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 RECONSIDERATION

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and respectfully objects to the Competitive Carriers' Motion for Reconsideration (the "Motion") of Order No. 25,319 (the "2012 CCL Order").[1] Specifically, the Competitive Carriers request that the Commission reconsider its decision that the revision to FairPoint's CCL tariff are effective January 21, 2012 and instead order that revision to be effective retroactively to October 10, 2009. As FairPoint explains further below, the Competitive Carriers have not described any matter that the Commission overlooked, nor have they cited any authority that establishes that the Commission's decision regarding the effective date was unlawful, unreasonable, or an abuse of the Commission's discretion. The Motion is for the most part a reiteration of the Competitive Carriers' brief, including their request for equitable relief. Indeed, the theme of the Motion is aptly summarized by the Competitive Carriers on page 12, when they state that "[t]he Competitive Carriers are merely seeking in 2012 what the Commission promised in 2008." However, throughout the pleading, they ignore the fact that this "promise" was repudiated by the New Hampshire Supreme Court when it

[1] The Motion for Rehearing was filed by Freedom Ring Communications, LLC d/b/a BayRing Communications, AT&T Corp., Sprint Communications Company, L.P. and Sprint Spectrum, L.P., and Global Crossing Telecommunications, Inc. (a Level 3 company) (collectively "the Competitive Carriers").

overturned the Commission's 2008 CCL Order.[2] Indeed, in many places the Motion reads more like a very untimely Motion for Reconsideration of the *Verizon* decision. FairPoint respectfully requests that the Commission deny the Competitive Carriers' Motion for Reconsideration.

I. BACKGROUND CLARIFICATIONS

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,"[3] there are two aspects of the Competitive Carriers' presentation of the facts that are incorrect or which require clarification.

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."[4] 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."[5] Consequently, 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.

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[2] *In re Verizon New England Inc.*, 158 N.H. 693 (2009) ("*Verizon*").
[3] Motion at n. 2.
[4] *Id.* at 2.
[5] Procedural Order at 6 (Nov. 29, 2006) (emphasis supplied).

The Competitive Carriers also indicate that the Commission issued its May 4, 2011 Procedural Order and Supplemental Order of Notice in response to unspecified "requests" to reactivate the docket.[6] FairPoint wishes to clarify that there was only one request, and that was by FairPoint. AT&T responded to this request many weeks later with a letter that concurred with this request to the extent that it requested Commission action but objected to FairPoint's request for a scheduling conference.[7]

II. THE COMMISSION'S ORDER CONFORMS TO THE LAW REGARDING RETROACTIVE APPLICATION OF UTILITY RATES.

The Competitive Carriers take issue with the Commission's reliance on *Pennichuck* as the basis of the Commission's holding that it cannot impose the CCL tariff revision retroactively. They assert that a retroactive effective date of October 10, 2009 does not conflict with *Pennichuck* because "under the reasoning in *Pennichuck*, a retroactive tariff change is proper as long as it does not become effective as of a date prior to the date that 'the utility applies for a change.'"[8] However, this is not what the Court held in *Pennichuck*. The Competitive Carriers' reporting of this case is inexact and overbroad; the Court was not deciding on the propriety of "retroactive tariff changes," but rather on the lawful effective date of *temporary* rates. It stated that

> we hold that the earliest date on which the PUC can order *temporary rates* to take effect is the date on which the utility files its underlying request for a change in its permanent rates. In no event, may temporary rates be made effective as to services rendered before the date on which the permanent rate request is filed.[9]

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[6] Motion at 5.
[7] Letter to D. Howland, Executive Director, NHPUC from J. Huttenhower, AT&T (Apr. 22, 2011) ("Huttonhower Letter").
[8] Motion at 9, citing to *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980) ("*Pennichuck*").
[9] *Pennichuck*, 120 N.H. at 567 (emphasis supplied).

In other words, *Pennichuck* established restrictions on the effective date of *temporary rates* that the Commission *had already approved.* Thus, this aspect of *Pennichuck* is not applicable to this case which, as the Commission explained in the 2012 CCL Order, never involved a temporary rate,[10] or any approved rate other than the then effective rate. Instead, as FairPoint explained in its December brief, and the Commission agreed, while New Hampshire law allows the effectiveness of a rate to relate back to a time prior to its final approval by the Commission, this is only in the case in which a temporary rate is fixed. "[T]he effective date of temporary rates fixes and preserves the period during which the rates allowed in the underlying permanent rate proceeding may apply . . . ."[11] In this case, the Commission never set a temporary rate, and thus there was no basis for retroactive application of the final rate.[12]

