THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

No. 2012-0398

Appeal of Northern New England Telephone Operation, LLC d/b/a

FairPoint Communications-NNE

SUPPLEMENTAL APPENDIX OF APPELLEES TO APPEAL BY PETITION PURSUANT TO RSA 541:6

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June 26, 2012

SUPPLEMENTAL APPENDIX OF APPELLEES TO APPEAL BY PETITION PURSUANT TO RSA 541:6

NO. 2012-0398

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April 20, 2007

VIA HAND DELIVERY AND ELECTRONIC MAIL
Debra Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

RE: Docket No. 06-067, Bay Ring Petition for Investigation into Verizon New Hampshire's Practice of Imposing Access Charges, Including Carrier Common Line (CCL) Access Charges, on Calls Which Originate on BayRing's Network and Terminate on Wireless Carriers' Networks

Dear Ms. Howland:

Enclosed for filing on behalf of AT&T Communications of New England, Inc., please find the following:

PANEL REBUTTAL TESTIMONY OF OLA A. OYEFUSI, CHRISTOPHER NURSE, AND PENN PFAUTZ

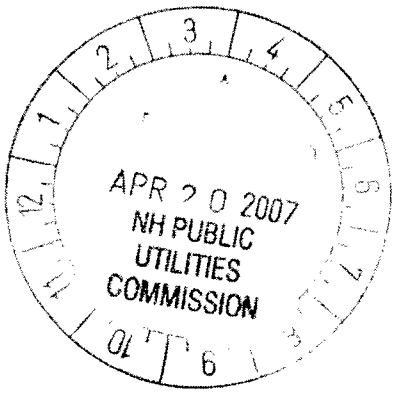
If you have any questions regarding this matter, please contact me at the address or e-mail above. Thank you.

Sincerely,

Jay E. Gruber

cc: Lynn Fabrizio, Esq.
Service List (*Electronic Only*)

Enclosure



STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DT 06-067

FREEDOM RING COMMUNICATIONS, LLC d/b/a
BAYRING COMMUNICATIONS

Complaint Against Verizon, New Hampshire Re: Access Charges

PANEL REBUTTAL TESTIMONY OF OLA A. OYEFUSI, CHRISTOPHER NURSE, AND PENN PFAUTZ

On Behalf of AT&T

April 20, 2007

PANEL REBUTTAL TESTIMONY OF OLA A. OYEFUSI, CHRISTOPHER NURSE, AND PENN PFAUTZ

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PANEL REBUTTAL TESTIMONY OF OLA A. OYEFUSI, CHRISTOPHER NURSE, AND PENN PFAUTZ

I. INTRODUCTION

Q: DR. OYEFUSI, PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Dr. Ola A. Oyefusi and my business address is 7125 Columbia Gateway Drive, Columbia MD 21046.

Q: MR. NURSE, PLEASE STATE YOUR FULL NAME, ADDRESS AND CURRENT RESPONSIBILITIES.

A: My name is E. Christopher Nurse, and my business address is 1120 20th Street, N.W., Suite 1000, Washington, D.C. 20036.

Q. DR. PFAUTZ, PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Penn L. Pfautz and my business address is 200 South Laurel Avenue, Middletown, New Jersey 07748.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. Our purpose is to respond to the direct testimony of Verizon New Hampshire witness Peter Shepherd. Mr. Shepherd's testimony contains several inaccurate claims or statements that need to be corrected.

Q. PLEASE SUMMARIZE YOUR TESTIMONY

A. Our rebuttal testimony explains why Verizon is wrong in its claim that the CCL charge applies to calls that do not traverse a Verizon switch or common line (or "local loop"). First, we very briefly address, once again, the problems with Verizon's tariff interpretation argument. Our rebuttal is very brief because we anticipated and addressed most of Verizon's tariff interpretation arguments in our initial testimony.

