncertainty remains to this day.

The Competitive Carriers also indicate that Order No. 25,219 states that FairPoint's tariff filing did not go into effect, but also grants FairPoint's request to withdraw the pages, and they argue that if the pages did not go into effect there would be no basis to allow them to be withdrawn. They point out that even FairPoint concedes that the tariff filing made to comply

with the Order *Nisi*, No. 25,002, was not voluntary under RSA 378:6, IV and that FairPoint merely declared that "[t]o the extent that the Commission is treating the tariff page filing as having been voluntarily made pursuant to RSA 378:6, IV, FairPoint hereby withdraws the filing and requests that the filing be treated as illustrative." Carriers' Motion at 19. The Competitive Carriers further argue that when FairPoint filed the tariff changing the CCL charge, it became effective without further action and therefore FairPoint could not unilaterally withdraw it. Instead, if FairPoint had sought further changes, it was required to file amended tariff pages sometime after making a filing complying with Order No. 25,002. The Competitive Carriers further contend that FairPoint was obligated by RSA 365:23 and 365:40 to comply with Order No. 25,002 which, in their view became final on September 10, 2009, and that by attempting to withdraw its tariff pages FairPoint was out of compliance with the Commission's order.

Lastly, the Competitive Carriers contend that Order No. 25,219 is unreasonable because it "rewards the party least worthy of the Commission's indulgence." Carriers' Motion at 21. In addition to the reasons already set forth, the Competitive Carriers contend that the Commission has repeatedly stated that FairPoint may not bill for CCL charges when a common line is not used, and has ordered that FairPoint amend its tariff to ensure this conclusion is met. Rather than comply with this directive, the Competitive Carriers contend, FairPoint has engaged in various forms of delay including by attempting to impose the increase to the interconnection charge. The Competitive Carriers ask the Commission to modify its prior orders, state that the change to the CCL went into effect on October 10, 2009, and set a procedural schedule to address the proposed increase to the interconnection charge.

2. FairPoint

In its objection, FairPoint disputes the factual summary offered by the Competitive Carriers. According to FairPoint, the Competitive Carriers pointed out that the Commission's Order of Notice in this docket allowed for prospective tariff modifications, but omitted reference to a later procedural order removing the issue of tariff modifications from this docket. *See Freedom Ring Communications d/b/a BayRing Communications*, Order No. 24,705 (Nov. 29, 2006) at 6. FairPoint argues that because the issue of tariff modifications had been removed, it was beyond the scope of this proceeding.

FairPoint then contends that the Competitive Carriers are incorrect, both as a matter of fact and law, that FairPoint's September 10, 2009 submission was two separate and distinct tariff filings. To that end, FairPoint argues that the Competitive Carriers misread Order No. 25,016 as stating that the Commission concluded only the submission relative to the interconnection charge was deemed to be incomplete. According to FairPoint, the Commission stated that the "filing" was incomplete and that filing was comprised of tariff revisions covering both the CCL and the interconnection charge. According to FairPoint, the "filing" was not complete until it had submitted the testimony of Michael Skrivan on September 28, 2009, and, therefore, could not have been effective before October 28, 2009. FairPoint notes that by October 28, 2009, it had withdrawn its tariff revisions and the Commission had suspended the procedural schedule.

Similarly, FairPoint contends that when extending the procedural schedule, the Commission referred to suspension of the proposed "changes," as opposed to a single "change" within the September 10, 2009 filing. Also, FairPoint contends that the Commission's October 16, 2009 secretarial letter suspending the procedural schedule references "a" tariff filing which

affected the CCL charge "and" the interconnection charge. Accordingly, FairPoint argues, the Competitive Carriers have misunderstood the filings made by FairPoint and the Commission's treatment of them.

FairPoint next argues that the Competitive Carriers' motion is moot because it is seeking reconsideration of an order that the Commission could not issue. More specifically, FairPoint argues that when the Supreme Court reversed the Commission's decision, all analyses and conclusions in that decision were also reversed. Thus, according to FairPoint, the Commission could not issue Order No. 25,002 ordering it to amend its tariff, because the Commission was without any basis to do so following the Supreme Court's decision.

Next, FairPoint argues that the Competitive Carriers' motion is, in essence, the same as their prior motion and seeks the same relief for the same reasons. FairPoint contends that the Competitive Carriers' motion merely reiterates the argument that FairPoint made two distinct filings on September 10, 2009, but offers no new or mistakenly conceived information to support that claim. FairPoint contends that it has repeatedly stated that the revisions to its tariff were to be treated as "a single revenue neutral adjustment." FairPoint Objection to Motion for Rehearing, Reconsideration and Clarification (FairPoint Objection) at 6. FairPoint states that it has always intended its adjustments to be treated in concert with each other and "any suggestion that FairPoint's September 10, 2009 filing can be separated is simply not correct." FairPoint Objection at 6.

In addition, FairPoint contends that the definition of the term "rate" covers the charge or price as well as the related service provisions. Thus, according to FairPoint, the rate change in

the tariff covered both the CCL amendment as well as the change to the interconnection charge and the two cannot be evaluated separately.

As to the Competitive Carriers' claim that the Commission's order did not require FairPoint to change its rate, but only the language in its tariff regarding the CCL, FairPoint contends that this argument is flawed in multiple respects. In particular, FairPoint notes that changes in the language of the tariff could have a strong impact on the costs of and charges for services, without any alteration of the amount of the charge. Thus, according to FairPoint, the Commission's treatment of its September 10, 2009 tariff filing as a single submission was not mistakenly conceived or grounds for rehearing.

Regarding the Competitive Carriers' argument that the CCL change became effective 30 days after filing by operation of law, FairPoint argues that the Competitive Carriers have overlooked the fact that the Commission extended the review period for the filing. Again noting its argument that the September 10, 2009 submission was a single filing, FairPoint contends that when the review of the filing was extended, that extension covered the entire submission, and not merely the interconnection charge.

As to the Competitive Carriers' contention that the Commission denied their previous motion for clarification based solely on the lapse of time, FairPoint contends that the Competitive Carriers ignore other language in the Commission's order. Specifically, FairPoint notes that Order No. 25,002 was issued on a *nisi* basis, that FairPoint requested a hearing on that order and that by issuing Order No. 25,016, the Commission granted FairPoint's request for a hearing relative to the requirements of Order No. 25,002. Therefore, according to FairPoint, it was proper for the Commission to deny the Competitive Carriers' motion on that ground.

FairPoint also contends that the Competitive Carriers are incorrect in stating that Order No. 25,002 became a final order. This is so according to FairPoint because it was issued as an order *nisi* "which by definition is conditionally moot and for which, in this case, the condition has been triggered." FairPoint Objection at 9. Further, FairPoint contends that pursuant to the settlement agreement in Docket No. DT 07-011, it has the same rights and obligations as Verizon would have had, including the right to seek rehearing and appeal. Thus, FairPoint contends, there is no final order which it could be charged with failing to honor.

B. COMMISSION ANALYSIS

To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable. *See* RSA 541:3; RSA 541:4; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,194 (February 4, 2011) at 3. Good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued. *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (April 2, 2010) at 14 (citing *Dumais v. State*, 118 N.H. 309, 312 (1978)). A successful motion does not merely reassert prior arguments and request a different outcome. *Freedom Ring Communications d/b/a BayRing Communications*, Order No. 24,886 (August 8, 2008) at 7.

First, in response to FairPoint's claim that the Commission was without authority to issue Order No. 25,002 because the Supreme Court had invalidated the Commission's findings, for the

reasons stated above relative to FairPoint's motion to certify interlocutory transfer statement, we reject this argument.

As to the merits of the Competitive Carriers' motion, they contend that the Commission erred as a matter of law when it concluded that FairPoint's September 10, 2009 filing was not composed of two separate filings which were subject to differing treatment. Many of the Competitive Carriers' claims are premised on their view that FairPoint submitted two distinct tariff filings on September 10, 2009, and that the language of FairPoint's cover letter supports that view when it states the CCL change was made "pursuant to the Commission's order" while the new interconnection charge was made "in conjunction with" the change to the CCL. We disagree. It was clear from the submissions that FairPoint viewed the two proposals as intertwined and intended they be dealt with as a package.

The Competitive Carriers observe that Order No. 25,002 stated that it would become final on September 10, 2009, unless superseded by an order prior to the effective date. They contend that because no superseding order was issued, Order No. 25,002 became final on September 10, 2009. Further, because FairPoint's CCL filing was in compliance with what the Competitive Carriers consider a final order, the CCL tariff went into effect on October 10, 2009, in accordance with RSA 378:6. The Competitive Carriers argue that the interconnection charge filing, in contrast, was not made in response to a Commission order and, therefore, did not become effective as a matter of law.

We disagree with the Competitive Carriers' interpretation of the finality of Order No. 25,002. The order provided that any party could request a hearing within a specified timeframe and FairPoint made such a request in a timely manner. Following FairPoint's request, the

Commission issued Order No. 25,016, which concluded that the Commission would hold a hearing to review FairPoint's filings. Though not issued until after September 10, 2009, Order No. 25,016 clearly stated that "an evidentiary hearing is necessary to address the issues raised by FairPoint's August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers' September 4 filings." Order No. 25,016 at 3. Thus, because the condition triggering a hearing was met and the Commission found that a hearing was needed, there was not a "final order" of the Commission regarding the CCL tariff provisions.

In reviewing this issue, however, we conclude that there is justification for some revision to our prior orders on this matter. In Order No. 25,219, the Commission stated that it granted FairPoint's request to withdraw its previously filed tariff pages and have them treated as illustrative. Order No. 25,219 at 6. This statement was in error. In FairPoint's conditional withdrawal and request for treating withdrawn tariff pages as illustrative, it stated that:

> The tariff filing was not a voluntary filing under RSA 378:6, IV; instead, it is a response by FairPoint to comply lawfully to the exercise by the Commission of its ratemaking authority under 378:7. To the extent that the Commission is treating the tariff page filing as having been voluntarily made pursuant to RSA 378:6, IV, FairPoint hereby withdraws the filing and requests that the filing be treated as illustrative.

Motion for Rehearing by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE and Conditional Withdrawal of Tariff Filing at 9. While we consider FairPoint's submission a single filing, we do believe that there is a basis for treating portions of the filing differently based upon the distinction drawn by FairPoint and others.

As noted, FairPoint acknowledges that the change to the CCL charge was not made voluntarily but was made pursuant to a Commission directive under the Commission's authority

in RSA 378:7. Unlike RSA 378:6, IV, there is no statutory timeframe for the Commission to review and authorize or reject submissions made to comply with Commission orders. Also, though it was filed in response to a Commission directive, the change to the CCL did not go into effect because intervening Commission orders concluded that hearings were required and FairPoint's bankruptcy further suspended the procedural schedule.

In contrast to the above analysis relative to the change to the CCL charge, the change to the interconnection charge was a voluntary filing, not made to comply with a Commission order issued pursuant to RSA 378:7. The Commission did not, at any point, require or request that FairPoint make any revision to the interconnection charge, or any charge other than the CCL. It is, therefore, only this section of the filing involving the interconnection charge that FairPoint could withdraw and request to make illustrative because it was the only portion made voluntarily. As such, we hereby reconsider that finding of Order No. 25,219 that stated that it granted FairPoint's request and now conclude that the portion of the tariff filing covering FairPoint's interconnection charge is withdrawn and will be treated as illustrative so that it may be the basis for further consideration in this proceeding without invoking the statutory timing constraints of RSA 378:6. The portion of the filing covering the CCL is accepted and not considered withdrawn, but we conclude that it did not go into effect because the properly requested hearing on the matter has not been held and the Commission has yet to determine if the changes proposed by FairPoint conform to the requirements of the Commission as stated in Order No. 25,002. As a result, the change to the CCL tariff remains filed, but suspended in application and effect.

Further, we note that Order No. 25,016, was issued on September 23, 2009, prior to the proposed effective date of October 10, 2009, and Order No. 25,016 found that a hearing on FairPoint's submission was necessary. Therefore, we conclude that because a hearing was found necessary before the tariff went into effect, the Competitive Carriers were not prejudiced as they might have been had the tariff gone into effect and later been revoked or suspended. *See, e.g., Kerouac v. Dir., N.H. Div. of Motor Vehicles*, 158 N.H. 353, 357 (2009).

Moreover, we note that the Competitive Carriers dispute that Order No. 25,016 contained language sufficient to amend, reject, or suspend the submission. As regards the interconnection charge, for the above reasons concluding that it was withdrawn, we do not find the argument applicable to this change. As to the CCL change, Order No. 25,016 stated that a hearing was needed on the "issues raised by FairPoint's August 28 and September 10 filings" which, in effect, rejected or suspended that submission and required a hearing. We do not believe that any special words are required to reject or suspend a filing and we conclude that the language of Order No. 25,016 was sufficient to achieve this purpose.

Also, in light of the above, we do not further consider the Competitive Carriers' argument that the Commission's administrative rules on tariff changes subject the portions of the tariff to different treatment. While it is true that the notation requirements are different, the Competitive Carriers cannot articulate a basis to conclude that the differing notations require some special review. Interpreting otherwise would elevate form over substance and would not promote efficient use of Commission and industry resources.

Furthermore, as to the distinction drawn by the Competitive Carriers between a filing intended to change the tariff *language* as opposed to one changing a tariff *rate*, we cannot say

that this distinction is one that matters in this case. As noted by FairPoint, changes in tariff language can have consequences as pronounced as changes in rates and our rules define "rates" as "any charge or price, and all related service provisions for services regulated and tariffed by the commission, including, but not limited to, availability . . . ." Puc 1602.03. Thus we see no reason, on the bases asserted by the Competitive Carriers, for treating the interconnection and CCL tariffs substantially differently.

Regarding the Competitive Carriers' claims that FairPoint's filing violated the terms of the settlement agreement and order in Docket No. DT 07-011, FairPoint, though bound by the terms of a final order, had all the rights and obligations Verizon would have had, including the right to appeal the Commission's order to the New Hampshire Supreme Court. In addition, as noted above, there is no final order in this docket that FairPoint can be said to have ignored or altered, as FairPoint was granted the opportunity for a hearing on the order requiring it to file a revised tariff.

Next, the Competitive Carriers contend that pursuant to section 9.1 of the settlement agreement in Docket No. DT 07-011, FairPoint was barred from submitting the increase to the interconnection charge. Therefore, the Competitive Carriers argue, the Commission cannot allow FairPoint to withdraw that tariff, because FairPoint was without authority to submit it in the first instance. Thus, the Commission should have disregarded the interconnection charge proposal and accepted the CCL tariff as a stand-alone document.

The settlement agreement in Docket No. DT 07-011 states, in relevant part at section 9.1: "FairPoint will not seek to increase wholesale rates to take effect during the three years following the Closing Date. The Commission shall not seek to decrease such rates for effect

during the three-year period following the Closing Date." The Closing Date referred to in the settlement agreement was March 31, 2008. Clearly, the Commission has not sought to lower FairPoint's rates and thus there is no violation of that term of the settlement agreement. In any event, the Commission's decisions in this docket were expressly exempted from that agreement.

Whether FairPoint's request in 2009 to increase the interconnection charge was proscribed by the settlement agreement in Docket No. DT 07-011 is immaterial because the charge never went into effect and the "stay out period" established in section 9.1 of that agreement has now expired.

The Competitive Carriers argue that in their view FairPoint was not entitled to seek the change in the interconnection charge and that by doing so, it caused a delay from which FairPoint benefits. In its conditional request for hearing, however, FairPoint had raised issues beyond the interconnection charge and permitting FairPoint to withdraw the portion of the tariff relative to that change does not necessarily eliminate those issues. In issuing Order No. 25,002 on a *nisi* basis, the Commission allowed for the possibility of hearings, which FairPoint requested in a timely fashion. Though the result is an extension of time before the matters at hand are resolved, we cannot say that FairPoint improperly manipulated the process to cause a delay.

Next, the Competitive Carriers contend that the Commission's statement in Order No. 25,219 regarding the passage of time is an insufficient basis for denial of their prior motion. We disagree. It is not the passage of time alone that led to denial. As stated in Order No. 25,219, when the Commission issued Order No. 25,016 in September 2009, it concluded that it needed a hearing on FairPoint's submission. Further, Order No. 25,219 explained that the hearing was

never held because of FairPoint's intervening bankruptcy filing. The Commission's inability to hold a hearing on the original schedule due to FairPoint's bankruptcy does not mean that it rescinded the determination that a hearing was necessary.

Finally, the Competitive Carriers argue that Order No. 25,219 is unreasonable because it rewards FairPoint, when, in their estimation, FairPoint is unworthy of such reward. We disagree. The Competitive Carriers point to no evidence that was overlooked or misconstrued, but only claim that FairPoint does not deserve to prevail. We find nothing in this argument to lead us to rehear or reconsider our order.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's Motion to Certify Interlocutory Transfer Statement is DENIED; and it is

FURTHER ORDERED, that the Competitive Carriers' Motion for Rehearing, Reconsideration and Clarification is DENIED in large part, consistent with this order, and GRANTED in part, in as much as Order No. 25,219 is hereby amended to disallow the withdrawal of FairPoint's CCL tariff compliance filing, but does still grant FairPoint's request to withdraw its proposed change to the interconnection tariff and treat it as illustrative; and it is

FURTHER ORDERED, that both the filed CCL tariff changes and the withdrawn, but illustrative interconnection tariff changes are subject to further proceedings consistent with this order.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of October, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

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

COMPETITIVE LOCAL EXCHANGE CARRIERS' MOTION FOR HEARING TO DETERMINE LANGUAGE AND EFFECTIVE DATE OF FAIRPOINT'S CCL TARIFF FILING

Competitive Local Exchange Carriers Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communications Company, L.P. and Sprint Spectrum, L.P. ("Sprint"), and AT&T Corp. ("CLECs") respectfully move that the New Hampshire Public Utilities Commission ("Commission") expeditiously convene a hearing and issue an order determining: 1) whether FairPoint's September 10, 2009 tariff filing results in the removal of the carrier common line ("CCL") charge for calls that do not use a FairPoint common line, consistent with the Commission's prior directives on this issue; and 2) the effective date of the CCL tariff modifications. Relief from FairPoint's anti-competitive application of the CCL charges is long overdue and should not be further delayed pending the Commission's review of FairPoint's request to increase its long-dormant interconnection charge. In support of their Motion, the CLECs state as follows:

1. Two tariff filings made by FairPoint on September 10, 2009 are presently pending before the Commission. One relates to CCL tariff language and is comprised of two pages (Tariff No. 85, Section 5, First Revision of Pages 1 and 4) ("the CCL tariff filing"). The other filing relates to a rate change and is also comprised of two pages

(Tariff No. 85, Section 6, First Revision of Page 5 and Section 30, Page 8, Second Revision) ("the interconnection charge filing").

2. The issue of whether FairPoint's CCL tariff filing complies with the Commission's prior orders is presently ripe for consideration by the Commission. No discovery or additional process is necessary for the Commission to determine whether the CCL tariff language complies with the Commission's directives to FairPoint to modify its tariff to eliminate the imposition of CCL charges when no FairPoint common line is used. The effective date of the CCL tariff language is also ripe for adjudication by the Commission. These are questions of tariff interpretation and law requiring no discovery, technical sessions or testimony – just argument – as the Commission noted in Order No. 25, 284 ("the Commission will permit *arguments* on whether…any changes should be reconciled…") (emphasis added). There is therefore no need to subject the CCL tariff filing to the procedural schedule set out in Order No. 25, 284, a schedule that more properly applies to the interconnection rate change sought by FairPoint.

3. FairPoint's unilateral attempt to condition the CCL tariff filing ordered by the Commission upon the institution of a separate interconnection rate increase should not be rewarded by a process that delays the resolution of the CCL tariff language change (a change that is long overdue). Simply put, the CCL tariff language change ordered by the Commission is currently ready for review and should not be subject to the procedural schedule needed for the consideration of the interconnection rate increase issue.

4. The Commission's delays in considering modifications to FairPoint's CCL tariff has caused the CLECs years of financial uncertainty as they continue to be billed CCL charges by FairPoint when no FairPoint common line is used, in addition to being

billed CCL charges by carriers whose common lines are actually used. The CLECs therefore urge the Commission to put an end to these improper CCL charges by moving forward with an expeditious review of FairPoint's CCL tariff language and a determination of its effective date as soon as possible.

Based on the foregoing, the CLECs respectfully urge that the Commission:

A. Expeditiously convene a hearing and issue an order to determine:

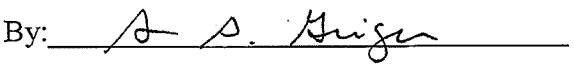
1) whether FairPoint's CCL tariff filing complies with the Commission's directives to FairPoint to modify its tariff to ensure that CCL charges are not imposed when no FairPoint common line is used; and

2) the effective date of the CCL tariff filing; and

B. Grant such further relief as it deems appropriate.

FREEDOM RING COMMUNICATIONS, LLC
D/B/A BAYRING COMMUNICATIONS
By its Attorneys,

ORR & RENO, P.A.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2011, I have forwarded a copy of the foregoing Motion either by first class mail, postage prepaid, or by electronic mail to the parties listed on the Service List.

Susan S. Geiger

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STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 06-067

Freedom Ring Communications LLC d/b/a BayRing Communications
Complaint Against Verizon New Hampshire Regarding Access Charges

RESPONSE TO MOTION FOR HEARING

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and responds to the Motion of Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communications Company, L.P. and Sprint Spectrum, L.P., and AT&T Corp. (together "CLECs") for Hearing to Determine Language and Effective Date of FairPoint's CCL Tariff Filing ("Motion"). Although styled as a "Motion for Hearing" it appears, based on the requested relief, that the CLECs Motion should be treated as a motion to bifurcate the proceeding, and FairPoint responds accordingly. As set forth further below, FairPoint assents in part and objects in part to the Motion.

On October 28, 2011, the Commission issued Order No. 25,283 dispensing with various motions related to FairPoint's September 10, 2009 tariff filing in which FairPoint revised the application of its CCL charge and increased the Interconnection Charge. On the same day, the Commission issued a separate order establishing the procedure for further discovery, technical sessions and testimony in this matter. In their Motion, the CLECs assert that "the CCL tariff language change ordered by the Commission is currently ready for review and should not be subject to the procedural schedule needed for the consideration of the interconnection rate

increase issue."[1] They further suggest that "[t]here is therefore no need to subject the CCL tariff filing to the procedural schedule set out in Order No. 25,284, a schedule that more properly applies to the interconnection rate change sought by FairPoint."[2] As such, they request that the Commission dispense with discovery, technical sessions and testimony, and convene a hearing on the question of revisions to the CCL tariff language alone.

The CLECs' motion to bifurcate appears to be grounded in their persistent contention that *two separate* tariff filings are the subjects of this proceeding,[3] notwithstanding the Commission's clear rejection of this argument.[4] FairPoint is past the point of disputing this now-settled issue, but it does allow that the tariff filing comprises two separate *questions*, and it does not dispute, as the CLECs state, that the question of "whether FairPoint's CCL tariff filing complies with the Commission's prior orders is presently ripe for consideration by the Commission"[5] (as are other questions related to the CCL charge) and that "it should not be subject to the procedural schedule needed for the consideration of the interconnection rate increase issue."[6] Consequently, FairPoint assents to the Motion to the extent that it seeks to place the resolution of these two questions on separate procedural tracks.

However, FairPoint disagrees that any hearing is necessary on the CCL question, and thus requests that the Commission order a procedural schedule that moves straight to briefing. As the CLECs have stated, "[n]o discovery or *additional process* is necessary for the Commission to determine whether the CCL tariff language complies with the Commission's directives to FairPoint to modify its tariff to eliminate the imposition of CCL charges when no

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[1] Motion at 2.
[2] *Id.*
[3] Motion at 1-2.
[4] Order 25,283 at 29.
[5] Motion at 2.
[6] *Id.*

FairPoint common line is used."[7] Moreover, FairPoint also concurs that "[t]he effective date of the CCL tariff language is also ripe for adjudication by the Commission. These are questions of tariff interpretation and law requiring no discovery, technical sessions or testimony—*just argument* . . . ."[8]

The Commission previously has determined that "[d]ue process requires a meaningful opportunity to be heard, i.e., a hearing, where *issues of fact* are presented for resolution by an administrative agency."[9] However, "no hearing is necessary [when] [a]ll of the issues . . . can . . . be resolved as a matter of law, and thus do not require the introduction of any additional evidence . . . ."[10] Given the consensus of the parties that no further fact finding is necessary and that there are only questions of tariff interpretation and law, a hearing would serve no lawful purpose. Accordingly, FairPoint requests that in addition to dispensing with further development of the factual record, the Commission also dispense with a hearing on the CCL question and move directly to briefs.[11]

FairPoint takes this position in the interest of judicial economy and timely resolution of this proceeding. However, despite assenting to bifurcation of the issues, FairPoint in no way concedes that the revisions to the CCL charge are not intertwined and conditioned on an increase

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[7] *Id.* (emphasis added)
[8] *Id.* (emphasis added).
[9] Birchview by the Saco, Inc., DE 97-255, Order No. 23,649 Denying Motion for Rehearing (March 7, 2001) (emphasis added).
[10] Holiday Acres Water and Wastewater Services, DW 01-244, Order No. 23,931 Denying Request for Hearing (March 8, 2002).
[11] FairPoint also notes that a grant of the Motion to any extent would obviate the need for FairPoint to respond to any pending data requests that relate solely to the CCL issue. Further, FairPoint emphasizes that regardless of the extent of the relief it grants pursuant to the Motion, this proceeding cannot be restricted to only the questions as described by the CLECs, *i.e.* whether FairPoint's CCL tariff filing complies with the Commission's directives (which FairPoint continues to assert are unlawful) and the effective date of such revisions. All relevant questions, including but not limited to those presented by the Commission in its Orders of Notice and by the parties in their respective pleadings, must remain before the Commission.

in the Interconnection Charge. Accordingly, FairPoint expects, and reserves all rights to argue, that if any revision of the CCL charge is ultimately required , revenue neutral revisions to the Interconnection Charge should be also be established and should be imposed effective the same day in which the CCL charge is revised by the Commission.

WHEREFORE, FairPoint respectfully requests that this Commission:

a) GRANT the CLECs' request to forego further development of the factual record in regard to the question of revisions to the CCL charge;

b) DENY the CLECs request for a hearing on the question of revisions to the CCL charge; and

c) GRANT FairPoint's request that the Commission issue a revised procedural schedule in which the parties proceed directly to briefing on the question of the revisions to the CCL charge.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC, D/B/A
FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: November 21, 2011 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a PDF copy of the foregoing Response was forwarded this day to the parties by electronic mail.

Dated: November 21, 2011

By: _____
Harry N. Malone, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Order on CLEC Motion for Hearing

ORDER NO. 25,295

November 30, 2011

On October 29, 2011, the Commission issued Order Nos. 25,283 and 25,284 in this docket. Order No. 25,283 concluded, among other things, that when Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (FairPoint) filed proposed changes to its tariff on September 10, 2009, it made a single filing, but that different portions of that filing would be subject to different treatment. *See Freedom Ring Communications, LLC d/b/a/ BayRing Communications*, Order No. 25,283 (Oct. 29, 2011) at 30. The Commission determined that the portion of FairPoint's filing concerning an increase to the Interconnection Charge was a voluntary filing made pursuant to RSA 378:6, IV and that it should be withdrawn and treated as illustrative pending further investigation consistent with FairPoint's request. *Id.* at 31. The Commission also determined that the portion of FairPoint's submission amending the terms and conditions of the carrier common line (CCL) charge was made to comply with a Commission order issued pursuant to RSA 378:7 and, therefore, was not subject to certain statutory timeframes for its review. *Id.* at 30-31. That CCL amendment, however, had never gone into effect because "the properly requested hearing on the matter has not been held and the Commission has yet to determine if the changes proposed by FairPoint conform to the

requirements of the Commission." *Id.* at 31. By Order No. 25,284, the Commission established a procedural schedule for further discovery, technical sessions and testimony in the docket.

On November 10, 2011, Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communication Company, L.P. and Sprint Spectrum, L.P., and AT&T Corp. (collectively the CLECs) filed a motion requesting that the Commission convene a hearing on the portions of the tariff submission relating to the CCL. On November 21, 2011, FairPoint filed a response to the CLECs' motion which identified the CLECs' motion more as a request to bifurcate the proceeding and, on that basis, assented in part and objected in part. In addition, on November 29, 2011, FairPoint filed a motion to amend the procedural schedule in which it stated that other parties either assented to the motion, or took no position.

According to the CLECs the issue of whether FairPoint's tariff filing covering the CCL complies with the Commission's order is ripe for consideration and no additional discovery is needed for the Commission to render a determination on that issue. In addition, the CLECs contend that the issue of the effective date of the CCL tariff filing is ripe for a decision. According to the CLECs, "These are questions of tariff interpretation and law requiring no discovery, technical sessions or testimony – just argument – as the Commission noted in Order No. 25,284." CLECs' Motion for Hearing at 2.

Further, the CLECs contend that any delay that may result from an investigation of the Interconnection Charge should not also delay any determinations relating to the change to the language of the CCL tariff. The CLECs argue that further delay subjects them to on-going uncertainty because they continue to be billed CCL charges improperly. The CLECs, therefore,

request that the Commission "expeditiously" schedule a hearing and issue an order on the CCL filing.

In its response, FairPoint "allows" that although it made a single tariff filing in September 2009, that filing "comprises two separate *questions*" and FairPoint does not dispute that further discovery is unnecessary to decide whether the CCL portion of the filing complies with the Commission's order. FairPoint Response to Motion for Hearing at 2 (emphasis in original). FairPoint, however, contends that no hearing is needed and that any schedule relating to a decision on the CCL change should be simply for establishing timeframes for briefing on the tariff filing's compliance with the Commission's order and its effective date.

FairPoint makes clear that it has taken this position in the interests of economy and ensuring a timely resolution, but it does not concede that the changes to the CCL are separable from an increase in the Interconnection Charge. FairPoint states that it "expects, and reserves all rights to argue, that if any revision of the CCL charge is ultimately required, revenue neutral revisions to the Interconnection Charge should also be established and should be imposed effective the same day [o]n which the CCL charge is revised by the Commission." FairPoint Response to Motion for Hearing at 4.

Because parties on both sides of the instant matter agree that no further discovery, technical sessions, or testimony are needed regarding: (1) whether the changes to the CCL tariff proposed by FairPoint on September 10, 2009 comply with the Commission's order; and (2) the effective date of the changes to the CCL tariff, we conclude that addressing those questions in a separate and more expedited process is appropriate. The CLECs have requested that the Commission hold a hearing on the issues, while FairPoint contends that only briefing is needed.

The identified issues relate to matters for which testimony and cross examination would not be needed, and both sides agree these are issues of law for which only argument is necessary. As a result, we do not find that a hearing is necessary and the matter can be decided on the basis of filings by the parties. Accordingly, the Commission will accept briefs addressing:

(1) Whether 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.

(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?

Briefs will be due by the close of business on December 19, 2011. We note that in accepting briefs on the above questions we do not intend to prejudice any other arguments about the Interconnection Charge that may be made later, and do not intend to convey that the Commission has made any determinations about the propriety of the proposed Interconnection Charge or its relationship to the CCL.

In FairPoint's response, at footnote 11, it contends that "a grant of the Motion to any extent would obviate the need for FairPoint to respond to any pending data requests that relate solely to the CCL issue." We have no basis to agree or disagree with the statement and encourage the parties and Staff to informally resolve any issues relating to discovery that may be presented by the instant ruling. We will address any disputes on discovery according to our regular process.

Lastly, with respect to the procedural schedule, in its November 29 motion to amend the schedule, FairPoint contends that modifications are needed to provide it more time to respond to voluminous discovery requests, and to allow other parties more time to respond to the information it will produce. FairPoint contends that the new schedule will enhance the orderly and efficient resolution of this case and will not interfere with the development of the record. In the motion, FairPoint proposes a new procedural schedule and states that AT&T has assented to the motion, Sprint has no objection, Staff, Earthlink, Global Crossing, and CRC take no position, and it had not heard from other parties at the time of filing.

In Order No. 25,284 the Commission noted that changes to the procedural schedule might be needed and that the parties are encouraged to work together to propose appropriate modifications. By this motion most of the parties have proposed modifications to the schedule that are acceptable to Staff and all parties who have contacted the Commission. Accordingly, we conclude that the proposed schedule is acceptable and will adopt it for the remainder of the docket, while also including a new date for the submission of briefs as indicated above. The new procedural schedule will be as follows:

FairPoint update and supplement testimony of Michael Skrivan	11/03/11
CLECs single, joint set of data requests to FairPoint	11/17/11
Briefs on CCL language and effective date	12/19/11
FairPoint responses to data requests	12/21/11
CLEC rebuttal testimony	1/17/12
Data requests on rebuttal	1/24/12
Responses to rebuttal requests	1/31/12

Technical session in lieu of further discovery between 2/14/12 and 2/17/12

Hearing on the merits 3/8/12

Based upon the foregoing, it is hereby

ORDERED, that the CLECs' Motion for Hearing is GRANTED in part as set out above; and it is

FURTHER ORDERED, that parties shall submit briefs on the above presented questions by December 19, 2011; and it is

FURTHER ORDERED, that the procedural schedule as set out above is APPROVED.

By order of the Public Utilities Commission of New Hampshire this thirtieth day of November, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius (KNS)
Commissioner

Attested by:

Lori A. Davis
Assistant Secretary

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Order on Tariff Change to Carrier Common Line Charge
and December 22, 2011 Tariff Filing

ORDER NO. 25,319

January 20, 2012

I. PROCEDURAL HISTORY

The complete procedural history of this docket is set out in prior orders in this case. Therefore, only history relevant to this order is included. On October 28, 2011, the Commission issued Order No. 25,284 setting a procedural schedule for discovery and a hearing for March 8, 2012 in this docket. Rather than await the March 8 hearing, on November 10, 2011, Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing), Sprint Communications Company, L.P. and Sprint Spectrum, L.P. (Sprint), and AT&T Corp. (AT&T) (collectively the CLECs) moved for an expedited hearing on the issue of the effective date of the proposed change to the tariff of Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint) regarding the carrier common line (CCL) charge.

In their motion, the CLECs contended that an expedited hearing was appropriate on: (1) whether FairPoint's September 10, 2009 tariff filing relating to the CCL charge complied with the Commission's orders; and (2) the appropriate effective date of the proposed tariff changes covering the CCL. They contended that the changes to the CCL were ripe for determination

because no additional discovery or process was needed for the Commission to determine the issue. The CLECs further argued that the remaining issues covered by FairPoint's proposal could be addressed on the schedule set out in Order No. 25,284. On November 21, 2011, FairPoint responded to the CLECs' motion and agreed that a determination on the language and effective date of the CCL change did not require the full process set out in Order No. 25,284. FairPoint also contended, however, that no hearing was needed on the CCL question and that the Commission should instead move immediately to briefing on the matter.

On November 30, 2011, the Commission issued Order No. 25,295 concluding, in relevant part:

> The CLECs have requested that the Commission hold a hearing on the issues, while FairPoint contends that only briefing is needed. The identified issues relate to matters for which testimony and cross examination would not be needed, and both sides agree these are issues of law for which only argument is necessary. As a result, we do not find that a hearing is necessary and the matter can be decided on the basis of filings by the parties.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 25,295 (Nov. 30, 2011) at 3-4. The Commission, therefore, ordered that the parties brief two questions, specifically:

> (1) Whether 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.
>
> (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?

Id. at 4. On December 19, 2011, the Commission received briefs on the above questions from FairPoint, Sprint, AT&T, and BayRing.

