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 CARRIERS' MOTION FOR REHEARING, RECONSIDERATION AND CLARIFICATION OF COMMISSION ORDER No. 25,219

The Competitive Carriers[1] respectfully move that the New Hampshire Public Utilities Commission ("Commission"), pursuant to RSA 541:3, rehear, reconsider and clarify Order No. 25, 219 issued on May 4, 2011 ("May 2011 Order"). For over five years the relief from FairPoint's anti-competitive conduct sought in this docket (i.e. the cessation of unjust and unreasonable application of carrier common line charges) has remained pending, and the time for final resolution of this issue is long overdue. In support of their Motion, the Competitive Carriers state as follows:

I. BACKGROUND

1. This docket has been pending since April 28, 2006 when Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") filed a Petition requesting that the Commission investigate Verizon New Hampshire's ("Verizon")[2] practice of billing carrier common line ("CCL") charges for calls that did not involve a Verizon end user or a

[1]The "Competitive Carriers" include: Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communications Company, L.P. and Sprint Spectrum, L.P. ("Sprint"), AT&T Corp., and 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 One Communications ("One Communications").

[2] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint") purchased Verizon's New Hampshire franchise and network after BayRing's Petition was filed.

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.[3] Over nearly the next two years, the matter was fully litigated, including discovery, Staff-led technical sessions, extensive evidentiary submissions, a multi-day hearing, and post-hearing briefs by multiple parties.

2. On February 25, 2008, the Commission issued its order in Docket No. DT 07-011 ("07-011 Order") approving Verizon's sale of its network and franchise to FairPoint.[4] 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."[5] The order also approved a Settlement Agreement which contained a provision (paragraph 9.1) establishing FairPoint's obligation not to seek an increase in wholesale rates to take effect within the three years following its acquisition of Verizon's assets. As part of its transaction with Verizon, FairPoint adopted Verizon's New Hampshire tariffs, but never established any cost basis for any rates therein.

3. On March 21, 2008, the Commission issued an Order in this docket ("March 2008 Order") determining that Verizon's imposition of CCL charges on calls not involving a Verizon end user or Verizon-provided local loop was "impermissible."[6] The Commission also ordered Verizon to cease billing CCL for such calls.[7] Accordingly, Verizon's practice of billing CCL

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[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 instant Motion.
[4] *In re Verizon New England Inc. 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, 2008)("07-011 Order").
[5] *Id.* at 75.
[6] *Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges*, Order No. 24,837, at 32 (March 21, 2008)("*March 2008 Order*").
[7] *March 2008 Order* at 33.

charges for calls not involving a Verizon end user or Verizon-provided local loop was precluded as of March 21, 2008.[8]

4. 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 denied rehearing of the March 2008 Order and granted FairPoint's Petition to Intervene.

5. FairPoint subsequently appealed to the New Hampshire Supreme Court, and identified only two questions for review: (1) "[d]id the Commission err in ruling that the carrier common line access charge should not be billed to local transport?" and (2) "[d]id the Commission's determination that the carrier common line access charge authorized by the tariff should not be applied in light of new competitive circumstances constitute unlawful retroactive ratemaking?"[9] FairPoint thus failed to challenge any factual findings made by the Commission or the Commission's ability to require changes to FairPoint's tariff prospectively.

6. On May 7, 2009, the Court issued its order which was confined only to the issue of the Commission's interpretation of FairPoint's tariff.[10] 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.[11] The decision also left entirely undisturbed the Commission's factual findings which, by statute, are "deemed to be prima facie lawful and reasonable." RSA 541:13.

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[8] Verizon and FairPoint's ability to impose the CCL charge on calls that *do* terminate over a Verizon or FairPoint local loop has never been, and is not now, at issue in this docket. Thus, the Commission's decisions in this docket affect only a part of the traffic governed by Tariff No. 85.

[9] *Appeal of Verizon New England d/b/a Verizon New Hampshire et al.*, Docket No. 2008-645, Brief of Appellants, at 1 (NH 2009).

[10] *Appeal of Verizon New England d/b/a Verizon New Hampshire & a. (New Hampshire Public Utilities Commission),* 158 N.H. 693, 972 A.3d 996 (2009).

[11] *Id.* at 700.

7. On August 11, 2009, the Commission issued Order No. 25,002 on a *nisi* basis ("Order *Nisi*"). Therein, the Commission ordered FairPoint to make specific modifications to the language of the tariff, and to file revised tariff pages within 30 days. The Commission also ordered that its "Order *Nisi* shall be effective September 10, 2009, [unless] the Commission provides otherwise in a supplemental order issued prior to the effective date."