The Competitive Carriers also contend that the *Pennichuck* prohibition against retroactive ratemaking does not apply in this case because "the notice/due process issues underpinning the *Pennichuck* decision are not present here."[13] Yet due process was hardly mentioned in *Pennichuck*, let alone serving as its foundation. The phrase "due process" is used only twice in the decision, and then only in the recitation of facts at the beginning. After that, it is never mentioned again. *Pennichuck* is actually grounded on the Contract Clause of the United States Constitution[14] and the related Part I, Article 23 of the New Hampshire Constitution, which form the basis of its holding that "the State may not create 'a new obligation in respect to a transaction already past.'"[15] Again, this is consistent with the Commission's interpretation, and conflicts

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[10] 2012 CCL Order at 11.
[11] *Pennichuck*, 120 N.H. at 564.
[12] 2012 CCL Order at 11.
[13] Motion at 10.
[14] Art. I, Section 10, cl. 1
[15] *Pennichuck*, 120 N.H. at 565, quoting *Geldhof v. Penwood Associates*, 119 N.H. 754, 754 (1979) ("*Geldhof*").

with that of the Competitive Carriers.

Finally, the Competitive Carriers argue that *Pennichuck* does not apply to this case because it is "clear" that *Pennichuck*'s concern about retroactive ratemaking applies only to "lawful contracts and tariffs,"[16] which do not include FairPoint's tariff because it is a tariff "imposing rates that have been held to be unjust and unreasonable."[17] First, despite the clarity that the Competitive Carriers seem to have found, *Pennichuck* did not even mention the threshold issue of the lawfulness of a tariff. For that, the Competitive Carriers have delved into *Geldhof*, a case that was cited by *Pennichuck*, and from which they extract a single instance of the phrase "lawfully contract," around which they build their argument.[18]

Second, even if such threadbare support did support this contention (which it does not), this argument fails because it completely ignores the Supreme Court holding that FairPoint's CCL *was* lawful. Acting as if that decision was never rendered, the Competitive Carriers observe that the 2008 CCL Order found FairPoint's tariff to be unjust and reasonable, and that the Commission "reiterated" this finding multiple times.[19] However much the Commission may reiterate this finding, it cannot change the fact that this finding was overturned by the Supreme Court. The simple fact is that FairPoint's CCL tariff has been lawful and effective during this entire proceeding.

Understandably reluctant to rely solely on *Pennichuck*, the Competitive Carriers direct the Commission's attention to a case that is purportedly more supportive, *Granite State*.[20] The Competitive Carriers contend that *Granite State* supports their argument for retroactive

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[16] Motion at 10.
[17] *Id.* at 11.
[18] *Geldhof*, 199 N.H. at 754.
[19] Motion at 10-11.
[20] *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980).

application of revisions to the CCL Charge because it affirms the Commission's "broad statutory power" to order a refund of "revenues collected under rates authorized and approved by the PUC but later found . . . to have been collected under improper rates."[21]

Notwithstanding the Competitive Carriers assertion that "[c]omparable circumstances exist here,"[22] *Granite State* is distinguished from this case in two important ways. First, as before, the Competitive Carriers rely on the 2008 CCL Order, again ignoring the fact that the 2008 CCL Order was overturned by the Supreme Court, which found that the FairPoint's CCL charge was *not* being collected under improper rates. Second, the Competitive Carriers fail to note that the only rates that were "authorized and approved" by the Commission were the rates in FairPoint's tariff in effect at the time of the Supreme Court decision. Although the Commission may have ordered different rates in its Order *Nisi*, those rates were never approved or effective, as the Commission has made clear on a number of occasions. Thus, under the *Granite State* standard advocated by the Competitive Carriers, no refund is due, nor is any retroactive application of a different rate. Consequently, *Granite State* does not support the Competitive Carriers' argument, which likely explains why the Commission made only an "oblique" reference to the case in the 2012 CCL Order.[23]

III. THE COMMISSION CORRECTLY HELD THAT IT HAS NO EQUITABLE AUTHORITY TO IMPOSE RETROACTIVE RATES.

Lacking any statutory or precedential support for their arguments, the Competitive Carriers again prevail upon the Commission to exercise a vague "equitable" authority to grant them the relief that they have requested. Notwithstanding the Commission's clear explanation that it was bound by statute to conform to its procedural rules, the Competitive Carriers argue

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[21] Motion at 12, citing *Granite State*, 120 N.H. at 540.
[22] *Id.*
[23] *Id.*

that the Commission has equitable authority to deny FairPoint its constitutional right to due process. Although they cite no authority in support, the Competitive Carriers claim that such an exercise is excused by FairPoint's "procedural maneuvering," by the Commission's duty to respond to rumors, by the apparent simplicity of the task at hand, and by the delay resulting from FairPoint's bankruptcy.