In addition to the above events, on November 30, 2011, FairPoint submitted a tariff filing with the stated purpose of "officially" placing its proposed tariff changes respecting both the CCL and the Interconnection Charge before the Commission. On December 14, 2011, the Commission issued Order No. 25,301 rejecting the tariff filing without prejudice to avoid the statutory timing constraints of RSA 378:6, IV, noting that those timing constraints were incompatible with the procedural schedule that had recently been extended at FairPoint's request. On December 22, 2011, FairPoint resubmitted the tariff pages, arguing that the filing was most appropriately and lawfully addressed under RSA 378:6, I(b), which has compatible timing constraints, rather than RSA 378:6, IV. On December 27, 2011, the Commission received an objection to the December 22 filing from AT&T and, on December 28, the Commission received a letter from BayRing stating that it concurred with AT&T's objection.

On January 9, 2012, a group of competitive carriers filed a motion to dismiss or for summary judgment on the Interconnection Charge arguing that a recent ruling by the Federal Communications Commission (FCC) bars the change to the Interconnection Charge sought by FairPoint. Coincident with that motion, those carriers filed a motion to suspend or modify the procedural schedule contending that because the Commission was already addressing the change to the CCL following briefing, the only matters left concerned the Interconnection Charge. Therefore, they argued, the Commission's ruling on their motion to dismiss or for summary judgment would render moot the remainder of the case, including their need to file testimony on January 17, 2012. By secretarial letter dated January 13, 2012, the Commission suspended the procedural schedule pending a ruling on the motion to dismiss, and stated that it would address

further procedural matters following a ruling on that motion. On January 19, 2012, FairPoint objected to the motion to dismiss and the motion to suspend the schedule.

II. CHANGES TO CCL IN FAIRPOINT'S TARIFF

A. Positions of the Parties

1. FairPoint

FairPoint contends that its September 10, 2009 tariff filing was fully compliant with Order No. 25,002 (Aug. 11, 2009), the order requiring FairPoint to amend the CCL portion of its tariff. FairPoint further contends that the "revenue neutral" revisions it had proposed to its tariff regarding the Interconnection Charge complied with the Commission's orders because the Commission had required FairPoint, "at a minimum," to amend the CCL portion of its tariff, but did not require FairPoint to reduce its overall access revenues. FairPoint Brief at 4-5. FairPoint also stated:

> However, FairPoint submits that the September 10, 2009, tariff filing was fully compliant with the Commission's orders, as would [be] any similar filing. Moreover, as the Commission has explained, the interconnection charge and the CCL revisions "were intertwined and intended to be dealt with as a package." As such, the Commission was in error to "partially withdraw" the September 10, 2009 tariff filing in its Order [25,283], and it cannot approve the CCL revisions without also approving the Interconnection Charge. The two revisions must become simultaneously effective.

FairPoint Brief at 6.

As to the matter of the effective date of the CCL revisions, FairPoint, as stated above, contended that the effective date must be the same as the effective date of any change to the Interconnection Charge and that neither change can become effective prior to a final decision in the docket. According to FairPoint, the Commission's rules and New Hampshire law prevent the

Commission from applying the change to the CCL retrospectively. FairPoint also argues that should the Commission determine that it may apply the CCL change retrospectively, no change could be effective prior to January 24, 2011, the date upon which it emerged from bankruptcy. FairPoint then includes a lengthy paragraph stating that it reserves all rights to the positions it has taken in this proceeding.

2. Sprint

As with FairPoint, Sprint states that the tariff filing made by FairPoint on September 10, 2009 "appears to be adequate" to comply with the Commission's order. Sprint Brief at 1. Sprint also argues, however, that the Commission should specify that the tariff will be "interpreted as allowing FairPoint to impose a single CCL charge when one of its common lines is used to facilitate the transport of a call to or from a customer of a competitive carrier." Sprint Brief at 2. Sprint contends that such a specification is necessary because any other interpretation would not comply with the Commission's order.

As to the date, Sprint argues that the tariff should be made effective on the effective date of the original filing, October 10, 2009. According to Sprint, the Commission has already found that FairPoint may not bill the CCL charge and that finding led to the Commission's order requiring FairPoint to amend its tariff. Therefore, setting the effective date later than October 10, 2009 will permit FairPoint to collect on a charge the Commission has found to be unjust and unreasonable, which the Commission may not allow. In addition, Sprint contends that it is inequitable to allow FairPoint to continue to bill the CCL and thereby require other carriers to bear the cost of FairPoint's non-compliance with the Commission's orders.

Sprint also contends that the Commission must set the effective date of the filing as October 10, 2009 because doing otherwise will permit FairPoint to use its filing for the change to the Interconnection Charge to avoid compliance with the Commission's order on the CCL change and will thereby allow FairPoint to be unjustly enriched. Also, Sprint contends that the New Hampshire Supreme Court has found it to be an abuse of discretion for the Commission to permit an injury to go unaddressed for an unreasonable time. According to Sprint, this matter was resolved in late 2009, and allowing FairPoint to continue to bill the CCL charge qualifies as an abuse of the Commission's discretion.

3. BayRing

BayRing contends that the tariff pages regarding the CCL submitted by FairPoint on September 10, 2009 do comply with the Commission's order. Similar to Sprint, BayRing further argues that to the extent there may be an interpretation of the language of the filing that does not comply, the Commission should make clear in its order that the tariff is to allow FairPoint to impose a CCL charge only when one of its common lines is used to facilitate the transport of a call to or from a FairPoint end user.

Also similarly to Sprint, BayRing contends that the effective date of the tariff filing should be October 10, 2009. According to BayRing, because the Commission has accepted the filing but suspended it, "[i]n effect, the Commission has made FairPoint's current tariff language 'temporary' pending a final determination of whether the language complies with the Commission's directives." BayRing Brief at 4. Thus, argues BayRing, because the change is temporary the Commission can declare the tariff change in effect as of the effective date of the filing, October 10, 2009. Much like Sprint, BayRing also argues that putting the changes into

effect later than October 10, 2009 will result in FairPoint being unjustly enriched, and would be an abuse of the Commission's discretion.

4. AT&T

As with all other parties filing briefs, AT&T first states that it believes FairPoint's submission regarding the CCL complies with the Commission's order. In lieu of further argument on the issue, AT&T notes that it concurs with the arguments made by BayRing in its brief.

As to the effective date of the tariff change, AT&T also contends that the effective date should be October 10, 2009. According to AT&T, the Commission has "extensive flexibility" on matters within its jurisdiction and that as part of that flexibility the Commission has been able "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." AT&T Brief at 4. AT&T contends that there is precedent for the Commission to craft a "remedy in a situation where it has been determined that the utility has been charging rates that are improper," AT&T Brief at 5, and that the Commission may, therefore, set the effective date at October 10, 2009 in this case.

AT&T further contends that FairPoint's bankruptcy does not stand in the way of setting the effective date at October 10, 2009. Citing *In re Public Service Co.*, 98 B.R. 120, 122 (Bankr. D.N.H. 1989), AT&T argues that a utility may not overcharge for its services and then use the shield of bankruptcy to avoid recovery of the overcharge. Furthermore, AT&T contends that the Commission's prior conclusion that the CCL change could not become effective because the hearing requested by FairPoint was not held does not bar the Commission from ordering the

effective date to be October 10, 2009 because FairPoint has now conceded that no hearing is needed on the CCL issue.

B. COMMISSION ANALYSIS

1. Hearing on CCL Tariff Change Not Necessary

On page 7 of its brief, FairPoint cites, with emphasis, the section of RSA 378:7 that states that the Commission may set rates following a hearing; FairPoint then notes that in Order No. 25,283 the Commission concluded that a hearing on the CCL was not held, though it had been requested. It is not clear from this reasoning whether FairPoint argues that a hearing is necessary to impose the changes proposed to the CCL charge pursuant to the Commission's prior order. The CLECs, believing a hearing was needed, requested that the Commission hold one, and FairPoint instead argued a hearing was not necessary and contended due process would be satisfied without a hearing. FairPoint's Response to CLECs' Motion for Hearing at 3. Thus, the Commission now rules upon the changes to the CCL portion of the tariff and its effective date without a hearing pursuant to FairPoint's specific request that a hearing not be held. Accordingly, in the event that FairPoint seeks to argue that the Commission may not order the imposition of the changes to the CCL portion of FairPoint's tariff without a hearing on that specific issue, we would have to conclude that FairPoint is intentionally trying to delay a decision through procedural maneuvers.

2. Compliance of the CCL Tariff Change Language and its Status Relative to the Proposed Interconnection Charge Tariff Change

In its brief at page 6, FairPoint contends that "the Commission was in error to 'partially withdraw' the September 10, 2009 tariff filing in its Order [25,283], and it cannot approve the

CCL revisions without also approving the Interconnection Charge." Order No. 25,283 was issued October 28, 2011 and no motion for reconsideration was received relative to that order. Therefore, our finding in Order 25,283 that the portion of the filing relative to the Interconnection Charge would be withdrawn and treated as illustrative pursuant to FairPoint's request has not been challenged and remains in effect.

Further, on November 30, 2011, the Commission received a tariff filing from FairPoint which stated, in relevant part, "Consistent with the Commission's determination [in Order No. 25,283], and to ensure that both questions are officially before the Commission, FairPoint is refiling the revised tariff incorporating both charges while continuing to reserve all rights to dispute the Commission's authority to impose any of these revisions." Cover Letter to FairPoint's November 30, 2011 Tariff Filing at 2. A similar letter was received on December 22, 2011. Because no motion for reconsideration was received regarding Order No. 25,283, and because FairPoint has already acted in a manner indicating its understanding that the portion of the filing covering the Interconnection Charge has been withdrawn and will be treated as illustrative for the purpose of further investigation of the charge and whether FairPoint is entitled to a revenue increase in light of the change to the CCL charge, the Commission will proceed as contemplated in Order No. 25,283. Thus, the portion of the September 10, 2009 filing that revises the Interconnection Charge is withdrawn, but considered illustrative for further proceedings in this docket.

With respect to the changes to the CCL language that were the subject of the parties' briefs, we agree with the parties that the amendments to the language of FairPoint's tariff originally submitted on September 10, 2009 are sufficient to comply with the Commission's

directive that FairPoint amend its tariff. For clarity, the Commission reiterates that in ordering FairPoint to amend its tariff, the Commission sought changes clarifying that "FairPoint's access tariff should permit the imposition of CCL charges only in those instances when a carrier uses FairPoint's common line and the common line facilitates the transport of calls to a FairPoint end-user." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,002 (Aug. 11, 2009) at 2. To the extent any interpretation of the changes to the CCL tariff would diverge from the conclusion that the tariff is to permit the imposition of the CCL charge only when a carrier uses FairPoint's common line and the common line facilitates the transport of calls to or from a FairPoint end user, they are expressly rejected.

3. Effective Date of CCL Charge

As to the effective date of the changes to the tariff, FairPoint contends that the Commission may declare the effective date only on a "going-forward" basis and that the effective date may not be applied retrospectively. For the reasons that follow we conclude that the changes to the CCL portion of the tariff, specifically the First Revision to Section 5, pages 1 and 4 of FairPoint's Tariff No. 3, take effect on January 21, 2012 as stated on the tariff pages included in FairPoint's December 22, 2011 tariff filing. The Commission shall use these tariff pages for administrative efficiency in lieu of requiring FairPoint to file conforming tariff pages at some later date. Moreover, the Commission places the December 22, 2011 pages regarding the CCL in effect, though it had previously rejected the November 30, 2011 pages which were all but identical. Since November 30, 2011, we have had the opportunity to consider the briefs regarding conformance of the tariff and the appropriate effective date of the CCL change. Thus,

with the record complete on those issues, we make effective the CCL tariff pages filed December 22, 2011.

RSA 378:7 provides that the Commission may fix rates and charges that are to be observed following a determination from the Commission of the just and reasonable or lawful rates and charges following a complaint that a rate or charge is unjust or unreasonable. By virtue of the various delays in this docket, the Commission had not, until this order, affirmed that the proposed changes to the CCL charge complied with Order No. 25,002 so as to cure what had been found to be an unjust or unreasonable rate.

BayRing argues that the Commission, in effect, instituted a temporary charge by accepting and suspending the filing. We find, however, the acts of accepting and suspending the filing insufficient to conclude that a temporary rate was established. To conclude otherwise would be to conclude that in each instance the Commission receives a compliance tariff affecting rates or charges and orders its suspension, it is thereby establishing a temporary rate or charge. Such a result would not be permitted by RSA 378:27.

The remaining arguments from the CLECs all reason that the Commission has authority – either through some inherent flexibility on matters within its jurisdiction, or through equitable authority to remedy an inequity or unwind an unjust enrichment – to set the effective date at October 10, 2009. The Commission, however, is bound by its governing statutes and, therefore, must make a determination before the change proposed here may take effect.

> The PUC, when it determines rates to be charged by public utilities, is performing essentially a legislative function and accordingly cannot exceed the limitations imposed upon the exercise of that function under our State and Federal Constitutions. . . . Moreover, it 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. 562, 565-66 (1980) (quotations and ellipsis omitted).

Further, using equity to avoid a statutory requirement is inappropriate in the current situation. In 2009, the Commission issued Order No. 25,002 ordering FairPoint to amend its tariff to comport with the Commission's determination that the CCL charge should only be applied to certain calls: those that use a common line. FairPoint filed amendments aimed at complying with the Commission's order, and which the parties admit did comply with the Commission's directive. FairPoint also, as the parties are aware, filed for an increase in the Interconnection Charge to offset the change to the CCL charge and contended that it was within its rights to do so because the Commission had not ordered an overall reduction in FairPoint's revenues. Further, FairPoint requested that the Commission hold a hearing as had been specifically provided for in Order No. 25,002. Though it may have been inadvertent, the requests to amend the Interconnection Charge and to hold a hearing had the effect of lengthening the process so that it extended into the time FairPoint declared bankruptcy, which effectively halted any further action on the matter. The facts that FairPoint made a request – a request it was entitled to make – and that the request resulted in a significant delay in a decision as to compliance on the CCL charge due to occurrences beyond the Commission's control, does not now give the Commission the authority to invoke equity to avoid the limitations of its enabling statutes. As a result, we are not persuaded that the use of equitable authority to set the effective date of the CCL change at October 10, 2009 is appropriate in this case. Further, because we find

the change should be prospective, we take no position on the impact of FairPoint's emergence from bankruptcy on the effective date.

We find that there is no basis to apply the change to the CCL retrospectively, and we therefore conclude that the earliest effective date is the date of this order. Because, however, FairPoint has provided tariff pages effective as of January 21, 2012, one day after this order, the Commission concludes that the changes shall be effective on that date as a matter of administrative efficiency. As noted, however, FairPoint contends that the Commission may not implement any change to the CCL without simultaneously implementing a change to the Interconnection Charge. We disagree for several reasons. First, although the Commission has agreed that the CCL and the Interconnection Charge tariff change submissions were made as a single filing, we also concluded "that there is a basis for treating portions of the filings differently based upon the distinction drawn by FairPoint and others." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 30. Thus, resolution of the compliance portion of the filing does not depend upon resolution of the voluntary portion of the submission which has been withdrawn, but is being treated as illustrative for purposes of investigation in this docket. Similarly, FairPoint's claim that the changes must occur together presupposes that the Interconnection Charge will, or should be, implemented, and that it is to be implemented in a manner intended to offset the CCL change. Whether the change to the Interconnection Charge is permitted at all, and if it is, how that change would operate, are not clear. Under FairPoint's logic, should the Commission, for example, determine that the change to the Interconnection Charge is either not allowed, or only allowed in an amount less than that sought by FairPoint, or that revenue would more appropriately be recovered through

some other wholesale or retail charge or rate, it would then mean that the Commission could not implement the change to the CCL charge as proposed. The Commission is not bound by such *quid pro quo* assertions.

In addition, FairPoint contends that no change can be ordered to the CCL that would reduce CCL revenue without a corresponding increase in the Interconnection Charge because "[t]o do otherwise would further contribute to FairPoint's well-documented under earnings in New Hampshire" FairPoint Brief at 6-7. The mere fact that FairPoint is under-earning, however, is not a basis to declare that the two tariff changes must happen simultaneously.

Also, FairPoint contends, citing its August 28, 2009 Comments and Conditional Request for Rehearing, that failing to implement the two changes simultaneously would be unconstitutionally confiscatory. In that document, FairPoint contended that the change to the CCL in the manner required by the Commission would be confiscatory because:

> The Commission would effectively be setting a rate of zero for a significant portion of FairPoint's access service at a time when the financial pressure on FairPoint is already immense. FairPoint is currently losing money while at the same time facing major financial commitments related to its acquisition of Verizon's assets. It has committed to $200 million in capital expenditures over the next four years, a cap on its rates for basic local exchange, wholesale and special access services, a double pole removal program, and it is still subject to millions of dollars in penalties under the Performance Assurance Plan.

FairPoint August 28, 2009 Comments and Conditional Request for Rehearing at 6. At its core, FairPoint claims that changing the application of the CCL would be confiscatory because it would result in a revenue decrease at a time when it is losing money as a result of its purchase of Verizon's assets and the commitments it made in the course of that acquisition, along with penalties for performance failures. We do not agree that a reduction to FairPoint's revenue is, of

necessity, unconstitutionally confiscatory because FairPoint is financially insecure as a result of its voluntary acts.

While it is true that the Commission may not force a utility to serve the public at rates that are confiscatory, it is likewise the case that public utilities, like other businesses, must monitor the costs of doing business and employ sound business judgment in determining when they should seek rate increases for future services. *Appeal of Pennichuck*, 120 N.H. at 567. FairPoint has not made any request or attempt to undo any restrictions on rate relief in the agreements it has made, nor has it made any other attempt to revise its rates that would allow the Commission to investigate whether the rates under which it currently operates are, in fact, confiscatory. Instead it merely asserts that change to the application of a single charge – a charge that, prior to 2006, had not been applied for at least 10 years, *see, e.g.*, Verizon New Hampshire's September 10, 2007 Post-Hearing Brief at 3-4, in a tariff that had not changed since 1993 – is a confiscation of constitutional dimension. The New Hampshire Supreme Court has stated that there is "no constitutional requirement that mandates the PUC to correct, retrospectively, past errors in judgment made by the utility." *Id.* Further, "The right of a utility to receive just and reasonable rates is *not a guarantee of net revenues regardless of circumstances*." *Public Service Company of New Hampshire v. State*, 113 N.H. 497, 501 (1973) (emphasis added). For these reasons, we conclude as we have previously in this docket that "the state and federal constitutions do not require us to indemnify [FairPoint] for failing to revise its tariff to the extent this was necessary to compensate the company for certain wholesale services provided in connection with calls that involve neither a [FairPoint] end-user nor a [FairPoint] local loop." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No.

24,886 (Aug. 8, 2008) at 9. Accordingly, for the reasons stated, we conclude that the implementation of the change to the CCL charge in FairPoint's tariff need not occur simultaneously with any potential change to the Interconnection Charge. Therefore, the changes to Section 5 pages 1 and 4 of FairPoint's Tariff No. 3 covering the CCL charge as originally proposed on September 10, 2009, and contained in FairPoint's December 22, 2011 tariff filing, will take effect on January 21, 2012. FairPoint is not be required to file a conforming tariff since the Commission shall place into effect Section 5, first revision of pages 1 and 4 on their previously proposed effective date of January 21, 2012.

III. REMAINDER OF DECEMBER 22, 2011 TARIFF FILING

A. POSITIONS OF THE PARTIES

1. FairPoint

In making its tariff filing on December 22, 2011, FairPoint contended that the filing was identical to the one it had submitted on November 30, 2011, and which the Commission had rejected by Order No. 25,301 (Dec. 14, 2011) in order to avoid the timing constraints of RSA 378:6, IV. FairPoint contended, however, that it presumed the Commission made the assumption that RSA 378:6, IV completely superseded RSA 378:6, I(b) and the extended timeframe under the latter statute. According to FairPoint, its research into legislative history indicated that RSA 378:6, IV was not intended to operate in that manner and that RSA 378:6, I(b) was the appropriate statute under which to address the filing. Accordingly, FairPoint presumed the Commission would suspend this filing pursuant to RSA 378:6, I(b) pending the outcome of this proceeding.

2. AT&T – CLECs

On December 27, 2011, the Commission received a letter from AT&T, in which AT&T contended that FairPoint's submission should be deemed null and void for three reasons. First, AT&T contended that the filing was an attempt to obtain reconsideration without filing a proper motion for reconsideration. Second, AT&T contended that by making the filing FairPoint was ignoring the Commission's direction about the procedure for this docket. Lastly, AT&T argued that FairPoint was engaging in a form of "gamesmanship" that the FCC had advised state commissions to guard against in its recent order overhauling the intercarrier compensation regime, including revisions to switched access charges such as those at issue here. According to AT&T it was authorized to state that Choice One of New Hampshire Inc., Conversent Communications of New Hampshire. LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business; and Global Crossing Telecommunications, Inc. (a Level 3 company) all joined in its objection. On December 28, 2011, the Commission received a letter stating that BayRing also concurred with AT&T's objection.

B. COMMISSION ANALYSIS

As noted above, the Commission finds that the portion of the December 22, 2011 filing covering the CCL, specifically the revisions to Section 6 page 1 and Section 30 page 4, shall take effect on January 21, 2012. Therefore, in this section we address only that portion of the tariff filing covering the Interconnection Charge, specifically the revisions to pages 5 and 9 of Tariff No. 3. In Order No. 25,301, the Commission specifically found that "in order to avoid the time constraints on review of tariffs contained in RSA 378:6, IV, we believe a better path, given the

terms of the statute, is to reject the tariff and treat it as illustrative." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,301 (Dec. 14, 2011) at 2. This statement reiterated a prior conclusion of the Commission to grant FairPoint's request to withdraw the portion of its filing that had been made pursuant to RSA 378:6, IV covering the Interconnection Charge. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 30-31. Only now does FairPoint claim that treating the Interconnection Charge filing under RSA 378:6, IV was in error. We disagree. We note that FairPoint's request relies upon the legislative history of these statutes, which is not necessary because the statutes are clear on their face. RSA 378:6, IV provides "[a]ny tariff for services filed for commission approval by a telephone utility, except a tariff reviewed pursuant to RSA 378:6, I(a) [dealing with general rate increases] shall become effective as filed 30 days after filing, unless the commission amends or rejects the filing within the 30-day period. . . ." Thus, by express language the statute only allows an exception to the process for telephone utility tariffs under RSA 378:6, IV for a rate schedule representing a general rate increase pursuant to RSA 378:6, I(a), and not for any tariff changes pursuant to RSA 378:6, I(b). In fact RSA 378:6, I(b) begins by stating "[e]xcept as provided in RSA 378:6, IV, for all other schedules . . ." which steers all telephone utility tariff filings that do not represent a general increase in rates to RSA 378:6, IV rather than RSA 378:6, I(b).

For the reasons stated, the Commission concludes that RSA 378:6, I(b) does not apply to the Interconnection Charge portion of the filing, and to the extent the Interconnection Charge filing may be considered properly made under RSA 378:6, IV, the Commission amends the filing by rejecting the portion covering the Interconnection Charge for the same reasons as set

out in Order Nos. 25,283 and 25,301, but the pages shall continue to be treated as illustrative in the pending adjudication. For clarity, the Commission reiterates that there is a pending motion to dismiss or for summary judgment relative to the Interconnection Charge and that the procedural schedule has been suspended until there is a ruling on that motion. At the time of a ruling on that motion the Commission will address further procedural matters as appropriate.

Based upon the foregoing, it is hereby

ORDERED, that the First Revision of pages 1 and 4 of Section 5 of FairPoint's Tariff No. 3 originally filed by FairPoint on September 10, 2009 in response to Order No. 25,002 and refiled on December 22, 2011 on the application of the carrier common line charge shall take effect on January 21, 2012 as stated on the pages filed December 22, 2011; and it is

FURTHER ORDERED, that the changes to Section 6 page 5 and Section 30 page 9 of FairPoint's Tariff No. 3 originally filed by FairPoint on September 10, 2009 and refiled on December 22, 2011covering the Interconnection Charge are rejected, but shall remain illustrative as set forth above; and it is

FURTHER ORDERED, that the Commission shall address further procedural matters following a ruling on the pending motion to dismiss or for summary judgment.

By order of the Public Utilities Commission of New Hampshire this twentieth day of January, 2012.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Order Granting Motion to Dismiss

ORDER NO. 25,327

February 3, 2012

I. PROCEDURAL HISTORY

The complete procedural history of this docket is set out in prior orders in this case. Therefore, only the history relevant to this order is included. Following an investigation on a complaint by Freedom Ring Communications, LLC d/b/a/ BayRing Communications, on March 21, 2008, the Commission issued Order No. 24,837 in this docket concluding, in relevant part, that Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint) could assess the carrier common line (CCL) charge only when its common line was used in the provision of a telephone message.[1] FairPoint appealed that decision to the New Hampshire Supreme Court which reversed the Commission and concluded that under the terms of FairPoint's tariff as it was written, FairPoint was permitted to impose the CCL charge even when its common line was not used. *Appeal of Verizon New England*, 158 N.H. 693, 697-98 (2008). On August 11, 2009, following the New Hampshire Supreme Court's decision, the Commission issued Order No. 25,002 directing FairPoint to revise its tariff to comport with the Commission's determination that the CCL charge only be imposed when FairPoint's common line was used.

[1] FairPoint is the successor to the franchise of Verizon New England.

On September 10, 2009, FairPoint filed proposed tariff pages intended to comply with the Commission's order that it revise its tariff relative to the CCL. At the same time, to achieve "revenue neutrality" FairPoint filed proposed tariff pages increasing the Interconnection Charge, which, at that time, was $0.00000. FairPoint then filed a motion for rehearing and conditional withdrawal of its September 10, 2009 tariff pages requesting, in part, that the tariff pages it had filed should be withdrawn to the extent the Commission treated them as having been voluntarily made. Motion for Rehearing by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE and Conditional Withdrawal of Tariff Filing (Oct. 12, 2009) at 9. The Commission had not yet ruled on those tariff pages or the request to withdraw them prior to FairPoint filing for voluntary reorganization under Chapter 11 of the United States Bankruptcy Code on October 26, 2009. *See* Secretarial Letter dated November 10, 2009. Upon FairPoint's emergence from bankruptcy in January, 2011, the Commission resumed the docket and issued Order No. 25,219 (May 4, 2011) as a procedural order and supplemental order of notice. Also in that order, the Commission granted FairPoint's request to withdraw the tariff pages submitted on September 10, 2009.

On October 28, 2011, the Commission issued Order No. 25,283, in part as a response to a motion for rehearing, reconsideration, and clarification, and concluded, in relevant part, that it would revise the prior grant of FairPoint's request to withdraw its tariff pages. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 30. The Commission determined that because the portion of the tariff filing relating to the CCL charge was made in compliance with a Commission order, rather than made voluntarily, it was accepted, but deemed suspended. *Id.* The portion of the filing relating to the Interconnection

Charge, however, was voluntarily made and therefore the Commission granted the request that those pages be withdrawn and be treated as illustrative for purposes of further investigation and proceedings. *Id.* at 30-31.

Also on October 28, 2011, the Commission issued Order No. 25,284 setting a procedural schedule for discovery and a hearing for March 8, 2012 on the remaining issues in the docket. Rather than await the March 8 hearing, on November 10, 2011, various competitive local exchange carriers moved for an expedited hearing on the issue of the effective date of the proposed changes to the CCL portion of FairPoint's tariff. By Order No. 25,295 (Nov. 30, 2011) the Commission determined that it would accept briefs on issues relating to the CCL. This determination effectively bifurcated the docket into a portion covering FairPoint's proposed changes to the CCL in light of the Commission's orders, and a portion relating to FairPoint's proposed increase to the Interconnection Charge, with the portion covering the CCL to be decided on the basis of the briefs of the parties on a separate track from the portion of the docket covering the Interconnection Charge. Briefs on the CCL portion of the docket were received on December 19, 2011.

Also, on November 30, 2011 FairPoint made a tariff filing consisting of new pages relating to both the CCL and the Interconnection Charge with the stated purpose of placing the issues relating to both items "officially" before the Commission. Cover Letter to November 30, 2011 Tariff Filing at 2. On December 14, 2011, the Commission issued Order No. 25,301 rejecting the tariff filing without prejudice to avoid the statutory timing constraints of RSA 378:6, IV, noting that those timing constraints were incompatible with the procedural schedule that had recently been extended at FairPoint's request. On December 22, 2011, FairPoint

submitted tariff pages virtually identical to those submitted November 30, arguing that the filing was most appropriately and lawfully addressed under RSA 378:6, I(b), rather than RSA 378:6, IV.

On January 9, 2012, while the Commission's decision on the CCL portion of the docket was pending, Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business; Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc., a Level 3 company (collectively, the CLECs) filed a motion to dismiss or for summary judgment (motion to dismiss) on the portion of the docket addressing FairPoint's proposal to increase the Interconnection Charge. Coincident with this filing, the CLECs requested that the procedural schedule be suspended in light of the dispositive nature of their motion. On January 13, 2012, the Commission issued a secretarial letter suspending the procedural schedule. On January 18, 2012, FairPoint objected to the motion to dismiss and the motion to suspend the procedural schedule.

On January 20, 2012, the Commission issued Order No. 25,319 concluding that the changes to the CCL as originally proposed by FairPoint on September 10, 2009 and refiled on December 22, 2011 complied with the Commission's directives, and that the changes would become effective on January 21, 2012. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 9-10, 16. In addition, that order found that RSA 378:6, I(b) did not apply to the December 22, 2011 filing and that to the extent it was a

proper filing under RSA 378:6, IV it was amended by the Commission rejecting the portion relating to the Interconnection Charge for the reasons set out in prior orders. *Id.* at 18-19.

Accordingly, the Commission has made a determination on the portion of the docket relating to the change to the CCL charge, and therefore the only portion of the docket remaining concerns the Interconnection Charge. The portion of the docket regarding the Interconnection Charge is the subject of the instant motion to dismiss.

II. POSITIONS OF THE PARTIES

A. CLECs

According to the CLECs, an order released by the Federal Communications Commission (FCC) on November 18, 2011 caps all intrastate switched access rates at the levels in effect on the effective date of the rules contained in the order, December 29, 2011. *See generally Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, (rel. Nov. 18, 2011) (CAF Order). The CLECs contend that as part of the CAF Order, the FCC determined that it would comprehensively reform and modernize the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation, and that as part of that effort the FCC adopted bill-and-keep as the default methodology for all intercarrier compensation traffic. CLEC Motion to Dismiss at 4-5. To implement these reforms, the FCC adopted regulations that took effect on December 29, 2011, 30 days following their publication in the Federal Register. According to the CLECs, these regulations provide for caps on certain intrastate rate elements, including the Interconnection Charge proposed by FairPoint. More particularly, the CLECs argue that the Interconnection

Charge is included in the "residual rate elements" identified in the newly adopted rules, and which are capped at the rate in effect on December 29, 2011. *See* 47 C.F.R. §§51.903(d), 51.907. Because the charge is capped at the $0.00000 in effect on December 29, 2011, the CLECs contend FairPoint may not raise the charge as it has proposed.

The CLECs further contend, citing paragraph 801 of the CAF Order, that the FCC explicitly capped all intrastate rates for price cap carriers, such as FairPoint, and that these caps begin the transition to the bill-and-keep format. The CLECs note that the FCC found that it had jurisdiction over intrastate switched access rates and that it had authority to adopt the mechanisms it uses in the CAF Order. Moreover, the CLECs contend that the FCC pointed out that the states would play a role in ensuring that carriers abide by the tariffing requirements of the CAF Order. Accordingly, the CLECs contend that the Commission should reject FairPoint's proposed increase to the Interconnection Charge.

The CLECs also argue that FairPoint's December 22, 2011 tariff filing does not alter the analysis. They contend that making the filing represents a kind of gamesmanship against which the FCC urged the states to defend. Further, the CLECs argue that "[n]othing in the federal regulations grants an exception from the December 29th rate caps to proposed rate increases or illustrative filings pending on that date." CLECs' Motion to Dismiss at 10. Therefore, they argue, neither FairPoint's December 22, 2011 filing, nor its previously retained illustrative filing, grant relief from the caps in the CAF Order. Accordingly, the CLECs contend that the Commission must reject the Interconnection Charge filing and dismiss the matter or grant summary judgment in their favor.

B. FairPoint

FairPoint contends that the authority cited by the CLECs in support of their motion does not support their claims, and actually contradicts their arguments. FairPoint points to the same rules and the same provisions of the CAF Order as the CLECs, but contends that in making their arguments the CLECs omitted a footnote that alters the analysis. While acknowledging that generally the omission of a footnote is a minor issue, FairPoint argues that footnote 1495, referenced in paragraph 801 of the CAF Order, contains language "fatal" to the CLECs' argument. FairPoint Objection to Motion to Dismiss at 2. Footnote 1495 states, in relevant part:

> Specifically, we cap all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect.

CAF Order, fn. 1495. FairPoint contends that paragraph (d)(3) of the FCC rule cited in the footnote encompasses the residual interconnection charge at issue here. Accordingly, FairPoint contends that the CAF Order does not bar the increase to the Interconnection Charge because it was filed, though not yet in effect.

FairPoint also contends that the CLECs are incorrect when they argue that the increase to the Interconnection Charge is not pending before the Commission as contemplated in the CAF Order. FairPoint counters the CLECs' argument that by its December 22, 2011 filing it is, in reality, seeking rehearing of the decision to reject its November 30, 2011 filing by noting that it would have been within its rights to request rehearing. Rather than it being a request for rehearing, FairPoint argues that its December 22 tariff filing was an "entirely separate and distinct filing" from the November one, "with a different proposed effective date and with

reference to the appropriate statutes for such a filing." FairPoint Objection to Motion to Dismiss at 3. Further, FairPoint notes that the Commission rejected the November 30, 2011 filing "without prejudice" and FairPoint was, therefore, within its rights to submit new tariff pages and argue on behalf of the change to the Interconnection Charge. Lastly, FairPoint contends that though the CLECs may have made arguments with respect to the motion to dismiss, they failed to make any argument that they are entitled to summary judgment and could not support such arguments if they did. Accordingly, FairPoint contends that the Commission must reject the motion to dismiss or for summary judgment.

III. COMMISSION ANALYSIS

Prior to addressing the motion to dismiss, we note that on January 26, 2012 the CLECs filed a reply to FairPoint's objection, but we do not consider the reply in our ruling here. Our administrative rules specifically authorize the filing of motions and objections to those motions, *see* N.H. Admin. R. Puc 203.07, but replies to objections are not authorized and we do not consider them absent specific authorization. *See City of Nashua*, Order No. 24,488 (July 18, 2005) at fn. 4.

In ruling on a motion to dismiss, we, like the New Hampshire Supreme Court, ascertain whether the allegations pleaded in the plaintiff's petition are reasonably susceptible of a construction that would permit recovery. *Pesaturo v. Kinne*, 161 N.H. 550, 552 (2011). In this instance, we assume that all facts pleaded by FairPoint are true, and we construe all reasonable inferences drawn from those facts in its favor. *Id.* We then engage in a threshold inquiry that tests the facts in the petition against the applicable law and if the facts fail to constitute a basis for legal relief, granting the motion is proper. *Id.*

In ruling upon a motion for summary judgment, we consider the evidence presented, and inferences properly drawn from it, in the light most favorable to the non-moving party. *Sabinson v. Trustees of Dartmouth College*, 160 N.H. 452, 455 (2010). If this review does not reveal any genuine issues of material fact, *i.e.*, facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law, the motion will be granted. *Id.*

Given the recent vintage of the CAF Order and the consequent dearth of precedent relating to it, we take some time to set out our understanding of the provisions of the order applicable here. In general, the CAF Order seeks to move all carriers to a bill-and-keep framework for all interstate and intrastate rates within the next decade. Bill-and-keep means that "carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary." CAF Order, ¶ 34. Once begun, the transition to bill-and-keep lasts six years for price cap carriers and nine years for rate of return carriers. CAF Order, ¶ 801 and Figure 9. Under the FCC's regulatory scheme FairPoint is a price cap carrier in its Northern New England service areas, including New Hampshire. The transition to bill-and-keep set out in the CAF Order begins with the FCC placing caps on certain access and transport rates on December 29, 2011, the effective date of the order and its related rules. CAF Order, ¶ 801.

