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

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, a Delaware limited liability company having its principal office at 521 E. Morehead Street, Charlotte, North Carolina ("FairPoint") hereby moves the Public Utilities Commission (the "Commission") to reconsider Order No. 24,387, dated March 21, 2008 (the "Order"), or order a rehearing in the above-docketed proceeding (this "Docket") and, in support of this Motion, states as follows:

I. INTRODUCTION

As this Commission and the parties to this Docket well know, FairPoint acquired the regulated wireline based telecommunications assets and business of Verizon New England Inc. ("Verizon") in New Hampshire effective with the closing process of March 31, 2008. *See ex. In re Verizon New England Inc. et al. - Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order 24,823 (February 25, 2008) (the "Transfer Order"). With all necessary regulatory and other approvals having been granted, and through the closing of the transactions contemplated in the Transfer Order, FairPoint became the successor in interest to Verizon's New

Hampshire landline telecommunications franchise, business and properties. As such, to the extent the Order compels FairPoint to take certain actions with respect to billing for switched access or other "access" services, the Order directly impacts FairPoint's property and other interests.[1]

This Commission's Order directly and adversely affects FairPoint's financial and operational interests. In relevant part, the Order requires FairPoint to "...cease the billing of carrier common line charges for calls that do not involve a [FairPoint] end user or a [FairPoint]-provided local loop." *See* Order at p. 33. For the reasons set forth below, FairPoint submits that good cause exists for this Commission to reconsider the Order and/or grant a rehearing in this Docket.

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.

RSA 541:3 (emphasis added).

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. *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 (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).

[1] FairPoint's Petition to Intervene has been submitted this day, along with the present Motion and an appearance of counsel.

III. FAIRPOINT'S BASIS FOR REHEARING AND/OR RECONSIDERATION[2]

1. The Order should be reconsidered, as the plain meaning of Tariff 85 allows for the imposition of a CCL charge for the access service at issue in this Docket.

The Commission should apply principles of contract interpretation and statutory construction when interpreting a tariff. Order at 25, citing *Re Public Serv. of N.H.*, 79 NH PUC 688, 689 (1964). It is well established that absent ambiguity, the intent of the contracting parties should be determined based on plain meaning of language used (*Id. See also Robbins v. Salem Radiology*, 145 N.H. 415, 418 (2000)), and that a contract must be read as a whole. *See General Linen Servs. v. Franconia Inv. Assocs.*, 150 N.H. 595, 597 (2004). Similarly, "...no clause, sentence or word, shall be superfluous, void or insignificant." *Churchill Realty v. City of Dover Zoning Bd.* (N.H. 1-15-2008) at page 7. FairPoint submits that the Commission committed legal error in defining what constitutes "switched access" under the tariff by failing to ascribe the plain meaning to words used in Tariff 85, reading words out of the tariff, and failing to interpret the tariff as a whole.

Section 2.1.1.A sets forth the scope of Tariff 85 and provides that it:

> "contains regulations, rates and charges applicable to switched access services and other miscellaneous services ... provided by Verizon New England, Inc. ... to interexchange carriers and wireless carriers, including resellers or other entities engaged in the provision of public utility common carrier services which utilize the network of the Telephone Company...."

Section 6 of the Tariff, titled "Switched Access Service," provides that "[s]witched access service is ordered under the access order provisions set forth in Section 3 and billed at the rates and charges set forth in Section 30." Section 6.1.1.A. Section 6.1.2.A, in turn, identifies the

[2] In order to preserve FairPoint's procedural and substantive rights, and in an attempt to avoid being unduly repetitious in this Motion, FairPoint hereby incorporates by reference, as if fully set forth herein, the positions set forth by Verizon in its Post-Hearing Brief, dated September 10, 2007, and in its Motion for Rehearing and/or Reconsideration, dated March 28, 2008, as would be applicable to FairPoint.

types of switched access services provided ("[t]he switched access services provided under this tariff are: originating, terminating, or two way FGA, FGB, FGD and FG2A, and 800 database access"),[3] while Section 6.1.2.B sets forth the rate categories which apply to switched access service. Those rate categories include local transport, local switching and carrier common line. Section 6.1.2.D also separately identifies that "[l]ocal transport, local switching and carrier common line when combined to provide a complete switched access service is as illustrated in Exhibit 6.1.2-1."