Second, we address why Verizon is wrong in its argument that CCL is a contribution element intended to guarantee Verizon a particular revenue stream and not designed "to recover any cost related to use of end-user access lines or loop related costs." *See* Shepherd Testimony at 4. According to Verizon, it originally proposed CCL to maintain a prior level of toll revenue to help subsidize local exchange service as the industry transitioned to intraLATA toll competition. As we explain below, Verizon's second argument fails because the Commission never accepted Verizon's proposal and rejected the factual and policy propositions on which Verizon's proposal was based. Whatever Verizon wanted is irrelevant. The Commission's actions, recorded in its decisions on the public record, are what is relevant; and as we demonstrate below, the Commission's actions support AT&T's position.

We also refute Verizon's claim that nothing relevant to interpretation of this tariff has changed. In telecommunications, *everything* has changed over the last ten years. The telecommunications market is now competitive for local, for long distance, and across technology platforms. Verizon's tariff was developed at a time when it was the only local service provider in its territory. Now it is competing against (and losing traffic to) a host of other providers, and pursuant to decisions of this Commission and the FCC, Verizon is now competing with (and taking traffic *from*) interexchange carriers. Nothing in Verizon's tariff or this Commission's Orders insulated Verizon from CCL revenue losses any more than the Commission insulated IXCs from long distance losses, nor did anything in the tariff or from this Commission indicate that, in a competitive market, Verizon,

and Verizon alone, would be extended a "contribution guarantee." As we explain below, Verizon's position in this regard is completely indefensible.

II. VERIZON'S TARIFF INTERPRETATION IS INCORRECT

Q. VERIZON WITNESS SHEPHERD (AT PAGE 17) MADE REFERENCE TO SEVERAL SECTIONS OF TARIFF 85 TO SUPPORT VERIZON BILLING OF CCL FOR CALLS THAT DO NOT TRAVERSE A VERIZON END OFFICE SWITCH OR COMMON LINE. IS HE CORRECT?

A. No. Mr. Shepherd references Section 5.1 which states that "carrier common line service is billed to each switched access service provided under this tariff *in accordance with the regulations as set forth herein and in Section 4.1…*" and Section 5.4.1A which states that "*except as set forth herein*, all switched access service provided to the customer will be subject to carrier common line access charges" (emphasis added). Just as Verizon did in its initial pleadings, Verizon witness Shepherd ignores the critical qualifiers which we emphasized in italics above. prerequisites of the referenced language. We responded to this same Verizon argument in our direct testimony (see AT&T Panel Direct at 11-15), and we will not reiterate here the demonstration we made there that the qualifying language italicized above requires that a call must traverse a Verizon common line before it can assess a CCL charge. The fundamental point is simply this – if the CCL is intended to offset a portion of Verizon's costs of providing a common line between its end office switch and its customer's premise, Verizon should not be imposing the CCL unless the call traverses the common line. It is what the tariff requires.

Q. AT 19, LINES 1 - 4, WITNESS SHEPHERD REFERENCED SECTION 4.1 AND ALLEGES THAT THIS LANGUAGE AUTHORIZES APPLICATION OF CCL TO "ALL INTRASTATE SWITCHED ACCESS PROVIDED." HOW DO YOU RESPOND?

A. Section 4.1.1A states that "the Telephone Company shall bill on a current basis all charges incurred by and credits due to the customer under this tariff attributable to services established or discontinued or provided during the preceding billing period." Mr. Shepherd is correct that this section generally pertains to billing matters, but that is not the point. The critical point, which he ignores, is that this section requires Verizon to have "*established* or *discontinued* or *provided*" a service before it can issue a bill. Accordingly, Verizon billing practice when it charges CCL without providing an associated end user line violates this section cited by Mr. Shepherd.

Q. AT 19, LINES 9 – 22, MR. SHEPHERD ALLEGES THAT SECTION 3.1.2D IS "INCLUDED IN THE TARIFF TO HIGHLIGHT THE REQUIREMENT THAT CARRIER COMMON LINE CHARGES APPLY TO ALL SWITCHED ACCESS SERVICE." HOW DO YOU RESPOND?

