THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

NO. _____

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

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

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

APPEAL BY PETITION PURSUANT TO RSA 541:6

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint"), and pursuant to RSA 541:6 and Supreme Court Rule 10, appeal to this Honorable Court from the New Hampshire Public Utilities Commission's (the "Commission") order on reconsideration, Order No. 25,358 issued on May 7, 2012. In support of this Petition, FairPoint states as follows:

1. The parties and counsel are as follows:

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2. The Commission issued a final decision on reconsideration (Order No. 25,358) on May 7, 2012. Copies of that Order and the following documents are contained in the Appendix filed with this Petition:

a) PUC Procedural Order
Order No. 24,705
November 29, 2006 — See Appendix p. 1

b) PUC Order *Nisi* Directing FairPoint to Revise Tariff
Order No. 25,002
August 11, 2009 — See Appendix p. 9

c) PUC Procedural Order and Supplemental Order of Notice
Order No. 25,219
May 4, 2011 — See Appendix p. 13

d) PUC Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification
Order No. 25,283
October 28, 2011 — See Appendix p. 23

e) Competitive Carriers' Motion for Hearing to Determine Language and Effective Date of FairPoint's CCL Tariff Filing
November 10, 2011 — See Appendix p. 59

f) FairPoint's Response to Competitive Carriers' Motion for Hearing
November 21, 2011 — See Appendix p. 63

g) PUC Order on CLEC Motion for Hearing
Order No. 25,295
November 30, 2011 — See Appendix p. 69

h) PUC Order
Order No. 25,319
January 20, 2012 See Appendix p. 75

i) PUC Order
Order No. 25,327
February 3, 2012 See Appendix p. 95

j) FairPoint Communications-NNE's
Motion for Rehearing and/or Reconsideration
Of Order Nos. 25,319 and 25,327
February 17, 2012 See Appendix p. 112

k) Competitive Carriers' Motion for
Reconsideration of Order No. 25,319
February 21, 2012 See Appendix p. 137

l) Competitive Carriers' Objection to
FairPoint Communications-NNE's
Motion for Rehearing and/or
Reconsideration of Order Nos. 25,319 and 25,327
February 27, 2012 See Appendix p. 155

m) FairPoint Communications-NNE's
Objection to the Competitive Carriers'
Motion for Reconsideration
February 28, 2012 See Appendix p. 196

n) PUC Order on Motions for Reconsideration
Order No. 25,358
May 7, 2012 See Appendix p. 209

3. The questions presented for review are:

a. Whether the Commission improperly pre-judged the issue of whether FairPoint's common carrier line charge contributes solely to the joint and common costs of providing FairPoint's services, thereby denying FairPoint meaningful opportunity to be heard.

b. Whether the Commission erred by ordering tariff revisions that were outside the scope of this proceeding thereby denying FairPoint proper notice and hearing.

c. Whether there was sufficient support within the record to support the Commission's finding that FairPoint's carrier common line charge is not solely a contribution element.

d. Whether the Commission erred by failing to approve FairPoint's tariff filing in a revenue neutral manner thereby reducing FairPoint's revenues without a proper investigation and hearing.

e. Whether the Commission erred by applying the incorrect statutory standard to FairPoint's December 2011 tariff filing.

f. Whether the Commission erred by acting on less than FairPoint's entire tariff filing in violation of RSA 378:6, I and IV.

g. Whether the Commission erred in its determination that FairPoint's filing of the Interconnection Charge was ineligible for the exception to the FCC's rate cap rule.

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

5. There are no insurance policies, contracts or related documents in this case.

6. Statement of the Case.

The procedural history of this matter arises, in relevant part, out of this Court's decision in *Verizon New England Inc.*, 158 N.H. 693 (2009). In that decision, this Court reversed the

Commission's ruling that the carrier common line ("CCL") charge imposed on long distance carriers by Verizon New England Inc.'s ("Verizon's") Tariff NHPUC No. 85 ("Tariff 85")[1] was chargeable only when Verizon (and subsequently FairPoint) provided the use of its CCL facilities to provide access to its own end user, but not the end user of another local exchange carrier that interconnected with the long distance carrier through Verizon's network. This Court held that, based on the plain language of Tariff 85, CCL access charges are properly chargeable to *all switched-access services*, not solely those services for which FairPoint provides CCL facilities for access to or from a FairPoint end user.[2] This Court further stated that if the Commission determined that the tariff should be amended, it should be "amended as a result of regulatory process."[3]

