STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 06-067

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

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

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

I. INTRODUCTION AND BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

In the Supplemental Order, the Commission also:

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

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

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

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

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

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

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

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

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

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

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

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

(1) Whether the changes to FairPoint's CCL tariff as proposed by FairPoint on September 10, 2009, comply with the Commission's orders requiring FairPoint to amend the CCL provisions in its tariff.

(2) Presuming the changes identified in question (1) comply, or can be made to comply, with the Commission's orders, what should be the effective date of the amended language in FairPoint's switched access tariff relating to the CCL?

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

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

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

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

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[11] *Id.* at 4.

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

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

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

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

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

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

II. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

However, the record does not support this conclusion.

As FairPoint has explained previously, the CCL charge was designed to make sure that each toll provider using Verizon's network to complete a long distance call contributed to Verizon's joint and common costs without regard to whether each call actually traversed a common line to a Verizon end user.[21] In this way, retail competition for toll services could flourish without undermining Verizon's right to recover its joint and common costs or shifting those costs to users of other services. Following a series of negotiations, the affected parties agreed that the CCL was a contribution element and settled on the language of the tariff, including the CCL charge, which the Commission approved in September 1993.[22]

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

Verizon designed its retail rate for intrastate toll service to exceed the direct cost of providing such services.[24] The purpose of this rate structure, approved by the Commission, was to have customers who made toll calls contribute to the recovery of the local telephone companies' "joint and common costs," i.e. the costs of facilities, employees, and other expenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

validated by the New Hampshire Supreme Court);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[63] Dismissal Order at 14.

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

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

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

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

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

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

V. CONCLUSION

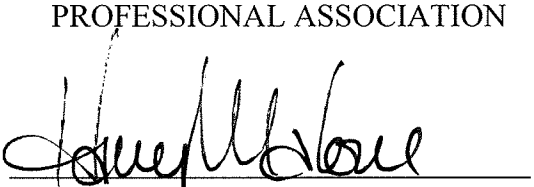
For the reasons described herein, the Commission overlooked or mistakenly conceived certain facts and interpretations of applicable law. As a result, it has issued an Order that is unlawful and unreasonable. FairPoint respectfully requests that the Commission reconsider its Order Nos. 25,319 and 25,327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

Respectfully submitted,

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

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

Dated: February 17, 2011

By: 

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CERTIFICATE OF SERVICE

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

Dated: February 17, 2012

By: _____
Harry N. Malone