STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 06-067

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

OBJECTION TO
MOTION FOR REHEARING, RECONSIDERATION AND CLARIFICATION

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and respectfully objects to the Competitive Carriers' Motion for Rehearing, Reconsideration and Clarification of Order No. 25,219 (the "Motion")[1] and in support hereof, states as follows:

I. INTRODUCTION

As the Commission is aware, the procedural history of Docket 06-067 is lengthy, extensive and complicated. FairPoint will not undertake to recite it to the degree that the Competitive Carriers have, but this should not be construed as concurrence with the version presented in the Motion. In fact, even allowing that their factual background is "not intended to be comprehensive,"[2] there are several aspects of the Competitive Carriers' presentation of the facts that are incorrect or which require clarification.

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[1] The Motion for Rehearing was filed by Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communications Company, L.P. and Sprint Spectrum, L.P., 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 (collectively "the Competitive Carriers").
[2] Motion at n. 3.

To start with, the Competitive Carriers refer to the Commission's June 23, 2006 Order of Notice "stating that if the challenged interpretation of the CCL tariff were found reasonable, it would investigate whether prospective modifications were warranted."[3] However, the Competitive Carriers fail to mention that in a later Procedural Order of November 29, 2006, the Commission found that "the consideration of prospective modifications to Verizon's tariff *will be removed from the present proceeding* and designated for resolution in a separate proceeding to be initiated at a later date if necessary."[4] Consequently, as FairPoint has argued previously, the issue of tariff modifications was beyond the scope of the proceeding and not properly before the Commission. The existing record in this proceeding cannot be relied on for support of any tariff modifications and must be developed anew.

Next, the Competitive Carriers persist in their attempt to change the ground rules of this proceeding by asserting that on September 10, 2009, "FairPoint made two separate and distinct tariff filings."[5] This is decidedly not an established fact and FairPoint, as explained further below, disputes this as a matter of fact and law.

The Competitive Carriers go on to claim that, in Order No. 25,016 ("Scheduling Order"), "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 . . . ."[6] This is incorrect and misleading. The Commission did not express this level of exactitude. It merely stated that "the *filing* is not complete."[7] As FairPoint explains later in this Objection, the "filing" that the Commission referenced was not just a few selected pages, as the Competitive Carriers

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[3] *Id.* at 2.
[4] Procedural Order at 6 (Nov. 29, 2006) (emphasis supplied).
[5] Motion at 4.
[6] *Id.* (emphasis supplied).
[7] Scheduling Order at 4 (emphasis supplied).

would argue, but was comprised of all tariff revisions. As such, no part of the filing was complete before FairPoint filed supporting information with the testimony of Michael Skrivan on September 28, 2009, and thus the tariff changes could not have been effective before October 28, 2009. By that time, FairPoint had withdrawn its changes and the Commission had suspended the proceeding.

The Competitive Carriers also note in passing that the Scheduling Order "established a procedural schedule for its investigation."[8] However, they fail to note that this schedule included a thirty day extension for review of FairPoint's "proposed tariff *changes*"[9] (plural) – a fact that undermines their claim that any tariff changes became effective on October 10, 2009.[10]

Finally, the Competitive Carriers assert that "On October 16, 2009, the Commission issued a letter ["Secretarial Letter"] suspending the procedural schedule for its review of the *proposed rate increase* while it considered the various Motions then pending before it."[11] Again, the Competitive Carriers put words in the Commission's mouth. Nowhere in this letter do the words "rate increase" occur, nor does the Commission in any way imply that its review of the tariff will be restricted to one portion of the tariff filing. On the contrary, the Commission appropriately refers to one aspect of the inquiry as concerning "*a* tariff to eliminate the application of CCL *and* to increase the interconnection charge."[12]

II. THE MOTION FOR REHEARING IS MOOT AS IT DESCENDS FROM A COMMISSION ORDER THAT WAS REVERSED BY THE SUPREME COURT IN *VERIZON*.

As an initial matter, the Motion should be denied as moot. Put simply, the issue

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[8] Motion at 4.
[9] Scheduling Order at 4.
[10] Motion at 5.
[11] *Id.* (emphasis supplied).
[12] Secretarial Letter at 1 (emphasis supplied).

presented by the Motion — whether Order No. 25,219 (the "Supplemental Order") warrants further consideration — is purely academic in nature. The substance of the Supplemental Order is ultimately derived from the Commission's analysis and conclusions within Order No. 24,837 (the "Tariff Interpretation Order"), of which the substance and ultimate reversal by the Supreme Court set in motion a series of events, including Order No. 25,002 (the "Order *Nisi*"), the Scheduling Order, and the AT&T/BayRing Joint Motion for Clarification of the Scheduling Order, which the Commission denied in last month's Supplemental Order.