Beginning at paragraph 798, the FCC sets out a default transition path for terminating end office switching and certain transport elements, and begins the process of other rate reforms by capping "all" interstate rate elements as of December 29, 2011 to "ensure that no rates increase during reform, and that carriers do not shift costs between or among other rate elements, which would be counter to the principles [the FCC] adopt[s] today." CAF Order, ¶ 798. In paragraph 801, the FCC reiterates that at the outset of the transition, "all interstate access and reciprocal

compensation rates will be capped at the rates in effect as of the effective date of the rules." It explains that it is capping the rates "as of the effective date of the Order, as opposed to a future date such as January 1, 2012, to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order." CAF Order, ¶ 801. It further states that for price cap carriers "all *intrastate* rates will also be capped . . . ." CAF Order, ¶ 801 (emphasis added). Figure 9 following paragraph 801 also states that as of the effective date of the order and rules "*All* intercarrier switched access rate elements, including *interstate and intrastate originating and terminating rates* and reciprocal compensation rates are capped." (Emphasis added.)

The footnote FairPoint contends supports its increase to the Interconnection Charge, footnote 1495, follows the first sentence in paragraph 801 which, as noted, states "Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules." CAF Order, ¶ 801. Rather than actually apply the cap to "all" rate elements as the FCC states elsewhere, footnote 1495 sets out a specific list of rate elements that are excepted, to a limited degree, from the cap. As noted by FairPoint, the list in the footnote provides that all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) are capped on the effective date of the order and the rules, "unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect." CAF Order, fn. 1495.

Under paragraph 803, the states are to aid the FCC by ensuring that carriers comply with the transition requirements. Specifically, the FCC anticipates that the states will oversee changes

to intrastate access tariffs to "ensure that modifications to intrastate tariffs are consistent with the framework and rules we adopt today. For example, states will help guard against carriers improperly moving costs between or among different rate elements to reap a windfall from reform." CAF Order, ¶ 803.

In footnote 1547 to paragraph 818, the FCC further clarifies that:

> This prohibition on increasing access rates also applies to any remaining Primary Interexchange Carrier Charge in section 69.153 of the Commission's rules, the per-minute Carrier Common Line charge in section 69.154 of the Commission's rules, and the per-minute Residual Interconnection Charge in section 69.155 of the Commission's rules. 47 C.F.R. §§ 69.153, 69.154, 69.155. *Price cap carriers and CLECs that benchmark to price cap rates are also prohibited from increasing their originating intrastate access rates.*

(Emphasis added.) Also, under new rule 47 C.F.R. § 51.907, cited by the CLECs, a price cap carrier is, as of December 29, 2011 to cap the rates for "all interstate and intrastate rate elements" contained in Interstate End Office Access Service, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Under the new 47 C.F.R. § 51.903(d), End Office Access Service includes the Residual Interconnection Charge.

Based on our review of the FCC's order and its attendant rules, the only exception to the requirement that access rates be capped at the rates in effect on December 29, 2011 is the exception provided in footnote 1495. The CAF Order does not, in any other place, provide any exceptions to that cap. Moreover, FairPoint contends only that the exception in footnote 1495 provides the permission necessary for it to increase the Interconnection Charge. For the reasons that follow, and in furtherance of the expectation of the FCC that states shall ensure that companies abide by the provisions of the CAF Order, we conclude that FairPoint's proposed increase to the Interconnection Charge as noted for Section 6, page 5 and Section 30, page 9 of

FairPoint's Tariff No. 3 is not permitted. That rate cannot be increased because it is capped at the rate in effect on December 29, 2011, which was $0.00000, irrespective of FairPoint's prior filing.

To determine whether the cap applies, we must ascertain whether the Interconnection Charge proposed by FairPoint is among those in the list of excepted items in footnote 1495. If the charge is not in the list of those excepted from the cap, then, of necessity, it is capped at the rate in effect on the effective date of the order and the rules, regardless of whether a tariff filing was pending on that date. Part 61 of 47 CFR covers tariffs of common carriers of telecommunications and 47 C.F.R. § 61.42 reads:

> 61.42 Price cap baskets and service categories.
> (a)–(c) [Reserved]
>
> (d) Each price cap local exchange carrier shall establish baskets of services as follows:
>
> (1) A basket for the common line, marketing, and certain residual interconnection charge interstate access elements as described in §§ 69.115, 69.152, 69.153, 69.154, 69.155, 69.156, and 69.157 of this chapter. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the "CMT basket."
>
> (2) A basket for traffic sensitive switched interstate access elements. For purposes of §§ 61.41 through 61.49 of this chapter, this basket shall be referred to as the "traffic-sensitive basket."
>
> (3) A basket for trunking services as described in §§ 69.110, 69.111, 69.112, 69.125(b), 69.129, and 69.155 of this chapter. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the "trunking basket."

Footnote 1495 excepts only subparts (d)(2)-(3) from the cap, so the elements identified in subpart (d)(1) are not in issue here. Further, by the plain language of the regulation, those access elements in the "traffic-sensitive basket" of subpart (d)(2) are specifically "traffic sensitive

switched *interstate* access elements." 47 C.F.R. § 61.42(d)(2) (emphasis added). Therefore, because these are interstate rate elements, any filing relative to those elements would not be relevant to a filing with this Commission. *See, e.g.*, FairPoint NH PUC Tariff No. 3, Section 1.3.2 (defining "Access Minutes" as "[t]hat usage of exchange facilities in *intrastate* service for the purpose of calculating chargeable usage" (emphasis added)). As noted, however, FairPoint contends that the Interconnection Charge falls into the "trunking basket" in subpart (d)(3), which covers the trunking services described in sections 69.110, 69.111, 69.112, 69.125(b), 69.129, and 69.155. Of these provisions, section 69.155 is the section specifically referenced by FairPoint as applicable to its proposed charge. FairPoint Objection to Motion to Dismiss at 3.

Part 69 of 47 C.F.R. addresses access charges, and subparts 151 to 158 cover the computation of charges for price cap local exchange carriers, such as FairPoint. 47 C.F.R. § 69.155 permits a carrier to recover a "Per-minute residual interconnection charge." Under 47 C.F.R. § 69.155(a) "Local exchange carriers may recover a per-minute residual interconnection charge on originating access." Under 47 C.F.R. § 69.155(b), to the extent the carrier cannot recover all of the permitted residual interconnection charge revenues via originating access, the remainder may be collected through terminating access. Thus, the interconnection charge in the trunking basket has a limited exception from the newly imposed rate cap on originating access, and, potentially, terminating access. However, the charges covered by subpart (d)(3) are, like those in subpart (d)(2), interstate. Under 47 C.F.R. § 69.1:

> 69.1 Application of access charges.
> (a) This part establishes rules for access charges for *interstate or foreign access services* provided by telephone companies on or after January 1, 1984.

(Emphasis added.) Therefore, all access charges in part 69 are for interstate or foreign access services, whereas the Interconnection Charge proposed here is an intrastate charge. Thus, based on the order and the rules, the exception in footnote 1495 applies only to specific baskets of interstate rate elements and does not apply to the intrastate charge in issue here.

Furthermore, even presuming the exceptions in footnote 1495 could somehow be read to cover intrastate charges, under the new 47 C.F.R. § 51.907 a price cap carrier is, as of December 29, 2011 to cap the rates for "*all interstate and intrastate rate* elements" contained in Interstate End Office Access Service, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Pursuant to the new 47 C.F.R. § 51.903(d), End Office Access Service includes the Residual Interconnection Charge. Thus, to the extent there may be some argument that footnote 1495 excepts both interstate and intrastate rates or charges, the newly adopted rules specifically require both interstate and intrastate charges, including the Interconnection Charge, to be capped at the rates in effect as of December 29, 2011.

Lastly, as to the provisions of footnote 1495, we note that the footnote directly follows the first sentence of paragraph 801which references "all interstate switched access and reciprocal compensation rates" and which makes no reference to intrastate rates or charges. The inference from this positioning is that the footnote serves to clarify the first sentence of paragraph 801 and thus applies only to interstate rates – a conclusion borne out by review of the elements excepted from the cap. Only later in paragraph 801 does the FCC state that intrastate rates will "also" be capped. At that point the FCC makes no reference to any footnotes or provisions of any orders or rules indicating that it intended intrastate rates to be excepted from the cap. Accordingly, the intrastate rates are capped at the rates in effect on December 29, 2011, pursuant to the CAF

Order and the relevant rules. Because the Interconnection Charge proposed by FairPoint does not fit the limited exception to the cap set out by the FCC in footnote 1495, it is subject to the general cap on access charges effective December 29, 2011. Thus, even construing all facts in its favor as true, because FairPoint does not have a legal right to increase the Interconnection Charge beyond the rate in effect on December 29, 2011, we must grant the motion to dismiss.

Beyond the language of the footnote and the relevant regulations, for the additional reasons below we conclude that the FCC did not intend to exclude charges such as the one proposed here from its cap. As noted, footnote 1495 provides that the cap applies unless a price cap carrier has made a tariff filing increasing particular rate elements, but the change has not yet taken effect. To the extent the FCC excepts from its rules any tariff filings in process with its office it is obviously acting within its purview. The FCC is presumed to be aware of the filings made with it and the length of time it would take to review and implement those filings. For the FCC to except filings in process at the state level relating to intrastate charges, however, would invite contentions that certain state processes are unfair, biased, inefficient or otherwise contrary to the intent of the FCC in the CAF Order. It is illogical to presume the FCC would allow for such situations and, moreover, it is potentially injurious to the reforms the FCC is attempting.

For the FCC to allow state filings to be excepted from the cap it could mean, for example, that a carrier could submit numerous tariff filings any time before December 29, 2011 through operating companies in various jurisdictions to increase one or more intrastate rate elements that would otherwise be capped. If the cap in the CAF Order did not apply, those tariffs would go into effect in each jurisdiction whenever the state commission was able to approve them, assuming the state commission would do so. Such approvals could be as early as a few days, or

perhaps many months, and would inevitably vary among jurisdictions. As a particular example, FairPoint, in its December 22, 2011 filing as well as its objection to the motion to dismiss, contends that the proper state statute for review of its filing is RSA 378:6, I(b), under which the Commission could take up to eight months to implement the filing. Presuming for purposes of this example that the argument is valid, that would mean the Commission had until August 22, 2012 to address the filing. Under the CAF Order not only are rates capped on December 29, 2011, but on July 1, 2012, carriers are to reduce their intrastate access rates, if above the interstate rates, by 50 percent of the differential between the intrastate and interstate rates. CAF Order, Figure 9. If the Commission has not finished its review of the proposed tariff by July 1, irrespective of the reason, there will be no way to apply that change since the true differential would not be known. The filing would, therefore, avoid not only the cap on rates, but also would disrupt the transition to bill-and-keep laid out by the FCC. A similar disruption could also occur in any other jurisdiction where a carrier managed to make a filing prior to December 29, 2011, but it was not in effect as of that day.

Furthermore, in the CAF Order the FCC repeatedly states – including in footnote 1495 – that it would not agree to postpose the application of the cap, even by two days from December 29, 2011 to January 1, 2012, because it intended to thwart carriers' attempts to inflate their rates ahead of the reforms. To allow carriers to file tariff revisions in any state in which they operate in the period between the issue date and the effective date of the order, and to allow those rates to become effective at different times in each state would render various portions of the order not only ineffective, but virtually impossible to administer and would permit the very rate inflation the FCC sought to avoid.

For the above reasons, we conclude that the CAF Order caps all intrastate access rate elements at the rates in effect on December 29, 2011. We further conclude that it is irrelevant whether a company has made a filing with a state commission for a rate increase, but the filing has not yet gone into effect, because the exception provided by the FCC does not apply to intrastate filings. Accordingly, we conclude that FairPoint may not increase the Interconnection Charge above the $0.00000 that was in effect on December 29, 2011. Consequently, we grant the motion to dismiss FairPoint's request to increase the Interconnection Charge. Because we grant the motion to dismiss, we do not address the motion for summary judgment.

Based upon the foregoing, it is hereby

ORDERED, that the CLECs' motion to dismiss is granted.

By order of the Public Utilities Commission of New Hampshire this third day of February, 2012.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 06-067

Freedom Ring Communications LLC d/b/a BayRing Communications
Complaint Against Verizon New Hampshire Regarding Access Charges

MOTION FOR REHEARING AND/OR RECONSIDERATION OF ORDER NOS. 25,319 AND 25,327

Pursuant to RSA 541:3 and N.H. Admin. Rules Puc 203.33, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint"), hereby moves the New Hampshire Public Utilities Commission (the "Commission") to reconsider Order No. 25,319 dated January 20, 2012 (the "2012 CCL Order") and Order No. 25,327 dated February 3, 2011 (the "Dismissal Order"). In support of this Motion, FairPoint states as follows:

I. INTRODUCTION AND BACKGROUND

On March 21, 2008, the Commission issued its Order No. 24,837 (the "2008 CCL Order") determining that the carrier common line charge ("CCL") contained in Verizon New England Inc. ("Verizon") Tariff NHPUC No. 85 ("Tariff 85") was chargeable only when Verizon provided the use of its common line (loop) facilities to provide access to or from a Verizon end user. On March 31, 2008, FairPoint acquired the New Hampshire wireline telecommunications business of Verizon and assumed Tariff 85. This acquisition was effected pursuant to and in accordance with the Commission's Order Approving Settlement Agreement with Conditions, Order No. 24,823 in Docket DT 07-011 (the "Merger Order").

On May 7, 2009, the New Hampshire Supreme Court issued its unanimous decision on *de novo* review, reversing the Commission's CCL Order and holding, based on the plain language

of Tariff 85, that CCL access charges are properly chargeable to all switched-access services, not solely those services for which FairPoint provides loop facilities for access to or from a FairPoint end user.[1] Motions for Reconsideration followed, which were denied by the Court in its order dated June 24, 2009.

On August 11, 2009, the Commission issued its Order *Nisi* No. 25,002 ("Order *Nisi*") directing FairPoint to file tariff pages revising Tariff 85 with respect to switched-access charges "to clarify that FairPoint shall charge CCL only when a FairPoint common line is used in the provision of switched access services."[2] On August 28, 2009, FairPoint filed its Comments and Conditional Request for Hearing, asserting, among other things, that the Commission had expressly removed the issue of prospective tariff changes from this proceeding in its Order No. 24,705 dated November 29, 2006 ("November 2006 Procedural Order").

FairPoint further asserted that its current CCL charges were lawful and that the applicable tariff provisions were clear and unambiguous. FairPoint noted that an order directing FairPoint to reduce access rates without any offset to recover lost revenues would be in violation of the settlement agreement approved in the Merger Order and would be confiscatory in contravention of the New Hampshire and Federal constitutions. However, in an effort to comply with the Order *Nisi* in a way that would be lawful, FairPoint stated that it would make a tariff filing making the changes directed in CCL rates in a revenue-neutral manner.

On September 10, 2009, FairPoint filed revised, revenue-neutral tariff pages removing CCL charges from certain switched access traffic and replacing the lost revenue by implementing changes to the "Interconnection Charge" switched access rate element contained in Tariff 85. On September 23, 2009, the Commission issued a Scheduling Order reiterating that

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[1] *In re Verizon New England Inc.*, 158 N.H. 693 (2009).
[2] Order *Nisi* at 2.

"when the use of Verizon's common line does not involve a Verizon end user, the CCL charge may not be imposed."[3] Essentially, the Commission yet again sought to impose the CCL Order on FairPoint despite being reversed by the Supreme Court.

On October 12, 2009, FairPoint filed a Motion for Rehearing of the Order *Nisi*, and withdrew the tariff filing, deeming it henceforth merely illustrative. On October 16, 2009, the Commission issued a letter suspending the procedural schedule.

On May 4, 2011, following FairPoint's Chapter 11 restructuring, the Commission issued a Procedural Order and Supplemental Order of Notice ("Supplemental Order") that, among other things, approved the withdrawal of the tariff filing and reiterated the grant of FairPoint's motion for hearing on the issue of whether FairPoint's proposed tariff revisions are just and reasonable. However, the Commission also declared that, based on the record of the proceeding below and its finding in the reversed CCL Order, the parties were estopped from litigating the issue of whether the CCL charge contributes to the joint and common costs of providing FairPoint's services. It stated that it in reaching a ruling on this case, it "will not re-litigate the purpose or propriety of the CCL charge," particularly in regard to whether it is a contribution element, and that it "will not entertain further argument about this conclusion." It referenced the 2008 CCL Order for support for this declaration:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. We disagree. Based on the record before us, we find 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. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.[4]

In the Supplemental Order, the Commission also:

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[3] Scheduling Order at 1.
[4] Supplemental Order at 7.

- determined that the procedural schedule was suspended on October 16, 2009 and therefore the tariff filing never went into effect;

- granted FairPoint's request to withdraw its entire September 10th, 2009 tariff filing;

- deemed those tariff pages as illustrative and the basis for further investigation and proceedings outside of the timing constraints of RSA 378:6.

On October 28, 2011, the Commission supplemented and revised these determinations in Order No. 25,283 ("Order on Motions"). In that Order, the Commission:

- held that FairPoint's two proposals in the September 10th, 2009 tariff filing (i.e. revised CCL language, increased Interconnection Charge) were intertwined and intended to be dealt with as a package;[5]

- partially reversed its grant of FairPoint's request to withdraw its September 10th, 2009 tariff filing, finding instead that the portion of the filing covering the CCL was accepted and not considered withdrawn (notwithstanding its determination that both portions constituted a single filing),[6] but still affirmed that the CCL revisions remain suspended in application and effect;[7]

- reiterated that although it was filed in response to a Commission directive, the September 10th, 2009 tariff filing did not go into effect;[8]

- emphasized that while it prohibited re-litigation of its finding that the CCL was not solely a contribution element, FairPoint was not prohibited from arguing that contribution elements are necessary to meet its financial needs.[9]

On November 30, 2011, the Commission issued Order No. 25,295 on the CLEC Motion for Hearing ("Briefing Order") in which it again reiterated that the CCL filing had not gone into effect.[10] Consistent with FairPoint's suggestion that it was not necessary to conduct a hearing for testimony and cross examination related to the CCL charge, the Briefing Order effectively bifurcated this proceeding by setting the CCL question for briefing, while noting that this

[5] Order on Motions at 29.
[6] *Id.* at 30.
[7] *Id.* at 31.
[8] *Id.*.
[9] Order on Motions at 17-18.
[10] Briefing Order at 1-2.

decision was not intended to prejudice any other arguments about the Interconnection Charge that may be made later, nor imply that the Commission has made any determinations about the propriety of the proposed Interconnection Charge or its relationship to the CCL.[11] Consequently, the Commission requested briefs on two narrow issues:

(1) Whether 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.

(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?

Consistent with its Supplemental Order, the Commission did not offer to entertain any arguments related to the lawfulness of the Order *Nisi* or whether the CCL Charge is a contribution element.

Also on November 30, 2011, FairPoint refiled its tariff for the CCL rate reduction and the increased Interconnection Charge. The Commission rejected this tariff on the grounds that it could not be considered within the time constraints of RSA 378:6, IV.

On December 21, 2011, FairPoint again refiled the identical tariff revisions ("December 2011 Tariff Filing"), this time requesting that the Commission review the filing within the longer timeframe specified in RSA 378:6, I(b).[12]

On January 20, 2012, the Commission issued its Order No. 25,319 regarding both the

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[11] *Id.* at 4.

[12] RSA 378:6, I(b) provides that

> [e]xcept as provided in RSA 378:6, IV [regarding "any tariff for *services* filed for commission approval by a telephone utility"], for all other schedules filed with the commission, the commission may, by an order served upon the public utility affected, suspend the taking effect of said schedule and forbid the demanding or collecting of rates, fares, charges or prices covered by the schedule for such period or periods, not to exceed 3 months from the date of the order of suspension, but if the investigation cannot be concluded within a period of 3 months, the commission in its discretion and with reasonable explanation may extend the time of suspension for 5 additional months. (emphasis supplied).

original September 10, 2009 CCL Tariff filing and the December 2011 Tariff Filing. In this Order, the Commission determined that the revised CCL language in the September 2009 CCL filing, as duplicated in the December 2011 Tariff Filing, complied with the Commission's directive to amend the tariff. It accordingly ordered, in the interest of administrative efficiency, that the CCL related provisions of the December 2011 Tariff Filing would become effective on January 21, 2011, as proposed in the filing. The Commission decided on this date based on its holding that it had no statutory or other lawful authority to impose these revisions retrospectively and because, contrary to opposing arguments, there was no basis to determine that any temporary rate had been established pursuant to RSA 378:27.

However, the Commission also rejected the portion of the December 2011 Tariff Filing related to the proposed Interconnection Charge. Drawing on its reasoning from the Order on Motions, the Commission explained that while the CCL language constituted a compliance filing pursuant to the RSA 378:7, for which there is no statutory deadline for consideration, the proposed Interconnection Charge did not. The Commission rejected FairPoint's argument that the Interconnection Charge should be considered under RSA 378:6, I(b), which provided for up to eight months of suspension and investigation, and instead held to its prior determination that it could only accept or reject the tariff under RSA 378:6, IV.

Finally, on February 3, 2012, the Commission issued its Order No. 25,327 Granting the Motion to Dismiss ("Dismissal Order"). In the Dismissal Order, the Commission terminated any further proceedings related to the proposed Interconnection Charge in light of the recent order of the Federal Communications Commission ("FCC") in which, among many other things, the FCC permanently capped the charges by price-cap carriers, like FairPoint, for any intrastate access

elements as of December 29, 2011.[13] The Commission rejected FairPoint's argument that the December 2011 Tariff Filing was eligible for the exception that the FCC had provided for tariff filings that were pending as of that date. Accordingly, it held that FairPoint was barred from any increase in the Interconnection Charge and dismissed the remainder of the proceeding.

II. STANDARD OF REVIEW

The standard of review for this Motion is well established. The governing statute states:

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.[14]

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings.[15] To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.[16]

III. MOTION FOR REHEARING AND OR RECONSIDERATION OF THE 2012 CCL ORDER.

A. The Commission Erred Because the Tariff Revisions Ordered by The Commission are Outside the Scope of this Proceeding and FairPoint has not been Heard.

In the Order *Nisi*, the Commission justified its directive because "[t]he order of notice in

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[13] *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 ¶ 801 and n.1495 (rel. Nov. 18, 2011) ("*CAF Order*").
[14] RSA 541:3.
[15] *See Dumais v. State*, 118 N.H. 309, 312 (1978). *See also Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (2002) (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).
[16] *See* RSA 541:3; RSA 541:4; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.,* Order No. 25,194 at 3 (Feb. 4, 2011).

this proceeding established that in the event Verizon's interpretation of the current tariffs was found to be reasonable, the Commission would decide whether any prospective modifications to the tariffs are appropriate."[17] However, there were subsequent procedural orders, one of which contracted the scope of this proceeding to exclude considerations of whether the tariff should be revised. In the November 2006 Procedural Order, the Commission found that "the consideration of prospective modifications to Verizon's tariff will be removed from the present proceeding and designated for resolution in a separate proceeding to be initiated at a later date if necessary."[18]

The purpose of the proceeding was to determine if the CCL was being lawfully applied in accordance with the tariff. Pursuant to the Commission's November 2006 Procedural Order, it was expressly *not* about whether any prospective modifications to the tariffs are appropriate, an inquiry grounded in whether the rate is just and reasonable.[19] Consequently, the issue of tariff modifications is beyond the scope of the proceeding and not properly before the Commission. Any decision regarding tariff modifications is inconsistent with RSA 365:4, which requires "notice and hearing" before the Commission may take action, and is therefore invalid.

1. The Record does not Support the Commission's Finding that the CCL Charge is not Solely a Contribution Element

Notwithstanding the Procedural Order, the Commission issued the Order *Nisi,* in which it held that "[b]ased on the record developed in this proceeding . . . FairPoint's access tariff should permit the imposition of CCL charges only in those instances when a carrier uses FairPoint's common line and the common line facilitates the transport of calls to a FairPoint end-user."[20]

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[17] Order *Nisi* at 2 (referring to Order of Notice at 3 (June 23, 2006)).
[18] November 2006 Procedural Order at 6.
[19] RSA 378:7. ". . . the commission shall determine the *just and reasonable* or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed . . . ." (emphasis supplied).
[20] Order *Nisi* at 2.

However, the record does not support this conclusion.

As FairPoint has explained previously, the CCL 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.[21] 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. Following a series of negotiations, the affected parties agreed that the CCL was a contribution element and settled on the language of the tariff, including the CCL charge, which the Commission approved in September 1993.[22]

In this proceeding, the Commission never found that the CCL charge was limited simply to the recovery of the costs of the local loop. Verizon presented unrebutted evidence that the CCL charge was designed to recover joint and common costs related to its business as a whole, which may include but are certainly not limited to loop costs.[23] The Commission has neither rejected this evidence nor cited any opposing evidence that the CCL charge was limited to or even included any loop costs.

Verizon designed its retail rate for intrastate toll service to exceed the direct cost of providing such services.[24] 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," i.e. the costs of facilities, employees, and other expenses

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[21] *Appeal of Verizon New England*; Docket 2008-0645, Petition for Appeal at 9 (Sep. 8, 2008) ("Petition").
[22] DT 06-067, Tr. at 17:17-21 (Jul. 11, 2007).
[23] *See, e.g.*, DT 06-067, Testimony of Peter Shepherd at 16, 20-21; Tr. at 11:11-14 (Jul. 11, 2007).
[24] Shepherd Testimony at 16, 20-21.

that support multiple services and/or the company's overhead.[25] The CCL charge was instituted to ensure that *all* toll calls contributed to Verizon's joint and common costs, whatever their nature. Accordingly, to the extent the CCL charge was designed in part to recover loop costs, FairPoint's NHPUC Tariff No. 3 makes clear that toll providers using FairPoint local transport must contribute to the recovery of those loop costs, whether or not the toll provider chooses to use the local loop.

Verizon presented uncontroverted evidence by the *actual* Verizon employee who was on the scene and managed the development of the original CCL charge, and who testified under oath that the CCL charge was designed as a contribution element, *i.e.*, as a means of recovering its joint and common costs generally, including loop costs.[26] Other parties provided testimony purporting to rebut Verizon's testimony, but this consisted only of policy arguments,[27] analysis of the proceedings in DT 90-002,[28] or observations that the Commission had never expressly acknowledged that the CCL charge was a contribution element.[29] None of the testimony in the record rises to the level of fact and it does not support the Commission's finding in the CCL Order, which did not set out the facts in support of that finding. The Commission may believe as a matter of policy that FairPoint's CCL charge *should* not be a contribution element, but this does not mean that it can declare by fiat that it *is* not a contribution element.

There is no record support for the Commission's conclusion that the charge may be assessed "only in those instances when a carrier uses FairPoint's common line." On the contrary, the uncontroverted evidence demonstrated that the charge was computed residually,

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[25] *Id*; *see also* DT 06-067, Tr. at 11:11-14 (Jul. 11, 2007); *see generally* Alfred E. Kahn, The Economics of Regulation 77-79 (1998) (discussing common costs).
[26] Verizon Direct Testimony, March 9, 2007 at 22:11-20.
[27] *See* AT&T Direct Testimony, March 9, 2007 at 22:7-24:2.
[28] *See* AT&T Rebuttal Testimony, April 20, 2007 at 5:11-11:6.
[29] *See* BayRing Rebuttal Testimony, April 20, 2007 at 10:20.

based on the difference between Verizon's overall switched access rate set by the Commission and the incremental costs of local switching and local transport.[30] The purpose of the CCL charge in New Hampshire was to ensure that toll providers purchasing any switched access service from Verizon would contribute to the recovery of all types of joint costs, just as Verizon's retail toll customers traditionally had done. The Commission's mandate to revise the CCL charge overlooks these important facts, and should be reconsidered.

2. By Pre-Judging of Certain Facts, The Commission Denied FairPoint A Meaningful Hearing.

FairPoint maintains that it has not received a proper hearing on this matter, in violation of its rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendments of the United States Constitution. Despite the procedural formalities that may have created the appearance that FairPoint was granted a hearing, the Commission's final determination was made at the very outset of this proceeding and the only issues under investigation were if and when FairPoint complied with the resulting directive.

In the 2012 CCL Order, the Commission has asserted that, regarding whether it may "impose the changes proposed to the CCL charge pursuant to the Commission's prior order," FairPoint "contended due process would be satisfied without a hearing."[31] This language misconstrues FairPoint's legal position. In noting that a hearing was not necessary, FairPoint was not addressing a constitutional due process issue. Rather, FairPoint addressed the CLECs' contention that no discovery or additional process, particularly the taking of testimony, was necessary for the Commission to determine the narrow and technical issue of "whether the CCL

[30] Shepherd Testimony at 26, 16-18
[31] 2012 CCL Order at 8.

tariff language complies with the Commission's directives to FairPoint to modify its tariff,"[32] particularly when FairPoint was restricted as to the case it could present. Whether tariff language complies with prior unlawful directives does not warrant an evidentiary hearing. Such review simply warrants a ministerial comparison of the content of the filing to the prior directives. In foregoing a hearing, FairPoint was making no concession as to whether it had, or would be, "heard" in this case, and indeed reserved numerous rights in its Response.[33]

FairPoint requested a hearing, and was putatively granted one by the Commission in the Supplemental Order. However, the Commission also declared that, based on the record of the proceeding below and its finding in the reversed and vacated 2008 CCL Order, the parties were estopped from litigating the issue of whether the CCL charge contributes to the joint and common costs of providing FairPoint's services. It stated that it in reaching a ruling on this case, it "will not re-litigate the purpose or propriety of the CCL charge," particularly in regard to whether it is a contribution element, and that it "will not entertain further argument about this conclusion." It referenced the 2008 CCL Order for support for this declaration:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. We disagree. Based on the record before us, we find 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. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.[34]

In the November 2011 Hearing Order, the Commission furthered constrained the proceedings by dictating that the scope of the briefing would only be whether FairPoint's September 10, 2009 proposed revisions to the CCL tariff, as dictated by the Commission, complied with the Order *Nisi* and, if so, when they should become effective. The Commission

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[32] CLECs Motion for Hearing at 2.
[33] FairPoint Response at 3-4.
[34] Supplemental Order at 7.

did clarify that FairPoint could argue that some type of contribution element was justified, *i.e.* Interconnection Charge, but it later frustrated all of FairPoint's efforts to preserve its rights to this issue and has since dismissed any proceedings related to the Interconnection Charge.

FairPoint had requested a hearing as to whether the Commission was authorized to mandate a reduction in its rates, and in the end was restricted to arguing whether the words on the paper conformed to those dictated by the Commission. This is not, and could never have been, a meaningful opportunity to be heard. Furthermore, in continuing to seek such an opportunity, FairPoint does not deserve to be the verdict of another of the Commission's foregone conclusions, *i.e.* that "FairPoint is intentionally trying to delay a decision through procedural maneuvers."[35]

"Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a *meaningful* manner."[36] "While due process in administrative proceedings is a flexible standard, this court long has recognized that the PUC has important quasi-judicial duties, and we therefore require the PUC's 'meticulous compliance' with the constitutional mandate where the agency acts in its adjudicative capacity, implicating private rights, rather than in its rule-making capacity."[37]

FairPoint maintains that by prejudging the central issue in this case, the Commission denied FairPoint a "meaningful" hearing. As FairPoint argued in its Motion for Interlocutory Transfer, the Commission's declaration regarding the CCL charge estopped FairPoint from

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[35] 2012 CCL Order at 8.
[36] *Appeal of Concord Steam Corp.* 130 N.H. 422, 427 (1988) (emphasis supplied) (holding that "[i]n making conclusive findings without affording the CSC a meaningful opportunity to be heard, the PUC thus failed to satisfy its obligation of meticulous compliance with the requirements of due process." *Id.* at 429).
[37] *Id.* at 428.

litigating this issue and was highly prejudicial to FairPoint, since the CCL charge is expressly designed to be a contribution element and any inquiry leading to a ruling on its justness and reasonableness can only be conducted on that basis. The Commission's determination is therefore erroneous as a matter of fact and law.

B. The Commission Erred Because its Failure to Approve the Interconnection Charge in Conjunction with the CCL Tariff Revisions is Confiscatory.

At every step of the proceeding involving this tariff filing, FairPoint has emphasized that the revisions were intended to be revenue neutral, meaning that to the extent that the Commission suggested revisions result in lower revenues to FairPoint, other charges would need to be increased to restore the balance. In its August 28, 2009 Comments, FairPoint notified the Commission and other parties that it would "revise its tariff in a revenue neutral manner by revising the application of the CCL and recovering the shortfall through increases in other access rate elements."[38] The tariff transmittal letter provided that "in conjunction with this filing, FairPoint is filing schedule sheets reflecting a revenue neutral adjustment to its switched access rates and is doing so by increasing the Interconnection Charge from $.00000 to $.010164 per minute." The letter went on to describe "the lost CCL revenue and the required Interconnection Charge rate to recover the lost CCL revenue." FairPoint's Michael Skrivan testified that the revised tariff pages reflected a revenue neutral adjustment, accomplished by an increase in the Interconnection Charge.[39] Consequently, there can be no doubt of FairPoint's intention that the revised tariff pages encompass a single revision of interdependent prices and terms.

This interdependency conforms to the Commission's definition of a "rate," which encompasses much more than a numerical price. Puc 1602.03 defines a "rate" as "any charge or

[38] FairPoint Comments at 6.
[39] Skrivan Direct Testimony at 5:3-10; Skrivan Supplemental Testimony at 6:5-13.

price, *and all related service provisions* for services regulated and tariffed by the commission, including, but not limited to, availability, terms of payment, and minimum service period." (emphasis supplied). In this case, the "rate" for CCL access service is related to the Interconnection Charge, which "is applied to all local transport access minutes . . . ."[40] Consequently, the new CCL rate regulations cannot be divorced from the interconnection charge and evaluated separately.