Despite this Court's ruling, and notwithstanding an early Commission procedural order that had expressly deferred the issue of prospective rate changes to another proceeding,[4] the Commission issued its Order *Nisi* No. 25,002 ("Order *Nisi*") on August 11, 2009 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."[5] FairPoint objected to the Order *Nisi,* asserting, among other things, that this "clarification" was really a confiscatory rate reduction, ordered without due process in direct disregard of the Court's directive in *Verizon.* However, in an effort to comply with the Order *Nisi* in a way that would be lawful, FairPoint filed revised, revenue-neutral tariff pages

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[1] FairPoint assumed Tariff 85, and re-designated it as NHPUC No. 3 pursuant to its acquisition of Verizon's New Hampshire wireline telecommunications business on March 31, 2008.

[2] *In re Verizon New England Inc.*, 158 N.H. 693, 700 (2009) ("*Verizon*").

[3] *Id.*

[4] Order No. 24,705, dated November 29, 2006 ("November 2006 Procedural Order").

removing CCL charges from certain switched access traffic and replacing the lost revenue by increasing the "Interconnection Charge" rate element contained in Tariff 85. Faced with numerous objections to this plan, FairPoint subsequently filed a Motion for Rehearing of the Order *Nisi* and withdrew the tariff filing, deeming it merely illustrative. Shortly thereafter, on October 16, 2009, the Commission suspended the procedural schedule for this matter due to FairPoint's then pending bankruptcy proceeding.

On May 4, 2011, following FairPoint's emergence from Chapter 11 protection, the Commission issued a Procedural Order and Supplemental Order of Notice that, among other things, approved FairPoint's withdrawal of its entire September 10, 2009 tariff filing and treatment of those tariff pages as illustrative, holding that since the procedural schedule was suspended on October 16, 2009, FairPoint's tariff filing never went into effect.[6] The Commission also granted FairPoint's motion for hearing on the issue of whether its proposed tariff revisions were just and reasonable.[7] However, the Commission again 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, stating that 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."[8] FairPoint sought an Interlocutory Transfer of this specific question by motion filed May 24, 2011, which transfer the Commission denied October 28, 2011, pursuant to Order No. 25,283 ("Order on Motions"). In

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[5] Order *Nisi* at 2.

[6] Order No. 25,219, dated May 4, 2011 at 6 ("Supplemental Order").

[7] *Id.*

making its decision, the Commission held, in relevant part, that despite this Court's decision in *Verizon* overturning the Commission's earlier ruling, there is nothing that prevented the Commission from arriving at its recent conclusion about the purpose or intent of the CCL based upon the existing record.[9]

The Commission also held in the Order on Motions that FairPoint's two proposals in the September 10, 2009 tariff filing (i.e. revised CCL language and increased Interconnection Charge) were intertwined and intended to be dealt with as a package. At the same time, however, it also reversed its grant of FairPoint's request to withdraw its September 10, 2009 tariff filing, finding instead that the portion of the filing covering the CCL was accepted and not considered withdrawn (notwithstanding the Commission's determination that both portions constituted a single filing), but affirmed that the CCL revisions remain suspended in application and effect. Also, the Order on Motions yet again reiterated that, while FairPoint could argue that contribution elements are necessary to meet its financial needs, it was prohibited from asserting that the CCL charge was solely a contribution element.

Thereafter, several competitive local exchange carriers, Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communications Company, L.P. and Sprint Spectrum, L.P., and AT&T Corp. (collectively the "CLECs") moved for an expedited hearing on whether FairPoint's September 10, 2009 tariff filing complied with the Commission's orders and the appropriate effective date of the proposed tariff changes. The CLECs contended that the expedited hearing was appropriate because no additional discovery or process was needed for the

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[8] *Id.* at 7.

[9] Order on Motions at 15.

Commission to determine these issues.[10] FairPoint responded and agreed that an examination of whether FairPoint's September 10, 2009 tariff filing complied with the Commission's orders, a mere ministerial administrative function, did not require further development of the factual record, and that in fact the Commission should dispense with a formal hearing immediately proceed to briefing on the matter.[11] In agreeing that an administrative or ministerial review of tariff pages did not require a formal hearing, FairPoint in no way waived its prior articulated positions that the Commission's actions were unlawful and unreasonable.