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

9. The Commission did not issue a supplemental order prior to September 10, 2009; thus, the Order *Nisi* became a final order on that day. On the same date, FairPoint made two separate and distinct tariff filings. One filing modified the terms of Section 5 of Tariff No. 85 in compliance with the *Order Nisi.* The other was an incomplete and therefore ineffective rate filing not contemplated by the Order *Nisi* — a request to increase from zero to $0.010164 per minute a long-dormant "Interconnection Charge." The cover letter accompanying the two filings, as well as the tariff pages themselves, specified an effective date of October 10, 2009.

10. On September 23, 2009, the Commission issued Order No. 25,016 ("Scheduling Order"). Therein, the Commission indicated that FairPoint's rate increase filing was incomplete due to its failure to submit the information required in accordance with the Commission's rules, and it set forth a number of specific issues to be addressed in its investigation of the proposed rate increase: "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; whether the filing is properly considered under RSA 378:6, I or IV; and whether RSA 378:17-a III applies." The Commission also established a procedural schedule for its investigation.

11. On October 2, 2009, BayRing and AT&T filed a Joint Motion for Clarification and Expedited Relief ("Motion for Clarification").

12. On October 10, 2009, FairPoint's tariff filing in compliance with the Order *Nisi,* which was complete when filed, became effective.

13. On October 12, 2009, FairPoint filed a Motion for Rehearing and Conditional Withdrawal of Tariff ("Motion for Rehearing"). Therein it admitted that the Order *Nisi* became effective on September 10, 2009.[12]

14. On October 16, 2009, the Commission issued a letter suspending the procedural schedule for its review of the proposed rate increase while it considered the various Motions then pending before it. On October 30, 2009, FairPoint filed a generic Petition for a 21-day extension of filing requirements and deadlines in numerous dockets (including this one) to allow it to concentrate on its bankruptcy restructuring efforts. Activity in this docket (among numerous others) was subsequently suspended by the Commission.

15. On May 4, 2011 the Commission issued the May 2011 Order. Therein the Commission said that it was granting in part and denying in part FairPoint's Conditional Request and Motion for Rehearing and denying BayRing and AT&T's Motion for Clarification.

II. STANDARD FOR REHEARING

16. 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 allow the Commission to reconsider matters that were either "overlooked or mistakenly conceived."[13] As stated by the Commission earlier in this docket:

[12] "On September 10, 2009, the Order *Nisi* became effective in accordance with its terms." Motion for Rehearing at 3.

[13] *See In re Comcast Phone of N.H.*, DT 08-013, Order No. 24,958, at 6-7 (April 21, 2009).

> RSA 541:3 permits the Commission to grant rehearing of an order when a petitioner's motion states good reason for such relief. Good reason may be shown by identifying specific matters that the Commission "overlooked or mistakenly conceived" in rendering its decision. *Dumais v. State*, 118 N.H. 309, 386 A.2d 1269 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003).[14]

The Commission may also grant rehearing if a party demonstrates that an agency's order is unlawful or unreasonable.[15]

17. The Commission must reconsider the May 2011 Order because (1) the Order overlooks the fact that FairPoint made two different tariff filings on September 10, 2009; and (2) the Order mistakenly relies on the passage of time as affecting the Commission's ability to determine the effective date of a tariff filing (which it does not.)

18. The Commission's conclusions, so far as they may be discerned from the limited discussion provided in May 2011 Order, constitute errors of law on crucial substantive and procedural issues. To the extent those conclusions constitute errors of law they are "mistakenly conceived," unlawful and unreasonable, and are therefore validly subject to rehearing.

III. BECAUSE THE ORDER *NISI* BECAME A FINAL ORDER ON SEPTEMBER 10, 2009 AND THE COMPLIANCE FILING WAS COMPLETE WHEN FILED, THE COMPLIANCE FILING BECAME EFFECTIVE ON OCTOBER 10, 2009.

19. A major basis for the Motion for Clarification was the Competitive Carriers' interest in having the Commission affirmatively acknowledge that the compliance portion of FairPoint's September 10, 2009 tariff filing would be effective on October 10, 2009, so that FairPoint's improper, unjust and unreasonable CCL billings would promptly cease. The

[14] Order on Motions for Rehearing and Motion to Intervene, DT 06-067, Order No. 24,886 at 7 (Aug. 8, 2008).
[15] Kearsarge Telephone Co., Wilton Telephone Co., Inc., Hollis Telephone Co., Inc., and Merrimack County Telephone Co. Petitions for Approval of an Alternative Form of Regulation, Order Denying Motion for Rehearing, Order No. 25,194, at 3 (Feb. 4, 2011).