In the Order on Motions, the Commission itself confirmed that "FairPoint's two proposals in the September 10th, 2009 tariff filing (i.e. revised CCL language, increased Interconnection Charge) were intertwined and intended to be dealt with as a package."[41] However, the 2012 CCL Order requires FairPoint to implement reductions to its CCL rate based on one portion of the December 2011 tariff filing, but rejects any compensating increase to the Interconnection Charge. The Commission has explained that this is not confiscatory for the following reasons:

- FairPoint must not be sincere in its contention, since it has honored the merger related commitments it made regarding rate caps and has not sought to rescind these commitments;[42]
- Verizon failed to bill for the CCL charge for ten years[43] (notwithstanding that FairPoint itself has always billed this charge and can be presumed to have relied on it when making the above commitments);
- there is no constitutional requirement that mandates the PUC to correct, retrospectively, past errors in judgment made by the utility[44] (without specifying what FairPoint errors those might be, other than relying on a filed tariff as

[40] Tariff Transmittal § 6.2.1.E.2.
[41] Order on Motions at 29.
[42] 2012 CCL Order at 15. Specifically, "FairPoint has not made any request or attempt to undo any restrictions on rate relief in the agreements it has made, nor has it made any other attempt to revise its rates that would allow the Commission to investigate whether the rates under which it currently operates are, in fact, confiscatory."
[43] *Id.*
[44] *Id.*

validated by the New Hampshire Supreme Court);

- the right to receive just and reasonable rates is not a guarantee of net revenues regardless of circumstances[45] (notwithstanding that FairPoint is not seeking a revenue guarantee, but only an opportunity to seek these revenues); and

- FairPoint should not be indemnified for "failing to revise its tariff to the extent this was necessary to compensate the company for certain wholesale services provided in connection with calls that involve neither a FairPoint end-user nor a FairPoint local loop"[46] (even though the Supreme Court deemed such tariff revisions unnecessary given the plain language of the tariff.)[47]

None of these reasons conform to the applicable statutory criteria, or in any way justify the Commission's unilateral decision to reduce FairPoint's revenues without a proper investigation and hearing. By simply ordering the cessation of billing for the service, the Commission confiscated FairPoint's property in violation of Part I, Article 12 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. The applicable statute, RSA 378:27, provides that "rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service . . ." For a return to not be confiscatory it must "be commensurate with returns on investments in other enterprises having corresponding risks" and be "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[48] The statute allows for no exceptions to this standard. FairPoint testified to its "excessively low earnings"[49] and has argued previously that, absent a revenue neutral adjustment, the CCL changes would impact its earnings. However, rather than focus on FairPoint's earnings, as

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[45] *Id.*
[46] 2012 CCL Order at 15.
[47] *In re Verizon New England, Inc.* 158 N.H. 693, 700 (2009).
[48] *Kearsarge Telephone Company*, DR 87-110, Order No. 19,154, 73 NH PUC 320, 324 (1988) (internal citations to *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) and *New England Tel. & Tel. Co. v. New Hampshire*, 95 N.H. 353, 361 (1949)).
[49] Skrivan Supplemental Testimony at 17.

required by statute, the Commission instead listed a series of FairPoint's purported failures that is factually and statutorily irrelevant.

FairPoint submits that the mandated revisions to the CCL rate cannot be deemed to be anything other than confiscatory and are not supported by the record of this proceeding or the applicable law. For these reasons alone, the Commission should reconsider its decision.

C. The Commission Erred Because Applicable Law does not Permit the Commission to Act on Less than the Entire Tariff Filing.

In the 2012 CCL Order, the Commission held that the CCL portion of the tariff filing would become effective, but that the provisions related to the Interconnection Charge were rejected and would be "illustrative" for purposes of further inquiry. Regardless of which provision of RSA 378:6 applies to this proceeding, the Commission could only act on the entire filing. Section 378:6, I provides that the Commission may suspend a "rate schedule" or "schedules" defined in the Commission rules as "the initial collection of information along with *any* revisions filed by a utility which includes the most recent rate schedule cover sheet and all effective rate sheets."[50] This suspension applies to entire "rate schedules," not simply rates or provisions. The rate schedule at issue consists of the currently effective schedule and the revisions filed as of December 21, 2011. If this schedule is suspended, it must be suspended in its entirety, not piecemeal.

To the extent that RSA 328:6, IV applies to this proceeding, the same reasoning applies. In regard to a tariff (defined in the Commission rules as "the schedule of rates, charges and terms *and* conditions under which a regulated and tariffed service is provided to customers,"[51]), RSA 378:6, IV provides that the Commission can only reject, amend or permit "*the filing*" to become

[50] Rule Puc 1602.04 (emphasis supplied).
[51] Rule Puc 1602.06.

effective by operation of law (unless, at its discretion, it has permitted an earlier effective date.)[52] As noted, this provision applies to the entire "filing," not simply individual rates, terms or conditions. Thus, whatever action the Commission takes, it must apply to all of the filed revisions *en masse*, regardless of which section of RSA 378:6 it is acting under. It cannot "pick and choose" which aspects to approve or reject.

D. The Commission Erred Because it did not Consider the December 2011 Tariff Filing Under RSA 378:6, I(B).

In the 2012 CCL Order, the Commission rejected the December 2011 Tariff Filing, reiterating its finding from Order No. 25,301 that "in order to avoid the time constraints on review of tariffs contained in RSA 378:6, IV, we believe a better path, given the terms of the statute, is to reject the tariff and treat it as illustrative."[53] As such, the Commission rejected FairPoint's argument that the tariff filing was subject to RSA 378:6, I(b), explaining that there were only two options to reviewing a telephone company tariff filing – either as "service offering" under RSA 378:6, IV, or a "general rate increase" under RSA 378:6, IV.[54]

In the December 2011 Tariff Filing, FairPoint explained that there was a third way, and that this position was well supported by the legislative history. It contained testimony of Commissioner Ignatius, then General Counsel to the Commission, in which she stated that RSA 378:6, IV is intended to only apply to changes in the *terms and conditions* of services, not rates, and that some types of rate filings should continue to be handled under RSA 378:6, I(b). The pertinent portions of her testimony highlighted on pages 5-6 and page 11 of the "Committee Minutes" section of the attached document. In short, Commissioner Ignatius testified that:

if it involves a rate change, whether it is a telephone company or anyone else, it

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[52] RSA 378:6,IV (emphasis supplied).
[53] 2012 CCL Order at 18.
[54] *Id.*

> would be under the section above [i.e. RSA 378:6, I(b)] . . . that is an existing statute that is a longer period of time to review. The 3 month review and you could have an additional 5 months.

The bill before the committee at the time had language identical to that in the eventual statute. Thus under this interpretation, RSA 378:6, I(b) applies to the subject tariff filing, and that it also provides ample to time to review the provisions within the context of DT 06-067.

In the 2012 CCL Order, the Commission disregarded this legislative history, asserting that referring to this history "is not necessary because the statutes are clear on their face."[55] FairPoint respectfully disagrees, and submits that these two statutes, on their own, are anything but clear. As the Commission aptly described, RSA 378:6, IV provides "[a]ny tariff for *services* filed for commission approval by a telephone utility, except a tariff reviewed pursuant to RSA 378:6, I(a) [dealing with general rate increases] shall become effective as filed 30 days after filing, unless the commission amends or rejects the filing within the 30-day period. . . ."[56] However, as FairPoint has testified,[57] and all opposing parties are anxious to demonstrate, the Interconnection Charge is not a *service*, but a *rate increase*. Fewer than three months ago, the Commission emphasized that such rate increase filings *are not eligible for review under RSA 378:6, IV*. This directly contradicts the Commission's holding in the 2012 CCL Order. In DT 11-248, in regard to a proposed surcharge, the Commission held that RSA 378:6, IV did not apply because

> [t]he proposed surcharge tariff is *not for any particular service*, but rather is the equivalent of a rate increase affecting all or a majority of the telephone utility's retail customers or every retail residential or business telephone exchange line and public access line (except those in excess of 25 lines per customer billing account), as well as such lines that are provided at wholesale to resellers.[58]

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[55] 2012 CCL Order at 18.
[56] *Id.* (emphasis supplied).
[57] Skrivan Supplemental Testimony at 8:16 – 9:10.
[58] DT 11-248, Order No. 25,293 at n.2 (Nov. 28, 2011) (emphasis supplied).

Contradictory findings in the space of three months are a strong indicator that the statutes are not clear and that as such the legislative history of RSA 378:6, IV is highly persuasive. FairPoint respectfully requests that the Commission reconsider its holding that RSA 378:6, I(b) is not applicable to the December 2011 Tariff Filing.

IV. MOTION FOR REHEARING AND/OR RECONSIDERATION OF THE DISMISSAL ORDER

In the Dismissal Order, the Commission held that FairPoint's December 2011 tariff filing of the Interconnection Charge was not eligible for the exception to the FCC's rule capping intrastate access rates as of December 29, 2011. In footnote 1495 of the *CAF Order*, the FCC explained that

> we cap all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) *unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect.* (emphasis supplied)

FairPoint argued that, because the Interconnection Charge filing had been made prior to the effective date of the rules, it was eligible for this exception. The Commission rejected this argument for primarily two reasons.[59]

First, the Commission examined the provision of subparagraph (3) of 47 C.F.R. § 61.42(d), which refers in turn to the definition of the "per minute residual interconnection charge" in 47 C.F.R. § 69.155, which FairPoint contended was the applicable rate element at

[59] The Commission also provided two other reasons that are not discussed at length here. One relates to the Commission's contention that footnote 1495 only supports the sentence in paragraph 801 related to interstate traffic. Dismissal Order at 14-15. This tenuous argument, related to principles of statutory interpretation, is irrelevant given the plain meaning of the FCC rules discussed further herein. The Commission also notes that FairPoint's interpretation of the FCC rules would create implementation problems with other FCC rules if the investigation of the Interconnection Charge extended beyond July 1, 2012. This, of course, is a factor that the FCC could not have been aware of when developing the rules, and thus cannot be a basis for any interpretation of its intent.

issue here. This rule provides that "[l]ocal exchange carriers may recover a per-minute residual interconnection charge on originating access" and to the extent that this does not recover all of the residual interconnection charge revenues permitted "the residual may be collected through a per-minute charge on terminating access." The rule does *not* distinguish between interstate or intrastate access. However, the Commission determined that this rule is nonetheless specific to the interstate charge only, because it is contained in Part 69 of the FCC rules, which "establishes rules for access charges for *interstate* or foreign access services provided by telephone companies . . . ."[60] Accordingly, the Commission held that "the exception in footnote 1495 applies only to specific baskets of interstate rate elements and does not apply to the intrastate charge in issue here."[61]

However, the rate cap rules are not contained in, or qualified by, Part 69 of the FCC's rules. Instead, the rate cap rules are contained in Part 51 of the FCC's rules, specifically new Subpart J, which "appl[ies] to reciprocal compensation for telecommunications traffic exchanged between telecommunications providers that is interstate ***or intrastate*** exchange access, information access, or exchange services for such access, other than special access."[62] The references in the new rules to Part 69 are just that – references for purposes of defining certain terms, like the residual interconnection charge. The rate cap rule is codified at 47 C.F.R. § 51.907(a), which provides that

> [n]otwithstanding any other provision of the Commission's rules, on [December 29, 1011], a Price Cap Carrier shall cap the rates for all interstate and intrastate rate elements for services contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. In addition, a Price Cap Carrier shall also cap the rates for any interstate ***and intrastate*** rate elements in the traffic sensitive basket" and

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[60] Dismissal Order at 13 (citing 47 C.F.R. § 69.1(a)) (emphasis supplied).
[61] *Id.* at 14.
[62] 47 C.F.R. § 51.901(b) (emphasis supplied).

> the "trunking basket" as described in 47 CFR 61.42(d)(2) and (3) to the extent that such rate elements are not contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Carriers will remove these services from price cap regulation in their July 1, 2012 annual tariff filing. (emphasis supplied)

Note that the FCC presumed that the trunking basket might contain intrastate rate elements, for the purposes of these new rules – a reasonable presumption considering that intrastate access tariffs mirror the interstate rate structures in many respects. Consequently, it is clear that to the extent there is an intrastate equivalent to the interconnection charge, it is contemplated by the new rate cap rules. Furthermore, footnote 1495, which explains this new rule, is agnostic as to interstate or intrastate rate elements, and is thus consistent with this rule. The only conclusion then is that the rate cap exception also applies intrastate elements, like the proposed Interconnection Charge.

However, this does not dispose of the Commission's alternate reason for holding that the footnote 1495 exception does not apply. The Commission also noted that, independent of the qualifications regarding the trunking basket elements, the new cap applies without exception to all rate elements contained in, among other categories, Interstate End Office Access Service, which includes the Residual Interconnection Charge.[63] Thus, according to the Commission, even if the footnote 1495 exception did apply to certain intrastate elements, FairPoint's proposed Interconnection Charge is not one of those elements because it is an element of End Office Access Service.

This reasoning is misplaced. The Commission has relied on new FCC rule 47 C.F.R. § 51.903(d), which provides that End Office Access Service includes "residual rate elements," which may include "state Transport Interconnection Charges, *Residual Interconnection Charges*,

[63] Dismissal Order at 14.

and PICCs."[64] This is true, as far as it goes, but the Commission has overlooked a key aspect of the definition, which provides that "End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on ***local switching access minutes***, including the information surcharge and residual rate elements."[65] However, the proposed Interconnection Charge is not related to *local switching*, given that it applies to all switched access traffic, including that which does not touch FairPoint's local switch. FairPoint's December 2011 Tariff Filing provided that the Interconnection Charge was a *local transport* element:

> The Interconnection Charge is applied to all ***local transport access minutes*** based upon the directionality of the traffic carried over the Switched Access Service and regardless of whether the customer is collocated (provided an Expanded Interconnection arrangement at an end office).[66] (emphasis added)

Consequently, FairPoint's proposed Interconnection Charge is not part of the End Office Access Service category and thus is not restricted by the unqualified rate cap.[67] The Commission has provided no reason why it the FCC's rate cap rules prevent the implementation of the Interconnection Charge in the December 2011 tariff filing.

This is also true despite the Commission's insinuation that FairPoint is seeking to "inflate" its access charges at the last minute in advance of the FCC reforms.[68] Contrary to accusations that FairPoint has "gam[ed] the system" with its November and December tariff filings, these filings were in fact the only way to reestablish a statutorily proper foundation for the investigation of its tariff and to preserve rights that FairPoint and its predecessor have been

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[64] *Id.* (referring to 47 C.F.R. § 51.903(d)(3) and note to paragraph (d)) (emphasis supplied).
[65] 47 C.F.R. § 51.903(d)(3) (emphasis supplied).
[66] Tariff NHPUC No. 3, § 6.2.E.2. First Revised Page 5.
[67] FairPoint is aware that the Tandem Switched Transport Access Services and Dedicated Transport Access Services categories are also subject to this unqualified cap. However, neither of these categories contains a residual element and thus are not pertinent to this discussion.
[68] Dismissal Order at 16.

consistently asserting for six years. The December 2011 Tariff Filing is FairPoint's reasonable effort to maintain the status quo that was unlawfully reversed by the Commission over two years before the release of the *CAF Order*.

V. CONCLUSION

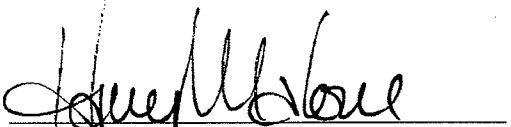
For the reasons described herein, the Commission overlooked or mistakenly conceived certain facts and interpretations of applicable law. As a result, it has issued an Order that is unlawful and unreasonable. FairPoint respectfully requests that the Commission reconsider its Order Nos. 25,319 and 25,327 and find that it was without authority to mandate a revision to FairPoint's CCL charge without also permitting a revenue neutral Interconnection Charge.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC, D/B/A FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: February 17, 2011

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: February 17, 2012

By: _____
Harry N. Malone

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

COMPETITIVE CARRIERS' MOTION FOR RECONSIDERATION OF COMMISSION ORDER NO. 25,319

Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc. (a Level 3 company) (collectively, the "Competitive Carriers"), respectfully move that the New Hampshire Public Utilities Commission ("Commission") reconsider certain aspects of Order No. 25,319 issued on January 20, 2012 ("January 20 Order"). In particular, the Competitive Carriers seek reconsideration of the portion of the January 20 Order concluding that the revisions of FairPoint's tariff[1] concerning the application of the carrier common line ("CCL") charge went into effect on January 21, 2012. For the reasons set forth below, the Commission should reconsider that decision and conclude that the tariff revisions went into effect on October 10, 2009.

[1] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint") took the place of Verizon New Hampshire ("Verizon") in this docket after it purchased Verizon's New Hampshire franchise and network.

INTRODUCTION AND BACKGROUND[2]

This docket began on April 28, 2006, when BayRing filed a Petition requesting that the Commission investigate Verizon's practice of billing CCL charges for calls that did not involve a Verizon end user or a Verizon-provided local loop. On June 23, 2006, the Commission issued an Order of Notice announcing its determination that BayRing's complaint warranted further investigation and stating that, if the challenged interpretation of the CCL tariff were found reasonable, it would investigate whether prospective modifications were warranted. Over the next 21 months, the matter was fully litigated, including discovery, Staff-led technical sessions, extensive evidentiary submissions, a multi-day hearing, and post-hearing briefs from multiple parties.

On February 25, 2008, the Commission issued Order No. 24,823 in Docket No. DT 07-011, approving Verizon's sale of its network and franchise to FairPoint.[3] In that order, the Commission expressly approved, and made a condition of the sale, FairPoint's agreement "to honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis."[4] As part of its transaction with Verizon, FairPoint adopted Verizon's New Hampshire tariffs.

On March 21, 2008, the Commission entered Order No. 24,837 in this docket, finding that the CCL rate element was intended to recover the cost of the local loop (or common line) and determining that Verizon's imposition of CCL charges on calls not involving a Verizon end user or Verizon-provided local loop was "impermissible." Order No. 24,837 ("March 2008 Order") at 31, 32. The Commission ordered Verizon to cease billing CCL charges for such calls. March 2008 Order at 33. Accordingly, Verizon's practice of billing CCL charges for calls not

[2] The Competitive Carriers note that the background provided herein is not intended to be comprehensive, but instead highlights those events relevant to the Commission's consideration of the current motion.
[3] *In re Verizon New England et al. – Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823 (Feb. 25, 2009) ("07-011 Order").
[4] 07-011 Order at 75.

involving a Verizon end user or Verizon-provided local loop was precluded as of March 21, 2008.[5] The Commission also found that Verizon owed refunds to customers who had been billed the inappropriate CCL charges and that the extent of those refunds would be determined in a later phase of the case. March 2008 Order at 32-33.

On April 21, 2008, FairPoint filed a Motion for Rehearing and Petition to Intervene. In its Petition to Intervene, FairPoint agreed to take the record in the docket "as is." On August 8, 2008, the Commission granted FairPoint's Petition to Intervene but denied rehearing of the March 2008 Order.

FairPoint subsequently appealed to the New Hampshire Supreme Court. On May 7, 2009, the Court issued its order, which was confined to the issue of the Commission's interpretation of FairPoint's tariff. *Appeal of Verizon New England, Inc.*, 158 N.H. 693 (2009). The Court disagreed with the Commission's interpretation of whether the then-existing tariff allowed FairPoint to apply CCL charges when no FairPoint common line was involved. The Court stated, however, that there was no bar to the Commission amending the CCL tariff through the regulatory process. *Id.* at 700.

On August 11, 2009, the Commission issued Order No. 25,002 on a *nisi* basis ("Order *Nisi*"). The Commission ordered FairPoint to make specific modifications to the language of the CCL tariff to clarify that it would "charge CCL only when a FairPoint common line is used in the provision of switched access services." Order *Nisi* at 2. The Commission required FairPoint to file the revised tariff pages within 30 days. *Id.* at 3.

On August 28, 2009, FairPoint filed Comments and a Conditional Request for Hearing ("Conditional Request"), raising a variety of challenges to the Order *Nisi*. FairPoint filed the

[5] FairPoint's ability to impose the CCL charge on calls that do terminate over a FairPoint local loop has never been at issue in this docket.

revised CCL tariff pages, in compliance with the Order *Nisi*, on September 10, 2009, accompanied by a voluntary submission of other unrelated tariff pages through which it sought to increase, from zero to $0.010164 per minute, a long-dormant Interconnection Charge.[6] FairPoint's cover letter, as well as the tariff pages themselves, specified an effective date of October 10, 2009. *See* Sept. 10, 2009 Letter of Kevin M. Shea and attachments ("FairPoint Tariff Filing").

The Commission then issued Order No. 25,016 on September 23, 2009, establishing a procedural schedule for investigation, submission of testimony, and a hearing on FairPoint's proposed Interconnection Charge. On October 2, 2009, BayRing and AT&T filed a Joint Motion for Clarification and Expedited Relief ("Motion for Clarification") requesting that the CCL tariff changes be implemented immediately due to published reports of FairPoint's impending bankruptcy which, if true, could further delay resolution of the docket. On October 12, 2009, FairPoint filed a Motion for Rehearing on the Order *Nisi* and for Conditional Withdrawal of Tariff ("Rehearing/Withdrawal Motion").[7] On October 16, 2009, the Commission issued a letter suspending the procedural schedule established in the September 23 Order while it considered the various motions pending before it.

FairPoint filed for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code on October 26, 2009. *In re FairPoint Communications, Inc. et al.*, Case No. 09-16335 (S.D.N.Y.). Shortly thereafter, in response to FairPoint's request, the Commission issued a General Scheduling Order staying, for several weeks, the filing requirements and deadlines in numerous dockets, including this one, to allow FairPoint to concentrate on its bankruptcy restructuring efforts. *See* Nov. 10, 2009 Letter of Debra A. Howland. This docket remained

[6] The submission of these additional tariff changes was not mandated, authorized, or invited by the Commission.
[7] FairPoint sought to withdraw the tariff pages it filed on September 10, 2009, and have them treated as illustrative. *See* FairPoint Rehearing/Withdrawal Motion at 9.

inactive while the bankruptcy proceeded. FairPoint emerged from bankruptcy on January 24, 2011.

More than four months later, on May 4, 2011, in response to requests to reactivate the docket, the Commission issued a Procedural Order and Supplemental Order of Notice, in which it denied BayRing and AT&T's Motion for Clarification and partially granted and partially denied FairPoint's Conditional Request and its Rehearing/Withdrawal Motion. Order No. 25,219 (May 4, 2011) ("May 2011 Order"). The Commission stated that it would not re-litigate the purpose or propriety of the CCL charge and reiterated its finding from the March 2008 Order that the CCL charge recovered a portion of the common line charge and thus was appropriately charged only when a common line was used. May 2011 Order at 7.

The Competitive Carriers filed a joint motion for rehearing, reconsideration and clarification relative to the May 2011 Order on June 3, 2011. FairPoint filed an objection to that motion on June 10, 2011.

The Commission ruled on the Competitive Carriers' motion on October 28, 2011, partially granting it. Order No. 25,283 (Oct. 28, 2011) ("October 2011 Order"). In particular, the Commission amended the May 2011 Order and rejected FairPoint's attempted withdrawal of the revised CCL tariff pages it had submitted to comply with the Order *Nisi*. October 2011 Order at 35.[8] The Commission also found that these tariff revisions were "suspended in application and effect" and subject to further proceedings. *Id.* at 31, 35.

The Competitive Carriers then moved on November 10, 2011, for an expedited hearing on the issue of the effective date of the CCL tariff revisions. FairPoint's response to the motion agreed that the CCL tariff issue involved only questions of "tariff interpretation and law" and

[8] The Commission, however, affirmed its earlier decision allowing FairPoint to withdraw its revised tariff pages related to the Interconnection Charge and have those pages treated as illustrative. October 2011 Order at 35.

that the effective date of the CCL tariff revisions was ripe for adjudication by the Commission. FairPoint Response to Motion for Hearing at 3 (filed Nov. 21, 2011). It also stated that no hearing was needed on the CCL issue and that the Commission should move straight to briefing on the issue. *Id.* at 2.

As a result, the Commission issued an order on November 30, 2011, in which it concluded that no hearing was needed on the CCL issue. Order No. 25,295 (Nov. 30, 2011) at 4. It also directed the parties to brief two questions:

> 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?

Id. In the October 2011 Order, the Commission had provided additional context for the second question, stating that it would 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." October 2011 Order at 2.

On December 19, 2011, AT&T, BayRing, FairPoint, and Sprint submitted briefs responding to the Commission's two questions.[9] On January 20, 2012, the Commission issued Order No. 25,319, which is the subject of the Competitive Carriers' current motion. In that order, the Commission found that the revisions to FairPoint's CCL tariff, which were originally submitted on September 10, 2009, were sufficient to comply with the Commission's prior

[9] To the extent that the current motion refers to any of these briefs, it will cite them in the following format: "BayRing Brief at __" or "AT&T Brief at __."

directive (in the Order *Nisi*) to amend the tariff. January 20 Order at 9-10. The Commission also concluded that those revised tariff pages would take effect on January 21, 2012. *Id.* at 19.[10]

STANDARD FOR REHEARING

The Commission may grant a motion for rehearing, under RSA 541:3, if an appropriate reason for rehearing is stated in a party's motion. The purpose of rehearing is "to direct 'attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State*, 118 N.H. 309, 311 (1978) (citation omitted). The Commission also may grant rehearing if a party demonstrates that the agency's order is unlawful and unreasonable. *See Hollis Telephone, Inc. et al.*, Order Denying Motion for Stay, Rehearing or Reconsideration, Order No. 25,088, at 14 (Apr. 2, 2010).

ARGUMENT

The Competitive Carriers seek rehearing of the January 20 Order on several grounds. First, the Order is unlawful and unreasonable because it misapplies the decision of the New Hampshire Supreme Court in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) ("*Pennichuck*"), and ignores other relevant precedent in determining the effective date for the revisions to FairPoint's CCL tariff. Second, the Order's conclusion that the Commission should not exercise equitable authority to set October 10, 2009 as the effective date of the CCL tariff revisions is unreasonable and an unlawful abuse of discretion.

[10] The January 20 Order also correctly rejected FairPoint's assertion that the revisions to the CCL tariff could only be implemented simultaneously with FairPoint's desired increase to the Interconnection Charge. January 20 Order at 13-16. The Commission subsequently granted the Competitive Carriers' motion to dismiss the Interconnection Charge portion of the case. *See* Order No. 25,327 (Feb. 3, 2012) at 17.

A. The Order Misapplies or Ignores Relevant Precedent and Thus Is Unlawful and Unreasonable.

The Competitive Carriers argued in their briefs that the Commission had broad statutory authority to deal with matters within its jurisdiction and thus had the power to establish October 10, 2009 as the effective date for the changes to FairPoint's CCL tariff. *See, e.g.*, AT&T Brief at 4-5; BayRing Brief at 5. The January 20 Order rejects the notion of such authority, relying on the prohibition on retroactive ratemaking set forth in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) ("*Pennichuck*"). *See* January 20 Order at 11-12. The order misapplies *Pennichuck* and overlooks another New Hampshire Supreme Court case[11] involving a more analogous situation. As a result, this portion of the Order should be reconsidered.

A close examination of *Pennichuck* shows that the New Hampshire Supreme Court's concerns about retroactive ratemaking are not applicable here. In *Pennichuck*, the Court considered the propriety of a Commission order that denied portions of a utility's request for temporary rates while it also evaluated the utility's request for a permanent rate increase. 120 N.H. at 563. The utility had sought approval for temporary rates that would be effective for bills issued on or after January 31, 1979, but the Commission allowed the temporary rates to apply only to bills issued on or after April 30, 1979, the date of its order on the temporary rate issue. *Id.* at 564. The Court found that the Commission could not have lawfully established the January 31 effective date sought by the utility because the use of that date would have allowed customers to be billed at the higher, temporary rates for a time period before the utility had sought any rate increase. *Id.* at 565.[12]

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[11] That case is *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980).

[12] The utility billed its customers on a staggered quarterly basis, and it filed its request for a permanent rate increase on December 29, 1978. *See* 120 N.H. at 563. As a result, if the higher temporary rate applied to bills issued on or after January 31, 1979, some customers would be charged a higher rate for water they had already used (e.g., in November or December 1979) prior to the date of the rate increase request. *See id.*

The Court found that utility customers "have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, *at least until such time as the utility applies for a change.*" *Id.* at 566 (emphasis added). The Court also found that allowing a rate increase to take effect as of a date before the utility even had a rate change request on file would be "retroactively altering the law and the established contractual agreement between the parties." *Id.*

The situation with FairPoint's CCL tariff changes differs substantially from the tariff change at issue in *Pennichuck* for at least two reasons. Either is sufficient to distinguish it from *Pennichuck.*

First, under the reasoning in *Pennichuck*, a retroactive tariff change is proper as long as it does not become effective as of a date prior to the date that "the utility applies for a change." 120 N.H. at 566. This allows customers to have notice that a different rate may be imposed. Indeed, after the Court remanded the case, the Commission described two key holdings of *Pennichuck* as follows: 1) "no utility can collect increased rates for service rendered prior to the filing of a permanent rate request"; and 2) "rates are a contracting obligation as well as a legal obligation between the consumer and the utility and as such notice is important if either is attempting an alteration of that relationship." *In re Pennichuck Water Works*, DR 79-3, Sixth Supplemental Order No. 14,681, 66 NH PUC 30, 31 (Jan. 23, 1981).

In the instant docket, FairPoint filed the revised CCL tariff pages on September 10, 2009, and expressly indicated on the tariff pages and in the cover letter accompanying them that the changes were to become effective on October 10, 2009. That date is exactly the effective date advocated by the Competitive Carriers, and it is a month after FairPoint's submission of the revised tariff pages. Thus, an effective date of October 10, 2009 for tariff changes filed a month

earlier does not conflict with *Pennichuck*.[13] Moreover, to the extent that *Pennichuck*'s concern about retroactive ratemaking was motivated by lack of notice to an affected party, the facts in *Pennichuck* are very different than those in this docket. Given that FairPoint made the tariff filing, it was certainly aware that the tariff revisions would alter the terms of its relationship with its existing switched access customers. In addition, the customers affected by the tariff change, i.e., customers such as the Competitive Carriers, were most certainly aware of the tariff filing as they had been seeking and anxiously awaiting the tariff change eliminating the unfair CCL charges. Thus, the notice/due process issues underpinning the *Pennichuck* decision are not present here.

Second, it is clear that *Pennichuck*'s concern about retroactive ratemaking applies only to lawful contracts or tariffs. The decision repeatedly relies on an earlier New Hampshire Supreme Court decision addressing the retroactive application of legislative acts: *Geldhof v. Penwood Associates*, 119 N.H. 754 (1979). *See Pennichuck*, 120 N.H. at 565, 566 (discussing *Geldhof*). In *Geldhof*, the Court rejected the argument that a newly-enacted statute requiring landlords to pay interest on tenant security deposits was applicable to a lease entered into prior to the passage of the statute. 119 N.H. at 754. The Court affirmed the principle that, "when corporations or citizens *lawfully contract* to exchange rights and obligations, they may have confidence that those rights and obligations will not subsequently be disturbed." *Id.* at 755 (emphasis added).

Under New Hampshire law, the Commission has the obligation to ensure that a utility charges only just and reasonable rates. RSA 378:7. The Commission first found in March 2008 that the then-existing CCL tariff constituted an unjust and unreasonable rate (*see* March 2008

[13] The Commission's 1981 supplemental order in *Pennichuck* – issued nearly two years after the utility filed its request for temporary rates – made those rates effective for all services rendered by the utility after January 31, 1979. 66 NH PUC at 31. That is, the temporary rates ultimately applied to the two-year period preceding the order approving those rates. This is comparable to the Competitive Carriers' request here.

Order at 31), it reiterated that finding in the Order *Nisi* (Order *Nisi* at 2), and it has repeated it multiple times subsequently. *See* May 2011 Order at 7; October 2011 Order at 16, 17; January 20 Order at 11. A tariff imposing rates that have been held to be unjust and unreasonable rates cannot also be a lawful tariff, and FairPoint cannot be allowed to continue to impose charges under such a tariff. It thus would not be improper "retroactive ratemaking" for the Commission to put a stop to FairPoint's unjust and unreasonable billing practices as of the earliest date proposed by the parties: i.e., October 10, 2009.

Moreover, the Order's reliance on *Pennichuck* is baffling, because it fails to mention another New Hampshire Supreme Court decision – *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980) ("*Granite State*") – that involves a more analogous procedural situation and that the Commission relied on earlier in this docket. The Competitive Carriers that submitted briefs on the CCL effective date issue in December 2011 each relied on *Granite State* in those briefs. *See* BayRing Brief at 5; AT&T Brief at 4-5; Sprint Brief at 4-5.

Granite State involved the second time that the Court had reviewed the Commission's actions in that particular rate case. The Commission originally issued an order in May 1978, granting the utility a $913,912 annual increase in its permanent rates. 120 N.H. at 538. On appeal from that order, the Supreme Court held that the Commission's inclusion of certain items in the utility's rate base was improper and remanded the matter to the Commission to deduct those items from the rate base and establish a new rate. *Legislative Utility Consumers' Council v. Granite State Electric Co.*, 119 N.H. 359 (1979). On remand, the Commission approved new rates embodying the rate reduction ordered by the Court, and it ordered the utility to refund charges collected under the improper, higher rates that the Commission had previously approved. 120 N.H. at 538.

In the second appeal, the Court upheld the Commission's ability to order the refund, finding that the higher rates established by the May 1978 order did not become final at that time because the appeal process had yet to play out. *Id.* As a result, the situation did not involve the possibility of retroactive ratemaking. *Id.* at 539. The Court also stated that the Commission's "broad statutory power" gave it the authority to order a refund of "revenues collected under rates authorized and approved by the PUC but later found ... to have been collected under improper rates." *Id.* at 539, 540.[14] Comparable circumstances exist here.

Indeed, in the March 2008 Order, the Commission relied on *Granite State* as support for the proposition that "refunds are an appropriate means for providing restitution for improperly applied charges" and described the case as holding that the Commission had "inherent power to award restitution if one has been unjustly enriched at the expense of another." March 2008 Order at 32. The Commission also found that Verizon would owe restitution to customers who had been billed CCL charges inappropriately and that the extent of such restitution would be determined in a later phase of the case. *Id.* at 32-33.

The January 20 order makes, at best, oblique reference to *Granite State* through its refusal "to unwind an unjust enrichment" that occurred here. January 20 Order at 11. The order certainly does not explain why the Commission relied on *Granite State* as applicable precedent requiring Verizon to refund improper CCL charges, but then failed to acknowledge it in the January 20 Order as authority to remedy FairPoint's imposition of the same inappropriate charge. The Competitive Carriers are merely seeking in 2012 what the Commission promised in 2008.

[14] *Cf. Clapp v. Goffstown School District*, 159 N.H. 206, 211 (2009) (stating that recovery of unjust enrichment may be available to contracting parties "where the contract was breached, rescinded, or otherwise made invalid").

Rehearing of this portion of the January 20 Order thus is appropriate for two reasons. The order's reliance on *Pennichuck* is "mistakenly conceived," and the order appears to have "overlooked" the applicability of *Granite State*. *Dumais v. State*, 118 N.H. 309, 311 (1978).

B. The Commission's Refusal to Exercise Its Equitable Authority Is Unreasonable.

The Competitive Carriers argued in their briefs that the Commission, in several prior cases, had exercised what could be viewed as equitable powers to craft an appropriate remedy where it had determined that a utility had been charging improper rates. *See* AT&T Brief at 4-5; BayRing Brief at 4-5; Sprint Brief at 4.[15] The January 20 Order, however, found that any use of equitable authority to set October 10, 2009, as the effective date of the CCL tariff revisions was inappropriate for two reasons: 1) FairPoint was entitled to ask for a hearing on its tariff revisions (and it did so); and 2) the Commission's decision on whether those tariff revisions were compliant was delayed by circumstances beyond its control. January 20 Order at 12. Neither reason is convincing, and thus this aspect of the order is unreasonable. Moreover, the order appears to be based, in part, on a misconstruction of record facts regarding the delays in this docket.

Shortly before FairPoint submitted the required changes to its CCL tariff in September 2009, it also made a conditional request for hearing. *See* FairPoint Conditional Request (filed Aug. 28, 2009). FairPoint then revealed, more than two years later, that it actually did not want a hearing. Although FairPoint asserted in November 2011 that the CCL issue involved only questions of "tariff interpretation and law" with no need for fact finding (FairPoint Response to Motion for Hearing at 3 (filed Nov. 21, 2011)), it has provided no explanation of what had

[15] The New Hampshire Supreme Court approved the Commission's actions in each case. *See Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980); *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394 (1961).

changed since it requested a hearing in August 2009.[16] The Commission cautions FairPoint elsewhere in the January 20 Order about "intentionally trying to delay a decision through procedural maneuvers" (January 20 Order at 8), but that appears to be precisely what happened with FairPoint's "first we want a hearing; now we don't" position regarding the CCL tariff revisions. FairPoint's procedural maneuvering has prejudiced the Competitive Carriers by inappropriately subjecting them to improper CCL charges over a prolonged period and by delaying a final resolution of this issue. It is unreasonable for the Commission to allow FairPoint to profit from its prejudicial procedural posturing.