A. Section 3.1.2D states that "each exchange telephone company will provide the portion of the local transport element in its operating territory to an IP [Interconnection Point] with another exchange telephone company and will bill the charges in accordance with its access service tariff. The charges for the local transport element will be determined as described in Section 3.1.2K and 3.1.2L. **All other appropriate charges in each exchange telephone company tariff are applicable."** (Emphasis added). Mr. Shepherd claims that the bolded language somehow supports his notion that CCL charges are applicable.

Even a beginning student in Logic 101 recognizes that this argument assumes the proposition to be proven. The bolded language refers to CCL

charges only if CCL charges are among the "appropriate" charges. But this is precisely the issue presented by the case. Mr. Shepherd must assume that he is right in order to prove that he is right. The Commission can and should dismiss this argument out of hand.

III. VERIZON'S ASSERTION THAT CCL IS A CONTRIBUTION ELEMENT IS IRRELEVANT TO A DETERMINATION OF HOW THE CCL SHOULD PROPERLY BE APPLIED

Q. AT 20 – 28, MR. SHEPHERD CLAIMS THAT CCL WAS DESIGNED TO PROVIDE CONTRIBUTION AND NOT TO RECOVER LOOP COST. PLEASE RESPOND.

A. In the referenced passage, Mr. Shepherd goes on at length quoting from the testimony of numerous Verizon's witnesses regarding Verizon's proposal presented to the Commission in Docket No. 90-002 fifteen years ago. Our first response to Verizon's arcane dissertation on history is that it is not evidence of what the tariff means. It is the words in the tariff that tell us what the tariff means. But even assuming that a 15 year old history that does not appear in the tariff is somehow relevant, we are still puzzled by references to *Verizon's testimony* in that case. While at the time of that case Verizon may have wished its position to be true, Verizon's wishes are not controlling. Rather, what matters is what the Commission decided. On that score, Verizon's position cannot stand. In Docket No. 90-002, the Commission never accepted Verizon's proposal and, in fact, rejected all the propositions that it was based on, as we explain in detail below. Rather, the Commission's own words and conclusions expressly support AT&T's position.

Q. PLEASE EXPLAIN WHAT VERIZON PROPOSED IN DOCKET 90-002 AND HOW THE COMMISSION RESPONDED.

A. In order to understand Verizon's proposal in Docket 90-002 to recover "residual" costs through a "contribution" charge, it is necessary to understand the background, *i.e.*, what had happened in Docket 89-010. This is because it was the ruling of the Commission in Docket 89-010 that gave rise to certain costs (which Verizon calls a "residual" amount or simply costs for which "contribution" is required) that Verizon wanted to recover in its access charge proposal in Docket 90-002.

Q. WHAT HAPPENED IN DOCKET NO. 89-010?

A. Docket 89-010 was a general rate case. In that case, Verizon had proposed to recover unseparated non-traffic sensitive costs (primarily loop costs) in basic exchange rates. The Commission, however, rejected Verizon's proposal. The Commission ruled that Verizon already recovers approximately 25% of non-traffic sensitive costs under its federal tariff and removed that amount from Verizon's allowed revenue requirement. More importantly for this case, it also ruled that some portion of the loop costs must be recovered in rates for other services, including toll services. *See* Docket No. 89-010, Order No. 20,082; 76 N.H. P.U.C. 150, at 166. The Commission also found that when a portion of the loop costs are recovered in the rates for toll and other services, basic exchange rates were compensatory. *See*, Order No. 20,082; 76 N.H. P.U.C. 150, at *166-167.[1] As a result, when the dust settled from Docket No. 89-010, the

[1] *See also*, Docket No. 90-002, Order No. 20,864, 1993 WL 475294, at *3 ("When [non-traffic sensitive] costs were appropriately allocated among all services utilizing loop facilities, and therefore causing loop costs, including toll, it was clear that basic exchange services were not being subsidized by toll or any other service.")

Commission had approved rates that produced Verizon's revenue requirement, and those rates included (a) toll rates that recovered a portion of the loop costs and (b) basic exchange rates the Commission found to be compensatory.