Commission sidestepped this issue in the May 2011 Order, stating that "given the time that has elapsed...we cannot now say that a portion of the tariff ought to have been in effect at some prior date."[16] The Commission, respectfully, is wrong as a matter of law. It is easily discernable from the record and applicable law when FairPoint's tariff revisions went into effect. Thus, this part of the Commission's May 2011 Order was "mistakenly conceived." As explained in greater detail below, the revisions to Section 5 of the FairPoint tariff filed on September 10, 2009, which were required by the Commission's Order *Nisi*, had a stated effective date of October 10, 2009. Those tariff revisions were complete when filed and, as they were never amended or rejected by the Commission, became effective on October 10, 2009, by operation of law. *See* RSA 378:6, IV. The revised Section 5 has continued in effect since that date. The Commission's action in the May 2011 Order thus impermissibly and retroactively purports to cancel a tariff that has been in effect for nearly two years.

20. In its August 11, 2009 Order *Nisi*, the Commission directed FairPoint to change or remove three provisions of FairPoint's Tariff No. 85: i.e., Section 5, Section 5.4.1.A and Section 5.4.1.C. These changes were necessary to make clear that FairPoint may only impose a CCL charge when its common line is used in the provision of switched access service. The Order *Nisi* states that the order "shall be effective September 10, 2009, [unless] the Commission provides otherwise in a supplemental order issued prior to the effective date."[17] No such supplemental order was ever issued. Because the Commission did not issue a supplemental order prior to September 10, 2009, the Order *Nisi* became a final order on that date. FairPoint admits that the Order *Nisi* became effective on September 10, 2009.[18]

[16] May 2011 Order at 6.
[17] Order *Nisi* at 3.
[18] Motion for Rehearing at 3.

21. On September 10, 2009, FairPoint made two different tariff filings under one cover letter. Both filings stated an effective date of October 10, 2009. The first filing ("Compliance Filing") was comprised of two revised tariff pages for Section 5, neither of which involved any rate changes. It is therefore governed by RSA 378:6, IV because it is a telephone utility tariff for services.[19] This filing was required by, and made in compliance with, the express provisions of the Order *Nisi*. FairPoint also filed two other revised tariff pages for Sections 6 and 30, which purported to change the definition and increase the applicable rate for a so-called Interconnection Charge. This second filing ("Subsidy Filing") did involve a rate change and rate schedule. By this second filing, FairPoint attempted to resurrect a defunct subsidy for its access services that Verizon had once used, but then phased out by giving the charge a zero rate. However, this second filing was incomplete and therefore ineffective because it lacked required supporting materials. *See* N.H. Code Admin. Rules Puc 1605.02(e).

22. The September 10, 2009, cover letter accompanying FairPoint's filings shows that FairPoint was submitting two filings to the Commission. FairPoint describes the Compliance Filing in the second paragraph of the letter: "In compliance with the New Hampshire Public Utility Commission Order Nisi in DT 06-067 dated August 8, 2009, FairPoint files revised terms and conditions to eliminate the application of the Carrier Common Line ("CCL") charge to access traffic which does not originate or terminate to a FairPoint end user." The letter addresses the separate Subsidy Filing in another paragraph, stating 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" (emphasis added).

[19] RSA 374:6, IV states in pertinent part: "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."

23. The language used in the second quoted sentence (italicized above) is telling. For an act to be done "*in conjunction with*" some other act, there must be two *separate* acts that occur or are done at the same time.[20] Stated differently, a single act cannot be done *in conjunction with* itself. Thus, FairPoint's unauthorized attempt to resurrect the defunct Interconnection Charge, via the Subsidy Filing, was a separate and distinct act from the Compliance Filing by which FairPoint – in accord with the Order *Nisi* – revised the terms and conditions of its tariff to eliminate application of CCL charges to traffic which neither originates with, nor terminates to, a FairPoint end user. The Subsidy Filing described in the third paragraph of FairPoint's cover letter is a rate increase filing that was neither discussed in, nor envisioned by, the Order *Nisi*.

24. The structure and provisions of RSA 378:6 require that the two filings made by FairPoint be treated differently and that the Compliance Filing that FairPoint made pursuant to the Order *Nisi* went into effect on the effective date specified in the filing: October 10, 2009. RSA 378:6, IV, mandates that "[a]ny 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" (emphasis added). The Commission never amended or rejected the Compliance Filing tariff pages, so they became effective on October 10, 2009.