The conclusion in the January 20 Order that any decision on the CCL tariff revisions was delayed due to "circumstances beyond the Commission's control" (January 20 Order at 12) also, respectfully, does not bear the weight of scrutiny. Although the Commission obviously had no control over FairPoint's decision to file for bankruptcy, the procedural history of this docket shows that the Commission's actions or inactions otherwise controlled the pace of this docket.

FairPoint filed its revised CCL tariff pages on September 10, 2009. *See* FairPoint Tariff Filing. Those revisions involved only two pages of the tariff and together comprised – at most – the equivalent of three sentences, or one-third of a page of text. *See id.* (Tariff No. 85, Section 5, first revision of pp. 1 and 4).[17] The revisions also altered only the three tariff sections that the Order *Nisi* specifically directed FairPoint to revise. *Compare id. with* Order *Nisi* at 2. Nonetheless, despite urging from BayRing and AT&T in early October 2009[18] to implement the

[16] It is doubtful that FairPoint even wanted a hearing on the specific issue of whether its CCL tariff revisions complied with the Order *Nisi*. FairPoint presumably believed its tariff changes were compliant when it filed them, and it asked for a hearing only if the Commission did not intend to allow it to make up for lost CCL revenue through other means. *See* FairPoint Conditional Request at 6.

[17] FairPoint subsequently renumbered its tariff, so the relevant pages are now designated as the First Revision of pages 1 and 4 of Section 5 of Tariff No. 3. *See* January 20 Order at 19.

[18] BayRing and AT&T sought an expedited decision from the Commission in a motion dated October 2, 2009 regarding the effectiveness of the CCL tariff revisions. *See* Joint Motion for Clarification and Expedited Relief.

CCL tariff changes immediately due to published reports of FairPoint's impending bankruptcy (which the carriers indicated might delay resolution of this docket), the Commission failed to review these three sentences for compliance with the instruction in the Order *Nisi* over the next several weeks.

Instead of reviewing the CCL tariff changes, on October 16, 2009, the Commission suspended the procedural schedule in the case to consider the parties' various motions regarding the effect of the Order *Nisi*. *See* Oct. 16, 2009 Letter of Debra A. Howland. Shortly thereafter, on October 26, 2009, FairPoint filed for bankruptcy, and the Commission issued a General Scheduling Order, at FairPoint's request, staying various dockets involving FairPoint (including this docket) for a period of several weeks. *See* Nov. 10, 2009 Letter of Debra A. Howland. However, the Commission did not revisit the limited stay of this docket before FairPoint emerged from bankruptcy 14 months later, in January 2011.

Although the existence of the bankruptcy may have placed some bounds on the Commission's freedom to conduct this docket, the Commission certainly had the authority to proceed with the case, including review of the CCL tariff revisions. *See* 11 U.S.C. § 362(b)(4) (creating exception to bankruptcy stay for proceedings to enforce regulatory powers of government unit); *In re Public Service Co.*, 98 B.R. 120, 126 (Bankr. D.N.H. 1989) (allowing Commission to continue "ordinary and routine regulatory oversight and supervision" of bankrupt utility, including certain ratemaking functions). The January 20 Order's statement about the circumstances causing delay in this docket thus appears to overlook certain aspects of the record and should therefore be reconsidered. *See Dumais*, *supra*, 118 N.H. at 311.

Since that motion expressly stated that the two carriers accepted the revisions as effectuating the Commission's intent in the Order *Nisi* (*id.* at 3 n.2), the Commission simply would have had to look over the revisions and concur.

All the while that any decision on the CCL tariff was on the back burner, FairPoint continued to bill its access customers, including the Competitive Carriers, charges under a tariff that the Commission had repeatedly found to be unjust and unreasonable, and that it had ordered FairPoint to revise. Although the Competitive Carriers had no control over the delay in the Commission's consideration of the CCL tariff changes, they are the ones who the Commission apparently expects to pay the price for more than two years of regulatory delay, since FairPoint either has been paid or expects to be paid for all the unlawful CCL charges it has billed the Competitive Carriers during this period.[19] This result is unreasonable and therefore the January 20 Order should be reconsidered. In addition, as explained below, the order should be reconsidered because it conflicts with applicable case law.

The New Hampshire Supreme Court found that the Commission acted unreasonably and abused its discretion when it required a utility to wait more than two years before considering its request for a rate increase. *Appeal of Gas Service, Inc.*, 121 N.H. 602, 603 (1981) ("*Gas Service*"). It is equally unreasonable and an abuse of discretion for the Commission to subject a utility's customers, such as the Competitive Carriers, to a comparable waiting period for rate relief they have been seeking for several years, by finding that the CCL tariff revisions can only go into effect more than two years after the Commission mandated that the revisions be made. In light of the holding in *Gas Service,* the Commission should reconsider this aspect of the January 20 Order.

[19] According to FairPoint, its 2010 revenue from the subset of CCL charges at issue in this case was approximately $2.9 million. Supplemental Testimony of Michael T. Skrivan at 11 (dated Nov. 3, 2011, but filed Dec. 22, 2011). To the extent that any of the Competitive Carriers have not paid the improper CCL charges due to the pendency of this docket, it is likely that FairPoint may claim that the carrier is also liable for late payment charges of approximately 18 percent annually under FairPoint's tariff. See N.H.P.U.C. Tariff No. 3, page 1, Section 4.1.2(B).

CONCLUSION

Based on the foregoing, the Competitive Carriers respectfully urge the Commission to reconsider its January 20, 2012 Order and issue an order holding that the revisions to FairPoint's CCL tariff went into effect on October 10, 2009.

February 21, 2012

Respectfully Submitted,

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Certificate of Service

I hereby certify that on this 21st day of February, 2012, I have forwarded a copy of the foregoing Motion either by first class mail, postage prepaid, or by electronic mail to the parties listed on the Service List for this docket.

Susan S. Geiger

853930_1

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

COMPETITIVE CARRIERS' OBJECTION TO FAIRPOINT'S MOTION FOR REHEARING AND/OR RECONSIDERATION OF ORDER NOS. 25,319 AND 25,327

The Competitive Carriers[1] object to FairPoint's motion for rehearing and/or reconsideration of Order Nos. 25,319 and 25,327 (the "Motion").

FairPoint's Motion fails to meet the standard for rehearing as it (1) consists largely of impermissible reargument of points the Commission has previously considered and rejected, and (2) purports to seek rehearing or reconsideration of orders issued previously in this docket long after the statutory deadline in RSA 541:3 for seeking rehearing of those orders has passed. To the minor extent that FairPoint's Motion advances new arguments, those arguments are legally or factually incorrect. The Commission's decisions to require FairPoint to cease imposing the carrier common line ("CCL") charge when no FairPoint common line is used and to dismiss FairPoint's proposal to increase a long-dormant Interconnection Charge as violative of the switched access rate caps established as a matter of federal law in the *Connect America Fund Order*[2] were appropriate and based on correct statements of fact and interpretations of law.

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[1] Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business; Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc. (a Level 3 company).

[2] *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 801 & Fig. 9 (released Nov. 18, 2011).

I. INTRODUCTION AND BACKGROUND[3]

This docket began on April 28, 2006, when BayRing filed a Petition requesting that the Commission investigate Verizon's practice of billing CCL charges for calls that did not involve a Verizon end user or a Verizon-provided local loop. On June 23, 2006, the Commission issued an Order of Notice announcing its determination that BayRing's complaint warranted further investigation and stating that, if the challenged interpretation of the CCL tariff were found reasonable, it would investigate whether prospective modifications were warranted. Over the next 21 months, the matter was fully litigated, including discovery, Staff-led technical sessions, extensive evidentiary submissions, a multi-day evidentiary hearing in July 2007, and post-hearing briefs from multiple parties.

On February 25, 2008, the Commission approved Verizon's sale of its network and franchise to FairPoint. *In re Verizon New England et al. – Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823 (Feb. 25, 2009). In that order, the Commission expressly approved, and made a condition of the sale, FairPoint's agreement "to honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis." *Id.* at 75. As part of its transaction with Verizon, FairPoint adopted Verizon's New Hampshire tariffs.

On March 21, 2008, the Commission entered Order No. 24,837 in this docket, expressly disagreeing with Verizon's contention that the CCL rate element is purely a contribution rate element. Instead, the Commission found, based on the record before it, that the CCL rate element was intended to, and in fact, does recover a portion of the cost of the local loop (or

[3] The Competitive Carriers note that the background provided herein is not intended to be comprehensive, but instead highlights those events relevant to the Commission's consideration of the current objection.

common line) and determined that Verizon's imposition of CCL charges on calls not involving a Verizon end user or Verizon-provided local loop was impermissible. Order No. 24,837 ("March 2008 Order") at 31, 32. The Commission ordered Verizon to cease billing CCL charges for such calls. *Id.* at 33. Accordingly, Verizon's practice of billing CCL charges for calls not involving a Verizon end user or Verizon-provided local loop was precluded as of March 21, 2008.[4] The Commission also found that Verizon owed refunds to customers who had been billed the inappropriate CCL charges and that the extent of those refunds would be determined in a later phase of the case. March 2008 Order at 32-33.

Verizon sought rehearing and/or reconsideration of the March 2008 Order on March 28, 2008. Although Verizon raised several grounds for reconsideration of the March 2008 Order, it did not challenge the Commission's factual finding that the CCL charge was intended to, and does, recover a portion of the cost of the local loop.

On April 21, 2008, FairPoint filed a Motion for Rehearing and Petition to Intervene. In its Petition to Intervene, FairPoint agreed to take the record in the docket "as is." Like Verizon, FairPoint did not raise as a basis for rehearing the Commission's finding that the CCL charge recovered part of the cost of the local loop.

On August 8, 2008 the Commission issued Order No. 24,886 granting FairPoint's Petition to Intervene but denying rehearing of the March 2008 Order.

Verizon and FairPoint subsequently appealed to the New Hampshire Supreme Court. On May 7, 2009, the Court issued its order, which was confined to the issue of the Commission's interpretation of FairPoint's tariff. *Appeal of Verizon New England, Inc.*, 158 N.H. 693 (2009). The Court disagreed with the Commission's interpretation of whether the then-existing tariff

[4] FairPoint's ability to impose the CCL charge on calls that do terminate over a FairPoint local loop has never been at issue in this docket.

allowed FairPoint to apply CCL charges when no FairPoint common line was involved. The Court stated, however, that if the CCL tariff should be amended, such amendment should occur through the regulatory process rather than by an order of the Court. *Id.* at 700.

On August 11, 2009, the Commission commenced the regulatory process suggested by the Supreme Court to amend the CCL tariff by issuing Order No. 25,002 on a *nisi* basis ("Order *Nisi*"). The Order *Nisi* noted that the original order of notice in this proceeding indicated that, if Verizon's interpretation of the tariff prevailed, then the Commission would decide whether any prospective modification to the tariff was appropriate. Order *Nisi* at 2. The Commission reiterated that, based upon the record in this proceeding, the tariff should permit imposition of CCL charges only when a carrier uses a FairPoint common line. *Id.* The Commission then ordered FairPoint to make specific modifications to the language of the CCL tariff to clarify that it would "charge CCL only when a FairPoint common line is used in the provision of switched access services." *Id.* The Commission also ordered FairPoint to file the revised tariff pages within 30 days. *Id.* at 3.

The Order *Nisi* further stated that it would become "effective September 10, 2009 [unless] (sic) the Commission provides otherwise in a supplemental order issued prior to the effective date." *Id.* The Commission did not issue such a supplemental order prior to the effective date.

On August 28, 2009, FairPoint filed Comments and a Conditional Request for Hearing ("Conditional Request"), raising a variety of challenges to the Order *Nisi*. FairPoint filed the revised CCL tariff pages, in compliance with the Order *Nisi*, on September 10, 2009, accompanied by a voluntary submission of other unrelated tariff pages through which it sought to increase, from zero to $0.010164 per minute, a long-dormant Interconnection Charge. The

submission of these additional tariff changes was not mandated, authorized, or invited by the Commission. FairPoint's cover letter, as well as the tariff pages themselves, specified an effective date of October 10, 2009 for elimination of the CCL and the increase to the Interconnection Charge. *See* Sept. 10, 2009 Letter of Kevin M. Shea and attachments.

The Commission then issued Order No. 25,016 on September 23, 2009, establishing a procedural schedule for investigation, submission of testimony, and a hearing on FairPoint's proposed Interconnection Charge. Consistent with the schedule that the Commission established in that order, FairPoint submitted the pre-filed direct testimony of Michael T. Skrivan on September 28, 2009. Substantial parts of Mr. Skrivan's testimony addressed the development of the Interconnection Charge proposal and how the Interconnection Charge rate was set. Little or none of that testimony addressed how the language of FairPoint's CCL tariff amendment proposal complied with the Order *Nisi.*

On October 2, 2009, BayRing and AT&T filed a Joint Motion for Clarification and Expedited Relief ("Motion for Clarification") requesting that the CCL tariff changes be implemented immediately due to published reports of FairPoint's impending bankruptcy, which, if true, could further delay resolution of the docket. On October 12, 2009, FairPoint filed a Motion for Rehearing on the Order *Nisi* and for Conditional Withdrawal of Tariff ("Rehearing/Withdrawal Motion"). In particular, FairPoint sought to withdraw the tariff pages it filed on September 10, 2009, including its Interconnection Charge proposal, and have them treated as illustrative. *Id.* at 9.

On October 16, 2009, the Commission issued a letter suspending the procedural schedule established in the September 23 Order while it considered the various motions pending before it.

FairPoint filed for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code on October 26, 2009. *In re FairPoint Communications, Inc. et al.*, Case No. 09-16335 (S.D.N.Y.). Shortly thereafter, in response to FairPoint's request, the Commission issued a General Scheduling Order staying, for several weeks, the filing requirements and deadlines in numerous dockets, including this one, to allow FairPoint to concentrate on its bankruptcy restructuring efforts. *See* Nov. 10, 2009 Secretarial Letter of Debra A. Howland. This docket remained inactive while the bankruptcy proceeded. FairPoint emerged from bankruptcy on January 24, 2011.

Several months later, on May 4, 2011, in response to requests to reactivate the docket, the Commission issued a Procedural Order and Supplemental Order of Notice, in which it denied BayRing and AT&T's Motion for Clarification and partially granted and partially denied FairPoint's Conditional Request and its Rehearing/Withdrawal Motion. Order No. 25,219 (May 4, 2011) ("May 2011 Order"). The Commission stated that it would not re-litigate the purpose or propriety of the CCL charge and reiterated its finding from the March 2008 Order that the CCL charge is not a contribution rate element, but rather, recovered a portion of the common line charge and thus was appropriately charged only when a FairPoint common line was used. May 2011 Order at 7. The Commission noted that this conclusion "was not addressed or overturned by the Supreme Court, which based its analysis on the terms of the tariff alone." *Id.* The Commission then expressly stated that it "will not entertain further argument about this conclusion." *Id.*

FairPoint did not challenge the May 2011 Order by filing a motion for rehearing in accordance with RSA 541:3. Instead, FairPoint filed a Motion to Certify Interlocutory Transfer Statement ("Motion to Certify") and Interlocutory Transfer without Ruling. The Motion to

Certify requested that the Commission transfer three questions of law to the New Hampshire Supreme Court, including the question of whether it was a settled finding of fact in this proceeding that the CCL charge does not contribute to FairPoint's common cost of service. Interlocutory Transfer without Ruling at 3.

The Competitive Carriers filed a joint motion for rehearing, reconsideration and clarification relative to the May 2011 Order on June 3, 2011 ("Joint Motion"). FairPoint filed an objection to the Joint Motion on June 10, 2011.

The Commission denied FairPoint's Motion to Certify and partially granted the Joint Motion on October 28, 2011. Order No. 25,283 (Oct. 28, 2011) ("October 2011 Order"). In denying FairPoint's Motion to Certify, the Commission held that it was not barred from restating its conclusion about the purpose or intent of the CCL charge based upon the existing record because "the Supreme Court has done nothing to disturb that conclusion." October 2011 Order at 15. The Commission emphasized that, although there would be no relitigation of the issue of whether the CCL rate element recovers costs of the local loop (or common line) and the Commission's determination that FairPoint may not impose a CCL charge when no FairPoint common line is involved, FairPoint was free to raise other arguments regarding whether it needed contribution from other rate elements to meet its financial needs.[5] October 2011 Order at 17.

In ruling on the Joint Motion, the Commission amended the May 2011 Order and rejected FairPoint's attempted withdrawal of the revised CCL tariff pages it had submitted to comply with the Order *Nisi*. The Commission determined that because the proposed CCL revisions were submitted to comply with a Commission order, FairPoint did not have the right unilaterally to

[5] Notwithstanding the Commission's invitation, FairPoint has not provided any evidence on this issue. Instead, contrary to the Commission's findings, rulings, and directives, it has continued to maintain that the CCL charge is purely a contribution rate element.

withdraw them. October 2011 Order at 35. The Commission also found that these tariff revisions were "suspended in application and effect" and subject to further proceedings. *Id.* at 31, 35. In addition, the Commission affirmed its earlier decision to allow the Interconnection Charge amendments to be withdrawn and treated as illustrative, finding that FairPoint's Interconnection Charge proposal was a voluntary filing. *Id.* FairPoint did not move for a rehearing of any aspect of the October 2011 Order within 30 days of that order as required by RSA 541:3.

On October 28, 2011, the Commission issued a second order (Order No. 25,284) which established an expedited procedural schedule for the docket including testimony, data requests, a technical session in lieu of further discovery in mid-January 2012, and an evidentiary hearing after that on a date to be determined. The Order further indicated that the Commission would hear arguments concerning whether changes to FairPoint's tariffs should be "reconciled" to a prior date, such as the date of the original submissions in 2009, the date when FairPoint emerged from bankruptcy (January 24, 2011), the date of the Commission's May 2011 order, or some other appropriate date. Order No. 25, 284 (Oct. 28, 2011) at 2.

The Competitive Carriers then moved on November 10, 2011, for an expedited hearing on the issue of the effective date of the CCL tariff revisions. In support of their motion, the Competitive Carriers noted that the Commission's delays in considering modifications to FairPoint's CCL tariff had caused years of financial uncertainty, as FairPoint had continued to bill the Competitive Carriers and other access customers CCL charges when no FairPoint common line was being used. Competitive Local Exchange Carriers' Motion for Hearing (Nov. 10, 2011) at 2-3. FairPoint's response to the motion agreed that the CCL tariff issue involved only questions of "tariff interpretation and law" and that the effective date of the CCL tariff

revisions was ripe for adjudication by the Commission. FairPoint Response to Motion for Hearing (Nov. 21, 2011) at 3 ("FairPoint Response"). It also stated that no hearing was needed on the CCL issue and that the Commission should move straight to briefing on the issue. *Id.* at 2. As a result, the Commission issued an order on November 30, 2011, in which it concluded, in accordance with the positions of both sides, that no hearing was needed on the CCL issue. Order No. 25,295 (Nov. 30, 2011) at 4 ("November 2011 Order"). It also directed the parties to brief two questions:

> 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?

Id.

On November 30, 3011, FairPoint filed tariff pages that were nearly identical to those filed in September of 2009. Two weeks later, the Commission rejected that filing, without prejudice, to avoid the statutory timing constraints of RSA 378:6. Order No. 25, 301 (Dec. 14, 2011) at 2-3. The Commission also noted that the amendments to the CCL tariff and the Interconnection Charge were already before the Commission for determination. Further, the Commission observed that FairPoint had acquiesced to the procedural schedule and even sought an extension of time to better prepare its case. *Id.* at 3. FairPoint did not file a motion for rehearing of Order No. 25,301 in accordance with RSA 541:3.

On December 19, 2011, AT&T, BayRing, FairPoint, and Sprint submitted briefs responding to the two questions raised in the Commission's November 2011 Order.

On December 22, 2011, FairPoint again filed tariff pages substantively identical to its November 30 filing, which the Commission had rejected just days before in Order No. 25,301. The Competitive Carriers responded with letters dated December 23, 2011 and December 28, 2011 requesting that the Commission declare FairPoint's most recent tariff filing null and void. In addition, on January 9, 2012, the Competitive Carriers filed a Motion to Dismiss or for Summary Judgment on the Interconnection Charge Issue, and a Motion to Suspend or Modify Procedural Schedule and for Expedited Decision. FairPoint filed an Objection to both Motions on January 18, 2012.

On January 20, 2012, the Commission issued Order No. 25,319 ("January 20 Order") which, among other things, found that the revisions to FairPoint's CCL tariff, which were originally submitted on September 10, 2009, were sufficient to comply with the Commission's prior directive (in the Order *Nisi*) to amend the tariff. January 20 Order at 9-10. The Commission concluded that as a matter of administrative efficiency, rather than require FairPoint to re-file tariff pages with a new effective date, those revised tariff pages would take effect on January 21, 2012, the effective date of the tariff pages filed by FairPoint on December 22, 2011. *Id.* at 19. The January 20 Order also rejected FairPoint's assertion that the revisions to the CCL tariff could only be implemented simultaneously with FairPoint's desired increase to the Interconnection Charge. *Id.* at 13-16. The Competitive Carriers moved for rehearing of portions of this Order, contending that the effective date of the elimination of the CCL should have been October 10, 2009. FairPoint also has moved for reconsideration, to which the Competitive Carriers hereby object.

On February 3, 2012, the Commission issued Order No. 25, 327 granting the Competitive Carriers' Motion to Dismiss ("February 3 Order"). FairPoint has moved for rehearing of this Order, to which the Competitive Carriers hereby object.

II. STANDARD OF REVIEW

A. The Commission Will Not Rehear Prior, Rejected Arguments.

The Commission will not grant a rehearing or reconsideration on the basis of a motion that merely rehashes prior arguments that the Commission has rejected. *See, e.g.,* October 2011 Order at 28; *In re Rural Telephone Companies — CLEC Registrations within RLEC Exchanges,* DT 10-183, Order Denying Motion for Rehearing, Order No. 25,291, at 9-10 (Nov. 21, 2011); *In re Comcast Phone of New Hampshire — Application for Authority to Serve Customers in the TDS Service Territories,* DT 08-013, Order Denying Motion for Rehearing, Order No. 24,958 at 7 (Apr. 21, 2009). "A successful motion does not merely reassert prior arguments and request a different outcome." October 2011 Order at 28.

Yet, that is precisely what the vast majority of FairPoint's motion does. FairPoint has rehashed numerous arguments that it or Verizon, its predecessor, has previously made but that did not obtain the results FairPoint desired. The following chart outlines these instances:

FairPoint Contention	**Where Decided Previously**
Review of the CCL charge is outside the scope of this docket (Motion, Part III.A)	Procedural Order and Supplemental Order of Notice, Order No. 25,219, at 7-8 (May 4, 2011). The Commission issued an Order of Notice on these issues, but for administrative convenience did not assign a new docket number.

FairPoint Contention	Where Decided Previously
The record does not support the determination that the CCL recovered part of the cost of the common line (Motion, Part III.A.1)	Procedural Order and Supplemental Order of Notice, Order No. 25,219, at 7 (May 4, 2011). The Commission reiterated its earlier determination made in Order No. 24,837 (March 21, 2008), based on the record before it, that the CCL charge is not a contribution rate element. The Commission further determined that it "will not re-litigate the purpose or propriety of the CCL charge... and will not entertain further argument about this conclusion." Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification, Order No. 25,283, at 15-16 (Oct. 28, 2011). "The Commission, as the trier of fact, heard the testimony and read the arguments of the parties and rendered a finding on an issue in dispute in the case."

FairPoint Contention	Where Decided Previously
The Commission prejudged certain facts and denied FRP a hearing (Motion, Part III.A.2)	Procedural Order and Supplemental Order of Notice, Order No. 25,219, at 7 (May 4, 2011). The Commission reiterated its earlier determination made in Order No. 24,837 (March 21, 2008), based on the record before it, that the CCL charge is not a contribution rate element. The Commission further determined that it "will not re-litigate the purpose or propriety of the CCL charge... and will not entertain further argument about this conclusion." Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification, Order No. 25,283, at 16 (Oct. 28, 2011). "The Commission, as the trier of fact, heard the testimony and read the arguments of the parties and rendered a finding on an issue in dispute in the case." Order on Tariff Change to Carrier Common Line Charge, at 8 (Jan. 20, 2012). "The Commission now rules on the CCL portion of the tariff and its effective date without a hearing **pursuant to FairPoint's specific request that a hearing not be held.**" (Emphasis added.)
The Commission's failure to approve the Interconnection Charge in conjunction with eliminating the CCL is confiscatory (Motion, Part III.B)	Order on Motions for Rehearing and Motion to Intervene, Order No. 24,886 at 9 (Aug. 8, 2008). "The takings clauses of the state and federal constitutions do not require us to indemnify Verizon for failing to revise its tariff to the extent this was necessary to compensate the company for certain wholesale services provided in connection with calls that involve neither a Verizon end-user nor a Verizon local loop."

FairPoint Contention	Where Decided Previously
The Commission is not permitted to act on less than the entire filing (Motion, Part III.C)	Order on CLEC Motion for Hearing, Order No. 25,295, at 3-4 (Nov. 30, 2011). "Because parties on both sides of the instant matter agree that no further discovery, technical sessions, or testimony are needed regarding: (1)whether the changes to the CCL tariff proposed by FairPoint on September 10, 2009 comply with the Commission's order; and (2) the effective date of the changes to the CCL tariff, we conclude that addressing those questions in a separate and more expedited process is appropriate." Order Rejecting Tariff Filing Without Prejudice, Order No. 25,301, at 1-2 (Dec. 14, 2011). "[I]n Order No. 25,283 (October 28, 2011, the Commission...concluded that the portion of the tariff revisions relating to the CCL charge would be accepted, but would not take effect...Also by that order, the Commission affirmed its decision to allow the portion of the tariff relating to the Interconnection Charge to be withdrawn and treated as illustrative."

FairPoint Contention	Where Decided Previously
The Commission erred because it did not consider FairPoint's December 22nd tariff filing (Motion, Part III.D)	Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification, Order No. 25,283, at 31 (Oct. 28, 2011). "[T]he portion of the tariff filing covering FairPoint's interconnection charge is withdrawn and treated as illustrative...The portion of the filing covering the CCL is accepted and not considered withdrawn, but we conclude that it did not go into effect because the properly requested hearing on the matter has not been held and the Commission has yet to determine if the changes proposed by FairPoint conform to the requirements of the Commission as stated in Order No. 25, 002. As a result, the change to the CCL tariff remains filed, but suspended in application and effect." Order Rejecting Tariff Filing Without Prejudice, Order No. 25,301, at 1-2 (Dec. 14, 2011). "[I]n Order No. 25,283 (October 28, 2011, the Commission...concluded that the portion of the tariff revisions relating to the CCL charge would be accepted, but would not take effect...Also by that order, the Commission affirmed its decision to allow the portion of the tariff relating to the Interconnection Charge to be withdrawn and treated as illustrative."

The most egregious example of FairPoint's continued regurgitation of issues previously decided in a manner adverse to FairPoint is its repeated attempts to claim that the CCL charge is purely a contribution element. The Commission has admonished the parties that it would not relitigate its determination - a determination based on the record of a fully litigated adjudicative proceeding - that the CCL element was not a pure contribution element in at least two orders:

May 2011 Order at 7, and October 2011 Order at 3, 18.[6] Moreover, the Commission has expressly ordered that it "will not entertain any further argument about this conclusion." May 2011 Order at 7.

In an attempt to relitigate the issue yet again, FairPoint has blatantly ignored the Commission's orders by including in its Motion arguments and factual allegations (which the Commission has previously considered and expressly rejected) about the CCL charge. The Commission should not tolerate FairPoint's continued disobedience of its orders.

Because all of FairPoint's arguments have previously been considered and rejected, the Commission need not consider them again. FairPoint's Motion should be denied.

B. The Time for FairPoint to Seek Rehearing of Numerous Issues Raised in its Motion Has Long Passed.

Numerous issues on which FairPoint purports to seek rehearing or reconsideration were decided by the Commission in earlier orders in this docket. The statutory 30-day deadline established by RSA 541:3 for FairPoint to seek rehearing or reconsideration of such issues has long passed. FairPoint's attempts now to seek reconsideration of such issues are untimely and must be denied.

The statute is clear that the date from which the 30-day deadline begins to run is the date the order or decision was *made:* "Within 30 days after any order or decision has been made by the commission, any party . . . may apply for a rehearing . . . ." RSA 541:3. As will be detailed in the discussion below, FairPoint's current motion seeks rehearing or reconsideration of numerous Commission decisions that were made before January 20, 2012. One such example is the Commission's decision, made no later than in the May 4, 2011 Order, to resume consideration of prospective changes to the CCL tariff provision in this docket, rather than

[6] FairPoint did not seek reconsideration of either of these orders in accordance with RSA 541:3.

assigning a new docket number. FairPoint's claim that prospective changes to the CCL tariff are beyond the scope of this docket, therefore, is untimely. Other instances of such untimeliness are set out in the specific, substantive sections below.

III. FAIRPOINT'S MOTION PROVIDES NO VALID REASON FOR THE COMMISSION TO RECONSIDER THE JANUARY 20 ORDER.

A. The Commission Properly Ordered Revisions to FairPoint's CCL Tariff and Provided FairPoint with Sufficient Process.

The first section of FairPoint's motion for reconsideration of the January 20 Order — although divided into two subsections — actually makes three arguments. First, FairPoint asserts that the Commission's direction that FairPoint modify its CCL tariff exceeds the scope of this docket. Motion at 8. Second, FairPoint claims that the record does not support the Commission's conclusion that the CCL charge is not a contribution element and may only be assessed when a carrier uses a FairPoint-provided common line. *Id.* at 8-11. Third, FairPoint asserts that the Commission denied it a "meaningful" hearing. *Id.* at 11-14. As explained below, the Motion seeks rehearing of decisions the Commission made before January 20, 2012, and is therefore untimely. The Motion also simply repeats arguments FairPoint made previously in the case and, accordingly, does not present a proper basis for rehearing. Moreover, even when considered on their merits, FairPoint's arguments are unconvincing or wrong.

As an initial matter, it is clear that this portion of FairPoint's motion seems to exist in an alternate universe where the legal requirements applicable to rehearing motions do not apply – at least to FairPoint. Although FairPoint claims it is seeking reconsideration of the January 20 Order, it mentions that order only twice (*see* Motion at 11 & n.31, 13 & n.35) and explicitly

attacks only one of the order's findings. *Id.* at 11.[7] FairPoint instead focuses on alleged errors the Commission made in earlier orders for which FairPoint never sought rehearing[8] or on alleged errors in the Order *Nisi* for which FairPoint's subsequent rehearing request did not produce the outcome it desired.[9] To the extent that FairPoint now seeks rehearing of matters decided in Commission orders issued in May or November 2011, its motion is untimely and should be rejected. *See* RSA 541:3 (requiring party to seek rehearing within 30 days of any order or decision). To the extent that FairPoint seeks rehearing of matters decided in a Commission order (such as the Order *Nisi*) for which FairPoint already sought rehearing, it cannot resurrect those matters now through a second motion for rehearing. *See Petition of Ellis*, 138 N.H. 159, 161 (1993) (noting that RSA 541:3 authorizes only one rehearing motion for a Commission order and RSA 541:4 specifies that such motion must contain "every ground" on which movant claims commission's underlying order was unjust or unreasonable); and Order No. 24,886 at 9-10 (Aug. 8, 2008).

1. The Commission Could Properly Order Tariff Modifications in This Docket.

FairPoint's first contention - that prospective modification of the CCL tariff is outside the scope of this docket (Motion at 8) - must fail for at least three reasons. First, FairPoint apparently believes that the Commission's statement in the November 2006 Procedural Order[10] regarding the scope of the docket is immutable. What FairPoint ignores, however, is that the

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[7] FairPoint accuses the Commission of misconstruing its position on whether a hearing was necessary. Motion at 11.

[8] *See, e.g.*, Motion at 12 (challenging Commission's conclusions in May 2011 and November 2011 orders regarding scope of proceeding).

[9] *See, e.g.*, Motion at 8 (challenging Commission's conclusions in Order *Nisi* regarding whether tariff modification issue was within scope of docket and whether FairPoint could impose CCL charge only when it provided common line).

[10] Order No. 24,705 (Nov. 29, 2006) at 6.

Commission has authority to change its orders (*see* RSA 365:28) and that the Commission did exactly that in the May 2011 Order in this case. *See* May 2011 Order at 8 (stating that Commission will implement substantive goal of November 2006 Procedural Order regarding tariff modifications by undertaking examination of FairPoint tariff without assigning separate docket number). FairPoint did not seek reconsideration of the Commission's conclusion in the May 2011 Order,[11] and its attempt to do so now is untimely.

Second, FairPoint's current position on whether the tariff modification issue is within the scope of this docket contradicts the position it took in an earlier motion for rehearing. In that motion, which sought reconsideration of the March 2008 Order, FairPoint faulted the Commission for not addressing the issue of tariff modification, and FairPoint made no mention of the November 2006 Procedural Order that is now its talisman.[12] If FairPoint chooses to talk out of both sides of its mouth, the Commission should give no credence to what it says.

Finally, FairPoint's contention that it failed to receive "notice and hearing" on this issue (Motion at 8) is pure malarkey. The May 2011 Order gave FairPoint and the other parties notice of how, as a matter of docketing, the Commission planned to treat the issue of tariff modification. *See* May 2011 Order at 8. And it was FairPoint that suggested that the Commission "dispense with a hearing on the CCL [tariff language] question and move directly to briefs." FairPoint Response at 3. FairPoint has presented no valid reason to reconsider whether tariff modifications are part of this docket.

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[11] Indeed, the Commission reached this conclusion when ruling on FairPoint's motion for reconsideration of the Order *Nisi*'s treatment of the tariff modification issue. *See* FairPoint Rehearing/Withdrawal Motion at 4-5. Thus, FairPoint cannot seek reconsideration of this issue a second time.

[12] *See* FairPoint Motion for Rehearing and/or Reconsideration at 8 (filed Apr. 21, 2008).

2. The Commission Has Correctly and Repeatedly Rejected the Notion that the CCL Charge Is a Contribution Element.

FairPoint's second contention – that the record does not support the conclusion that the CCL charge may only be imposed when a carrier uses a FairPoint common line (Motion at 8-11) – also fails for at least two reasons. First, FairPoint is precluded from raising such an argument at this stage of the case. The Commission's March 2008 Order expressly rejected FairPoint's assertion about the role of the CCL charge:

> Based on the record before us, we find 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. As a result, we find that the CCL charge may be applied only when [FairPoint] provides the use of its common line.

See March 2008 Order at 31. Neither Verizon nor FairPoint moved for rehearing on this issue, the New Hampshire Supreme Court's decision did not disturb this finding, and the Commission reaffirmed it in the Order *Nisi*. Order *Nisi* at 2 (ordering FairPoint to modify its tariff to clarify that it "shall charge CCL only when a FairPoint common line is used"). Although FairPoint sought reconsideration of this aspect of the Order *Nisi*,[13] the Commission denied this aspect of FairPoint's motion, stating that it would "not re-litigate the purpose or propriety of the CCL charge." May 2011 Order at 7. FairPoint did not appeal that decision,[14] and it cannot resurrect the issue now through a second motion for rehearing. *See Petition of Ellis*, *supra*, 138 N.H. at 161.