When reading these provisions as a whole, it is evident that: switched access services are provided and billed under Tariff 85; switched access services include originating, terminating, or two way FGA, FGB, FGD and FG2A, and 800 database access; and there are three rate categories that apply to these services (local transport, local switching and carrier common line). Indeed, the Commission itself acknowledged that "the individual, billable elements of 'switched access' are local transport, local switching, and carrier common line." Order at 26.

Despite Tariff 85's detailed provisions describing what compromises "switched access," the Commission concluded that "local transport, used independently without the benefit of Verizon's common line, does not constitute switched access service." *Id.* at 31. The Commission's Order is inconsistent because, at the same time, the Commission held that "*[i]n the calls at issue here*, Verizon *is providing a component of switched access service...*" *Id.* at 30 (emphasis added).[4]

---

[3] Similarly, 47 U.S.C. § 153 (16) defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll service." Switched access is distinguishable from private line service ("furnishing facilities for communications between specified locations"). Verizon Tariff 83, Part B § 1.1.1.A; *see also* § 1.3.

[4] The Commission concluded that the "petitioners and intervenors use tandem switching, and therefore, local transport for the calls that are the focus of the dispute." Order at 26.

Nowhere in Tariff 85 does it state that switched access exists only when provided in combination with a common line. Switched access encompasses any use of FairPoint's network for the provision of toll service, whether that use be of a singular component, such as a tandem switch (i.e., on an unbundled or stand-alone basis), or whether it uses that component in combination with transport and local switching.[5] *See* Tr. Day II at 104-05. Switched access is not measured in degrees; once a component of FairPoint's network constituting switched access is used by a carrier for the provision of intrastate toll service, the applicable "regulations, rates and charges" of Tariff 85 apply. *See e.g.*, Tr. Day II at 104-105.

BayRing and AT&T conceded this point. In its Pre-filed Direct Testimony, BayRing witness Darren Winslow provided the following definition of "switched access service:"

> "Switched access service" is a service that provides "access" to a telephone company's local exchange end user for the origination or termination of toll traffic . . . . As the term "access" indicates, Verizon's switched access service allows another carrier to reach *something* (i.e. Verizon's end use customers) over which Verizon has rights or control.

Pre-filed Direct Testimony of Darren Winslow at 22 (emphasis added). On cross examination, Mr. Winslow conceded that a Verizon end-user was not the only "something" to which switched access service provides access:

> **Q:** [W]hy did you use the word "something" when defining the term "access"?
>
> **A:** In order to provide access, you have to provide access to something.
>
> **Q:** Okay. And is Verizon's tandem switched access, local transport tandem switching, local transport termination, and/or local transport facilities something?
>
> **A:** Yes, it is.

---

[5] Thus, where one CLEC transports a toll call from its end user to the end user of another CLEC, and FairPoint provides only the transport switching function, FairPoint nonetheless provides switched access service and the CCL charge applies on a minute of use basis, per the terms of Tariff 85.

Q: And, does Verizon have rights or controls over its tandem switching equipment and facilities?

A: Yes, it does.

Tr. Day I at 97. "Tandem switched access," "local transport tandem switching," "local transport termination," and "local transport facilities" are "switched access service" explicitly defined in Tariff 85. *See* Tariff 85 § 6.2.1.B, G.

Furthermore, BayRing witness Trent Lebeck confirmed that BayRing presently purchases certain intermediary switched access components from Verizon for the purposes of furnishing intrastate toll services:

Q: Does Bay Ring purchase tandem switching with local transport from Verizon in the absence of a Verizon end-user presently?

A: Would you please state that again please.

Q: I'm asking you whether BayRing currently can and does purchase tandem switching and local transport, even in the absence of a Verizon end-user, presently?

A: Under the auspice that we are originating or terminating calls to an IXC [inter-exchange carrier].

Q: *A toll call?*

A: *Yes.*

Tr. Day 1 at 73 (emphasis added).

The AT&T panel of witnesses also acknowledged that switched access elements may be purchased on a stand-alone basis or in combination:

Q: Does the switched access tariff require that all of the elements be purchased if a carrier wishes to purchase only certain of the elements of switched access?

A: . . . [Y]ou can buy the Section 6 ["Switched Access Service"] tariff items, and you can buy those on a stand-alone basis.

*****

Q: So, when you say that you "can buy the Section 6 items on a stand-alone basis," those are the local transport tandem switching, local transport termination, local transport facilities, etcetera, as contained in Section 6.2 that we discussed earlier with BayRing?