The Tariff Interpretation Order, which is the root of the Supplemental Order and the source of extensive motion practice culminating in the instant Motion, has no continuing vitality. The New Hampshire Supreme Court reversed the Tariff Interpretation Order, and without qualification or remand.[13] The general rule is that reversal, without express direction from an appellate court regarding its scope, is "to nullify the judgment below and place the parties in the same position in which they were before judgment."[14] "To 'reverse' a judgment means to 'overthrow, vacate, set aside, make void, annul, repeal, or revoke it."[15] "[R]eversal of a judgment without other direction nullifies the judgment, findings of facts, and conclusions of law, and leaves the case standing as if no judgment or decree had ever been entered."[16] Because

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

[14] *Sugarloaf Mills Limited Partnership of Georgia v. Record Town, Inc.*, 701 S.E.2d 881, 883 (Ga. App. 2010) (emphasis omitted); *see Hurley v. Heart Physicians, P.C.*, 3 A.3d 892, 901 (Conn. 2010) (quotation omitted) ("[I]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered."); *Murray v. Murray*, 856 P.2d 463, 467 (Alaska 1993).

[15] *Hasse v. Fraternal Order of Eagles No. 2421 of Vermillion*, 658 N.W.2d 410, 413 (S.D. 2003). (quotation omitted).

[16] *Id.* (quotation omitted); *see People, By and Through Dept. of Public Works v. Lagiss*, 223 Cal. App. 2d 23, 44 (1963) (stating that, after a reversal, "the original judgment ceases to exist for any purpose and it cannot be modified; nor are the findings at the first trial of any effect; nor can the trial court make findings based on evidence taken at the first trial") (citations omitted); *Ceravole v. Giglio*, 587 N.Y.S.2d 741, 743 (N.Y. App. Div. 1992) ("It is settled jurisprudence that when

the Tariff Interpretation Order is void, so too is everything built upon it, including the Supplemental Order. Accordingly, the Commission simply has no occasion to reconsider or rehear the Supplemental Order, as requested by the Competitive Carriers, because the Supplemental Order concerns issues that are each academic and therefore moot.

III. THE MOTION FOR REHEARING FAILS TO ASSERT ANY OVERLOOKED OR MISTAKENLY CONCEIVED INFORMATION.

Even if the Commission determines that the Motion is not moot, the Motion marks the second time in this proceeding that the Competitive Carriers, through joint movants AT&T and BayRing in their October 2, 2009 Joint Motion for Clarification (the "Motion for Clarification") have requested the same relief for the same reasons. Motions for Rehearing may only be granted for "good reason."[17] Further, as correctly noted by the Competitive Carriers in their Motion, a party must do more in a rehearing motion than "merely reassert[] prior arguments and request a different outcome."[18] Yet his is precisely what the Competitive Carriers have attempted here. The Competitive Carriers have not produced any new facts or arguments in their motion nor have they raised any matters that were "overlooked or mistakenly conceived." Rather, they continue to assert the same erroneous claim set forth in the Motion for Clarification, that FairPoint's September 10, 2009 compliances filing represented two separate and distinct rate filings.

Contrary to the Competitive Carriers' assertions,[19] the Commission did not overlook anything regarding the tariff filing on September 10, 2009. As was previously made clear in its

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an appellate court reverses a judgment, the rights of the parties are left wholly unaffected by any previous adjudication." (quotation omitted)).

[17] RSA 541:3

[18] Order No. 24,886 on Motions for Rehearing and Motion to Intervene at 7 (*citing* Connecticut Valley Elec. Co., 88 NH PUC 355, 356 (2003)).

[19] Motion at 6.

Objection to the Motion for Clarification, FairPoint has repeatedly stated that the revisions to its tariff were to be taken together as a single revenue neutral adjustment. FairPoint has always emphasized that the revisions were intended to be revenue neutral, meaning that to the extent that the Commission's suggested revisions result in lower revenues to FairPoint, other charges would need to be increased to restore the balance. In its August 28th Comments, FairPoint notified the Commission and other parties that it would "revise its tariff in a revenue neutral manner by revising the application of the CCL and recovering the shortfall through increases in other access rate elements."[20] Likewise, the transmittal letter for this tariff revision 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." In his testimony, FairPoint's Michael Skrivan testified that the revised tariff pages reflected a revenue neutral adjustment, accomplished by an increase in the Interconnection Charge.[21] Consequently, there can be no doubt of FairPoint's intention that the revised tariff pages encompass a single revision of interdependent prices and terms. Despite the Competitive Carriers' intricate parsing of the word "conjunction,"[22] any suggestion that FairPoint's September 10, 2009 filing can be separated is simply not correct.