On November 30, 2011, the Commission issued Order No. 25,295 on the CLEC Motion for Hearing ("Briefing Order") finding that it was not necessary to conduct a hearing for testimony and cross examination related to the CCL charge and set the CCL question for briefing. In addition, not only did it continue to preserve the Commission's existing bar on any arguments regarding the CCL charge as a contribution element, it further restricted the inquiry to only two 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?[12]

Also on November 30, 2011, to formalize its request, 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,

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[10] CLEC's Motion for Hearing to Determine Language and Effective Date of FairPoint's CCL Tariff Filing, dated November 10, 2011.

[11] FairPoint Response to Motion for Hearing, dated November 21, 2011.

[12] Briefing Order at 4.

IV.[13] On December 21, 2011, FairPoint again refiled the identical tariff revisions, this time requesting that the Commission review the filing within the longer timeframe specified in RSA 378:6, I(b),[14] citing to legislative history that confirmed that this paragraph was applicable.

On January 20, 2012, the Commission issued the first order of the two orders being appealed by this petition, Order No. 25,319 concerning the original September 10, 2009 CCL Tariff filing and the December 2011 CCL Tariff Filing (the "CCL Order"). FairPoint addresses the CCL Order in the first instance. In the CCL Order, the Commission determined that the revised CCL language in the September 2009 CCL filing, as duplicated in the December 21, 2011 Tariff Filing, complied with the Commission's directive to amend the tariff. It accordingly ordered that the CCL related provisions of the December 2011 Tariff Filing would become effective on January 21, 2011.

However, the Commission rejected the portion of the December 21, 2011 Tariff Filing related to the proposed Interconnection Charge. The Commission stated 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, therefore, rejected FairPoint's argument that the Interconnection Charge should be

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[13] RSA 378:6, IV provides that:

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. (emphasis supplied).

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

[e]xcept 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

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.

On February 3, 2012, the Commission issued the second order at issue in this appeal, 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. The Commission based its decision on a 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 charge elements as of December 29, 2011.[15] FairPoint had argued that the December 21, 2011 Tariff Filing was excepted from the FCC cap because it was pending prior to the CAF Order's December 29, 2011 effective date, and because the cap only applied to interstate rates, not intrastate rates. The Commission rejected these arguments. Accordingly, it held that FairPoint was barred from any increase in the Interconnection Charge and dismissed the remainder of the proceeding.

FairPoint filed a timely Motion for Rehearing and/or Reconsideration of Order Nos. 25,319 (i.e., the CCL Order) and 25,327 on February 17, 2012 ("FairPoint's Motion for Rehearing"),[16] which the Commission denied pursuant to Order No. 25,358 ("Rehearing Order"), dated May 7, 2012. In the Rehearing Order, the Commission rejected FairPoint's contention that the tariff revisions ordered by the Commission were outside the scope of this proceeding

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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.

[15] *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*") available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

[16] The CLECs filed a Motion for Rehearing of Order No. 25,319 on February 21, 2011.

pursuant to this Court's decision in *In re Verizon*.[17] It also continued to decline to address any claim about the purpose of the CCL.[18] The Commission also rejected FairPoint's claim that that the changes to its tariff must be made concurrently, explaining that RSA 378:6 was unambiguous, and therefore, there was no need for it to look to legislative history.[19] The Commission also held that even if it erred in its conclusion that the exception in footnote 1495 of the CAF Order concerned only interstate rate elements, FairPoint was still not entitled to reconsideration because the rate cap in the CAF Order applies to the proposed Interconnection Charge.[20] Finally, in its most striking holding, the Commission further rejected FairPoint's claim that it had been denied its right to be heard on the issue of whether the CCL charge was a contribution element, asserting that FairPoint had waived any right to a hearing on the issue by suggesting that the parties move directly to briefing.[21]

7. RSA 541:6 supplies the jurisdictional basis for this appeal.

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

This Court should accept this appeal because in limiting FairPoint's ability to fully present its case with respect to the purpose of its CCL charges, the Commission has denied FairPoint due process with respect to its revision of Tariff 85. It has also overlooked key evidence that runs contrary to its determination and misconstrued the relevant statutory requirements. The Commission failed to conform to the Court's requirement that, if revised, Tariff 85 be revised as part of a regulatory *process*. As is more fully detailed below, despite the

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[17] Rehearing Order at 17.

[18] *Id.*

[19] *Id.* at 21.

[20] *Id.* at 23.

lengthy proceeding leading up to its decision, the Commissions' restricted process had the effect of pre-judging the outcome and failed in more than one respect to truly provide FairPoint a meaningful opportunity to be heard in violation of its rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment of the United States Constitution. Accordingly, the acceptance of this appeal will "present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice"[22] and is worthy of this Court's review.

a. The Commission improperly pre-judged whether FairPoint's CCL charge contributes to the joint and common costs of providing FairPoint's services.