Second, FairPoint's description of what the record showed about the purpose of the CCL charge, and its role in Verizon's rate structure, is simply wrong. The April 20, 2007, Prefiled Panel Rebuttal Testimony of AT&T witnesses Ola A. Oyefusi, Christopher Nurse and Penn

[13] *See* FairPoint Rehearing /Withdrawal Motion at 5-6.

[14] FairPoint instead filed, on May 24, 2011, a Motion to Certify Interlocutory Transfer Statement and Interlocutory Transfer without Ruling, which the Commission denied in the October 2011 Order.

Pfautz (at pp. 5-11) completely rebuts FairPoint's argument that the CCL charge recovers joint and common costs, and therefore may be imposed irrespective of common line usage. As the AT&T witnesses pointed out, while Verizon witness Peter Shepherd may have testified that Verizon's predecessor, New England Telephone Company, originally "designed" the CCL charge as a contribution element to recover joint and common costs along with loop costs, the Commission did not approve the rate as filed, nor did it approve a subsequent settlement stipulation containing access charges reduced from Verizon's proposal. *See* Panel Rebuttal Testimony of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, on Behalf of AT&T at 8 (Apr. 20, 2007). Through their comprehensive discussion and analysis of the two dockets that led up to the institution of switched access charges in the state,[15] these witnesses demonstrated that the CCL charge was linked to the recovery of loop costs allocated to toll services and therefore should be assessed only on calls that traverse the local loop. *See* Panel Rebuttal Testimony of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, on Behalf of AT&T at 11 (Apr. 20, 2007).

Moreover, Mr. Shepherd – whom FairPoint hypes as "the *actual* Verizon employee who was on the scene and managed the development of the original CCL charge" (Motion at 10 (emphasis in original)) – admitted during the July 11, 2007, evidentiary hearing in this docket that the Commission did not accept Verizon's proposal for setting the CCL rate (Transcript Vol. 2, at 78-79), and that the settlement stipulation that the Commission ultimately accepted broke the link between Verizon's costs and revenue requirements, on the one hand, and the CCL rate determination on the other. *See id.* at 79-80. In other words, Mr. Shepherd admitted that the CCL rate had no relationship to any cost level or revenue requirement Verizon may have had. As a result, FairPoint's current assertion that the record here contains "unrebutted evidence" that

[15] The two dockets are Nos. 89-010 and 90-002.

the CCL charge "was designed to recover joint and common costs related to its business as a whole" (Motion at 9) is delusional.

The Commission correctly concluded, as a factual finding on the record before it, that the CCL charge should be assessed only when the carrier uses a FairPoint common line. FairPoint's Motion presents no valid basis to reconsider that conclusion.

3. The Commission Did Not Deprive FairPoint of a "Meaningful" Hearing.

FairPoint's third contention – that it did not receive a "meaningful" hearing (Motion at 11-14) – also is based on revisionist history. FairPoint first asserts that the Commission misconstrued FairPoint's legal position in its Response to the Competitive Carriers' Motion for Hearing because its proposal to dispense with a hearing on the CCL tariff revisions "was not addressing a constitutional due process issue." Motion at 11. FairPoint also points out that it "reserved numerous rights" in its Response. *Id.* at 12. But the context of FairPoint's proposal last November to dispense with a hearing makes clear that FairPoint had due process issues in mind, because its Response quotes a discussion of due process from an earlier Commission decision.[16] In addition, FairPoint's assertion that it was reserving its rights regarding "[a]ll relevant questions" (FairPoint Response at 3 n.11) hardly makes clear that it was reserving its right to a hearing as "a constitutional due process issue" (Motion at 11), while waiving its right to "an evidentiary hearing" (*id.* at 12) – whatever that tortuous distinction might mean. Such contortions prove the Commission's prescience in cautioning FairPoint about "intentionally trying to delay a decision through procedural maneuvers" regarding the need for a hearing. January 20 Order at 8.

[16] The Response stated: "The Commission previously has determined that '[d]ue process requires a meaningful opportunity to be heard, i.e., a hearing, where issues of fact are presented for resolution by an administrative agency.'" FairPoint Response at 3 (quoting *Birchview by the Saco, Inc.*, DE 97-255, Order No. 23,649 Denying Motion for Rehearing, at 5 (Mar. 7, 2001) (emphasis omitted)).

Moreover, FairPoint is equally evasive about the "central issue" (Motion at 13) this "meaningful" hearing was supposed to address. FairPoint sometimes suggests that the hearing would consider the status of the CCL charge as a contribution element (*see* Motion at 13-14), while it suggests elsewhere that a hearing was necessary on whether the Commission could mandate a reduction in FairPoint's CCL revenues without also allowing a compensatory rate increase. *See id.* at 13. Under either scenario, the Commission did not abridge any right FairPoint may have had to a "meaningful" hearing.

If the "central issue" is the status of the CCL charge, as explained in the preceding section, Verizon – FairPoint's predecessor in interest – did participate in an evidentiary hearing in 2007 that addressed the purpose and propriety of the CCL charge. The Commission subsequently entered an order finding that the CCL charge was not a contribution element and could only be imposed when a FairPoint common line was used. *See* March 2008 Order at 31-32. The Supreme Court's decision on appeal did not disturb that aspect of the Commission's order, as the Commission explained in an extensive discussion in the October 28, 2011 Order. Accordingly, FairPoint, through its predecessor Verizon,[17] has received any hearing it was due on this issue.

If the "central issue" is FairPoint's ability to be compensated for the reduced CCL revenue through other means, all that FairPoint has lost is the ability to make up that revenue in the exact manner and on the exact schedule that FairPoint has dictated. Although the Commission's ability to address FairPoint's revenue concerns via an increased Interconnection Charge has been checked by the actions of the FCC in the *Connect America Fund Order*, it is that federal action, rather than anything in the January 20 Order, that foreclosed FairPoint's

[17] When FairPoint petitioned to intervene in this docket, it agreed to take the record "as is." *See* FairPoint Petition to Intervene ¶ 2 (filed Apr. 21, 2008).

proposal to replace the revenue generated by the CCL charge with the Interconnection Charge. As the Commission has pointed out, FairPoint has other ways to seek to change its rates and improve its financial position — none of which it has sought to implement. *See* January 20 Order at 15. Given these options, FairPoint has not been deprived of anything meaningful. Even if the issue were ripe for rehearing at this advanced stage of the case, the Commission should deny the motion for rehearing.

B. The January 20 Order Did Not Unconstitutionally Confiscate FairPoint's Property.

FairPoint next argues that the Commission's mandated revisions to the CCL tariff, which reduce FairPoint's wholesale/access revenues, result in a confiscation of its property in violation of the state and federal constitutions. Motion at 16. Once again, FairPoint's arguments reflect a confused and myopic view of the applicable law, and the Commission should reject them.

FairPoint sets forth at length the various reasons why the Commission concluded it was not obligated to implement any change to the CCL tariff without simultaneously implementing a change to the Interconnection Charge. Motion at 15-16. FairPoint then asserts that the Commission's reasons do not conform "to the applicable statutory criteria," which it indicates are set forth in RSA 378:27. *Id.* at 16. However, RSA 378:27 deals only the Commission's authority to set temporary rates, and it is puzzling why FairPoint believes that the standards for temporary rates are applicable here. Indeed, FairPoint seemed to take a conflicting position in a pleading filed just two months ago, in which it stated that the Commission "never set a temporary rate" in this case. FairPoint Brief on CCL Language and Effective Date at 8 (filed Dec. 19, 2011). If FairPoint cannot keep its positions straight, the Commission has no reason to take its arguments seriously.

Putting aside FairPoint's apparent statutory confusion, its confiscation argument suffers from a more fundamental flaw: it attempts to apply a ratemaking concept designed for general rate cases to an issue to which that concept is not germane. FairPoint relies exclusively on the description of a non-confiscatory rate provided in *Kearsarge Telephone Co.*, DR 87-110, Order No. 19,154, 73 NH PUC 320, 324 (1988). *See* Motion at 16. However, *Kearsarge* and the cases on which it relies[18] all concern themselves with rate-setting - *i.e.,* the establishment of rates that a utility is permitted to charge to recover its overall costs of service (including capital costs) necessary to provide the services it offers. Moreover, the cases address issues that affect the utility's overall rate of return resulting from the revenues from all services and the costs of providing them. The subsequent sentence in *Kearsarge* — which FairPoint does *not* quote — makes that clear: "The import of *Hope* is that the constitution is only concerned with the end result of a rate order: i.e., that it be just and reasonable. Under *Hope*, the particular ratemaking methodology employed by the regulatory agency is, for the most part constitutionally irrelevant." *Kearsarge*, 73 NH PUC at 325 (quoting *In re Public Service Co. of New Hampshire*, 130 N.H. 265, 275 (1988)).

As a result, the constitutional standards on which FairPoint relies are inapposite and have no meaning when applied in the context of a particular rate for an individual service. It makes no sense to suggest, as FairPoint does here, that a reduction in one particular rate element — the CCL for some, but not all, calls — would not allow it to operate successfully, maintain its financial integrity, attract capital, or appropriately compensate its investors. Indeed, a lower rate for one service may be balanced by generous rates for other services. It is the overall level of rates, revenues and costs that determine a company's financial integrity and attractiveness to

[18] *Kearsarge* cites *Federal Power Comm'n v. Hope Natural* Gas *Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"), and *New England Tel. & Tel. Co. v. New Hampshire*, 95 N.H. 353, 361 (1949).

investors. As noted elsewhere in this Objection (*e.g.,* Parts II.C and IV.E), FairPoint has options to increase revenues other than increasing the Interconnection Charge available to it, but it has not taken advantage of those opportunities.

The Commission correctly recognized this concept in the January 20 Order when it rejected FairPoint's assertion that a "change to the application of a single charge... was a confiscation of constitutional dimension." January 20 Order at 15.[19] Since FairPoint cannot state a cognizable claim for confiscation in the absence of a consideration of the adequacy of its overall rate levels, it has failed to provide the Commission with a basis to reconsider its decision.

C. The Commission Acted Lawfully In Bifurcating Consideration of the CCL Tariff Changes From Consideration of FairPoint's Requested Interconnection Rate Increase.

FairPoint's Motion argues that the Commission acted unlawfully by deciding the CCL tariff change issue separately from the Interconnection Charge issue. FairPoint argues that "the Commission could only act on the entire filing." Motion at 17. In addition to being legally flawed, the argument must be rejected because FairPoint itself expressly assented to the bifurcation of these issues. *See* FairPoint Response at 2-3 ("FairPoint ...does not dispute ...that the question of 'whether FairPoint's CCL tariff filing complies with the Commission's prior orders is presently ripe for consideration by the Commission'...FairPoint concurs 'that [t]he effective date of the CCL tariff language is also ripe for adjudication by the Commission'... FairPoint assent[s] to bifurcation of the issues.")

Just because FairPoint sought to link the CCL tariff changes to its request for an Interconnection Charge increase, does not mean the Commission must act in accordance with

[19] Moreover, FairPoint's *argument* seems grounded in the position that, unless the Commission allows FairPoint the exact revenue amount it wants at the exact time it wants that revenue, the Commission will have imposed an unconstitutional confiscation. Such a position would tie the Commission's hands and ignore its obligation to ensure both that customers "will not pay higher rates than are required" and that the utility earns a reasonable return. *New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 95 (1973).

FairPoint's wishes. The Commission has the authority to review and implement separately (not *en masse*, as FairPoint argues) portions of filings made on the same day. *See, e.g., Legislative Utility Consumers' Council v. Granite State Electric Company,* 119 N.H. 359, 362 (1979) (Commission must be given wide latitude to exercise its judgment in determining components of a utility's rate of return) (emphasis added). This is especially so if the components of the filing concern totally different issues that may properly be resolved, as here, in a manner that does not provide a revenue neutral result for the filing utility.

The mere fact that FairPoint intended its CCL and Interconnection Charge filings as inexorably linked does not bind the Commission. Compelling the Commission to review unrelated components of a filing made on the same day by a utility seeking a *quid pro quo* would severely undermine the Commission's ratemaking power which, except in a few specifically excepted instances, is "plenary." *Legislative Utility Consumer Council v. Public Service Company of New Hampshire,* 119 N.H. 332, 341 (1979). For all of the reasons set forth above, FairPoint's argument that the Commission erred by not considering the CCL tariff changes along with the Interconnection Charge issue is without merit and should be rejected.

D. The Commission Correctly Rejected FairPoint's December 2011 Filing.

FairPoint argues that the Commission erred in rejecting the portion of FairPoint's December 2011 Tariff filing that sought to increase the Interconnection Charge. FairPoint argues that the tariff rejection was improper because the Commission erroneously applied RSA 378:6, IV, which requires that telephone utility filings (except those concerning general rate increases) be acted upon by the Commission within 30 days. FairPoint argues that the Commission should have applied RSA 378:6, I(b) (which provides for a review period longer than 30 days) and therefore should not have rejected the filing due to the Commission's inability

to meet the 30 day deadline established in RSA 378:6, IV.[20] FairPoint argues that the legislative history of RSA 378:6, I(b) and a recent Commission decision in Docket No. DT 11-248, Order No. 25,293 (Nov. 28, 2011) both support its position. FairPoint is incorrect for the reasons discussed below.

First, as the Commission has correctly noted, if the plain language of statutory provisions is unambiguous, legislative history need not be examined.[21] *See Sutton v. Town of Gilford,* 160 N.H. 43, 55 (2010). The Commission was able to interpret the provisions of RSA 378:6 based upon the plain meaning of the words used therein. In so doing, the Commission correctly noted that the statutory scheme embodied in RSA 378:6 requires that a telephone utility's filings must be reviewed under RSA 378:6, IV, unless those filings relate to a rate schedule representing a general rate increase made pursuant to RSA 378:6, I(a). The Commission reached this conclusion, in part, because RSA 378:6, I(b) expressly states that telephone utility filings under RSA 378:6, IV are exempt from the provisions of RSA 378:6, I(b). Therefore, contrary to FairPoint's assertion, RSA 378:6, I(b), by its very terms, cannot apply to non-general rate increase filings (such as the Interconnection Charge) made by a telephone utility.

Second, FairPoint's argument that Commission Order No. 25,293 in DT 11-248 directly contradicts the Commission's decision that the Interconnection Charge increase must be considered under RSA 378:6, IV is totally misplaced. As Order No. 25,293 plainly indicates, Docket DT 11-248 concerns the investigation of a rate schedule representing a general increase

[20] Note, however, that this is another expedient flip-flop in FairPoint's position. In October 2009, FairPoint contended that RSA 378:6, I. did not apply to its Interconnection Charge filing. Objection to Joint Motion for Clarification and Expedited Relief, Oct. 12, 2009, at 4.

[21] Even if the piece of legislative history offered by FairPoint as support for its interpretation of RSA 378:6, I (b) were to be considered, it is not dispositive of the legislature's intent as it consists of only one piece of testimony.

in rates[22] to the vast majority of FairPoint's retail and wholesale customers, not an increase to a specific rate like the Interconnection Charge that affects wholesale customers only. Thus, because the general rate increase filing in DT 11-248 clearly must be considered under RSA 378:6, I(a), the Commission, in Order No. 25, 293 correctly determined that RSA 378:6, IV did not apply to that filing.

IV. THE COMMISSION PROPERLY DISMISSED FAIRPOINT'S INTERCONNECTION CHARGE FILING IN THE FEBRUARY 3 ORDER.

A. The Last Sentence in Footnote 1495 Is Inapplicable.

FairPoint continues to assert that its proposed increase in the Interconnection Charge is excepted from the rate caps imposed in the FCC regulations adopted in the *Connect America Fund Order*, because its tariff filing was subject to an exception set forth in one sentence in one footnote of that 759-page order:

> Specifically, we cap all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) unless a price cap carrier made a tariff filing increasing any such rate element prior to the effective date of the rules and such change was not yet in effect.

Connect America Fund Order, ¶ 801, fn. 1495, last sentence. First, FairPoint bases its contention on a claim that the Interconnection Charge rate element, a proposed *state* access rate element relating to purely *intrastate* access rates, is within the "trunking basket" established in *federal* regulations that set *interstate* access rates under the FCC's price-cap access rate structure. Second, FairPoint claims that its tariff filing proposing to increase the Interconnection Charge

[22] The surcharge for which FairPoint sought approval in DT 11-248 was to recover increased costs resulting from increased municipal property taxes billed to FairPoint. FairPoint sought to apply this surcharge to customers on a per access line basis following the same methodology as the application of the E911 surcharge. Thus, the Commission correctly determined that because the surcharge is not for any particular service, it is the equivalent of a general rate increase affecting all or a majority to FairPoint's retail customers, as well as access lines that are provided to wholesale customers. Order No. 25,293 (Nov. 28, 2011), at 2.

was validly pending on the effective date of the rate caps adopted in the *Connect America Fund Order*. Neither premise is true.

1. The Federal "Trunking Basket" Has No Relation to New Hampshire Intrastate Tariffs.

FairPoint claims that the Interconnection Charge is within the FCC "trunking basket" defined in 47 C.F.R. § 61.42(d)(3). Motion at 22. This is absurd.

The "trunking basket" is a set of services subject to the FCC's "price-cap" regulations. 47 C.F.R. §§ 61.41 - .49. Carriers subject to "price-cap" regulation submit to the FCC an annual price cap tariff filing that proposes rates for the coming year. *Id.* § 61.43. These filings must make adjustments to the carrier's Price Cap Index (PCI), Actual Price Index (API), and Service Band Index (SBI) values. *Id.* Each of these values is calculated using a complex formula with multiple variables. For example, the formula to calculate the PCI value is:

$$PCI_t = PCI_{t-1}[1+w[GDP\text{-}PI\text{-}X] + Z/R.$$

Some of the variables in the formula are:

> GDP-PI = For annual filings only, the percentage change in the GDP-PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year. For all other filings, the value is zero.
>
> X = For the CMT, traffic sensitive, and trunking baskets, for annual filings only, the factor is set at the level prescribed in paragraphs (b)(1)(ii) and (iii) of this section. For the interexchange basket, for annual filings only, the factor is set at the level prescribed in paragraph (b)(1)(v) of this section. For the special access basket, for annual filings only, the factor is set at the level prescribed in paragraph (b)(1)(iv) of this section. For all other filings, the value is zero.
>
> Z = The dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations.

Id., § 61.45(b)(1)(i). Similarly complex formulas govern calculation of the API:

$$API_t = API_{t-1}[\sum i\ v_i\ (P_t/P_{t-1})i]$$

and SBI:

$$SBI_t = SBI_{t-1}[\sum_i v_i(P_t/P_{t-1})_i]$$

Id., §§ 61.46 & 61.47.

Needless to say, this regulatory structure bears no resemblance to the way intrastate access rates are set in New Hampshire. A "trunking basket" does not appear anywhere in the Commission's telecommunications regulations, Puc 400, or its tariff regulations related to telephone utilities, Puc 1600 and Appendix III. Telephone utilities in New Hampshire do not submit annual rate filings or adjust their rates annually based on various revenue, growth, and productivity factors, as they must do under the interstate regime. FairPoint's Tariff No. 3 contains no mention of a trunking basket. Simply put, the "trunking basket" does not exist in New Hampshire.

The trunking basket is an interstate rate-setting device. It appears in the FCC's Part 61 rules, which govern tariffing of interstate services. Section 61.1(a) provides, "The purpose of this part is to prescribe the framework for the initial establishment of and subsequent revisions to tariff publications." In addition, "No carrier required to file tariffs may provide any *interstate or foreign* communication service until every tariff publication for such communication service is on file with the Commission and in effect." 47 C.F.R. § 61.1(c) (emphasis added). Nothing in the Part 61 rules establishes, or requires state Commissions to establish, "trunking baskets" for intrastate rates.

Likewise, nothing in the new regulations adopted in the *Connect America Fund Order* serves to create, or to mandate that the Commission create, an intrastate "trunking basket" in New Hampshire. The *Connect America Fund Order* amended only three provisions in the FCC Part 61 rules: creating a new definition of "access stimulation," § 61.3(aaa); amending the rules

relating to tariffing of competitive interstate switched exchange access services so as to include termination of traffic to end users of a VoIP provider and to address access stimulation, § 61.26; and addressing access stimulation by ILECs serving 50,000 or fewer lines in a given study area, § 61.39. *See* pages 567-70 of the *Connect America Fund Order.* None of these has anything to do with the intrastate access rates of FairPoint in New Hampshire that are at issue here.

FairPoint's proposed intrastate Interconnection Charge simply is not within the "trunking basket" used in part to set the interstate switched access rates of price-cap carriers under the federal regulatory regime. FairPoint's argument that the last sentence in footnote 1495 provides an exception to the rate cap imposed by 47 C.F.R. § 51.907(a) therefore fails. That being the only ground on which FairPoint claims that the Commission should reconsider the dismissal of FairPoint's Interconnection Charge in the February 3 Order, FairPoint's motion for reconsideration of the dismissal order lacks merit and should be denied.

2. FairPoint's Claim That the Interconnection Charge Is a Local Transport Rate Element Does Not Change the Result.

FairPoint additionally claims that its Interconnection Charge is not an End Office Access Service and therefore fits within the exception in the last sentence of footnote 1495. Motion at 22-23. Instead, FairPoint claims that its "Interconnection Charge [is] a *local transport* element." *Id.* at 23 (emphasis in original). This argument is unavailing for at least two reasons.

First, in making this argument, FairPoint ignores the plain language of the Note to paragraph (d) of 47 C.F.R. § 51.903. The Note expressly includes "state *Transport* Interconnection Charges [and] Residual Interconnection Charges" within the definition of End Office Access Services (emphasis added).

Second, assuming for sake of argument that FairPoint's Interconnection Charge is a local transport rate element that is outside the definition of End Office Access Services, then that

charge is a Tandem Switched Transport Access Service under 47 C.F.R. § 51.903(i): "Tandem Switched Transport Access Service means: (1) Tandem switching and common transport between the tandem switch and end office . . . ."

As the Commission correctly found, Tandem Switched Transport Access Services, just like End Office Access Services, are squarely within the rate cap imposed by 47 C.F.R. § 51.907(a). February 3 Order at 14. This is because, under § 51.907(a), the question whether a rate element is within the "trunking basket" only arises if a rate element is not an End Office Access Service, a Tandem Switched Transport Access Service, or a Dedicated Transport Access Service.

> Notwithstanding any other provision of the Commission's rules, on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], a Price Cap Carrier shall cap the rates for all interstate and intrastate rate elements for services contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. *In addition,* a Price Cap Carrier shall also cap the rates for any interstate and intrastate rate elements in the ["]traffic sensitive basket" and the "trunking basket" as described in 47 CFR 61.42(d)(2) and (3) *to the extent that such rate elements are not contained in the definitions of Interstate End Office Access Services, Tandem Switched Transport Access Services,* and Dedicated Transport Access Services. Carriers will remove these services from price cap regulation in their July 1, 2012 annual tariff filing.

47 C.F.R. § 51.907(a) (p. 508 of the *CAF Order*) (italicized emphasis added; capitalized emphasis in original).

Here, the Interconnection Charge is an End Office Access Service or (under FairPoint's view) a Tandem Switched Transport Access Service. Either way, the question of whether it is in the trunking basket is irrelevant. The rate cap in § 51.907(a) precludes any increase to the Interconnection Charge. The exception in footnote 1495 does not apply.

Moreover, if FairPoint is correct and its Interconnection Charge is not within the definition of "End Office Access Service" (despite the FCC's clear statement to the contrary),

then it cannot be within the "trunking basket" so as to bring it within the exception of the last sentence of footnote 1495. Federal regulations state that "Residual Interconnection Charges" are included within End Office Access Services. 47 C.F.R. § 51.903, note to paragraph (d). If, as FairPoint claims, its Interconnection Charge is not an End Office Access Service, it cannot also be a Residual Interconnection Charge under 47 C.F.R. § 69.155. However, FairPoint claims that its Interconnection Charge is within the trunking basket because it is a Residual Interconnection Charge under § 69.155. Motion at 20-21.

FairPoint cannot have it both ways. If its Interconnection Charge is a Residual Interconnection Charge under § 69.155, then it is an End Office Access Service and not subject to the exception in the footnote. If it is not an End Office Access Service, it is not a Residual Interconnection Charge under § 69.155, and not within the § 61.42 "trunking basket." In either case, the last sentence of footnote 1495 does not apply. FairPoint's Interconnection Charge filing is squarely under the rate cap imposed by § 51.907(a).

3. FairPoint Did Not Have a Lawful Tariff Proposal Pending.

FairPoint's convoluted attempt to shoehorn its Interconnection Charge proposal into the narrow exception in the last sentence of footnote 1495 fails for another reason: FairPoint did not have a legitimate tariff proposal pending on the effective date of the rate cap established by the new federal regulations.

FairPoint, yet again, conveniently forgets that it, itself, requested that its Interconnection Charge filing be withdrawn and treated it as illustrative for purposes of investigation. FairPoint Objection to Joint Motion for Clarification and Expedited Relief (Oct. 12, 2009) at 4. As the Commission has pointed out several times in its orders, the Commission established a process and set a schedule in this docket to investigate the Interconnection Charge proposal. January 20

Order at 17-18; February 3 Order at 3. To implement that process, the Commission issued a number of procedural orders. One of these, in particular, granted FairPoint's request for additional time to prepare its case in support of the illustrative Interconnection Charge proposal. November 2011 Order at 5.

Rather than work within the process that the Commission established for FairPoint's benefit, FairPoint took matters into its own hands, not once, but twice, by purporting to refile the identical Interconnection Charge tariff provisions that the Commission was in the process of reviewing on an illustrative basis in this docket. Worse, just days after the Commission, in Order No. 25,301, had rejected FairPoint's purported November 30th filing in favor of the process that was already underway, FairPoint flagrantly disregarded the Commission's order and refiled the identical proposal on December 22, 2011.

The Commission should not countenance FairPoint's procedural shenanigans. Contrary to FairPoint's claim, FairPoint may not "mak[e] *any* tariff filing it chooses." FairPoint's Objection to Motion to Dismiss or for Summary Judgment, Jan. 18, 2012, at 4 (emphasis in original). Under FairPoint's hubristic view, Commission procedures and Commission orders directing FairPoint to comply with those procedures mean nothing. Having just been told that the Commission was addressing the Interconnection Charge increase under the proceeding already underway and the schedule already established, FairPoint made its "in your face" December 22nd filing that was directly contrary to what the Commission had just ordered.

FairPoint had no legitimate right to refile the Interconnection Charge proposal on December 22nd. Its action blatantly contravened the Commission's Order No. 25,301 issued days before. The Commission was correct to find that the December 22nd Interconnection Charge

filing was not a legitimate proposal and did not permit FairPoint to escape the rate caps established by the FCC regulations.

B. FairPoint's Interconnection Charge Proposal Contravenes National and State Telecommunications Policy and Is Futile and Wasteful.

FairPoint's Interconnection Charge proposal is contrary to national telecommunications policy as set forth in the *Connect America Fund Order* and New Hampshire telecommunications policy as set forth in RSA 378:17-a, III. In addition, given the step-down process for intrastate access rates established by the *Connect America Fund Order,* adopting, or even scrutinizing, the Interconnection Charge proposal would be a futile and wasteful gesture.

As a matter of national telecommunications policy, the FCC has established bill-and-keep as the default methodology for all intercarrier compensation traffic. *Connect America Fund Order,* ¶ 736. To implement that goal, the FCC has established a multi-year step-down process for reducing intercarrier compensation rates to the bill-and-keep end point. 47 C.F.R. § 51.907; *Connect America Fund Order,* ¶ 801 & Figure 9. FairPoint's proposed increase to its Interconnection Charge contravenes that national goal.

As both the Commission and the FCC recognized, FairPoint is not without alternatives to make up revenues it may be losing because of this federal policy change. *See* January 20 Order at 13-15; *Connect America Fund Order,* ¶¶ 745-46, 750. While the Commission's order approving the Verizon/FairPoint transaction limits FairPoint's options to some degree, that order permitted FairPoint *at any time* to seek a revenue-neutral rebalancing of access and local exchange rates. *In re Verizon New England Inc., et al. and Fairpoint Communications, Inc. — Transfer of Assets,* DT 07-011, Settlement Agreement Among the Joint Petitioners and the Commission Staff, § 8.1 (Feb. 25, 2008) ("FairPoint/Staff Settlement"). Thus, nothing precluded FairPoint from seeking to rebalance access and retail rates in August 2009, immediately upon

issuance of the Order *Nisi,* so as to make up the revenue shortfall it claimed would result from the elimination of the CCL charge on certain calls.

In addition, FairPoint retained the right to petition for a retail rate case in the event of exigent circumstances, including a claim of alleged excessively low earnings. *Id.* FairPoint, of course, has made such claims of revenue deficiencies in numerous filings in this docket. *E.g.,* Motion at 16 (citing Skrivan Supplemental Testimony at 17). While § 8.1 of the FairPoint/Staff Settlement precluded the change in rates from any such rate proceeding from taking effect until the fourth anniversary of the transaction's closing (that is, March 31, 2012), that anniversary is just weeks away. Thus, if FairPoint had a sincere concern about excessively low earnings, it could have sought a rate case months ago.

But, as the Commission knows, FairPoint has done nothing to explore such alternatives. January 20 Order at 13-15. Instead, it continues to seek the easy money of excessive intercarrier compensation.

Nonetheless, shifting FairPoint's access charges to end-user charges would be consistent with the goals of national telecommunications policy as set forth in the *Connect America Fund Order.* The FCC noted that end-users benefit from both making and receiving interexchange calls. *Id.,* ¶ 744. According to the FCC, allowing a carrier to recover those costs from another provider rather than the end-user beneficiary confuses the pricing signals sent to those end-users. Eliminating the ability of carriers to shift costs from their local networks to other carriers helps to reveal the true cost of the network to potential subscribers. *Id.,* ¶ 745. The FCC further noted, "Such an approach provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers." *Id.,* ¶ 745.

The FCC anticipated arguments like FairPoint's that increasing local rates will harm carriers competitively, noting instead that consumers likely would benefit from the measures the FCC adopted. "[W]e expect carriers will engage in substantial innovation to attract and retain consumers. New services that are presently offered on a limited basis will be expanded, and innovative services and complementary products will be developed. . . . All these changes will bring substantial benefits to consumers." *Id.*, ¶ 750.

The New Hampshire Legislature also has expressed an expectation that intrastate access rates will be reduced and rebalanced by increases in local service rates. RSA 378:17-a, III(a) requires that, as soon as possible after the federal government reduces interstate access rates, the Commission should consider a corresponding reduction in intrastate access rates, in so doing balancing the disadvantages of higher intrastate rates and the disadvantages of raising local rates.[23] Thus, the Legislature clearly understood the tradeoff between access rate reductions and increased local rates, yet it nonetheless required the Commission to consider raising local rates — *not* other intercarrier compensation rates — when access rates are lowered.

Moreover, reviewing FairPoint's Interconnection Charge proposal would be largely a futile exercise and a waste of the Commission's and parties' time and resources. Under the FCC regulations adopted in the *Connect America Fund Order,* FairPoint is obligated to significantly reduce its intrastate access rates on July 1, 2012 as the next step in the transition to a nationwide bill-and-keep regime. 47 C.F.R. § 51.907(b); *Connect America Fund Order,* ¶ 801 and Figure

[23] RSA 378:17-a, III(a) states:

> The commission should, as soon as possible after each significant decrease of interstate access charges by the federal government, consider corresponding reductions in intrastate access charges, taking into account both the disadvantages to customers of intrastate access charges that exceed interstate access charges and the disadvantages to customers of increases in charges for basic services.

9.[24] There is little to be gained by allowing FairPoint to increase its Interconnection Charge access rate element, only to have to substantially lower such access rates again in a few months' time. There are many more productive uses of the Commission's and parties' time and money.[25]

Allowing FairPoint to increase intercarrier compensation by means of the Interconnection Charge will delay realization of the benefits projected by the FCC. The Commission correctly dismissed FairPoint's Interconnection Charge proposal because it is contrary to federal and New Hampshire law and policy. FairPoint has offered no valid reason for the Commission to reconsider that decision. The Commission should deny FairPoint's Motion.

CONCLUSION

As demonstrated above, FairPoint's Motion, for the most part, merely reasserts matters it previously argued and the Commission correctly rejected. In addition, many of the Commission decisions of which FairPoint complains were made in earlier orders for which the time for seeking rehearing or reconsideration has long passed. For these reasons, without more, the Motion must be denied. Moreover, given that the Commission has expressly ordered that it would entertain no further arguments concerning its conclusion that the CCL charge is not a contribution rate element, FairPoint's Motion on that issue is improper and must be denied. In addition, because FairPoint's proposal to increase the Interconnection Charge contravenes federal and state law and policy, its Motion concerning that issue must fail.

[24] Price cap carriers are obligated to reduce most intrastate terminating access rates by one-half the difference between such intrastate rates and the carrier's interstate rates. *Id.*

[25] In addition, under FairPoint's theory that RSA 378:6, I(b) applies to its purported filing, the Commission could take eight months, or until August 22, 2012, to complete its review of the proposed Interconnection Charge increase, some seven weeks after the first mandatory step-down in intrastate rates — an absurd result.

February 27, 2012

Respectfully Submitted,

Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all d/b/a EarthLink Business

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Certificate of Service

I hereby certify that on this 27th day of February, 2012, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.

Susan S. Geiger

857014_1

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 06-067

Freedom Ring Communications LLC d/b/a BayRing Communications
Complaint Against Verizon New Hampshire Regarding Access Charges

OBJECTION TO
MOTION FOR RECONSIDERATION

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and respectfully objects to the Competitive Carriers' Motion for Reconsideration (the "Motion") of Order No. 25,319 (the "2012 CCL Order").[1] Specifically, the Competitive Carriers request that the Commission reconsider its decision that the revision to FairPoint's CCL tariff are effective January 21, 2012 and instead order that revision to be effective retroactively to October 10, 2009. As FairPoint explains further below, the Competitive Carriers have not described any matter that the Commission overlooked, nor have they cited any authority that establishes that the Commission's decision regarding the effective date was unlawful, unreasonable, or an abuse of the Commission's discretion. The Motion is for the most part a reiteration of the Competitive Carriers' brief, including their request for equitable relief. Indeed, the theme of the Motion is aptly summarized by the Competitive Carriers on page 12, when they state that "[t]he Competitive Carriers are merely seeking in 2012 what the Commission promised in 2008." However, throughout the pleading, they ignore the fact that this "promise" was repudiated by the New Hampshire Supreme Court when it

[1] The Motion for Rehearing was filed by Freedom Ring Communications, LLC d/b/a BayRing Communications, AT&T Corp., Sprint Communications Company, L.P. and Sprint Spectrum, L.P., and Global Crossing Telecommunications, Inc. (a Level 3 company) (collectively "the Competitive Carriers").

overturned the Commission's 2008 CCL Order.[2] Indeed, in many places the Motion reads more like a very untimely Motion for Reconsideration of the *Verizon* decision. FairPoint respectfully requests that the Commission deny the Competitive Carriers' Motion for Reconsideration.

I. BACKGROUND CLARIFICATIONS

As the Commission is aware, the procedural history of Docket 06-067 is lengthy, extensive and complicated. FairPoint will not undertake to recite it to the degree that the Competitive Carriers have, but this should not be construed as concurrence with the version presented in the Motion. In fact, even allowing that their factual background is "not intended to be comprehensive,"[3] there are two aspects of the Competitive Carriers' presentation of the facts that are incorrect or which require clarification.