25. Although the Commission issued the Scheduling Order within 30 days of the Compliance Filing, that Order is devoid of any language that could reasonably be construed as amending, rejecting or suspending the Compliance Filing. Rather, *all* of the issues noted for hearing in the Scheduling Order clearly relate *only* to the proposed Interconnection Charge – not

[20] Webster's II Dictionary, Office Edition (copyright 2005) defines "conjunction" as follows: "1. A combination or association. 2. The *simultaneous occurrence of 2 conditions, events, etc.*" (emphasis added).

the tariff pages containing language changes that eliminate the improper application of CCL charges.[21] Thus, in accord with RSA 378:6, IV and the effective date specified in FairPoint's cover letter, the Compliance Filing became effective 30 days after filing.

26. In addition to the provisions of RSA 378:6, there is ample support in the Commission's rules for the conclusion that the Commission must, as a matter of course, treat the Compliance Filing and the Subsidy Filing separately, and that it can reach different conclusions about whether each filing went into effect. The Commission's rules categorize the two filings differently from the outset. PUC Rule 1603.05(b)(1) directs utilities how to designate different types of tariff changes. PUC Rule 1603.05(b)(1)a. requires that, when a utility proposes a "change in tariff regulation," such pages must be designated with the letter "C" in the right margin of the filed tariff page. FairPoint's two Compliance Filing pages bear that designation.

27. With respect to tariff filings that propose to increase rates, PUC Rule 1603.05(b)(1)c. requires a utility to designate the portion of the tariff filing that creates a rate increase with the letter "I" in the right margin. The page reflecting the change to the rate for the Interconnection Charge (Section 30.6.6) in FairPoint's Subsidy Filing, which FairPoint's cover letter describes as an increase, bears that designation. Thus, it is clear that FairPoint's two separate tariff 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"

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[21] Three of the issues specified in the order were:

- Whether FairPoint's tariff changes are just and reasonable. (The Commission already had ruled that application of the CCL charge when no Verizon or FairPoint common line was involved, was unjust and unreasonable.)
- Whether the proposed Interconnection Charge is consistent with the settlement in DT 07-011. (By the Commission's terms, this issue refers only to the Interconnection Charge.)
- Whether RSA 378:17-a, III applies. (This statute requires the Commission to consider reductions in New Hampshire intrastate access rates following reductions in interstate rates. Consideration of this statute makes no sense in the context of the Commission's elimination of an unjust and unreasonable charge applied to switched access calls in some, but not all, cases (i.e., when no FairPoint common line is used)).

The fourth issue, whether the filing should be considered under RSA 378:6, I or IV, is procedural.

designation in the right margin) and increasing a zero-rated charge to a positive *rate* ("I" designation in the right margin).[22]

28. This same Commission rule undercuts any contention by FairPoint that its changes to Section 5 constituted the elimination or reduction of CCL *rates*, which reduction it inaccurately alleges it was entitled to offset by increasing the Interconnection Charge. If FairPoint were truly eliminating or decreasing its CCL rates, it was required to designate the CCL "reduction" language in the tariff pages with either a "D" or an "R," as required by PUC Rules 1603.05(b)(1) b. and e., respectively. FairPoint failed to make such designations. This failure completely belies any argument that the CCL language changes required by the Order *Nisi* constituted a rate change.

29. Further, there has been no decrease to the CCL rate; it remains at $0.026494 per minute. The rate continues to apply to intraLATA traffic that terminates over a FairPoint local loop — no doubt a substantial part of the traffic subject to Tariff No. 85.

30. The Scheduling Order found that FairPoint's Subsidy Filing was "not complete" because FairPoint did not file the supporting documents required by PUC Rule 1605 with its proposed tariff change. The Motion for Clarification sought confirmation that this need for supporting documentation applied only to FairPoint's Subsidy Filing, but the Commission declined to provide such clarification in the May 2011 Order. In the Scheduling Order and the May 2011 Order, the Commission overlooked the fact that FairPoint made two distinct filings: 1) the Compliance Filing, which made no change to the CCL rates, and 2) the incomplete Subsidy

[22]PUC Rule 1603.06(j)(1),which dictates the actions a carrier must take when the Commission suspends a portion of a proposed tariff, provides additional support for the unavoidable conclusion that the Compliance Filing became effective on October 10, 2009, while the Subsidy Filing remains ineffective to this day. While this rule is not directly applicable to the matter at bar, it is informative in highlighting that the Commission's own rules contemplate instances in which only a portion of a tariff filing becomes effective.