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[20] FairPoint Comments and Conditional Request for Hearing at 6 (Aug. 28, 2009) ("FairPoint Comments").
[21] Testimony of Michael Skrivan at 5:3-10 (Sep. 28, 2009).
[22] Motion at 8-9. The Competitive Carriers also dissect FairPoint's implementation of the Commission's rules regarding margin annotations in tariffs. Motion at 10-11. FairPoint is not aware of any instance in which word choice in transmittal letters or margin notations has been dispositive in the interpretation of a tariff, nor have the Competitive Carriers cited any support for this.

This interdependency also conforms to the definition of a "rate," which encompasses much more than a numerical price. The United States Supreme Court has clearly stated that "[r]ates ... do not exist in isolation. They have meaning only when one knows the services to which they are attached."[23] Further, the Commission pursuant to Puc 1602.03 defines a "rate" 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). In this case, the "rate" for CCL access service was filed contemporaneously and is related to the Interconnection Charge, which "is applied to all local transport access minutes . . . ."[24] Consequently, the new CCL rate regulations cannot be divorced from the interconnection charge and evaluated separately.

The Competitive Carriers argue otherwise, claiming that the FairPoint was not entitled to balance a reduction in its CCL rate because "the Commission did not order any reduction to FairPoint's *rates*; it merely ordered *language* changes . . . ."[25] Notwithstanding that this conflicts with established law regarding filed rates, this claim does not stand up to simple analysis. For example, a local exchange carrier could change the *language* describing its basic service to provide that only calls within 1000 feet of the subscriber's location are local calls under its existing flat *rate*, and that all other calls would henceforth be billed as toll calls. According to the Competitive Carriers, this would not be a *rate* increase. Of course, customers would most assuredly disagree, protesting that at the end of the month, they would be paying a lot more for

[23] *American Tel. and Tel. Co. v. Central Office Tel., Inc.*, 118 S.Ct. 1956, 1963 (1998).
[24] Tariff Transmittal § 6.2.1.E.2.
[25] Motion at 15 (emphasis original).

making the same calls as before.[26]

IV. FAIRPOINT'S TARIFF FILING WAS NOT EFFECTIVE PRIOR TO ITS WITHDRAWAL.

The Competitive Carriers claim that FairPoint's September 10, 2009 filing became effective thirty days after its filing, as of October 10, 2009, but this ignores the fact that the Commission extended the time for review of the proposed tariff changes for 30 days. The September 23, 2009 Scheduling Order recognized that all pages comprised a "filing" ("In this *filing*, FairPoint stated that, in conjunction with its compliance filing, it was filing schedule sheets reflecting revenue neutral adjustments to its switched access rates by increasing the InterConnection Charge from $.000000 to $.010164 per minute.")[27] and it "extend[ed] the time for review of the proposed tariff *changes* [plural, *i.e.* not just rate increase] for 30 days from the date the filing is complete."[28] FairPoint filed additional information on September 28, 2009, but the filing was never deemed complete prior to FairPoint's withdrawal of all of revisions on October 12, 2009 and the Commission's suspension of the entire proceeding on October 16, 2009, well before the October 28, 2009 extension deadline.

V. AT&T'S/ BAYRING'S MOTION FOR CLARIFICATION WAS PROPERLY DENIED BY THE COMMISSION.

The Competitive Carriers claim that "[t]he Commission's stated basis for denying the Motion was the passage of time since the issuance of the Scheduling Order."[29] However, this is not true. The Competitive Carriers' emphasis on just the second portion of the Commission's statement tells only half the story. They ignore the first part of that sentence, which establishes

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[26] Or conversely, "[i]f 'discrimination in charges,' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing additional benefit at no additional charge." *Central Office Tel.,* 118 S.Ct. at 1963.
[27] Scheduling Order at 3 (emphasis supplied).
[28] *Id.* at 4 (emphasis supplied).
[29] Motion at 17.

the primary basis for the Commission's decision, i"Order No. 25,016 granted FairPoint's request for a hearing on its tariff filing."[30] As it explained earlier in the Supplemental Order,

> [b]ecause Order No. 25,002 was issued on a *nisi* basis, it permitted FairPoint, or others, the opportunity to request that a hearing be held. On August 28, 2009, FairPoint made such a request. By issuing Order No. 25,016, the Commission concluded that a hearing was needed. In effect, therefore, FairPoint's motion for a hearing was granted, though a hearing was never held due to FairPoint's bankruptcy filing.[31]

FairPoint requested a hearing "regarding tariff modifications"[32] and whether FairPoint may "recover its costs through other means."[33] The Commission granted a hearing on these issues, prior to which the tariff revisions could not have been effective, and thus the Commission's denial of the Motion for Clarification was proper on this ground alone.