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 considered thereafter were if and when FairPoint complied with the initial directive. One of the Commission's most significant errors is in misconstruing FairPoint's legal position and claiming that FairPoint "contended due process would be satisfied without a hearing."[23] That statement simply is not correct. In noting that a hearing was not necessary with respect to whether the Commission may impose the changes proposed to the CCL charge pursuant to its prior order, FairPoint was not addressing a constitutional due process issue. FairPoint was addressing the CLECs' contention that no discovery or additional process, particularly the taking of testimony, was necessary for the Commission to determine the narrow and essentially ministerial matter of "whether the CCL tariff language complies with the

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[21] *Id.* at 18.

[22] N.H. Supreme Court Rule 10(1)(h).

[23] CCL Order at 8.

Commission's directives to FairPoint to modify its tariff,"[24] however unlawful that may have been.

FairPoint has contended at every possible opportunity, using every procedural device available, that it has been stymied as to the case it could present. FairPoint previously requested a hearing, and was putatively granted one by the Commission in the Supplemental Order. However, the Commission declared that FairPoint was estopped from litigating the issue of whether the CCL charge contributes to the joint and common costs of providing FairPoint's services. Specifically, the Commission 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."[25] Likewise, in the Briefing 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.[26]

FairPoint had requested a hearing as to whether the Commission was authorized to mandate a reduction in its rates, but in the end was maneuvered into merely confirming whether it had properly transcribed the words dictated by the Commission. Such review does not require an evidentiary hearing, it simply warrants a ministerial comparison of the content of the filing to the prior directives. Thus, in foregoing a hearing, FairPoint was making no concession as to

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[24] CLECs Motion for Hearing at 2.

[25] Supplemental Order at 7.

[26] Briefing Order at 4.

whether it had, or would be, "heard" in this case, and indeed reserved numerous rights.[27]

This restricted review is not, and could never have been, a meaningful opportunity to be heard. "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."[28] "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."[29]

By prejudging the central issue in this case, the Commission erred in denying FairPoint a meaningful hearing, in violation of its rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendments of the United States Constitution. The Commission's declaration regarding the CCL charge estopped FairPoint from litigating this issue and was, therefore, highly prejudicial to FairPoint as the CCL charge is expressly designed to be a contribution element.

b. The Commission ordered tariff revisions that were outside the scope of this proceeding thereby denying FairPoint proper notice and hearing.

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

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[27] *See* FairPoint Response to Motion for Hearing, dated November 21, 2011 at 3-4.

[28] *Appeal of Concord Steam Corp.* 130 N.H. 422, 429 (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.").

[29] *Id.* at 428.

the tariffs are appropriate."[30] However, there were subsequent procedural orders, one of which contracted the scope of this proceeding to expressly exclude considerations of whether the tariff should be revised. For instance, 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."[31]

The only purpose of this 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. Consequently, the issue of tariff modifications was beyond the scope of the proceeding and was therefore, 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.

c. There was insufficient evidence within the record to support the Commission's finding that FairPoint's CCL charge is not a contribution element.

The Commission held in the Order *Nisi* 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."[32] Even if the Order *Nisi* was lawful (which FairPoint contends it was not), the record does not support this conclusion. In this proceeding, the

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[30] Order *Nisi* at 2.

[31] November 2006 Procedural Order at 6.

Commission never found that the CCL charge was limited simply to the recovery of the costs of the local loop. In fact, Verizon presented unrebutted evidence, by the very person who developed Tariff 85, 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.[33]

Specifically, the CCL charge was designed to ensure that each long distance 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.[34] 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.[35]

Verizon designed its retail rate for intrastate toll service to exceed the direct cost of providing such services.[36] 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 that support multiple services and/or the company's overhead.[37] Thus, Verizon presented uncontroverted evidence by the *actual* Verizon employee who was on the scene and managed the

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[32] Order *Nisi* at 2.

[33] *See, e.g.,* DT 06-067, Testimony of Peter Shepherd at 16, 20-21; Tr. at 11:11-14 (Jul. 11, 2007).

[34] *Appeal of Verizon New England*; Docket 2008-0645, Petition for Appeal at 9 (Sep. 8, 2008) ("Petition").

[35] DT 06-067, Tr. at 17:17-21 (Jul. 11, 2007).