Q. WHAT DOES THAT HAVE TO DO WITH VERIZON'S PROPOSAL FOR THE CCL CHARGE IN DOCKET NO. 90-002 AND ITS ARGUMENT THAT THE CCL CHARGE IS A "CONTRIBUTION" RATE ELEMENT THAT DOES NOT RECOVER THE COST OF THE LOOP?

A. Docket No. 90-002 was opened to establish the conditions for introducing competition into the intraLATA toll market, including the rates that Verizon could charge to its new intraLATA toll competitors. Verizon's principal objective in that docket was to ensure that it would be able to continue to recover the same net revenues from toll related services (toll and access) that were allowed in Docket 89-010, even as it lost toll customers to its new intraLATA toll competitors. *See*, Shepherd Testimony, p. 21, lines 12-15. Accordingly, Verizon proposed a CCL charge that, if approved, would have produced the same net revenues from toll related services that Verizon would have enjoyed if it had maintained its single provider position in the intraLATA toll market.[2]

Q. DID THE FACT THAT VERIZON PROPOSED THE CCL CHARGE AS A "CONTRIBUTION" RATE ELEMENT MEAN THAT VERZION WAS GUARANTEED A LEVEL OF CCL REVENUES?

A. No, of course not. Although Mr. Shepherd now claims that the purpose of this "contribution" rate element was to "support" basic exchange service with toll related rates designed to maintain that support after the introduction of toll

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[2] Verizon thus proposed the CCL rate to generate additional revenue needed to cover the shortfall in its revenue requirement created as a result unassigned loop cost. The unassigned loop costs are thus what Mr. Shepherd now refers to as contribution.

competition, the Commission ruled otherwise. In Docket No. 90-002, the Commission ruled that it is not appropriate to set rates in a competitive marketplace to guarantee revenues at any particular level.[3] As a result, whatever Verizon's hopes may have been in proposing the charge, the Commission did not consider it as guaranteed contribution towards the cost of basic exchange service.

Q. ON WHAT BASIS WAS THE CCL CHARGE SET?

A. First, one thing is clear: it was ***not*** set on the basis of Verizon's proposal. The Commission never accepted the proposal that Verizon continuously references in this case. After months of litigation, Verizon entered into a settlement stipulation under which it agreed to access rate elements that, when combined, produced a total access rates per minute of about 12 cents, considerably below the effective access rates in Verizon's discarded proposal. The Commission, however, rejected even that rate in the Stipulation and ordered Verizon to reduce its access rates to interstate levels, approximately 8 cents per minute in total, over a four year transition period. Order No. 20,864, at *11.

Q. WHAT DOES ALL THIS MEAN AS IT RELATES TO THE ISSUE IN THIS CASE, WHETHER VERZION CAN CHARGE THE CCL RATE ON CALLS THAT NO NOT TRAVERSE ITS END OFFICE SWITCH AND COMMON LINE?

A. First, it means that the Commission can easily dismiss one of the principal grounds that Verizon relies on in support of its claim that it can charge the CCL when there is no Verizon end user involved (that the CCL is somehow a rate element that operates like a tax, permitting Verizon to recover guaranteed

[3] *See*, Order No. 20,864, at *7 ("An effectively competitive marketplace is totally at odds with any notion that NET's total revenues can be 'guaranteed' to remain at any particular level.").

"contribution" to achieve a predetermined revenue requirement without regard to whether it actually provides a service). It is clear that the Commission did not intend that result.

Second, it adds support to AT&T's position that the CCL rate is tied to whether the common line, or "local loop" is actually being used to complete the call.