Filing, which attempted to increase rates by changing the rate for the Interconnection Charge from $.00000 to $.010164 per minute. The distinction is important. Because the Compliance Filing changed only the language of the tariff, left all rates under the tariff unchanged and was made pursuant to a Commission directive, it was complete upon submission. In contrast, FairPoint's unauthorized Subsidy Filing did propose rate changes and was therefore governed by the requirements of PUC Rule 1605.02(c). Since the Subsidy Filing was obviously incomplete, the Commission appropriately ordered FairPoint, pursuant to PUC Rules 1605.02(c) and 1604.08(c)(9), to submit the information required to support that filing.

31. Given that the Compliance Filing was effective October 10, 2009, any attempt by the Commission to reject the Compliance Filing approximately 18 months after it became effective is impermissible and cannot stand. It is generally understood that a tariff that becomes effective under a final order is effective until a new rate is fixed by the governing agency. *See Appeal of Granite State Elec. Co.*, 120 N.H. 536, 538 (1980)("The Electric Company argues that ... consumers are entitled to rely on "permanent" rates established under final PUC orders and that, absent statutory authority, final rates cannot be retroactively adjusted ... We agree." (internal citations omitted)). This doctrine is directly applicable to the matter at bar. The Commission's Order *Nisi* required FairPoint to make certain tariff language revisions, and FairPoint filed such revisions. The Order *Nisi*, by its own terms, and by operation of law, became a final order on September 10, 2009. The Compliance Filing bore an effective date of October 10, 2009, and became effective on that day, because the Commission took no action to suspend the Compliance Filing before it became effective. It would violate the precedent announced in *Granite State*, and therefore be unlawful and unreasonable, for the Commission to

attempt to retroactively suspend the Compliance Filing now, some 18 months after the Compliance Filing's effective date.

32. The Commission's treatment of the Subsidy Filing as incomplete and therefore ineffective is appropriate, however. The Subsidy Filing was never validly on file with the Commission because FairPoint failed to submit the supporting documentation required by the Commission's rules (as well as for those other reasons described below in Section IV).[23] That defect remains uncured to this day. It therefore follows that FairPoint's Interconnection Charge was and remains set at a zero rate.

33. In view of the foregoing, the Commission erred when it did not state that FairPoint's September 10, 2009 Compliance Filing, i.e. the simple language changes in Sections 5.1, 5.4.1 A and C, went into effect on October 10, 2009. Similarly, the Commission must acknowledge that FairPoint's Subsidy Filing was defective when filed, and because those defects remain uncured, the Subsidy Filing has never been effective. Any other outcome is unlawful and unreasonable.

IV. THE MAY 2001 ORDER FAILED TO RECOGNIZE THAT, BY TERMS OF THE 07-011 ORDER, FAIRPOINT WAS LEGALLY AND CONTRACTUALLY OBLIGATED TO FOLLOW A FINAL ORDER IN THIS DOCKET AND ALSO BARRED FROM SEEKING TO INCREASE ITS INTERCONNECTION CHARGE.

34. Another reason the Commission must conclude that the Subsidy Filing was defective when filed is that when FairPoint made its defective Subsidy Filing it was legally and contractually barred from seeking to put into effect an increase its access rates at that time. That is, nevertheless, exactly what FairPoint attempted to do via its defective Subsidy Filing.

[23] The Competitive Carriers do not concede that the Subsidy Filing would have become effective had the supporting documentation been placed on file along with the tariff pages as required by the Commission's rules. Such a filing would still have been precluded from becoming effective as described below in Section IV.

Accordingly, to the extent that the May 2011 Order purports to allow FairPoint to "withdraw" its Subsidy Filing, that part of the Order is "mistakenly conceived."

35. The legal and contractual bar to the Subsidy Filing arose out of the 07-011 Order and Settlement Agreement in Docket No. DT 07-011. In the 07-011 Order, the Commission approved and incorporated the Settlement Agreement, thereby effectuating the promises and commitments made by FairPoint as delineated in the Settlement Agreement. In particular, the Settlement Agreement states, "*Notwithstanding 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."[24] The Commission clarified that it understood the above quoted section of the Settlement Agreement "to mean that FairPoint will honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis."[25]

36. Thus, under the plain terms of the 07-011 Order, the Commission reserved to itself the right to resolve the CCL dispute in the instant docket regardless of any other term or condition contained in the 07-011 Order and Settlement Agreement. And it was obvious at the time the 07-011 Order was issued that "the terms of a final order in Docket No. DT 06-067" could include a prohibition against application of CCL charges in instances where no FairPoint common line is used. It is equally clear that FairPoint – which failed to appeal this provision of the 07-011 Order – was and is bound to accept a final order in the instant docket, such as the Order Nisi, requiring FairPoint to change its tariff language to prevent unreasonable application of CCL charges. Any attempt by FairPoint to avoid compliance with the terms of a final order in the instant docket runs afoul of FairPoint's obligations arising under the Settlement Agreement and the 07-011 Order.