A. (Nurse) Yes.

Tr. Day I at 177; *see also* Tr. Day I at 173 ("[Any of the items in Section 6 . . . can be provided on a stand-alone basis or in combination[.]"). In light of these unambiguous admissions, the Commission's conclusion that Verizon is not providing switched access governed by Tariff 85 is not well founded and is not supported by the record evidence. Freedom Ring Communications LLC ("BayRing"), AT&T Corp. ("AT&T") and One Communications Corp. (collectively, the "Competitive Carriers") did not refute this evidence, even though they bear the burden of proof in this proceeding. *See* Puc 203.25 ("[u]nless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden or proving the truth of any factual proposition by a preponderance of the evidence.").

By deviating from the plain and ordinary meaning of the words used in Tariff 85, the Order does not adhere to basic tenants of contract and statutory interpretation. *See supra, Robbins* at 418; *Churchill Realty* at page 7. As a result, the Order is unreasonable and unlawful and should not be sustained. FairPoint submits that the Commission should reconsider its Order and allow FairPoint to continue imposing the CCL charge at issue. In the alternative, the Commission should grant a rehearing in this matter.

2. The Commission, in its Order, essentially confiscated FairPoint's property by requiring the provision of a telecommunications service without compensation and provides the Competitive Carriers with an unjust windfall and competitive advantage.

Verizon raised issues related to the Commission's Order constituting an unlawful and unconstitutional confiscation of its property. *See, e.g.,* Verizon's Motion for Rehearing and/or Reconsideration of Commission Order 24,837, dated March 28, 2008, at pp. 11-14. In turn, the

Competitive Carriers claim, among other things, that Verizon has no property to be confiscated. *See* Competitive Carriers Joint Opposition to Verizon's Motion for Rehearing and/or Reconsideration, served April 9, 2008 (the "Joint Opposition") at p. 18. According to the Competitive Carriers, Verizon "...invented a world [that] bears no relationship to reality." *Id.* at 2. Despite such inflammatory comments, which have no legal significance, it is clear that the effect of the Commission's Order is to require FairPoint to provide a telecommunications service to the Competitive Carriers without compensation.

The Competitive Carriers make a significant admission and concession that should not be lost on the Commission as it considers the pleadings filed in the present motion practice. The Competitive Carriers conceded that:

> No party in the case disputed Verizon's right to be compensated for providing tandem switching and local transport functions. Indeed, the parties expressly recognized that Verizon provides those functions and should be compensated for them.

Joint Opposition at p. 2. The Commission apparently recognized this issue as its Order of Notice, dated October 23, 2007, raised issues related to (i) whether such services are more properly assessed under a tariff provision different than the provisions of Tariff 85 at issue in this Docket and (ii) whether prospective modifications to the tariff provisions are appropriate in the event Verizon's issued the billing charges in an appropriate manner. *See* Order of Notice, October 23, 2007, at pp. 2-3; *see also* Order 24,837 at ps. 24-25.

Notwithstanding this identification of issues in the Order of Notice, the Commission never addressed whether the services at issue in this case should be assessed under a tariff provision other than the provisions of Tariff 85 at issue. The Commission also never addressed whether prospective modifications to the tariff would be appropriate. The Commission's failure to address these issues, combined with (i) an order to cease billing for service and (ii) a clear

admission from the Competitive Carriers that they ought to be paying for a service provided now by FairPoint, constitutes an unlawful taking or confiscation of FairPoint's property. The issue does not turn on this Docket being something other than a rate case. *See* Joint Opposition at pp. 15-16. In ordering FairPoint to cease billing for services (i.e., setting the rate at zero), the Commission did not consider that "[t]he fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated." *See Federal Power Commission et al v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944). The constitutional concern is that the end result must be just and reasonable, and that the constitutional limitation with the Commission's methodology is that it produce neither confiscatory nor exploitive rates. *See Petition of PSNH*, 130 N.H. 265, 268 (1988).

Assuming, *arguendo*, that Tariff 85 does not allow FairPoint to impose a CCL charge for the "access" service provided, the Commission should have decided (i) what "access" was being provided and (ii) the appropriate charge Verizon should have imposed in the past, leading to a charge that FairPoint could impose in the present and on a "go forward" basis. By simply ordering the cessation of billing for the service, however, the Commission confiscated Verizon and now 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. Allowing the Competitive Carriers to secure service absent the payment of compensation provides the carriers with a windfall and a competitive advantage over FairPoint. FairPoint submits that a rate of zero for a telecommunications service can not be deemed to be anything other than confiscatory and exploitive. *See also,* RSA 378:14 (prohibiting free service). For these reasons alone, the Commission should reconsider its decision and order a rehearing in this Docket.