Q. HOW DO THE COMMISSION'S ACTIONS IN DOCKETS 89-010 AND 90-002 SUPPORT AT&T'S POSITION?

A. In two different ways. First, the objective of the Commission in establishing access rates for the introduction of intraLATA toll competition was to establish the conditions for robust, economically efficient competition in the intraLATA toll market and for that reason determined that intrastate access rates that mirror interstate levels are most appropriate. In rejecting Verizon's proposals, the Commission stated:

> We believe that the proposed reductions are insufficient. Access charges above interstate levels threaten to deprive New Hampshire ratepayers of the reduced toll prices which have characterized competition in the interstate jurisdiction. Access charges should also be set at levels which will enhance New Hampshire's ability to maintain a telecommunications infrastructure that will attract new businesses to the State and will encourage existing businesses to remain here. Moving our access charges from the second highest levels in the nation to the fourth or fifth highest is inconsistent with this goal.
>
> A low-cost, efficient, state of the art telecommunications infrastructure is vital to New Hampshire's economy and its long run ability to create jobs and to compete in a regional, national and international marketplace. Telecommunications infrastructure is particularly important to a state like New Hampshire which depends heavily on its small business and service sector for job creation. Indeed, the service sector accounts for over half of the employment in the State, and small businesses account for virtually all new jobs in New Hampshire.

Permitting the incumbent toll provider to assess charges on its competitors for traffic that does not traverse Verizon's facilities, and which would guarantee Verizon a particular revenue stream (something none of Verizon's competitors enjoy) is directly contrary to the Commission's objective of encouraging robust and efficient competition and lower prices.[4] The Commission had observed the effect of access prices in the interstate arena and wanted the same pro-competitive result, a result that did not guarantee a revenue stream for one competitor at the expense of all others.

Q. WHAT IS THE SECOND WAY IN WHICH THE COMMISSION'S ACTIONS IN DOCKETS 89-010 AND 90-002 SUPPORT AT&T'S POSITION?

A. The Commission's actions in Dockets 89-010 and 90-002 show that the costs that Verizon's so called "guaranteed contribution" rate recovers are actually the portion of loop costs allocated to toll related services rather than basic exchange rates. Recall that, in Docket 89-010, Verizon had been ordered to recover a portion of its loop costs from toll service, among others, and Verizon was allowed to adjust its toll rates accordingly. Thus, Verizon's proposal in Docket 90-002 to maintain its net toll related revenues in access rates through use of the CCL was actually a proposal to recover the portion of loop costs assigned to toll related services.[5] While the Commission did not permit Verizon to charge the full

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[4] We described some of the adverse effects on competition of Verizon's tariff interpretation in our March 9, 2007 Panel Testimony, at pages 24-25.

[5] The basis of Verizon's CCL rate development in Docket 90-002 is the toll rate that was set in Docket 89-010. See Verizon Response to AT&T 2-3 (Workpaper 1 to Workpaper 7). In that exhibit, Verizon developed the CCL as follows: Verizon, 1) calculates a differential between the costs of access and toll service; 2) subtracts that cost differential from the tariffed retail rate of toll services (i.e.

amount it sought, it is apparent that the CCL, to the extent that it recovers "contribution" is, in fact, recovering the portion of loop costs allocated to toll related services. In shortThus, contrary to Verizon's claim, the CCL is, in fact, linked to the recovery of loop costs and, therefore, is to be assessed only on calls that traverse the Verizon loop. Conversely, the CCL should not be assessed, and is not applicable to, calls that do not traverse the Verizon loop.

IV. EVIDENCE OF HISTORICAL CHANGES

Q. AT 28, LINES 12-13, MR. SHEPHERD STATED THAT NOTHING HAS OCCURRED HISTORICALLY TO AFFECT THE RELEVANCE OF THE TARIFF LANGUAGE ADOPTED ALMOST 15 YEARS AGO PURSUANT TO DOCKET 90-002. DO YOU AGREE?

A. No. We are tempted to ask Mr. Shepherd where he has been in the last fifteen years. The passage of time and subsequent legal and industry developments completely contradict this Verizon statement. In considering the issue of whether Verizon today is entitled to charge for the loop for traffic that does not traverse a Verzion loop, but which instead is being routed to a competitor's customer, the biggest single change is the appearance of carriers providing an alternative to Verizon's access to the customer, i.e., the loop. The current tariff was approved at a time when IXCs, as a practical matter, could only purchase switched access from either Verizon or the Independent companies, both of whom maintained exclusive operations in their franchised territories. The issue at the time was introduction of a multi-carrier environment *to the intraLATA toll market* and

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Retail MTS rate) - the result is an End-to-End access target; 3) subtract local switching and local transport - the result equals total common line. Therefore, to the extent the Commission allocated loop cost to toll rates in Docket 89-010, that cost was included (through the Retail MTS rate) in the development of CCL as described above.