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[24] *Id.* at 75; the quoted text is derived from the Stipulated Settlement Terms, section 4.h., which were incorporated into the Settlement Agreement at Section 9.3, and then incorporated into the 07-011 Order.
[25] *Id.* at 75.

37. FairPoint's Subsidy Filing – by which it attempted to alter the terms of the Commission's Order *Nisi*, a final order – is plainly no less than an attempt to avoid "honor[ing] the terms of a final order in Docket No. DT 06-067." The Commission cannot allow FairPoint's brazen disregard for its obligations under the 07-011 Order and Settlement Agreement to go unaddressed (and even be rewarded) especially when such actions were calculated to and have injured other carriers. Accordingly, the Commission must, upon rehearing, find that the Subsidy Filing was defective when filed and never became effective because that filing was barred by FairPoint's obligation to "honor the terms of a final order in Docket No. DT 06-067."

38. There are additional terms of the Settlement Agreement and the 07-011 Order that barred FairPoint from submitting its Subsidy Filing. FairPoint argued that section 9.1 of the Settlement Agreement prohibited the Commission from ordering a decrease to FairPoint's access rates for three years.[26] That same section of the Settlement Agreement also prohibited FairPoint from raising those same rates during the same period. There are two flaws with FairPoint's argument that the actions ordered by the Commission in its Order *Nisi* were barred by the Settlement Agreement and the 07-011 Order. First, the Commission did not order any reduction to FairPoint's *rates*; it merely ordered *language* changes to prevent the unjust and unreasonable application of CCL charges in certain cases. Thus, even if one accepts FairPoint's flawed argument on its face, while section 9.1 of the Settlement Agreement contractually barred FairPoint from making its Subsidy Filing to increase an access rate, the same section presented no impediment to the Commission ordering a change in tariff *language* and leaving FairPoint's *rates* unchanged.

39. Second, the Commission clearly and expressly excepted application of the terms of the 07-011 Order and Settlement Agreement from interfering in any way with its ability to

[26] Motion for Rehearing at 7. The Commission should note that its Order *Nisi* did not involve a rate increase.

resolve the issues in the instant docket. As quoted above, the Settlement Agreement states "*[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." The use of the term "anything" is unqualified and absolute, and means that, whatever else may be in the agreement, the agreement does not limit, hinder or otherwise diminish the Commission's ability to determine issues with respect to CCL charges. The Commission took the additional step of announcing its interpretation of the quoted language by stating that it interpreted the language to mean that FairPoint would honor the terms of a final order in the instant docket.[27]

40. It also bears noting that the 07-011 Order was issued on February 25, 2008, and thus that the March 2008 Order was released (on March 21, 2008) during the 30-day rehearing period applicable to the 07-011 Order. To the extent FairPoint had concerns over the interpretation or application of the 07-011 Order and Settlement Agreement to this docket, it was obligated to file for rehearing of the 07-011 Order by late March 2008. FairPoint, however, failed to seek rehearing of the 07-011 Order, including any of the language herein cited.[28]

41. Taking the foregoing into consideration, the Commission must recognize that FairPoint was legally and contractually barred from taking any action that frustrated, impeded or disregarded its obligation to "honor the terms of a final order" in the instant docket. That prohibition precluded FairPoint from lawfully and validly submitting its Subsidy Filing which violated both Section 9.1 of the Settlement Agreement and the 07-011 Order itself insofar as the 07-011 Order incorporated the Settlement Agreement.

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[27] 07-011 Order at 75.

[28] FairPoint's failure to seek rehearing is particularly damning since the March 2008 Order involved the very tariff that FairPoint later attempted to avoid amending via its Subsidy Filing.

42. As the terms of the 07-011 Order and Settlement Agreement prohibited FairPoint from seeking to increase its access rates or from otherwise taking any action to avoid "honor[ing] the terms of a final order" in the instant docket, FairPoint was legally and contractually barred from submitting its Subsidy Filing. To the extent that the Commission's action allowing FairPoint to withdraw its Subsidy Tariff may be construed as a decision that the Subsidy Filing was validly made, that decision is mistaken. The Commission was also mistaken in failing to recognize that the FairPoint's Compliance Filing – a filing FairPoint was legally obligated to make subject to the terms of a valid final order – was separate and distinct from the legally and contractually prohibited Subsidy Filing. The only acceptable course is for the Commission to reconsider its earlier conclusions and acknowledge that the Subsidy Filing was defective when filed and has never become effective, while the Compliance Filing was effective on October 10, 2009.