The Competitive Carriers criticize FairPoint for manipulating the process for purposes of delay by first requesting a hearing on the Order *Nisi* and then, two years later, foregoing a hearing.[24] The Competitive Carriers are engaging in a game of semantics, ignoring the distinction between one sense of the word "hearing" ("opportunity to be heard or to present one's side of a case")[25] and another sense ("a trial before an administrative tribunal").[26] As FairPoint explained in its Motion for Rehearing, there is a difference between being granting an opportunity to be heard on a matter, and being granted an oral hearing to take evidence. The Competitive Carriers are conflating the two in their attempt to disparage FairPoint's reasonable actions to preserve its rights. However, the distinction is clear and well-known. For example, in regard to the federal Administrative Procedure Act:

> [t]o the extent that the parties are not able to settle the controversy by consent, they are entitled to a hearing and decision on notice in accordance with the formal hearing sections of the Federal APA. Although the Act provides that a party is entitled to present its case or defense by oral or documentary evidence, a federal agency is not required to provide oral hearings unless the statute governing its actions makes an oral hearing mandatory.[27]

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[24] Motion at 14.
[25] Webster's Third New International Dictionary 1044, sense number 2a(3) (2002).
[26] *Id.*, sense number 2b(4). *See also* Black's Law Dictionary 721 (6th ed. 1990) (a hearing is "any confrontation, oral *or otherwise*, between an affected individual and an agency decision-maker sufficient to allow individual [sic] to present his case in a meaningful manner.") (emphasis supplied).
[27] Am. Jur. 2d *Administrative Law* § 306.

When FairPoint asked for a hearing, it was asking for an opportunity to present its case. Whether that ultimately entailed an actual oral hearing for taking evidence or presenting argument was a secondary consideration. Indeed, given the fact that FairPoint was restricted by Commission order as to the case it could present, and thus the degree to which it would be "heard," there was clearly no need for an oral hearing.

The Competitive Carriers also fault the Commission for failing to adjust the procedural schedule (in violation of FairPoint's rights) based on rumors of FairPoint's bankruptcy.[28] Furthermore, the Competitive Carriers maintain that the Commissioned erred in suspending the procedural schedule because only "one third of a page of text" needed to be reviewed – as if the complexity of an issue is directly related to the number of words describing it.[29] The Competitive Carriers also complain that the Commission should have lifted the stay of this proceeding prior to FairPoint's emergence from bankruptcy, but they do not assert (nor can they) that they ever requested that the stay be lifted during that time. Indeed, it was not until FairPoint itself requested a scheduling conference that the stay was lifted.[30] Prior to that, the only communication from the Competitive Carriers was a letter from AT&T and BayRing to "simply . . . make the Commission aware" that FairPoint continued to bill in accordance with its tariff.[31] Whatever procedural rights the Competitive Carriers may have had, they "sat" on those rights and cannot now claim that the delay is solely the Commission's fault (assuming for the sake of argument that the Commission ever had any latitude in this matter.)

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[28] Motion at 15.
[29] *Id.* at 14.
[30] It is particularly ironic that AT&T chastised FairPoint – six weeks later – for not structuring this request in a manner that best accommodated AT&T's preferred timeline. *See* Huttonhower Letter.
[31] Letter to D. Howland, Executive Director, NHPUC from K. Gold, AT&T (Feb. 16, 2010).

None of the Competitive Carriers complaints are tied to any standard or doctrine of equitable relief. The best the Competitive Carriers can do is assert that the delay has been "prejudicial" to them and to cite *Gas Service*[32] for the proposition that it is unreasonable and an abuse of discretion for the Commission to delay the effectiveness of a rate revision for more than two years after the Commission mandated that the revision be made.[33] As even the Competitive Carriers noted, this is not exactly the holding in *Gas Service*, and a careful review of that case establishes that it is pertinent to this case in ways that the Competitive Carriers may not have intended.

With respect to *Gas Service*, in February 1980 the Commission granted the utility a rate increase of approximately sixty per cent of that originally requested. Six months later, in August 1980, the utility filed a proposed tariff that was designed to produce additional revenues. The Commission rejected the tariff filing on the basis that the request simply sought to relitigate the issues which had been decided against the company in the previous rate proceeding and was nothing more than a late motion for a rehearing. On appeal, the utility alleged that for the past seven years it had not earned and was not able to earn the reasonable rate of return to which it is legally entitled due to the inadequate rate increases approved by the Commission. It maintained that, because of events which had occurred since the February 1980 rate increase, its cost of capital and attrition had increased beyond that reflected in the rates approved by the Commission at that time, thereby resulting in an earnings deficiency which constitutes an unconstitutional confiscation of its property. The Court held that, if the facts were as claimed by the utility, then the Commission abused its discretion in refusing to consider adequately the company's renewed