Verizon's tariff was designed for that purpose. Indeed, Verizon's own witness stated that the issues before the Commission in Docket 90-002 did ***not*** include "issues of separate competing networks or multiple exchange carriers in the same franchise territory." *See*, McCluskey Testimony, at 3, in Docket 90-002 (Attachment 2-20(a) to Verizon's response to AT&T 2-20). Now, with the presence of competing multi-modal networks, the world has fundamentally changed in a way that affects the relevance and meaning of this fifteen year old tariff.

Q. CAN YOU BE MORE SPECIFIC?

A. Yes. First, the passage of 1996 Act allowed entry into the local exchange market and created a multiple carrier environment. In the post-1996 Act era, CLECs were allowed to interconnect their facilities to NET's (Verizon's predecessor) network and provide access service in competition with NET. According to Verizon's response to discovery, the number of CLECs operating in New Hampshire has grown from zero in 1993 to 21 in December 2006. *See* VZ Response to AT&T 2-19a and 2-19b.

Second, the proliferation of wireless services coupled with the disparate regulatory regimes between the wireless and wireline industry segments has caused a significant substitution of wireless minutes (and revenue) for wireline minutes (and revenue). From 1993 to 2006, nationwide wireless usage exploded from 30 billion million to 1.8 *trillion minutes,* and wireless subscribership became

virtually universal, growing from 16 million users to 233 million.[6] According to the FCC, by 2003 wireless MOUs and revenue had grown from a mere 5% of *total industry* revenue and minutes in 1996 to a whopping 30% of the *industry's total* revenue and minutes by year end 2002, and, as we all know, that growth is continuing.[7] New Hampshire has been part of that growth. New Hampshire wireless penetration has climbed steadily from approximately 22% in 1999 to approximately 75% as of year end 2005.[8] Not surprisingly, intrastate toll revenue in New Hampshire has declined significantly as wireless revenue has advanced.[9]

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6 See, CTIA's *2006 Semi-Annual Wireless Industry Survey*. In 1993, wireless interconnection was still evolving from the original Type 1 form to Type 2. In Type 1, the wireless switch connects to the LEC end office (rather than a tandem) via a facility described as "Trunk with Line Treatment" just as would a PBX. Further, wireless numbers were shown in the Local Exchange Routing Guide as assigned to the LEC end office rather than to the wireless switch. In this situation it might have been logical to think of Verizon as providing end office switching and CCL on wireless calls, in effect complete switched access service. As Verizon's response to discovery [AT&T/BayRing 1-37] indicates, little if any Type 1 interconnection remains and in Type 2 interconnection Verizon can in no way be construed as providing these elements. The FCC [see AT&T Direct, March 9, 2007, p. 20ff] recognized this change in prohibiting LECs from assessing CCL charges on interstate wireless calls.

7 See In the Matter of Implementation of Section 60029b) of the Omnibus Budget and reconciliation Act of 1993. Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services. WT Docket No. 02-379 *Eight Report*, rel., July 14, 2003 ¶103-105.

8 Wireless penetration is a function of POPs or population. Thus, penetration is calculated as population / number of subscribers. Data sources employed are the FCC's *Local Competition Report* , July 2006, Table 14 for year-over-year wireless subscribers in New Hampshire and Dept. of Commerece Quick Facts for New Hampshire's population trends available at http://www.quickfacts.census.gov/qfd/states/33000.html