V. THE MAY 2011 ORDER PROVIDES NO VALID REASON FOR DENYING THE MOTION FOR CLARIFICATION.

43. As the Competitive Carriers demonstrate in Section III above, the relevant statutes and PUC rules make clear that FairPoint's Compliance Filing became effective on October 10, 2009. Despite the clear authority establishing the effectiveness of that filing, the May 2011 Order denied the Motion for Clarification submitted by BayRing and AT&T. The Commission's stated basis for denying the Motion was the passage of time since the issuance of the Scheduling Order.[29] Although the passage of time certainly justifies resetting the procedural schedule outlined in that Order, such a rationale provides no logical or legal basis for denying the primary argument on which the Motion for Clarification was based: i.e., acknowledgement that the

[29] *See* May 4, 2011 Order at 6.

procedural schedule established in the Scheduling Order did not apply to FairPoint's proposed changes to Section 5 of its tariff, and that those compliance-related changes went into effect on October 10, 2009, so that FairPoint's tariff did not permit it to continue to bill CCL charges when no FairPoint common line was used. The May 2011 Order directs that the focus of this docket going forward should be "any information... relative to FairPoint's new tariff pages under the scope of the proceeding as established in Order No. 25,016."[30] BayRing and AT&T filed the Motion for Clarification because they wanted certainty regarding the scope of the proceeding as established in the Scheduling Order (i.e., Order No. 25,016), regardless of any subsequent bankruptcy filing by FairPoint. The May 2011 Order does little to dispel that uncertainty, but instead refers back to the earlier order that failed to overtly distinguish between the Compliance Filing and the Subsidy Filing. Rather than provide adequate explanation of the Commission's rationale for denying the Motion for Clarification, the May 2011 Order simply establishes that the very clarification of the scope of this docket, first sought in 2009, is still needed.

44. Indeed, the Commission's inconsistent treatment of FairPoint's September 2009 tariff filings, in the May 2011 Order, suggests that the Commission may itself be uncertain about the extent to which those filings became effective. In particular, at page 6 of the May 2011 Order, the Commission first states that the tariff filings "never went into effect," but two sentences later it grants FairPoint's request to withdraw the tariff pages. If FairPoint's tariff never went into effect, why would the Commission need to take action to formally grant withdrawal of the tariff sections?

45. The Commission's treatment of FairPoint's purported conditional withdrawal of the Compliance Filing also is "mistakenly conceived" and should be reconsidered. First, the

[30] *Id.* at 6-7.

Commission is mistaken when it says in the May 2011 Order that FairPoint requested that the tariff be withdrawn and treated as illustrative (May 2011 Order at 4). FairPoint made no such request. Instead, it made a unilateral, but conditional, declaration concerning the Compliance Filing:

> This tariff filing was made pursuant to the Order Nisi. 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.

FairPoint's October 12, 2009 Motion for Reconsideration at 9 (emphasis in original). There can be no question that the Compliance Filing was not voluntary; Fairpoint admits that it made the Compliance Filing pursuant to the Order *Nisi*. By FairPoint's own admission, the condition for the withdrawal of the Compliance Tariff (i.e. a voluntary filing) has not been satisfied, and any attempt at unilateral withdrawal is ineffective.[31]

46. Moreover, FairPoint may not simply withdraw an effective tariff by unilaterally declaring, in a filing in an adjudicatory case, that the tariff is withdrawn. Once a tariff is effective, the proper way to amend that effective tariff is to file new proposed tariff pages and let the administrative tariff approval process take its course. Even if FairPoint's self-declared condition for the withdrawal of the Compliance Tariff (that it be deemed a voluntary filing) were satisfied, its unilateral declaration of withdrawal is improper.

47. Additional support for the inescapable conclusion that the Compliance Filing became effective on October 10, 2009 arises under RSA 365:23 (Effect of Orders) and RSA

[31] By contrast, FairPoint's Subsidy Filing was entirely voluntary. It was not required by any Commission order but represents FairPoint's attempt to regain revenues lost by the Commission's appropriate treatment of the unjust and unreasonable CCL charge.