[36] Shepherd Testimony at 16, 20-21.

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.[38] Other parties to the underlying proceeding provided testimony purporting to rebut Verizon's testimony, but this consisted only of policy arguments,[39] analysis of the proceedings in DT 90-002,[40] or observations that the Commission had never expressly acknowledged that the CCL charge was a contribution element.[41]

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."[42] On the contrary, the uncontroverted evidence establishes that 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 overlooked these important facts and was in error.

d. The Commission erred by failing to approve FairPoint's tariff filing in a revenue neutral manner, thereby reducing FairPoint's revenues without a proper investigation and hearing.

FairPoint has continuously emphasized that the proposed revisions to its tariff were intended to be revenue neutral. In other words, to the extent the Commission suggested revisions result in lower revenues to FairPoint, other charges would need to be increased to restore the

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[37] *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).

[38] Verizon Direct Testimony, March 9, 2007 at 22:11-20.

[39] *See* AT&T Direct Testimony, March 9, 2007 at 22:7-24:2.

[40] *See* AT&T Rebuttal Testimony, April 20, 2007 at 5:11-11:6.

[41] *See* BayRing Rebuttal Testimony, April 20, 2007 at 10:20.

balance. 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."[43] Moreover, FairPoint's September 10, 2009 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." Additionally, FairPoint's Michael Skrivan testified that the revised tariff pages reflected a revenue neutral adjustment, accomplished by an increase in the Interconnection Charge.[44] Thus, throughout the underlying proceeding, FairPoint has repeatedly stated its intention that the revised tariff pages encompass a single revision of interdependent prices and terms.

Moreover, this interdependency conforms to definition of a "rate" under Rule Puc 1602.03 as "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." (emphasis supplied). Thus, "rate" encompasses much more than a numerical price. In this case, the "rate" for CCL access service includes the Interconnection Charge, which "is applied to all local transport access minutes . . . ."[45]

In the Order on Motions, the Commission itself confirmed that "FairPoint's two proposals in the September 10, 2009 tariff filing (i.e. revised CCL language, increased

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[42] CCL Order at 10.

[43] FairPoint Comments and Conditional Request for Hearing, dated August 28, 2009 at 6.

[44] Skrivan Direct Testimony at 5:3-10; Skrivan Supplemental Testimony at 6:5-13.

Interconnection Charge) were intertwined and intended to be dealt with as a package."[46] Nevertheless, the CCL Order requires FairPoint to implement reductions to its CCL rate based on one portion of the December 2011 tariff filing without any compensating increase to the Interconnection Charge. The Commission's explanation for its decision was, in relevant part, that Verizon failed to bill for the CCL charge for ten years[47] (notwithstanding that FairPoint itself has always billed this charge and can be presumed to have relied on it when making the above commitments) and that 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"[48] (even though this Court deemed such tariff revisions unnecessary given the plain language of the tariff).[49]

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 . . . ." Thus, a return 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."[50] FairPoint testified to its

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[45] Tariff Transmittal § 6.2.1.E.2.

[46] Order on Motions at 29.

[47] *Id.*

[48] Order No. 25,319 at 15.

[49] *In re Verizon New England, Inc.* 158 N.H. 693, 700 (2009).

[50] *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)).

"excessively low earnings"[51] and has argued previously that, absent a revenue neutral adjustment, the CCL changes would impact its earnings. However, by simply ordering the cessation of billing for the service without addressing FairPoint's earnings and without a proper investigation and hearing, the Commission erred by confiscating 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.

e. The Commission erred by applying the incorrect standard of RSA 378:6, I(b) to FairPoint's December 2011 tariff filing.

In The CCL Order, the Commission rejected FairPoint's 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."[52] In doing so, the Commission implied 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, I(a),[53] rejecting FairPoint's argument that a third option existed under RSA 378:6, I(b),

FairPoint's position is well supported by the legislative history. This history contains testimony of Commission Chair 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). Commissioner Ignatius testified that:

> if it involves a rate change, whether it is a telephone company or anyone else, it would be under the section above [i.e. RSA 378:6, I(b)] . . . that is an existing

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[51] Skrivan Supplemental Testimony at 17.

[52] CCL Order at 18.