9 See, for example, FCC's *Trends in Telephone Service,* Table 15.7, (Feb., 2007; April 2005; May, 2004; and May, 2002).

Third, pursuant to Section 271 of the 1996 Act, Verizon obtained approval for in-region interLATA toll competition, further changing the telecommunications landscape. It was clear that as Verizon began providing interLATA long distance services for the first time that its interLATA revenues would grow (an inescapable fact, given that Verizon started with a zero market share), but at the same time Verizon would continue to face competition from other carriers, including in the intrastate intraLATA toll market. Verizon can hardly claim that when this Commission and the FCC approved Verizon's application to compete in the interLATA long distance market that Verizon would be guaranteed any particular level of revenues. That statement is equally true with regard to Verizon's CCL revenues. With the advent of competition, everyone – regulators, competitors and Verizon – understood quite clearly that in some instances Verizon's revenues were going to increase (*e.g.*, interLATA long distance) and in some instances they could decrease, such as, relevant here, when traffic is completed to a competing carrier rather than Verizon. Nowhere in the pro-competitive scheme established by the Telecommunications Act of 1996 was Verizon, or any other carrier for that matter, given a revenue guarantee. Verizon's claim that this Commission gave it such a guarantee, and that the guarantee has survived all of the pro-competitive changes we have seen in the telecommunications landscape, should be dismissed as nothing more than Verizon wishful thinking.

Q. WHAT IS THE SIGNIFICANCE OF THESE CHANGES FOR THIS CASE?

As noted above, Mr. Shepherd's statement that nothing has changed over fifteen years is so far from current reality as to be incredulous, and should be rejected. In fact, his statement is contradicted by the profound difference between today's reality and Verizon witness McCauskey's description of the reality that existed (and did not exist) when the access tariff was developed. Indeed, it is clear that Verizon understood that the access structure at issue in Docket 90-002 was not designed for a multiple network world and that Verizon contemplated the need for further adjustments when that world was to arrive. *See*, McCluskey Testimony, at 3, in Docket 90-002 (Attachment 2-20(a) to Verizon's response to AT&T 2-20).

The competitive world Mr. McCluskey predicted in his 1992 testimony arrived more than a decade ago, yet Verizon has not presented any filing with the Commission to request a review of its tariff as suggested by its expert witness. Rather, Verizon has chosen to stretch the meaning of a tariff not designed to accommodate a fully competitive, multiple network environment to try to obtain "guaranteed" revenues from calls completed over competitors' networks

V. VERIZON'S ALLEGATIONS REGARDING FINANCIAL IMPACT ARE COMPLETELY IRRELEVANT

Q. AT 29-30, MR. SHEPHERD EXPLAINED THAT VERIZON WOULD SUFFER SOME FINANCIAL HARM IF THE COMMISSION WERE TO RULE THAT IT CANNOT CHARGE CCL IF IT DOES NOT PROVIDE COMMON LINE. HOW DO YOU RESPOND?

A. The tariff means what the words in the tariff say it means. Who wins and who loses and by how much should not determine what the words mean. So, at the outset, we say that the financial impact is irrelevant to the interpretation of the tariff. As we noted above, the market has changed to become fully competitive,

both for local and long distance traffic. Verizon's entry into the long distance market meant that AT&T and other IXCs would lose traffic and revenues to Verizon. Likewise, the emergence of CLECs and wireless carriers in the local market meant that Verizon would lose traffic and revenues to those other carriers, including, relevant to this case, CCL revenues when calls were completed to other carriers and not to a Verizon customer. Both of those shifts have been predictable outcomes from the emergence of competition. Here, however, Verizon is trying to argue that notwithstanding the gains it has make in the interLATA and wireless markets, this Commission somehow insulated it from any potential CCL revenues losses in the local market. That is not what this Commission intended, nor is it what this Commission has done.

Q. ASSUMING FOR THE SAKE OF DISCUSSION, AND WITHOUT CONCEDING THAT THE FINANCIAL IMPACT IS RELEVANT, DO YOU AGREE WITH THE WAY IN WHICH VERIZON HAS CALCULATED IT?

A. No. Verizon's calculation of financial impact figure is severely flawed. Verizon has not presented any direct measure of any lost revenue for most of the period affected. In fact, for at least ten years since the rate structure was effective (1996 to 2006), Verizon has admitted[10] that it did not charge a CCL on calls that did not involve its end users.[11] Verizon cannot now claim that it would lose some

[10] Although Verizon claims that, prior to 1996, it had billed the CCL on calls that terminated to non-Verizon end users, it has failed to provide a single piece of documentary evidence to support that claim.