3. *To the extent that the Order is based on the premise that the application of the CCL charge under Tariff 85 to service rendered in the past was not just and reasonable, the Order amounts to retroactive ratemaking and is unreasonable and unlawful.*

The power of the Commission to fix or adjust rates is *prospective* in nature. RSA 378:7 provides (with emphasis added):

> Whenever the commission shall be of the opinion . . . 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, . . . the commission shall determine the just and reasonable or lawful rates, fares and charges to be ***thereafter observed and enforced.***

In setting rates, the Commission is "performing essentially a legislative function and accordingly cannot exceed the limitations imposed on the exercise of that function under [the New Hampshire] and Federal Constitutions." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 565-566 (1980). Moreover, tariffs "do not simply define the terms of the contractual relationship between a utility and its customers. They have the force and effect of law and bind both the utility and its customers." *Id.*, p. 566. The Supreme Court clearly stated that:

> If the PUC were to allow a rate increase to take effect applicable to services rendered at any time prior to the date the petition for the rate increase was filed, it would be retroactively altering the law and the established contractual agreement between the parties. In essence, such action would be creating a new obligation in respect to a past transaction, in violation of Part 1, Article 23 of our State Constitution and, due to the retroactive application, would also raise serious questions under the Contract Clause of the Federal Constitution, U.S. Const. Art. I, 10, Cl. 1. *Id.*

These principles apply with equal force to tariff provisions as applied to service furnished in the past where the Commission determines subsequently that those tariff provisions are not just and reasonable. While FairPoint believes its access rates to be just and reasonable, any challenge by a customer or action by the Commission on its own motion must address the issue through proceedings that are prospective in effect only. "[I]t is a basic legal principle that a rate

is made to operate in the future and cannot be made to apply retroactively...." *Pennichuck* at 566.

Ultimately, a utility is entitled to rely on a final rate order until a new rate is fixed by the governing regulatory commission. *See, e.g., Arizona Grocery Co.*, 284 U.S. at 389. "Consequently, the revenues collected under the lawfully imposed rates become the property of the utility and cannot rightfully be made the subject of a refund." *So. Central Bell Telephone Co. v. Louisiana Pub. Serv. Comm'n*, 594 So.2d 357, 359 (La. 1992). The Commission can effect that change only on a *prospective* basis. Thus, FairPoint should be permitted to impose the CCL charge for the switched access (or "access") being requested by the Competitive Carriers until the Commission determines, after an evidentiary hearing, what new rate should apply.[6]

In this case, the rate in question was based on a straightforward application of the Tariff (discussed in Verizon's Motion for Rehearing and/or Reconsideration) and is not illegal. Moreover, since as early as 2001, Verizon has billed, and competitive providers have paid, the carrier common line charge based on the plain meaning of a tariff that has the force and effect of law. The record evidence was not refuted that Verizon billed the CCL charge for the access service prior to the 2005 - 2006 time frame. *See ex.* Tr. Day 2 at 36-37. None of the Competitive Carriers has claimed that Verizon has been "discriminatory" in applying the carrier common line charge to particular competitive carriers. Thus, the general rule against retroactive ratemaking – and not the reparations statute – applies in this instance.

WHEREFORE, FairPoint respectfully requests that the Commission:

(1) Schedule oral argument concerning the motions for rehearing and/or reconsideration filed by Verizon and FairPoint; or

---

[6] While FairPoint does not concede that a rate other than the CCL charge would be justified, it is clear that the Competitive Carriers admit that some other rate should apply. Until the Commission sets that rate, the CCL charge is the appropriate rate.

(2) Grant this Motion for Rehearing and/or Reconsideration and allow FairPoint to impose the CCL charge at issue until and unless the Commission revises the rate on a prospective basis.

Respectfully submitted,

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

By Its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: April 21, 2008

By: _____

Frederick J. Coolbroth
Patrick C. McHugh
43 North Main Street
Concord, NH 03301
(603) 226-1000
fjcoolbroth@devinemillimet.com
pmchugh@devinemillimet.com

Shirley J. Linn, Esq.
Michael J. Morrissey, Esq.
FairPoint Communications, Inc.
521 E. Morehead Street, Suite 250
Charlotte, NC 28202

CERTIFICATE OF SERVICE

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

Dated: April 21, 2008

By: _____

Frederick J. Coolbroth, Esq.
Patrick C. McHugh, Esq.