[53] *Id.*

> 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. 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 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."[54] To the contrary, these two statutes, on their own, are anything but clear. Pursuant to the Commission's own description, 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. . . ."[55] However, as FairPoint has testified,[56] and all opposing parties have insisted, the Interconnection Charge is not a *service*, but a *rate increase*. Further, in another recent proceeding, the Commission stated that such rate increase filings are not eligible for review under RSA 378:6, IV 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.[57]

These contradictory findings in the space of three months are a strong indicator that the statutes are ambiguous. *See First Berkshire Bus. Trust v. Comm'r, N.H. Dep't of Revenue Admin.*, 161

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[54] *Id.*

[55] *Id.* (emphasis supplied).

[56] Skrivan Supplemental Testimony at 8:16 – 9:10.

[57] DT 11-248, Order No. 25,293 at n.2 (Nov. 28, 2011) (emphasis supplied).

N.H. 176, 180 (2010) ("We review legislative history to aid our analysis when the statutory language is ambiguous or subject to more than one reasonable interpretation"). Accordingly, the Commission erred by refusing to refer to and rely on the legislative history of RSA 378:6, IV.

f. The Commission erred because applicable law does not permit the commission to act on less than the entire tariff filing.

In the 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. RSA 378:6, I provides that the Commission may suspend a "rate schedule" or "schedules." Thus, any suspension applies to entire "rate schedules," not simply rates or provisions. "Rate schedule" is 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."[58] In this proceeding, the rate schedule consists of the currently effective schedule and the revisions filed as of December 21, 2011. Therefore, if this rate schedule is suspended, it must be suspended in its entirety, including all revisions.

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,"[59]), RSA 378:6, IV provides that the Commission can only reject, amend or permit "*the filing*" to become effective by operation of law (unless, at its discretion, it has permitted an earlier effective date.)[60] As noted, this provision applies to the entire "filing," not simply individual rates, terms or

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[58] Rule Puc 1602.04 (emphasis supplied).

[59] Rule Puc 1602.06.

[60] RSA 378:6, IV (emphasis supplied).

conditions. Thus, regardless of which provision of RSA 378:6 applies to this proceeding, the Commission may only act on the entire filing.

g. The Commission erroneously determined that FairPoint's filing of the Interconnection Charge was ineligible for the exception to the FCC's cap rate rule.

In the Dismissal Order, the Commission held that FairPoint's December 2011 tariff filing of the Interconnection Charge was ineligible for the exception to the FCC's rule capping intrastate access rates as of December 29, 2011. This was despite the fact that FairPoint's Interconnection Charge filing had been made prior to the effective date of the rules and the FCC's clear guidance in footnote 1495 of its order to:

> 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.*[61]

The Commission based its decision primarily on two reasons.[62] 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. 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

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[61] *See* FCC *CAF Order* at fn 1495 (emphasis supplied).

[62] 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.

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 . . . ."[63] 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."[64]

However, the rate cap rules are not contained in, or qualified by, Part 69 of the FCC's rules. Rather, 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."[65] The references in the new rules to Part 69 are simply 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 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)

The FCC presumed that the trunking basket might contain intrastate rate elements, for the

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[63] Dismissal Order at 13 (citing 47 C.F.R. § 69.1(a)) (emphasis supplied).

[64] *Id.* at 14.

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 is that the rate cap exception also applies intrastate elements, like the proposed Interconnection Charge.

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.[66] 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*, and PICCs."[67] 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."[68] However, the proposed Interconnection Charge is not related to *local switching*, given that it applies to all switched

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[65] 47 C.F.R. § 51.901(b) (emphasis supplied).

[66] Dismissal Order at 14.

[67] *Id.* (referring to 47 C.F.R. § 51.903(d)(3) and note to paragraph (d)) (emphasis supplied).

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).[69]

Consequently, FairPoint's proposed Interconnection Charge is not part of the End Office Access Service category and is not restricted by the unqualified rate cap.[70] The Commission has erred because it provided no reason why it the FCC's rate cap rules prevent the implementation of the Interconnection Charge in the December 2011 tariff filing. Further, 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 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*.

9. Each issue raised in this appeal has been presented to the Commission and has been properly preserved for appellate review.

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[68] 47 C.F.R. § 51.903(d)(3) (emphasis supplied).

[69] Tariff NHPUC No. 3, § 6.2.E.2. First Revised Page 5. (emphasis supplied)

[70] 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.

Respectfully submitted,

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

By its Attorneys,

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Date: June 6, 2012

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CERTIFICATION OF COMPLIANCE

I hereby certify that I have this 6th day of June, 2012 forwarded a copy of the foregoing Appeal By Petition Pursuant to RSA 541:6 by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.

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Harry N. Malone