365:40 (Compliance Required). Both statutes dictate that a public utility is affirmatively and mandatorily obligated to comply with final Commission orders. RSA 365:23 states that "... it shall be the duty of every such public utility to observe and obey every requirement of such order so served upon it, and to do everything necessary or proper in order to secure compliance with and observance of the same by all the officers, agents and employees." Along the same lines, RSA 365:40 requires that "[e]very public utility and all officers and agents of the same shall obey, observe, and comply with every order made by the commission under authority of this title so long as the same shall be and remain in force." The legislature has left no room for doubt that a public utility has a specific and overt duty to make every practicable effort to ensure compliance with a final Commission order. Once the Order *Nisi* became a final order on September 10, 2009, FairPoint had an affirmative statutory obligation to "do *everything necessary* to secure compliance with" the order.[32] In these circumstances, the Commission must conclude that FairPoint not only failed to do everything practicable to discharge its legal duties in that regard, but took affirmative actions to *avoid* compliance with the Order *Nisi*. FairPoint submitted a separate, unauthorized, defective filing in conjunction with the Compliance Filing to sow confusion; FairPoint sought to link its separate Subsidy Filing[33] and Compliance Filing; and FairPoint continued to bill carriers in contravention of the tariff language changes ordered in the Order *Nisi* and effective on and after October 10, 2009.

48. The Competitive Carriers have shown that the Compliance Filing went into effect in October 2009 by operation of law, and, concomitantly, why the Subsidy Filing did not. Based on this reasoning, the Commission should reconsider its May 2011 Order to the extent it denies

[32] It bears mentioning that FairPoint was also obligated to comply with the 07-011 Order, and its failure to comply with the Order *Nisi* amounts to a failure to comply with the 07-011 Order as well – a point discussed elsewhere herein. That, too, constitutes a violation of FairPoint's duties under RSA 365:23 and 365:40.

the Motion for Clarification. If valid grounds exist to deny that motion, it behooves the Commission and the parties to announce those grounds rather than arbitrarily dismissing the pleading without supplying adequate rationale. In addition, the Commission should reconsider its apparent conclusion that FairPoint can withdraw the Compliance Filing.

VI. THE MAY 2011 ORDER IS UNREASONABLE BECAUSE IT REWARDS THE PARTY LEAST WORTHY OF THE COMMISSION'S INDULGENCE.

49. The reasons above provide ample cause for the Commission to reverse the erroneous conclusions contained in the May 2011 Order. Nevertheless, the Competitive Carriers also urge the Commission to reconsider aspects of that order based on the unseemly nature of FairPoint's conduct here. On multiple occasions now, the Commission has stated that it is inappropriate for FairPoint to impose CCL charges on calls that do not involve a FairPoint common line. The Commission issued its first decision on this issue *over three years ago*, yet FairPoint continues to bill CCL charges in such circumstances.

50. Following its March 2008 Order, the Commission validly ordered, via its Order *Nisi*, changes to tariff language – not to rates – to resolve FairPoint's continuing unjust and unreasonable application of CCL charges. All parties agree that the Order *Nisi* became a final order. FairPoint filed the tariff language changes required by the Order *Nisi* on September 10, 2009, but it also attempted to thwart its compliance by unilaterally attempting to revive a long-defunct access subsidy, the Interconnection Charge. This tactic, which smacks of contempt for the Commission's authority, has allowed FairPoint to continue to try and extract improper payments from its competitors, rather than competing fairly in the marketplace to earn its revenues.

51. There can be no doubt that FairPoint's Subsidy Filing in September 2009 was simply a delay tactic designed to sow confusion in the instant docket, and FairPoint has taken

advantage of that confusion for close to 18 months. As explained above in Section III, the relevant law makes clear that, while cleverly conceived, FairPoint's delay tactic was procedurally defective, and that the Compliance Filing has been in effect since October 2009.

52. Moreover, FairPoint's interest in linking the Compliance Filing and the Subsidy Filing should not be allowed to mislead the Commission into creating a linkage where none otherwise exists. Nothing gives FairPoint the right to demand that its compliance with the Commission's clear and valid directive in the Order *Nisi* be linked with the unauthorized revival of an anticompetitive subsidy that FairPoint essentially pulled out of a hat. Through the Subsidy Filing, FairPoint has imposed a price on its compliance with a Commission mandate. A utility should not be allowed to set the terms for its compliance with the law.

VII. REQUEST FOR RELIEF

Based on the foregoing, the Competitive Carriers respectfully urge that the Commission:

A. Modify its May 4, 2011 Order to confirm that FairPoint's Compliance Filing went into effect on October 10, 2009 and remains in effect;

B. Implement an appropriate procedural schedule for the consideration of FairPoint's Subsidy Filing; and

C. Grant such further relief as it deems appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 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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