VI. THERE IS CURRENTLY NO FINAL ORDER IN THIS PROCEEDING.

In their Motion, the Competitive Carriers argue, superfluously, that FairPoint is compelled by the Settlement Agreement in DT 07-011 to honor the terms of a final order in this proceeding, and that FairPoint has breached the Settlement Agreement by "alter[ing] the terms of the Commission's Order *Nisi, a final order.*"[34] The Competitive Carriers are incorrect.

It goes without saying that FairPoint, Settlement Agreement or not, would be bound under RSA 365:23 by any order of the Commission, and it has at all times sought to do so in this proceeding. However, the Competitive Carriers beg the question that any order in this proceeding is a "final" order. Certainly not the Tariff Interpretation Order, which was reversed by the Supreme Court, nor the Order *Nisi*, which by definition is conditionally moot and for which, in this case, the condition has been triggered. "*Nisi*" is Latin for "unless," and is an

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[30] Supplemental Order at 6.
[31] *Id.* at 5-6.
[32] FairPoint Comments at 2.
[33] *Id.* at 6.
[34] Motion at 15 (emphasis supplied).

expression "to indicate that the adjudication spoken of is one which is to stand as valid and operative *unless* the party affected by it shall appear and show cause against it or take some appropriate step to avoid or procure its revocation."[35] By that same token, an "order *nisi*" is a "provisional or conditional order, allowing a certain time within which to do some required act, failure of which the order will be made absolute."[36] The Order *Nisi* provided that all persons could "file a written request for a hearing which states the reason and basis for a hearing no later than August 28, 2009,"[37] which FairPoint did without fail, and which request the Commission granted in the Scheduling Order and confirmed in the Supplemental Order. Hence the Order *Nisi* is not final or absolute.

Even if the Order *Nisi* were to be considered "final," the Settlement Agreement provides, as the Competitive Carriers noted, that "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."[38] Certainly one of the rights connected to any final Commission Order is the right to seek rehearing and appeal under RSA 541. Consequently, FairPoint's actions in this proceeding are entirely consonant with the terms of the Settlement Agreement.

VII. FAIRPOINT IS ENTITLED TO EXERCISE ITS RIGHTS.

At the conclusion of the Motion, the Competitive Carriers gratuitously condemn FairPoint for its "unseemly" conduct, its "contempt" for the Commission's authority, its "delay tactic" and its attempt to "mislead" the Commission. [39] FairPoint would like to remind the parties that FairPoint has once already had its rights vindicated in this proceeding by the New

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[35] Blacks Law Dictionary 1047 (6th. ed.) (emphasis original).
[36] *Id. at* 1097.
[37] Order *Nisi* at 3.
[38] Motion at 14, citing Stipulated Settlement Terms, section 4.h. (emphasis supplied).
[39] *Id.* at 21-22.

Hampshire Supreme Court. While the Competitive Carriers may direct their vituperation at FairPoint, FairPoint submits that any objective observer would conclude that FairPoint is simply exercising its rights – as confirmed by the Supreme Court and pursuant to applicable laws and regulations – to recover its costs in accordance with a valid tariff as originally approved by the Commission. At all times since the issuance of the Order *Nisi*, FairPoint has made its position clear, and in regard to the tariff filing, signaled its intentions in advance. Furthermore, it was FairPoint that, on March 10, 2011, requested the reactivation of this proceeding. FairPoint timely filed motions for rehearing and those motions have been granted. FairPoint acknowledges the strong differences of opinion in this proceeding, but it rejects and protests any intimation that it is acting in bad faith or abusing the Commission's procedures.

WHEREFORE, FairPoint respectfully requests that this Commission DENY the Motion for Rehearing, Reconsideration and Clarification.

Respectfully submitted,

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

By its Attorneys,

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Dated: June 10, 2011

By: _____

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CERTIFICATE OF SERVICE

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

Dated: June 10, 2011

By: _____
Harry N. Malone, Esq.