[32] *Appeal of Gas Service Co.*, 121 N.H. 602, 603-604 (1981) ("*Gas Service*").
[33] Motion at 16.

application for a rate increase, and that it was unreasonable and unconstitutional to require the utility to wait for two years (with appeals) for its original rate increase to be considered.[34]

Thus, contrary to what the Competitive Carriers claim, *Gas Service* actually supports the reasonableness of the Commission's decision to establish a procedural schedule to (ostensibly) consider FairPoint's claims. On the other hand, *Gas Service* also supports FairPoint's contention that the Commission has abused its discretion by barring FairPoint from presenting evidence that the CCL Charge is solely a contribution element, and by consistently rejecting FairPoint's attempts to tariff the increased Interconnection Charge.

When the Competitive Carriers complain that the Commission has been unreasonable in making them endure "a comparable waiting period for rate relief they have been seeking for several years," what they are really claiming is that the Commission should have denied FairPoint due process in order to grant them relief that had already denied them by the New Hampshire Supreme Court. The Commission acted appropriately in this instance.

IV. FEDERAL LAW PROHIBITS RETROACTIVE APPLICATION OF THE RATE PRIOR TO JANURARY 24, 2011.

As FairPoint explained in its brief, even if the Commission reverses itself and finds that it may revise the CCL tariff retroactively, no claims for refunds or reduced payments can be made for any traffic prior to the effective date of FairPoint's emergence from Chapter 11 bankruptcy.[35] As a result of FairPoint's confirmed Bankruptcy Plan, effective January 24, 2011, FairPoint received a discharge that was applicable to all debts that arose before that date, regardless of whether a proof of claim was filed on such debt or whether the holder of the debt accepted the Plan. Further, FairPoint received an injunction by operation of law protecting FairPoint against

[34] *Gas Service*, 121 N.H. at 603-604.
[35] *In re: FairPoint Communications, Inc., et al.*, Case No. 09-16335 (S.D.N.Y.).

the commencement or continuation of any action, act or process to collect or recover or offset any such discharged debt. Section 1141 of the Bankruptcy Code provides that, as stated in the Plan or in the order confirming the Plan, the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation.[36] Further, Section 524 of the Code provides that a discharge voids any judgment at any time obtained to the extent that such judgment is a determination of liability of the debtor with respect to any debt discharged and operates as an injunction against the commencement or continuation of any action, the employment of any process or an act, to collect, recover or off-set any such debt as a liability of the debtor.[37] Accordingly, Section 13 of the FairPoint's Third Amended Joint Plan of Reorganization provided that:

> Except as provided in the Plan [which did not provide for the charges at issue in the CCL proceeding], on the Effective Date, all existing Claims against FairPoint and Old FairPoint Equity Interests shall be, and shall be deemed to be, released, terminated, extinguished and discharged, and all holders of such Claims and Old FairPoint Equity Interests shall be precluded and enjoined from asserting against Reorganized FairPoint . . . .
>
> Upon the Effective Date, all such Persons shall be forever precluded and enjoined, pursuant to section 524 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against, or terminated Old FairPoint Equity Interest in, FairPoint.[38]

In summary, if no Proof of Claim was filed for any obligation that arose prior to the Effective Date, the obligation was discharged. The creditor can take no action to recover the obligation.

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[36] 11 U.S.C. § 1141(d)(1).

[37] 11 U.S.C. § 524.

[38] *See* Order Confirming Debtor's Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated as of December 29, 2010, *In re: FairPoint Communications, Inc., et al.*, Case No. 09-16335 (S.D.N.Y.) [Document No. 2113]. Also, it should be noted that FairPoint and BayRing entered into a Bankruptcy Court approved settlement agreement whereby all claims which pre-dated August 1, 2010, were settled. The Bankruptcy Court approved of this settlement agreement on October 25, 2010. BayRing's request for relief back to 2009 not only is disingenuous, but also violates a federal court order.

V. CONCLUSION

For the reasons described herein, the Competitive Carriers have failed to establish that the Commission overlooked or mistakenly conceived certain matters and interpretations of applicable law. FairPoint respectfully requests that the Commission deny their Motion for Rehearing.

Respectfully submitted,

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

By Its Attorneys,
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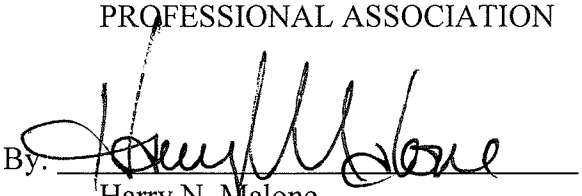
Dated: February 28, 2011 By: 

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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: February 28, 2012

By: _____
Harry N. Malone