To start with, the Competitive Carriers refer to the Commission's June 23, 2006 Order of Notice "stating that if the challenged interpretation of the CCL tariff were found reasonable, it would investigate whether prospective modifications were warranted."[4] However, the Competitive Carriers fail to mention that in a later Procedural Order of November 29, 2006, the Commission found that "the consideration of prospective modifications to Verizon's tariff *will be removed from the present proceeding* and designated for resolution in a *separate* proceeding to be initiated at a later date if necessary."[5] Consequently, the issue of tariff modifications was beyond the scope of the proceeding and not properly before the Commission. The existing record in this proceeding cannot be relied on for support of any tariff modifications and must be developed anew.

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[2] *In re Verizon New England Inc.*, 158 N.H. 693 (2009) ("*Verizon*").
[3] Motion at n. 2.
[4] *Id.* at 2.
[5] Procedural Order at 6 (Nov. 29, 2006) (emphasis supplied).

The Competitive Carriers also indicate that the Commission issued its May 4, 2011 Procedural Order and Supplemental Order of Notice in response to unspecified "requests" to reactivate the docket.[6] FairPoint wishes to clarify that there was only one request, and that was by FairPoint. AT&T responded to this request many weeks later with a letter that concurred with this request to the extent that it requested Commission action but objected to FairPoint's request for a scheduling conference.[7]

II. THE COMMISSION'S ORDER CONFORMS TO THE LAW REGARDING RETROACTIVE APPLICATION OF UTILITY RATES.

The Competitive Carriers take issue with the Commission's reliance on *Pennichuck* as the basis of the Commission's holding that it cannot impose the CCL tariff revision retroactively. They assert that a retroactive effective date of October 10, 2009 does not conflict with *Pennichuck* because "under the reasoning in *Pennichuck*, a retroactive tariff change is proper as long as it does not become effective as of a date prior to the date that 'the utility applies for a change.'"[8] However, this is not what the Court held in *Pennichuck*. The Competitive Carriers' reporting of this case is inexact and overbroad; the Court was not deciding on the propriety of "retroactive tariff changes," but rather on the lawful effective date of *temporary* rates. It stated that

> we hold that the earliest date on which the PUC can order *temporary rates* to take effect is the date on which the utility files its underlying request for a change in its permanent rates. In no event, may temporary rates be made effective as to services rendered before the date on which the permanent rate request is filed.[9]

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[6] Motion at 5.
[7] Letter to D. Howland, Executive Director, NHPUC from J. Huttenhower, AT&T (Apr. 22, 2011) ("Huttonhower Letter").
[8] Motion at 9, citing to *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) ("*Pennichuck*").
[9] *Pennichuck*, 120 N.H. at 567 (emphasis supplied).

In other words, *Pennichuck* established restrictions on the effective date of *temporary rates* that the Commission *had already approved*. Thus, this aspect of *Pennichuck* is not applicable to this case which, as the Commission explained in the 2012 CCL Order, never involved a temporary rate,[10] or any approved rate other than the then effective rate. Instead, as FairPoint explained in its December brief, and the Commission agreed, while New Hampshire law allows the effectiveness of a rate to relate back to a time prior to its final approval by the Commission, this is only in the case in which a temporary rate is fixed. "[T]he effective date of temporary rates fixes and preserves the period during which the rates allowed in the underlying permanent rate proceeding may apply . . . ."[11] In this case, the Commission never set a temporary rate, and thus there was no basis for retroactive application of the final rate.[12]

The Competitive Carriers also contend that the *Pennichuck* prohibition against retroactive ratemaking does not apply in this case because "the notice/due process issues underpinning the *Pennichuck* decision are not present here."[13] Yet due process was hardly mentioned in *Pennichuck*, let alone serving as its foundation. The phrase "due process" is used only twice in the decision, and then only in the recitation of facts at the beginning. After that, it is never mentioned again. *Pennichuck* is actually grounded on the Contract Clause of the United States Constitution[14] and the related Part I, Article 23 of the New Hampshire Constitution, which form the basis of its holding that "the State may not create 'a new obligation in respect to a transaction already past.'"[15] Again, this is consistent with the Commission's interpretation, and conflicts

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[10] 2012 CCL Order at 11.
[11] *Pennichuck*, 120 N.H. at 564.
[12] 2012 CCL Order at 11.
[13] Motion at 10.
[14] Art. I, Section 10, cl. 1
[15] *Pennichuck*, 120 N.H. at 565, quoting *Geldhof v. Penwood Associates*, 119 N.H. 754, 754 (1979) ("*Geldhof*").

with that of the Competitive Carriers.

Finally, the Competitive Carriers argue that *Pennichuck* does not apply to this case because it is "clear" that *Pennichuck*'s concern about retroactive ratemaking applies only to "lawful contracts and tariffs,"[16] which do not include FairPoint's tariff because it is a tariff "imposing rates that have been held to be unjust and unreasonable."[17] First, despite the clarity that the Competitive Carriers seem to have found, *Pennichuck* did not even mention the threshold issue of the lawfulness of a tariff. For that, the Competitive Carriers have delved into *Geldhof*, a case that was cited by *Pennichuck*, and from which they extract a single instance of the phrase "lawfully contract," around which they build their argument.[18]

Second, even if such threadbare support did support this contention (which it does not), this argument fails because it completely ignores the Supreme Court holding that FairPoint's CCL *was* lawful. Acting as if that decision was never rendered, the Competitive Carriers observe that the 2008 CCL Order found FairPoint's tariff to be unjust and reasonable, and that the Commission "reiterated" this finding multiple times.[19] However much the Commission may reiterate this finding, it cannot change the fact that this finding was overturned by the Supreme Court. The simple fact is that FairPoint's CCL tariff has been lawful and effective during this entire proceeding.

Understandably reluctant to rely solely on *Pennichuck*, the Competitive Carriers direct the Commission's attention to a case that is purportedly more supportive, *Granite State*.[20] The Competitive Carriers contend that *Granite State* supports their argument for retroactive

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[16] Motion at 10.
[17] *Id.* at 11.
[18] *Geldhof*, 199 N.H. at 754.
[19] Motion at 10-11.
[20] *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980).

application of revisions to the CCL Charge because it affirms the Commission's "broad statutory power" to order a refund of "revenues collected under rates authorized and approved by the PUC but later found . . . to have been collected under improper rates."[21]

Notwithstanding the Competitive Carriers assertion that "[c]omparable circumstances exist here,"[22] *Granite State* is distinguished from this case in two important ways. First, as before, the Competitive Carriers rely on the 2008 CCL Order, again ignoring the fact that the 2008 CCL Order was overturned by the Supreme Court, which found that the FairPoint's CCL charge was *not* being collected under improper rates. Second, the Competitive Carriers fail to note that the only rates that were "authorized and approved" by the Commission were the rates in FairPoint's tariff in effect at the time of the Supreme Court decision. Although the Commission may have ordered different rates in its Order *Nisi*, those rates were never approved or effective, as the Commission has made clear on a number of occasions. Thus, under the *Granite State* standard advocated by the Competitive Carriers, no refund is due, nor is any retroactive application of a different rate. Consequently, *Granite State* does not support the Competitive Carriers' argument, which likely explains why the Commission made only an "oblique" reference to the case in the 2012 CCL Order.[23]

III. THE COMMISSION CORRECTLY HELD THAT IT HAS NO EQUITABLE AUTHORITY TO IMPOSE RETROACTIVE RATES.

Lacking any statutory or precedential support for their arguments, the Competitive Carriers again prevail upon the Commission to exercise a vague "equitable" authority to grant them the relief that they have requested. Notwithstanding the Commission's clear explanation that it was bound by statute to conform to its procedural rules, the Competitive Carriers argue

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[21] Motion at 12, citing *Granite State*, 120 N.H. at 540.
[22] *Id.*
[23] *Id.*

that the Commission has equitable authority to deny FairPoint its constitutional right to due process. Although they cite no authority in support, the Competitive Carriers claim that such an exercise is excused by FairPoint's "procedural maneuvering," by the Commission's duty to respond to rumors, by the apparent simplicity of the task at hand, and by the delay resulting from FairPoint's bankruptcy.

The Competitive Carriers criticize FairPoint for manipulating the process for purposes of delay by first requesting a hearing on the Order *Nisi* and then, two years later, foregoing a hearing.[24] The Competitive Carriers are engaging in a game of semantics, ignoring the distinction between one sense of the word "hearing" ("opportunity to be heard or to present one's side of a case")[25] and another sense ("a trial before an administrative tribunal").[26] As FairPoint explained in its Motion for Rehearing, there is a difference between being granting an opportunity to be heard on a matter, and being granted an oral hearing to take evidence. The Competitive Carriers are conflating the two in their attempt to disparage FairPoint's reasonable actions to preserve its rights. However, the distinction is clear and well-known. For example, in regard to the federal Administrative Procedure Act:

> [t]o the extent that the parties are not able to settle the controversy by consent, they are entitled to a hearing and decision on notice in accordance with the formal hearing sections of the Federal APA. Although the Act provides that a party is entitled to present its case or defense by oral or documentary evidence, a federal agency is not required to provide oral hearings unless the statute governing its actions makes an oral hearing mandatory.[27]

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[24] Motion at 14.
[25] Webster's Third New International Dictionary 1044, sense number 2a(3) (2002).
[26] *Id.*, sense number 2b(4). *See also* Black's Law Dictionary 721 (6th ed. 1990) (a hearing is "any confrontation, oral *or otherwise*, between an affected individual and an agency decision-maker sufficient to allow individual [sic] to present his case in a meaningful manner.") (emphasis supplied).
[27] Am. Jur. 2d *Administrative Law* § 306.

When FairPoint asked for a hearing, it was asking for an opportunity to present its case. Whether that ultimately entailed an actual oral hearing for taking evidence or presenting argument was a secondary consideration. Indeed, given the fact that FairPoint was restricted by Commission order as to the case it could present, and thus the degree to which it would be "heard," there was clearly no need for an oral hearing.

The Competitive Carriers also fault the Commission for failing to adjust the procedural schedule (in violation of FairPoint's rights) based on rumors of FairPoint's bankruptcy.[28] Furthermore, the Competitive Carriers maintain that the Commissioned erred in suspending the procedural schedule because only "one third of a page of text" needed to be reviewed – as if the complexity of an issue is directly related to the number of words describing it.[29] The Competitive Carriers also complain that the Commission should have lifted the stay of this proceeding prior to FairPoint's emergence from bankruptcy, but they do not assert (nor can they) that they ever requested that the stay be lifted during that time. Indeed, it was not until FairPoint itself requested a scheduling conference that the stay was lifted.[30] Prior to that, the only communication from the Competitive Carriers was a letter from AT&T and BayRing to "simply . . . make the Commission aware" that FairPoint continued to bill in accordance with its tariff.[31] Whatever procedural rights the Competitive Carriers may have had, they "sat" on those rights and cannot now claim that the delay is solely the Commission's fault (assuming for the sake of argument that the Commission ever had any latitude in this matter.)

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[28] Motion at 15.
[29] *Id.* at 14.
[30] It is particularly ironic that AT&T chastised FairPoint – six weeks later – for not structuring this request in a manner that best accommodated AT&T's preferred timeline. *See* Huttonhower Letter.
[31] Letter to D. Howland, Executive Director, NHPUC from K. Gold, AT&T (Feb. 16, 2010).

None of the Competitive Carriers complaints are tied to any standard or doctrine of equitable relief. The best the Competitive Carriers can do is assert that the delay has been "prejudicial" to them and to cite *Gas Service*[32] for the proposition that it is unreasonable and an abuse of discretion for the Commission to delay the effectiveness of a rate revision for more than two years after the Commission mandated that the revision be made.[33] As even the Competitive Carriers noted, this is not exactly the holding in *Gas Service*, and a careful review of that case establishes that it is pertinent to this case in ways that the Competitive Carriers may not have intended.

With respect to *Gas Service*, in February 1980 the Commission granted the utility a rate increase of approximately sixty per cent of that originally requested. Six months later, in August 1980, the utility filed a proposed tariff that was designed to produce additional revenues. The Commission rejected the tariff filing on the basis that the request simply sought to relitigate the issues which had been decided against the company in the previous rate proceeding and was nothing more than a late motion for a rehearing. On appeal, the utility alleged that for the past seven years it had not earned and was not able to earn the reasonable rate of return to which it is legally entitled due to the inadequate rate increases approved by the Commission. It maintained that, because of events which had occurred since the February 1980 rate increase, its cost of capital and attrition had increased beyond that reflected in the rates approved by the Commission at that time, thereby resulting in an earnings deficiency which constitutes an unconstitutional confiscation of its property. The Court held that, if the facts were as claimed by the utility, then the Commission abused its discretion in refusing to consider adequately the company's renewed

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[32] *Appeal of Gas Service Co.*, 121 N.H. 602, 603-604 (1981) ("*Gas Service*").
[33] Motion at 16.

application for a rate increase, and that it was unreasonable and unconstitutional to require the utility to wait for two years (with appeals) for its original rate increase to be considered.[34]

Thus, contrary to what the Competitive Carriers claim, *Gas Service* actually supports the reasonableness of the Commission's decision to establish a procedural schedule to (ostensibly) consider FairPoint's claims. On the other hand, *Gas Service* also supports FairPoint's contention that the Commission has abused its discretion by barring FairPoint from presenting evidence that the CCL Charge is solely a contribution element, and by consistently rejecting FairPoint's attempts to tariff the increased Interconnection Charge.

When the Competitive Carriers complain that the Commission has been unreasonable in making them endure "a comparable waiting period for rate relief they have been seeking for several years," what they are really claiming is that the Commission should have denied FairPoint due process in order to grant them relief that had already denied them by the New Hampshire Supreme Court. The Commission acted appropriately in this instance.

IV. FEDERAL LAW PROHIBITS RETROACTIVE APPLICATION OF THE RATE PRIOR TO JANURARY 24, 2011.

As FairPoint explained in its brief, even if the Commission reverses itself and finds that it may revise the CCL tariff retroactively, no claims for refunds or reduced payments can be made for any traffic prior to the effective date of FairPoint's emergence from Chapter 11 bankruptcy.[35] As a result of FairPoint's confirmed Bankruptcy Plan, effective January 24, 2011, FairPoint received a discharge that was applicable to all debts that arose before that date, regardless of whether a proof of claim was filed on such debt or whether the holder of the debt accepted the Plan. Further, FairPoint received an injunction by operation of law protecting FairPoint against

[34] *Gas Service*, 121 N.H. at 603-604.
[35] *In re: FairPoint Communications, Inc., et al.*, Case No. 09-16335 (S.D.N.Y.).

the commencement or continuation of any action, act or process to collect or recover or offset any such discharged debt. Section 1141 of the Bankruptcy Code provides that, as stated in the Plan or in the order confirming the Plan, the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation.[36] Further, Section 524 of the Code provides that a discharge voids any judgment at any time obtained to the extent that such judgment is a determination of liability of the debtor with respect to any debt discharged and operates as an injunction against the commencement or continuation of any action, the employment of any process or an act, to collect, recover or off-set any such debt as a liability of the debtor.[37] Accordingly, Section 13 of the FairPoint's Third Amended Joint Plan of Reorganization provided that:

> Except as provided in the Plan [which did not provide for the charges at issue in the CCL proceeding], on the Effective Date, all existing Claims against FairPoint and Old FairPoint Equity Interests shall be, and shall be deemed to be, released, terminated, extinguished and discharged, and all holders of such Claims and Old FairPoint Equity Interests shall be precluded and enjoined from asserting against Reorganized FairPoint . . . .
>
> Upon the Effective Date, all such Persons shall be forever precluded and enjoined, pursuant to section 524 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against, or terminated Old FairPoint Equity Interest in, FairPoint.[38]

In summary, if no Proof of Claim was filed for any obligation that arose prior to the Effective Date, the obligation was discharged. The creditor can take no action to recover the obligation.

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[36] 11 U.S.C. § 1141(d)(1).
[37] 11 U.S.C. § 524.
[38] *See* Order Confirming Debtor's Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated as of December 29, 2010, *In re: FairPoint Communications, Inc., et al.*, Case No. 09-16335 (S.D.N.Y.) [Document No. 2113]. Also, it should be noted that FairPoint and BayRing entered into a Bankruptcy Court approved settlement agreement whereby all claims which pre-dated August 1, 2010, were settled. The Bankruptcy Court approved of this settlement agreement on October 25, 2010. BayRing's request for relief back to 2009 not only is disingenuous, but also violates a federal court order.

V. CONCLUSION

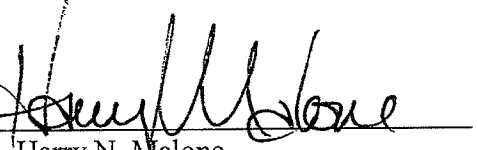
For the reasons described herein, the Competitive Carriers have failed to establish that the Commission overlooked or mistakenly conceived certain matters and interpretations of applicable law. FairPoint respectfully requests that the Commission deny their Motion for Rehearing.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC, D/B/A FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: February 28, 2011

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing objection was forwarded this day to the parties by electronic mail.

Dated: February 28, 2012

By: _____
Harry N. Malone

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Order on Motions for Reconsideration

ORDER NO. 25,358

May 7, 2012

I. PROCEDURAL HISTORY

The complete procedural history of this docket is set out in prior orders in this case. Therefore, only the history relevant to this order is included here. Following an investigation on a complaint by Freedom Ring Communications, LLC d/b/a/ BayRing Communications, on March 21, 2008, the Commission issued Order No. 24,837 in this docket concluding, in relevant part, that Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint) could assess the carrier common line (CCL) charge only when its common line was used in the provision of a telephone message.[1] FairPoint appealed that decision to the New Hampshire Supreme Court which reversed the Commission and concluded that under the terms of FairPoint's tariff as it was written, FairPoint was permitted to impose the CCL charge even when its common line was not used. The Court also stated that the tariff could be rewritten if the Commission chose to do so. *Appeal of Verizon New England*, 158 N.H. 693, 697-98 (2009). On August 11, 2009, following the New Hampshire Supreme Court's decision, the Commission issued Order No. 25,002 directing FairPoint to revise its tariff to comport with the Commission's

[1] FairPoint is the successor to the franchise of Verizon New Hampshire.

determination that the CCL charge should only be imposed when FairPoint's common line was used.

On September 10, 2009, FairPoint filed proposed tariff pages intended to comply with the Commission's order that it revise its tariff relative to the CCL. At the same time, to achieve "revenue neutrality" FairPoint filed proposed tariff pages increasing the Interconnection Charge. FairPoint then filed a motion for rehearing and conditional withdrawal of its September 10, 2009 tariff pages requesting, in part, that the tariff pages it had filed should be withdrawn to the extent the Commission treated them as having been voluntarily made. FairPoint's Motion for Rehearing and Conditional Withdrawal of Tariff Filing (Oct. 12, 2009) at 9. The Commission had not yet ruled on those tariff pages, or the conditional request to withdraw them, prior to FairPoint filing for voluntary reorganization under Chapter 11 of the United States Bankruptcy Code on October 26, 2009. *See* Secretarial Letter dated November 10, 2009. Upon FairPoint's emergence from bankruptcy in January, 2011, the Commission resumed the docket and issued Order No. 25,219 (May 4, 2011) as a procedural order and supplemental order of notice. Also in that order, the Commission granted FairPoint's request to withdraw the tariff pages submitted on September 10, 2009.

On October 28, 2011, the Commission issued Order No. 25,283, in part as a response to a motion for rehearing, reconsideration, and clarification, and concluded, in part, that it would revise the prior grant of FairPoint's request to withdraw its tariff pages. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 30. The Commission determined that because the portion of the tariff filing relating to the CCL charge was made in compliance with a Commission order, rather than made voluntarily, it was

accepted, but deemed suspended. *Id.* The portion of the filing relating to the Interconnection Charge, however, was voluntarily made and therefore the Commission granted the request that those pages be withdrawn and be treated as illustrative for purposes of further investigation and proceedings. *Id.* at 30-31.

Also on October 28, 2011, the Commission issued Order No. 25,284 setting a procedural schedule for discovery and a hearing for March 8, 2012 on the remaining issues in the docket. Rather than await the March 8 hearing, on November 10, 2011, various competitive local exchange carriers moved for an expedited hearing on the issue of the effective date of the proposed changes to the CCL portion of FairPoint's tariff. On November 21, 2011, FairPoint responded to the motion for a hearing and contended that it should be treated as a motion to bifurcate the proceeding. FairPoint also contended that a hearing was not needed on the CCL issues and requested that those issues be decided on the briefs from the parties. By Order No. 25,295 (Nov. 30, 2011) the Commission determined that it would accept briefs on particular questions relating to the CCL. This determination effectively bifurcated the docket into a portion covering FairPoint's proposed changes to the CCL in light of the Commission's orders, to be decided on the basis of briefs, as requested, and a portion relating to FairPoint's proposed increase to the Interconnection Charge, to be decided on a separate track culminating in evidentiary hearings. Briefs on the CCL portion of the docket were received on December 19, 2011.

On November 30, 2011, FairPoint made a tariff filing consisting of new pages relating to both the CCL and the Interconnection Charge with the stated purpose of placing the issues relating to both items "officially" before the Commission. Cover Letter to FairPoint's November

30, 2011 Tariff Filing at 2. On December 14, 2011, the Commission issued Order No. 25,301 rejecting the tariff filing without prejudice to avoid the statutory timing constraints of RSA 378:6, IV, and noting that those timing constraints were incompatible with the procedural schedule that had recently been extended at FairPoint's request. On December 22, 2011, FairPoint submitted tariff pages virtually identical to those submitted November 30, arguing that the filing was most appropriately and lawfully addressed under RSA 378:6, I(b), rather than RSA 378:6, IV.

On January 9, 2012, while the Commission's decision on the CCL portion of the docket was pending, Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business; Freedom Ring Communications, LLC, d/b/a BayRing Communications (BayRing); AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P. (Sprint); and Global Crossing Telecommunications, Inc., a Level 3 company (Global Crossing)[2] filed a motion to dismiss or for summary judgment (motion to dismiss) on the portion of the docket addressing FairPoint's proposal to increase the Interconnection Charge. Coincident with this filing, the competitive carriers requested that the procedural schedule be suspended in light of the dispositive nature of their motion. On January 13, 2012, the Commission issued a secretarial letter suspending the procedural schedule. On January 18, 2012, FairPoint objected to the motion to dismiss and the motion to suspend the procedural schedule.

On January 20, 2012, the Commission issued Order No. 25,319 concluding that the changes to the CCL as originally proposed by FairPoint on September 10, 2009, and re-filed on

[2] These companies are all competitive local exchange carriers (CLECs) providing telecommunications services to customers and relying in part on wholesale services purchased from FairPoint.

December 22, 2011, complied with the Commission's directives, and that the changes would become effective on January 21, 2012. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 9-10, 16. In addition, the order found that RSA 378:6, I(b) did not apply to the December 22, 2011 filing and that, to the extent it was a proper filing under RSA 378:6, IV, it was amended by the Commission rejecting the portion relating to the Interconnection Charge for the reasons set out in prior orders. *Id.* at 18-19.

On February 3, 2012, the Commission issued Order No. 25,327 and concluded that due to a recent order issued by the Federal Communications Commission (FCC), *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Further Notice of Proposed Rulemaking, FCC 11-161, (rel. Nov. 18, 2011) (CAF Order), FairPoint was not permitted to increase the Interconnection Charge as it had proposed. The Commission, therefore, granted the competitive carriers' motion to dismiss.

On February 17, 2012, FairPoint filed a motion for rehearing and/or reconsideration of both Order No. 25,319 and Order No. 25,327. On February 21, 2012, BayRing, AT&T, Sprint, and Global Crossing (collectively, the CLECs) filed a motion for reconsideration of Order No. 25,319. On February 27, 2012, the CLECs objected to FairPoint's motion for reconsideration and on February 28, 2012, FairPoint objected to the CLECs' motion for reconsideration. On March 7, 2012, BayRing filed a letter responding to FairPoint's objection and on March 13, 2012, AT&T filed a similar letter.

II. FAIRPOINT'S MOTION FOR RECONSIDERATION

A. FairPoint

Relative to Order No. 25,319, FairPoint first contends that the Commission erred because the tariff revisions ordered by the Commission, and implemented through Order No. 25,319, are beyond the scope of this proceeding. FairPoint contends that the record of this proceeding is insufficient to support the finding that the CCL is not a contribution element because the record was not developed with the intent of determining that issue. Moreover, FairPoint contends that the record contains uncontroverted evidence that the CCL is a contribution element. Accordingly, FairPoint contends that the Commission's "mandate to revise the CCL charge" should be reconsidered. FairPoint's February 17, 2012 Motion for Rehearing at 11.

FairPoint next argues that the Commission erred by denying FairPoint a meaningful opportunity to be heard. According to FairPoint, the Commission misconstrued FairPoint's legal position in Order No. 25,319. In that order the Commission stated that the change to the CCL charge could be implemented without a hearing and that FairPoint contended that due process would be satisfied without a hearing. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 8. FairPoint argues that when it noted that a hearing was not necessary, it "was not addressing a constitutional due process issue", but only that it was responding to the CLECs' contention that no further process was needed. FairPoint's February 17, 2012 Motion for Rehearing at 11. According to FairPoint:

> Whether tariff language complies with prior unlawful directives does not warrant an evidentiary hearing. Such review simply warrants a ministerial comparison of the content of the filing to the prior directives. In foregoing a hearing, FairPoint was making no concession as to whether it had, or would be, "heard" in this case, and indeed reserved numerous rights in its Response.

FairPoint's February 17, 2012 Motion for Rehearing at 12. FairPoint further contends that the Commission's restrictions prevented a meaningful opportunity to be heard on the issue of "whether the Commission was authorized to mandate a reduction in [FairPoint's] rates." FairPoint's February 17, 2012 Motion for Rehearing at 13. Thus, according to FairPoint, the Commission prejudged the matter and prevented it from meaningfully being heard.

FairPoint next contends that the Commission erred by failing to approve the change to the Interconnection Charge in conjunction with the change to the CCL charge. FairPoint contends that the changes were interdependent and could not be made separately. Further, FairPoint contends that the Commission's justifications for not implementing the changes together are insufficient to support the Commission's decision and, as a result, the Commission has confiscated FairPoint's property in violation of the state and Federal constitutions.

Next, FairPoint argues that applicable law does not permit the Commission to act on less than the entire tariff filing. According to FairPoint, the Commission is constrained by RSA 378:6 to act on the filing as a whole and not on portions of the filing. Therefore, FairPoint argues, the Commission erred in treating different portions of the filing differently.

FairPoint also argues that the Commission erred in failing to consider its December 2011 tariff filing under the terms of RSA 378:6, I(b) rather than RSA 378:6, IV. According to FairPoint, the statutes are not clear on their face, and therefore the Commission should have relied upon legislative history. Had the Commission relied upon such history, FairPoint contends, it would have determined that the filing was to be reviewed under RSA 378:6, I(b).

With respect to Order No. 25,327, FairPoint contends that the Commission erred in its analysis of the CAF Order and the associated rules in granting dismissal. Specifically, FairPoint argues that the Commission misread the relevant FCC rules as distinguishing between interstate and intrastate access, when the rules are actually "agnostic as to interstate and intrastate rate elements . . .." FairPoint's February 17, 2012 Motion for Rehearing at 22. In addition, FairPoint contends that in analyzing the exemption from the rate cap defined in the CAF Order, the Commission overlooked a portion of the relevant FCC rules. Particularly, FairPoint contends that its proposed Interconnection Charge is not part of the End Office Access Service category that is subject to the rate cap because it is a local transport element. Accordingly, FairPoint contends that the Commission erred in concluding that the rate cap in the CAF Order applied to its proposed Interconnection Charge and, consequently, in granting the motion to dismiss.

B. CLECs

The CLECs argue, as a general matter, that the majority of the arguments raised by FairPoint are reassertions of arguments the Commission has already heard and rejected. They contend, therefore, that the Commission ought to deny FairPoint's motion for attempting to reargue previously rejected arguments. In addition, the CLECs generally object to FairPoint's motion as raising issues for which the rehearing period has already passed. Therefore, they argue that the untimeliness of the motion is cause for denial.

As to the specific arguments raised by FairPoint, the CLECs first contend that the Commission could properly order the revisions to FairPoint's tariff and that such an order was not outside the scope of the docket. The CLECs point out that while the Commission may have at one point removed the issue of prospective modifications from the docket, the issue of tariff

modification was returned to the docket by Commission order and FairPoint did not seek reconsideration of that order. They also argue that FairPoint's position that tariff modifications are outside the scope of the docket is contrary to a position it took while seeking reconsideration of a prior Commission order in this docket.

Next, the CLECs contend that the Commission has repeatedly rejected FairPoint's contention that the CCL charge is a contribution element and there is no basis upon which to reconsider that contention now. Further, the CLECs argue that FairPoint is incorrect to argue that the record contains unrebutted evidence of the purpose of the CCL. According to the CLECs, witnesses for AT&T provided evidence rebutting FairPoint's argument and demonstrated that the CCL charge should only be assessed on calls using the local loop. Further, according to the CLECs, when ruling upon the CCL as originally proposed, the Commission only approved a settlement that "broke the link between Verizon's costs and revenue requirements, on the one hand, and the CCL rate determination on the other." CLECs' Objection to FairPoint's Motion for Reconsideration at 21. Thus, according to the CLECs, it was long ago determined that the CCL is not purely a contribution element.

The CLECs next argue that the Commission has not deprived FairPoint of a meaningful opportunity to be heard. The CLECs contend that in discussing due process in its earlier pleading, FairPoint quoted a discussion of due process from a prior Commission order and that in claiming to reserve certain rights, it was not clear what rights FairPoint intended to reserve. Further, according to the CLECs, it is not clear what FairPoint believes the central due process issue to be, but that no matter which explanation is accepted, the Commission has either ruled upon the matter previously, or it is not ripe for consideration.

As to the issue of confiscation, the CLECs argue that FairPoint relies on inapplicable statutory provisions and attempts to apply rate making concepts in an area where such concepts are of only limited application. The CLECs argue that there is little merit in FairPoint's contention that the reduction in one rate element is a confiscation because that reduction may be balanced by generous rates on other services and it is the overall level of rates, revenues and costs that determine a company's financial status. The CLECs contend that FairPoint cannot support a claim of confiscation without allowing for consideration of its overall rates and costs and, therefore, there is no basis to grant reconsideration on that ground.

Next, the CLECs contend that when bifurcating the proceeding, the Commission acted lawfully. More particularly, the CLECs argue that the Commission did not err in acting on the proposed changes to the CCL charge and the Interconnection Charge separately and FairPoint's contention that they be dealt with together was properly rejected.

As to FairPoint's December 2011 tariff filing, the CLECs contend that the Commission was correct to reject the Interconnection Charge portion of that filing. The CLECs contend that the Commission was correct to find that RSA 378:6, I(b) does not apply to non-general rate increase filings by a telephone utility. Further, the CLECs argue that this situation is distinct from that in Docket No. DT 11-248, concerning FairPoint's recovery of certain municipal property taxes, and the Commission's decision in that docket does not apply to this case.

As to the motion to dismiss FairPoint's Interconnection Charge and the Commission's ruling on that item in Order No. 25,327, the CLECs argue that footnote 1495 to the CAF Order – the footnote upon which FairPoint relies for an exemption from the rate cap imposed by the FCC – does not apply to FairPoint's filing. The CLECs contend that the footnote does not apply

because the Federal "trunking basket" is not covered by New Hampshire's intrastate tariffs. According to the CLECs, the Federal regulatory structure covering rate elements in the "trunking basket" is significantly different from, and not reflected in, the telecommunications regulations in New Hampshire, and that the "trunking basket" exists as an interstate rate-setting device. Moreover, the CLECs note that there is nothing in the CAF Order creating, or requiring states to create, an intrastate equivalent to the "trunking basket". Therefore, according to the CLECs, FairPoint's proposed Interconnection Charge is not within the "trunking basket" as defined by Federal law and, as a result, it is not covered by the exception from the rate cap in footnote 1495.

In addition, the CLECs argue that FairPoint's claim that the Interconnection Charge is a local transport rate element does not exempt the Interconnection Charge from the rate cap. The CLECs contend that the note to new regulation 47 C.F.R. §51.903 specifically includes state transport elements within the definition of End Office Access Services, which are not exempted from the rate cap. Further, the CLECs argue, if the Interconnection Charge could be interpreted to fall outside the definition of End Office Access Services, then it is within the definition of Tandem-Switched Transport Access Service, which is also subject to the rate cap. In either event, the CLECs contend, the Interconnection Charge is subject to the rate cap in the CAF Order and the exception in footnote 1495 does not apply.

The CLECs also contend that the exception in footnote 1495 does not apply because FairPoint did not have a lawful tariff pending at the time the new regulations in the CAF Order took effect. According to the CLECs, FairPoint had previously requested that the tariff be withdrawn and treated as illustrative and that the Commission granted FairPoint's request to withdraw the Interconnection Charge portion of the tariff and have it treated as illustrative for

purposes of investigation in this docket. The CLECs contend that rather than abide by the Commission's decision, FairPoint attempted to file the tariff in November, 2011 and, following the Commission's rejection of the filing, again in December. The CLECs argue that FairPoint did not have a legitimate basis for making the December filing and therefore a lawful tariff was not pending before the Commission in December, 2011.

In addition to the above arguments, the CLECs contend that allowing FairPoint to increase its Interconnection Charge would be contrary to state and Federal policies on telecommunications and ultimately would be wasteful. The CLECs note that through its order the FCC has begun the transition to a "bill-and-keep" framework and, as part of that transition, intercarrier compensation rates have begun a step-down process. According to the CLECs, allowing an increase to the Interconnection Charge – an intercarrier compensation rate – at this time would contravene the FCC's goals. The CLECs argue that FairPoint may have other means to make up any revenues it may lose as a result of the change in Federal policy, but that FairPoint has not availed itself of them. Further, the CLECs contend that any limitations placed upon FairPoint's ability to alter its rates are not as restrictive as claimed by FairPoint.

Furthermore, the CLECs contend that pursuant to RSA 378:17-a, III(a), as soon as possible after a reduction in interstate access rates, this Commission is to consider corresponding reductions to intrastate rates. The CLECs argue that in enacting this statute, the Legislature understood that such reductions might result in increases in local rates, but that increases to local rates are preferable to increases in intercarrier compensation rates. Lastly, the CLECs contend that because the FCC has ordered a reduction to various rates beginning on July 1, 2012,

allowing for an increase in the rates at this time would be "futile". CLECs' Objection to FairPoint's Motion for Reconsideration at 38.

III. CLECs' MOTION FOR RECONSIDERATION

A. CLECs

The CLECs contend that the Commission erred in its ruling in Order No. 25,319 that the effective date of the change to the CCL portion of FairPoint's tariff would be January 21, 2012, rather than October 10, 2009. According to the CLECs, in making its ruling the Commission erred in relying upon *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) for the proposition that retroactive rate changes are not permitted. The CLECs contend that the Commission misapplied the *Pennichuck* case because setting an effective date of October 10, 2009 does not conflict with the restrictions on retroactive rate changes discussed in *Pennichuck.* Moreover, the CLECs argue, that case's concerns about retroactive ratemaking apply only to lawful contracts or tariffs, and the Commission had previously concluded that the CCL, as it was charged, resulted in unjust and unreasonable rates.

Further, the CLECs contend that the Commission's reliance upon *Pennichuck* is "baffling", CLECs' Motion for Reconsideration at 11, because the Commission failed to acknowledge another, more relevant decision, *Appeal of Granite State Electric*, 120 N.H. 536 (1980). According to the CLECs, the *Granite State* decision is comparable to the instant matter and was relied upon by the Commission in an earlier order in this proceeding in determining that Verizon would owe restitution for inappropriately billing CCL charges. The CLECs contend that the Commission does not explain why it did not rely upon *Granite State* in Order No. 25,319 despite having used it in a prior order.

Next, the CLECs contend that because they had urged the Commission to use "what could be viewed as equitable powers" and that because the Commission did not offer a "convincing" reason for failing to do so, Order No. 25,319 is unreasonable. CLECs' Motion for Reconsideration at 13. The CLECs argue that FairPoint's "procedural maneuvering" prejudiced them and thus it is unreasonable for the Commission to have allowed FairPoint to profit from its "procedural posturing." CLECs' Motion for Reconsideration at 14.

On March 7, 2012, BayRing filed a letter stating that although it seeks to have the Commission declare FairPoint's CCL tariff in effect as of October 10, 2009, it is not asserting that FairPoint owes any refunds or credits for billings prior to August 1, 2010. BayRing contends that aligning any possible refund or credit with that date would comply with the settlement agreement reached in the context of FairPoint's bankruptcy proceedings and approved by the bankruptcy court. On March 13, 2012, AT&T filed a similar letter contending that FairPoint's bankruptcy and the settlement of that proceeding does not bar the Commission from setting the effective date of the CCL changes at a date prior to FairPoint's emergence from bankruptcy.

B. FairPoint

FairPoint first contends that the CLECs themselves misapply the *Pennichuck* decision. According to FairPoint, that decision restricts certain Commission actions relative to temporary rates and that temporary rates were never set in this case. Further, FairPoint contends that the CLECs place undue emphasis on the references to due process in the *Pennichuck* decision. In addition, FairPoint contends that the CLECs inappropriately rely on the reference to the term "lawful contract" in *Pennichuck* and that they ignore that the CCL was lawful based upon the

Supreme Court's conclusions in the *Verizon* decision. For these reasons, FairPoint contends that *Pennichuck* does not operate in the manner claimed by the CLECs.

Moreover, FairPoint contends that the CLECs' reliance on *Granite State* is misplaced since that case is distinguishable from the instant matter in part because the Supreme Court overturned the Commission's decision on the CCL. In addition, FairPoint contends that *Granite State* is distinguishable because the rates that have been authorized and approved are the rates in FairPoint's tariff as it existed at the time of the *Verizon* decision and that although the Commission ordered the rates changed, the new rates had never become effective. Thus, FairPoint contends, even under *Granite State*, no refund is due, and a new rate may not be retroactively applied.

FairPoint next counters that the Commission was correct to find that it did not have a basis to apply equitable authority in this instance. According to FairPoint, the CLECs' arguments that FairPoint manipulated the process to cause delay by requesting a hearing and then later stating that a hearing was not needed, ignore distinctions in different uses of the word "hearing." According to FairPoint, the CLECs attempt to blur the distinctions to make it appear that FairPoint was acting unreasonably. FairPoint also contends that the CLECs are incorrect to fault the Commission for failing to adjust the procedural schedule based upon rumors of FairPoint's bankruptcy, or upon the length of the proposed tariff to be reviewed, or upon the Commission's professed ability to proceed with this matter despite FairPoint's bankruptcy. According to FairPoint, the CLECs have "sat" on any rights they may have had with regard to that schedule. FairPoint Objection to CLECs' Motion for Reconsideration at 8.

FairPoint next argues that the CLECs' improperly rely upon *Appeal of Gas Service Co.*, 121 N.H. 602 (1981). According to FairPoint, in *Gas Service* the Supreme Court found that the Commission erred by failing to consider the claims of the utility. Therefore, FairPoint argues, *Gas Service* supports the reasonableness of the Commission's decision to establish a schedule to address FairPoint's claims. Further, according to FairPoint, *Gas Service* actually supports FairPoint's arguments that the Commission has abused its discretion by barring FairPoint from presenting evidence about the CCL charge being a contribution element. As FairPoint argues, to interpret *Gas Service* in the manner the CLECs suggest would be to deny FairPoint due process.

FairPoint concludes by arguing that even if the Commission were to reverse itself on the effective date of the change to the CCL charge, Federal law would prevent any change from being effective prior to FairPoint's emergence from bankruptcy on January 24, 2011. According to FairPoint, in emerging from bankruptcy, it received a discharge applicable to all debts that arose prior to January 24, 2011 and it received an injunction by operation of law that protects it from the commencement or continuation of any action to collect on a discharged debt. According to FairPoint, any charges at issue in the proceeding relating to the CCL were not part of any exception to the discharge or injunction and therefore the CLECs cannot collect on any alleged debt from the CCL charge.

IV. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311

(1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977) and *Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9-10. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Comcast Phone of New Hampshire*, Order No. 24,958 (Apr. 21, 2009) at 6-7, and *Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9-10.

A. FairPoint's Motion for Reconsideration

We begin by noting that many of FairPoint's arguments are little other than reassertions of arguments already addressed by the Commission. For example, FairPoint first contends that the prospective tariff revisions ordered by the Commission were outside the scope of this proceeding following the Supreme Court's decision in *Verizon*. FairPoint has previously raised the argument that prospective revisions were not permitted, and the Commission has determined otherwise. *See, e.g., Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 15-16, 28-29; *see also Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,219 (May 4, 2011) at 8. The Commission will not entertain such arguments as a basis for rehearing. We reach the same conclusion with respect to FairPoint's claim that there was "uncontroverted" evidence about the purpose of the CCL, which was also addressed in Order No. 25,283. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 15-16. For completeness, we address the remainder of FairPoint's claims on their merits, though despite doing so we acknowledge that many of the arguments are restated versions of prior arguments.

FairPoint contends that the Commission erred by denying it a meaningful opportunity to be heard when the Commission misunderstood FairPoint's legal position relative to the need for a hearing. In FairPoint's November 21, 2011 response to the CLECs' motion for a hearing, it was FairPoint that determined that the CLECs' motion for a hearing on the change to the CCL portion of the tariff should be treated as a motion to bifurcate the proceeding. In responding on that basis, FairPoint did "allow" that "the question of 'whether FairPoint's CCL tariff filing complies with the Commission's prior orders is presently ripe for consideration by the Commission' (as are other questions related to the CCL charge). . .." FairPoint November 21, 2011 Response to CLECs' Motion for Hearing at 2. Further, FairPoint requested that "in addition to dispensing with further development of the factual record, the Commission also dispense with a hearing on the CCL question and move directly to briefs." FairPoint November 21, 2011 Response to CLECs' Motion for Hearing at 3. On that basis, the Commission concluded that it would accept briefs on two specific questions related to the CCL, and those briefs were submitted on December 19, 2011. The Commission thereafter issued Order No. 25,319 in response to the briefs.

FairPoint now contends that the Commission erred by not allowing for a hearing on certain issues relating to the CCL. FairPoint's current claim that there was some specific and meaningful type of hearing on the CCL that was not being waived is not borne out by our review of its response to the CLECs' motion for a hearing. There was nothing in that request creating the nuanced distinctions FairPoint now contends are in issue. At no time did FairPoint qualify its request for a hearing , despite its assertions that it did so. Accordingly, we will not grant reconsideration on that basis.

Next, FairPoint argues that the Commission erred by not approving the change to the CCL portion of its tariff simultaneously with the change to the Interconnection Charge portion of the tariff because to do otherwise would amount to a confiscation of its property. First, as the Commission stated in Order No. 25,319, we do not agree with FairPoint's claim that the two changes are inextricably linked. We reiterate our conclusion that we do not accept FairPoint's claim that because the Commission had determined that the CCL charge must change, the Interconnection Charge must as well. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 13-14. Furthermore, in Order No. 25,319, the Commission concluded that FairPoint had not requested rate relief or allowed the Commission to investigate its current rates and that FairPoint's mere assertion that a rate change was necessary was not a sufficient basis for the Commission to adjust other rates:

> While it is true that the Commission may not force a utility to serve the public at rates that are confiscatory, it is likewise the case that public utilities, like other businesses, must monitor the costs of doing business and employ sound business judgment in determining when they should seek rate increases for future services. *Appeal of Pennichuck*, 120 N.H. at 567. FairPoint has not made any request or attempt to undo any restrictions on rate relief in the agreements it has made, nor has it made any other attempt to revise its rates that would allow the Commission to investigate whether the rates under which it currently operates are, in fact, confiscatory. Instead it merely asserts that change to the application of a single charge – a charge that, prior to 2006, had not been applied for at least 10 years, *see, e.g.,* Verizon New Hampshire's September 10, 2007 Post-Hearing Brief at 3-4, in a tariff that had not changed since 1993 – is a confiscation of constitutional dimension.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 25,319 (Jan. 20, 2012) at 15.

The conclusion in Order No. 25,319 that the change to the CCL does not result in a confiscation without further evidence on FairPoint's overall rates is in line with the conclusion we reached in Order No. 25,283 that:

> As a final point of emphasis we note that our determination to not re-litigate our 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 and thus should not be charged when there is no use of a common line, does not prevent FairPoint from raising other arguments that elements of contribution are necessary to meet its financial needs. . .. Nevertheless, to assure that FairPoint is not prejudiced or denied due process, FairPoint may propose other changes to its tariff, including contribution elements, that it might consider necessary for achieving the revenues it needs. For avoidance of doubt, we will allow FairPoint to introduce evidence and make argument about the extent to which the CCL rate element has historically provided some contribution to general overhead and costs, but not to argue that it was solely a contribution element or that its tariff language on a going forward basis should allow it to be charged when there is no use of a common line. As was discussed at the May 25, 2011 prehearing conference, we believe that permitting those proposals and their attendant arguments will grant FairPoint the latitude it feels necessary without reopening matters the Commission considers closed.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 25,283 (Oct. 28, 2011) at 17-18. The Commission has consistently acknowledged that FairPoint may argue for some appropriate level of overall revenues to avoid the possibility that its rates would be so insufficient as to create a confiscation. Allowing such argument concerning overall revenue levels, however, does not presuppose that any change to the tariff potentially decreasing a particular source of revenue must be offset by some other change. Moreover, we again emphasize that FairPoint remains free to propose changes to its tariff intended to produce additional revenue to the extent it views such revenue as necessary. Should it do so, the Commission will review that request pursuant to an appropriate process which could include an analysis of the sufficiency of FairPoint's overall revenues. In short, FairPoint was, and remains,

free to petition for an increase in its revenue through the adjustment to a properly vetted charge. Therefore, we reject FairPoint's argument that the Commission erred in its conclusion that the two changes could be made separately.

FairPoint next contends that the Commission erred in acting on less than the entire filing by separating treatment of the CCL and Interconnection Charge portions of the proposed tariff. This argument appears to ignore FairPoint's agreement to bifurcate the proceeding in its response to the CLECs' motion for a hearing. Such bifurcation would, by definition, mean that the two revisions would be addressed separately rather than by having the Commission act upon the entire filing. Further, RSA 378:6, IV specifically states that the Commission may amend a tariff filing by a telephone utility. By giving the Commission authority to amend a filing, the statute presumes that the Commission could act independently on different sections of the filing. Thus, the Commission is not bound to only accept or reject a filing in its entirety, but may alter a filing in appropriate circumstances. In this case, the Commission amended FairPoint's filing by accepting the portion relating to the CCL while rejecting the portion relating to the Interconnection Charge pending further investigation. We conclude that such action is consistent with, not counter to, the provisions of RSA 378:6, IV.

Also relative to RSA 378:6, IV, FairPoint contends that the Commission erred in basing its ruling upon that statute when the proper statute based on legislative history, it contends, is RSA 378:6, I(b). We disagree. As we noted in Order No. 25,319, RSA 378:6, I(b) begins with a specific exception placing filings by telephone utilities under RSA 378:6, IV to the extent they are anything other than a general rate increase. Given this language, we remain unpersuaded that the statute is ambiguous and that reliance on legislative history is necessary in this instance.

FairPoint also argues that RSA 378:6, I applies here based upon our approach in Docket No. DT 11-248 allowing for review of FairPoint's proposed new charge accounting for a change in its property tax burden under RSA 378:6, I. That case is inapposite to this one. As noted in Order No. 25,293, in Docket No. DT 11-248, FairPoint's proposed charge is "the equivalent of a rate increase affecting all or a majority of the telephone utility's retail customers or every retail residential or business telephone exchange line and public access line . . ., as well as such lines that are provided at wholesale to resellers." *Northern New England Telephone Operations LLC*, Order No. 25,293 (Nov. 28, 2011) at fn. 2. Thus, the proposal was for a charge applicable to all or nearly all retail end users as well as certain lines provided to wholesale resellers. In this instance the Interconnection Charge would be applied to 36 wholesale customers only. *See, e.g.*, Supplemental Testimony of Michael T. Skrivan, filed December 22, 2011, at 10-11. In this instance we do not find that FairPoint's proposed interconnection charge is analogous to a general rate increase. Accordingly, application of RSA 378:6, I is not appropriate and the Commission does not grant reconsideration on that ground.

With respect to FairPoint's motion to reconsider the Commission's conclusions in Order No. 25,327 that the proposed increase to the Interconnection Charge was barred by the FCC, and to dismiss the case because the Interconnection Charge has been the only remaining issue in this docket, we conclude that reconsideration is not warranted. FairPoint contends that the Commission erred in its conclusion that the exception in footnote 1495 of the CAF Order concerned only interstate rate elements. FairPoint further contends that in its analysis of the CAF Order, the Commission incorrectly concluded that the exception to the rate cap did not apply to the proposed Interconnection Charge. Even if we assume that FairPoint is correct that

the Commission erred in its conclusion that the exception in footnote 1495 of the CAF Order concerned only interstate rate elements, FairPoint is still not entitled to reconsideration because the rate cap in the CAF Order applies to its proposed Interconnection Charge, for reasons cited below.

FairPoint states that "according to the Commission, even if the footnote 1495 exception did apply to certain intrastate elements, FairPoint's proposed Interconnection Charge is not one of those elements because it is an element of End Office Access Service." FairPoint's February 17, 2012 Motion for Rehearing at 22. FairPoint, however, contends that the Commission's reasoning is "misplaced" because its proposed Interconnection Charge is actually for local transport access and is not, therefore, covered by the definition of End Office Access Service. FairPoint's February 17, 2012 Motion for Rehearing at 22.

First, paragraph (d)(3) of 47 C.F.R. §51.903, which defines End Office Access Service, states in relevant part, that "*End Office Access Service rate elements for an incumbent local exchange carrier also include* any rate elements assessed on local switching access minutes, including the information surcharge and *residual rate elements*." (emphasis added). The note to paragraph (d) of the regulation states "For incumbent local exchange carriers, residual rate elements may include, for example, *state Transport Interconnection Charges*, *Residual Interconnection Charges*, and PICCs." (emphasis added). Since FairPoint is an incumbent local exchange carrier, its residual rate elements may include both state Transport Interconnection Charges and Residual Interconnection Charges[3] pursuant to the FCC's explanation. Thus, if the

[3] The term "Residual Interconnection Charge" is synonymous with the term "Interconnection Charge" as used by FairPoint. *See* Supplemental Testimony of Michael T. Skrivan submitted December 22, 2011 at 8-9.

Interconnection Charge is within the definition of End Office Access Service, it is subject to the cap in the CAF Order.

Despite the above, we note that, as proposed, the Interconnection Charge would change the portion of FairPoint's intrastate tariff covering local transport. To the extent, however, that FairPoint's proposed Interconnection Charge is rightly called a transport element existing outside the definition of End Office Access Service, the rate cap still applies. As described, the proposed Interconnection Charge is a state Transport Interconnection Charge included in the local transport section of FairPoint's tariff. Whether the Interconnection Charge at issue is a state Transport Interconnection Charge covered under the note to 47 C.F.R. § 51.903(d), (the definition of End Office Access Service), or a local transport rate element applicable to Tandem-Switched Transport Access Service, both are subject to the cap imposed by the FCC. *See* 47 C.F.R. §§ 51.903, 51.907(a). Accordingly, irrespective of the classification FairPoint gives to the Interconnection Charge, it is subject to the cap in the CAF Order and may not be raised above the rate in effect on December 29, 2011. Therefore, the Commission will not reconsider the determination that the proposed change to the Interconnection Charge is barred by the CAF Order, nor the resulting determination that the case be dismissed.

B. CLECs' Motion for Reconsideration

As with FairPoint's motion, we note at the outset that the CLECs' motion is, in large part, a reassertion of claims they have made before, including in their brief on the CCL. Nevertheless, we address the CLECs' arguments individually and find no basis upon which to grant reconsideration.

The CLECs first argue that the Commission misapplied the relevant law in relying upon *Appeal of Pennichuck Water Works* and ignoring *Appeal of Granite State Electric*. According to the CLECs, *Pennichuck* is less relevant than *Granite State* and the Commission ought to have relied upon the latter case, particularly since it did so in an earlier phase of this proceeding. We do not agree that *Pennichuck* was misapplied, or that any failure to cite *Granite State* compels a contrary result.

As to *Pennichuck*, the CLECs contend that it is distinguishable from the instant matter because FairPoint originally filed for the change to the CCL to become effective on October 10, 2009, and therefore, the Commission could make the tariff effective on that date without implicating the retroactivity issues present in *Pennichuck* because there was notice of the change. Initially, we note that *Pennichuck* states that rates are in effect "at least" until there is a request to make a change. There is no requirement that the rate change become effective at the earliest conceivable date. Further, as noted by FairPoint, the *Pennichuck* decision related to the date upon which temporary rates were set as being the earliest date back to which permanent rates could be imposed. Here, no temporary rate was set. In addition, the Supreme Court clarified the purpose of its holding in *Pennichuck* by stating that "Our decision today merely requires that public utilities, like other businesses, monitor their costs of doing business and employ sound business judgment in determining when they should seek a rate increase for future services." *Pennichuck*, 120 N.H. at 567. Thus, in *Pennichuck* the focus was on the provision of future services and the Commission's conclusion that the revision to the CCL portion of the tariff would apply prospectively in Order No. 25,319 is consistent with that decision. As such, we do

not agree that *Pennichuck* is as distinguishable as the CLECs argue and we do not agree that the Commission erred in its application of that decision.

Alternatively, the CLECs contend that the concerns about possible retroactivity in *Pennichuck* apply only to lawful tariffs, and because the Commission had determined that the CCL was being improperly billed, there was not a lawful tariff at issue. This argument ignores the ruling of the Supreme Court that the tariff permitted FairPoint to bill for the CCL in the manner it had been. Therefore, until the tariff actually changed it was lawful, despite the Commission's prior conclusion.

As to the CLECs' reliance on *Granite State*, they claim that the Commission has broad power to correct an unjust enrichment and that the Commission did not properly address that decision and its conclusions in Order No. 25,319. Underlying the CLECs' claim is a conclusion that there is an unjust enrichment to rectify by equitable means. We continue to conclude as we did in Order No. 25,319 that there is no cause to resort to equity in the current matter. Further, in discussing the use of equitable authority to refund money to rectify an unjust enrichment the Supreme Court stated that, "A refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired." *Granite State Electric*, 120 N.H. at 539-40. In this case, the Supreme Court concluded that FairPoint's tariff permitted it to bill the CCL as it had done despite the Commission's conclusion to the contrary. Further, the Commission has previously determined that the amended CCL tariff was suspended, *see Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 31, and did not take effect until January 21, 2012. Because the prior version of the tariff remained in effect FairPoint did not improperly acquire anything that

must now be returned. FairPoint has charged for the CCL under its tariff as it was permitted to do until the tariff was changed. Thus, even if the Commission had cited *Granite State*, any reliance upon that decision would not compel the Commission to alter its prior determination.

The CLECs also contend that it was unreasonable for the Commission not to use its equitable authority in this instance because when FairPoint recently agreed no hearing was needed on the CCL change, it was implying that its request for a hearing in 2009 was a form of "procedural maneuvering." Therefore, the CLECs contend, it is appropriate for the Commission to invoke equity to counter this "maneuver." In addition, the CLECs argue that the Commission's conclusion that the prolonging of the docket was due to circumstances beyond its control ignores the fact that the Commission retained a level of control over the docket despite FairPoint's bankruptcy, and should not be a basis for avoiding the exercise of equity.

As to the CLECs' first point, in its request for a hearing in 2009, FairPoint contended that a hearing was necessary on the general issues of its revenue and cost recovery. Its request was not bound specifically to the change to the CCL. Further, though the filings created substantial confusion and resulted in lengthy delays of this docket we do not view FairPoint's concession in late 2011 that a hearing was not needed on the changes to the CCL portions of its tariff, to be a form of "procedural maneuvering" requiring an equitable remedy.

As to the claim that the Commission did have authority to conduct the docket despite FairPoint's bankruptcy and that failing to do so justifies an equitable remedy, neither the CLECs, either individually or as a group, nor FairPoint requested that the Commission take any action on this docket during FairPoint's bankruptcy. After the Commission stayed this and other dockets involving FairPoint, and prior to FairPoint's March 2011 request for a scheduling conference, the

only filings received in this docket were a letter from AT&T and BayRing intended to "make the Commission aware" that FairPoint continued to bill for CCL charges as it had been, and a response from FairPoint stating that it disagreed with assertions in the letter. Neither submission requested an action be taken. In fact, the CLECs now contend that "the Competitive Carriers had no control over the delay in the Commission's consideration of the CCL tariff changes . . .." CLECs' Motion for Reconsideration at 16. The CLECs appear to contend that they had no ability to request that the Commission take any action on this docket. In a circumstance where neither the CLECs, nor FairPoint requested that the Commission take any action following its imposition of a stay, the Commission will not reconsider its prior decision based upon a claim that it should have acted.

Finally, the CLECs contend, citing *Gas Service*, that it was an abuse of the Commission's discretion to have required the CLECs to wait more than two years to have the changes to the CCL portion of the tariff declared to be in effect. In *Gas Service*, the Supreme Court concluded that it was an abuse of the Commission's discretion to require a utility to wait more than two years for its claim to be considered when the utility had requested that the Commission address its concerns about under-earning despite having recently received a rate increase. *Gas Service*, 121 N.H. at 603. The Supreme Court's conclusion that the Commission abused its discretion rested on the fact that the Commission had simply refused to address the arguments of the subject company. The Commission has not done so here. With the exception of the time that FairPoint was in bankruptcy – during which time, as noted, no party requested the Commission to act – the Commission has addressed the arguments and issues of the parties. As such, we do

not agree that there is reason to conclude, based upon *Gas Service*, that the Commission has abused its discretion, and we will not grant reconsideration on that ground.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's motion to reconsider or rehear Order No. 25,319 and Order No. 25,327 is denied; and it is

FURTHER ORDERED, that the CLECs' motion to reconsider Order No. 25,319 is denied.

By order of the Public Utilities Commission of New Hampshire this seventh day of May, 2012.

Amy L. Ignatius	Michael D. Harrington (KMS)	Robert R. Scott
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director

C

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)
➡ **AmendmentV. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

END OF DOCUMENT

C

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

➡➡ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

END OF DOCUMENT

C

Revised Statutes Annotated of the State of New Hampshire Currentness
Constitution of the State of New Hampshire (Refs & Annos)
Part First. Bill of Rights
➡➡ **[Art.] 12th. [Protection and Taxation Reciprocal.]**

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

HISTORY

Amendments--1964. Deleted "or an equivalent" following "necessary" at the end of the first sentence.

N.H. Const. Pt. 1, Art. 12, NH CONST Pt. 1, Art. 12

Updated with laws current through Chapter 48 of the 2012 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services

END OF DOCUMENT

C

Revised Statutes Annotated of the State of New Hampshire Currentness
Constitution of the State of New Hampshire (Refs & Annos)
Part First. Bill of Rights
➡➡ **[Art.] 15th. [Right of Accused.]**

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

HISTORY

Amendments--1984. Deleted "and" preceding "every" at the beginning of the second sentence and preceding "no" at the beginning of the third sentence and added "provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established" following "land" at the end of that sentence.

--1966. Added the fourth sentence.

N.H. Const. Pt. 1, Art. 15, NH CONST Pt. 1, Art. 15

Updated with laws current through Chapter 48 of the 2012 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services

END OF DOCUMENT

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 365
COMPLAINTS TO, AND PROCEEDINGS BEFORE, THE COMMISSION

Complaints and Investigations

Section 365:4

365:4 Investigation. – If the charges are not satisfied as provided in RSA 365:3, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate the same in such manner and by such means as it shall deem proper, and, after notice and hearing, take such action within its powers as the facts justify.

Source. 1911, 164:10. PL 238:4. RL 287:4. 1951, 203:11 par. 4, eff. Sept. 1, 1951.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 378
RATES AND CHARGES

Schedules, Etc., Generally

Section 378:6

378:6 Suspension of Schedule. –

I. (a) Pending any investigation of a rate schedule which represents a general increase in rates and the decision thereon, the commission may, by an order served upon the public utility affected, suspend the taking effect of said schedule and forbid the demanding or collecting of the rates, fares, charges or prices covered by the schedule for such period or periods, not to exceed 12 months in all, as in the judgment of the commission may be necessary for such investigation, except as provided in paragraph II.

(b) Except as provided in RSA 378:6, IV, for all other schedules filed with the commission, the commission may, by an order served upon the public utility affected, suspend the taking effect of said schedule and forbid the demanding or collecting of rates, fares, charges or prices covered by the schedule for such period or periods, not to exceed 3 months from the date of the order of suspension, but if the investigation cannot be concluded within a period of 3 months, the commission in its discretion and with reasonable explanation may extend the time of suspension for 5 additional months.

II. If a public utility submits a rate schedule which incorporates a newly completed generating facility into the rate base and the capital investment for the new facility exceeds 50 percent of the total capital investment of the public utility, the commission may suspend the schedule as provided in paragraph I, except that such suspension shall not exceed 18 months. The total capital investment of the public utility shall include the capital investment of the new facility. The commission may suspend a schedule under this paragraph only once in relation to each new facility.

III. If for any reason the commission is unable to make its determination prior to the expiration of 6 months from the originally proposed effective date of a rate schedule, the public utility affected may place the filed schedule of rates in effect, pending expiration of the appropriate suspension period, as provided in paragraph I or II, upon furnishing the commission with a bond in such form and with such sureties, if any, as the commission may determine. The bond and sureties, if any, shall secure the repayment to the customers of the public utility of the difference, if any, between the amounts collected under said schedule of rates and the schedule of rates determined by the commission to be just and reasonable.

IV. Any tariff for services filed for commission approval by a telephone utility, except a tariff reviewed pursuant to RSA 378:6, I(a), shall become effective as filed 30 days after filing, unless the commission amends or rejects the filing within the 30-day period. The commission may, in its discretion and with reasonable explanation, including an explanation of the likely areas of disagreement with the tariff, extend the time for its determination by up to 30 days. At its discretion, the commission may permit changes to existing tariffs to become effective in fewer than 30 days from the date of filing.

Source. 1911, 164:7. PL 242:6. RL 292:6. 1951, 203:46, par. 6. RSA 378:6. 1983, 99:1. 1993, 326:1, 2. 1997, 201:2, 3, eff. June 18, 1997.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 378
RATES AND CHARGES

Schedules, Etc., Generally

Section 378:7

378:7 Fixing of Rates by Commission. – Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges chargeable by any such public utility are insufficient, the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. The commission shall be under no obligation to investigate any rate matter which it has investigated within a period of 2 years, but may do so within said period at its discretion.

Source. 1913, 145:10. PL 242:7. RL 292:7. 1951, 203:46 par. 7, eff. Sept. 1, 1951.

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 378
RATES AND CHARGES

Temporary and Permanent Rates of Utilities

Section 378:27

378:27 Temporary Rates. – In any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine, and prescribe for the duration of said proceeding reasonable temporary rates; provided, however, that such temporary rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

Source. 1941, 148:1. RL 292:28. 1951, 203:46 par. 27, eff. Sept. 1, 1951.

CHAPTER Puc 1600 TARIFFS AND SPECIAL CONTRACTS

PART Puc 1601 APPLICATION OF RULES

Puc 1601.01 Application of Rules.

(a) Every utility shall file all tariffs with the commission pursuant to the requirements set forth in Puc 1600, except as provided in (b) and (c) below.

(b) Any utility which obtains more than 75% of its revenue from interstate service may, as to its service within New Hampshire, file tariffs with the commission which conform with the requirements of the federal authority to which it is subject.

(c) Telecommunications utilities which are competitive local exchange carriers as defined in Puc 402.11 or competitive intraLATA toll providers as defined in Puc 402.10 are not required to comply with this chapter.

(d) Water utilities meeting the definition of "utility" in Puc 602.13 and having gross annual revenues under $100,000 shall comply with tariff filing requirements pursuant to Puc 1600 unless the commission and the utility agree to alternative filings pursuant to a petition filed by the utility as specified in Puc 200.

(e) A utility shall document any request for emergency rate relief pursuant to RSA 378:9 but shall not be required to comply with the filing requirements of Puc 1600 when seeking emergency rate relief.

Source. #2011, eff 5-4-82; ss by #2912, eff 11-26-84; ss by #5006, eff 11-26-90; ss by #6365, INTERIM, eff 11-18-96, EXPIRED: 3-18-97

New. #6573, eff 9-10-97; ss and moved by #8428, eff 9-10-05 (from Puc 1602.01)

PART Puc 1602 APPLICATION OF RULES

Puc 1602.01 "Full rate case" means a proceeding in which a revenue requirement is established for a utility and rates set to meet that revenue requirement.

Source. #6573, eff 9-10-97; ss and moved by #8428, eff 9-10-05 (from Puc 1601.01)

Puc 1602.02 "Pro forma adjustment" means an adjustment in the test year to arrive at an adjusted test year appropriate for a forecasted period.

Source. #8428, eff 9-10-05 (from Puc 1601.02)

Puc 1602.03 "Rate" or "rates" means any charge or price, and all related service provisions for services regulated and tariffed by the commission, including, but not limited to, availability, terms of payment, and minimum service period.

Source. #8428, eff 9-10-05 (from Puc 1601.03)

Puc 1602.04 "Rate schedule" means the initial collection of information along with any revisions filed by a utility which includes the most recent rate schedule cover sheet and all effective rate sheets.

Source. #8428, eff 9-10-05 (from Puc 1601.04)

Puc 1602.05 "Special contract" means rates and charges, including terms and conditions, covering service rendered under prices and conditions which vary from those contained in the filed tariff. The term does not include any contract that applies to service furnished in accordance with an existing tariff.

Source. #8428, eff 9-10-05 (from Puc 1606.01)

Puc 1602.06 "Tariff" means the schedule of rates, charges and terms and conditions under which a regulated and tariffed service is provided to customers, filed by a utility and either approved by the commission or effective by operation of law.

Source. #8428, eff 9-10-05 (from Puc 1601.05)

Puc 1602.07 "Test year" means a utility's actual financial data for a 12-month period.

Source. #8428, eff 9-10-05 (from Puc 1601.06)

Puc 1602.08 "Utility" means "public utility" as defined by RSA 362:2.

Source. #8428, eff 9-10-05 (from Puc 1601.07)

PART Puc 1603 GENERAL TARIFF FILING REQUIREMENTS

Puc 1603.01 Format and Page Markings.

(a) Each utility shall submit all tariff pages as follows:

(1) Using 8-1/2 inches by 11 inches sized paper;

(2) In loose leaf form with standard 3-hole punch in the left-hand margin;

(3) Without alterations or erasures; and

(4) In legible print.

(b) All tariff pages shall include the following:

(1) A header which contains, in the order presented below, the following information:

a. The tariff number, designated as "NHPUC No. _", located in the upper left hand corner of the page;

b. The name of the utility, located in the upper left hand corner of the page directly below the tariff number; and

c. The page number and designation of page as provided in (c) below, located in the upper right hand corner of the page; and

(2) A footer which contains in the order presented below, the following information:

a. The date the tariff is issued, located in the lower left hand corner of the page;

b. The effective date of the tariff, located directly under the date the tariff is issued; and

c. The name and title of the utility official issuing the tariff, located in the lower right hand corner of the page.

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Title 47: Telecommunication
PART 51—INTERCONNECTION
Subpart J—Transitional Access Service Pricing

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§ 51.901 Purpose and scope of transitional access service pricing rules.

(a) The purpose of this section is to establish rules governing the transition of intercarrier compensation from a calling-party's-network pays system to a default bill-and-keep methodology. Following the transition, the exchange of traffic between and among service providers will, by default, be governed by bill-and-keep arrangements.

(b) Effective December 29, 2011, the provisions of this subpart apply to reciprocal compensation for telecommunications traffic exchanged between telecommunications providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access.

Note to §51.901: See FCC 11–161, figure 9 (chart identifying steps in the transition).

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Title 47: Telecommunication

PART 51—INTERCONNECTION
Subpart J—Transitional Access Service Pricing

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§ 51.903 Definitions.

For the purposes of this subpart:

(a) *Competitive Local Exchange Carrier.* A *Competitive Local Exchange Carrier* is any local exchange carrier, as defined in §51.5, that is not an incumbent local exchange carrier .

(b) *Composite Terminating End Office Access Rate* means terminating End Office Access Service revenue, calculated using demand for a given time period, divided by end office switching minutes for the same time period.

(c) *Dedicated Transport Access Service* means originating and terminating transport on circuits dedicated to the use of a single carrier or other customer provided by an incumbent local exchange carrier or any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. *Dedicated Transport Access Service* rate elements for an incumbent local exchange carrier include the entrance facility rate elements specified in §69.110 of this chapter, the dedicated transport rate elements specified in §69.111 of this chapter, the direct-trunked transport rate elements specified in §69.112 of this chapter, and the intrastate rate elements for functionally equivalent access services. Dedicated Transport Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access services.

(d) *End Office Access Service* means:

(1) The switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises;

(2) The routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or facilities used; or

(3) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. End Office Access Service rate elements for an incumbent local exchange carrier include the local switching rate elements specified in §69.106 of this chapter, the carrier common line rate elements specified in §69.154 of this chapter, and the intrastate rate elements for functionally equivalent access services. End Office Access Service rate elements for an incumbent local exchange carrier also include any rate elements assessed on local switching access minutes, including the information surcharge and residual rate elements. End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.

Note to paragraph (d): For incumbent local exchange carriers, residual rate elements may include, for example, state Transport Interconnection Charges, Residual Interconnection Charges, and PICCs. For non-incumbent local exchange carriers, residual rate elements may include any functionally equivalent access service.

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Title 47: Telecommunication

PART 69—ACCESS CHARGES
Subpart A—General

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§ 69.1 Application of access charges.

(a) This part establishes rules for access charges for interstate or foreign access services provided by telephone companies on or after January 1, 1984.

(b) Except as provided in §69.1(c), charges for such access service shall be computed, assessed, and collected and revenues from such charges shall be distributed as provided in this part. Access service tariffs shall be filed and supported as provided under part 61 of this chapter, except as modified herein.

(c) The following provisions of this part shall apply to telephone companies subject to price cap regulation only to the extent that application of such provisions is necessary to develop the nationwide average carrier common line charge, for purposes of reporting pursuant to §§43.21 and 43.22 of this chapter, and for computing initial charges for new rate elements: §§69.3(f), 69.106(b), 69.106(f), 69.106(g), 69.109(b), 69.110(d), 69.111(c), 69.111(g)(1), 69.111(g)(2), 69.111(g)(3), 69.111(l), 69.112(d), 69.114(b), 69.114(d), 69.125(b)(2), 69.301 through 69.310, and 69.401 through 69.412. The computation of rates pursuant to these provisions by telephone companies subject to price cap regulation shall be governed by the price cap rules set forth in part 61 of this chapter and other applicable Commission rules and orders.

(d) To the extent any provision contained in 47 CFR part 51 subparts H and J conflict with any provision of this part, the 47 CFR part 51 provision supersedes the provision of this part.

[48 FR 10358, Mar. 11, 1983, as amended at 55 FR 42385, Oct. 19, 1990; 58 FR 41189, Aug. 3, 1993; 62 FR 40463, July 29, 1997; 76 FR 73882, Nov. 29, 2011]

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