[11] Although Verizon contends that the failure to bill was a "mistake," it has presented no evidence of that. The failure to bill the CCL during this period is evidence that the people responsible for doing so did not believe that it was appropriate.

revenue or under-earn by extrapolating its estimates to cover periods when it was not collecting that revenue.

Q. SHOULD THE COMMISSION GIVE ANY WEIGHT TO VERIZON'S THREAT THAT A LOSS OF CCL REVENUES COULD RESULT IN AN INCREASE IN BASIC EXCHANGE RATES?

A. No, any such assertions are not relevant here. Just like any other competitor in today's market, if Verizon's revenues decline for one of its services, it will need to find ways to become more efficient, to introduce new services that its customers want, or to generate new revenues. That is the way competitive markets operate, and that is the way every other firm competing in New Hampshire today is required to manage its business. Verizon should not receive an special protection from this Commission, nor should it be treated any differently than any other competitor.

Even assuming that all these market changes had not occurred, Verizon's behavior over the ten year period it was not collecting these revenues demonstrates that the CCL revenues at issue in this case are not causing any undearnings. For ten years, when Verizon was not collecting most of the money at issue, it never sought rate increases to defray any claimed underearnings. If Verizon had been underearning during the ten year period in which it did not collect the disputed CCL charges, it had the option to file for a rate review as allowed under its rate of return regulation. Yet, during that period, Verizon presented no such filing perhaps because Verizon found new sources of revenue, or perhaps because Verizon found ways to offer services more efficiently. Whatever the case, Verizon's behavior belies its claim of underearings.

VI. CONCLUSION

Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.

A. This rebuttal testimony refutes several contentions that Verizon made in its initial testimony. *First*, we showed how Verizon's tariff interpretation is flawed because it ignores the qualifying language that requires that Verizon's loop be involved in the transmission to or from the end user before Verizon can charge for it. *Second*, we refuted Verizon's argument that it could charge the CCL because the rate was a "guranteed contribution" not related to the recovery of loop cost. With respect to Verizon's "contribution" argument, we showed

(a) that the Commission never accepted Verizon's "guaranteed contribution" position and firmly rejected all claims that such position was based on (including Verizon's claim that basic exchange somehow did not recover its incremental costs and thus required "support", and including Verizon's claim that it was entitled to made whole from losses resulting from intraLATA toll competition);

(b) that the principal basis for the CCL as allowed by the Commission was the Commission's desire to match the more economically efficient interstate rate levels in order to encourage robust intrastate toll competition – a basis entirely at odds with Verizon's claim that it can charge its new competitors for services that it does not provide to them; and

(c) that, to the extent the Commission permitted Verizon to charge CCL, the CCL rate recovers the portion of Verizon's loop costs assigned to toll related services, and thus should only be assessed for traffic that actually traverses a Verizon loop.

Third, we showed that the world has changed, and dramatically so, since the Commission approved Verizon's CC tariff. Today multiple carriers compete in an environment of multiple and multi-modal carrier networks not contemplated when the tariff was developed. Verizon cannot claim that, with all of the advances in long distance and local competition, that its CCL tariff can now be read as a revenue "guarantee," and that Verizon enjoys revenue protections to which no other competititve carrier in the marketplace is entitled.

Fourth, we showed that Verizon's claims of financial impact are irrelevant and, in any event, without basis.

Q. WHAT CONCLUSION SHOULD THE COMMISSION DERIVE FROM THE EVIDENCE YOU HAVE PROVIDED IN THIS REBUTTAL TESTIMONY?

A. The Commission should conclude that Verizon's arguments are baseless and rule that Verizon's tariff should be interpreted in a manner that does not allow Verizon to charge CCL unless its loop is involved in the transmission to the end user.

Q: DOES THIS CONCLUDE YOUR TESTIMONY?

A: Yes, it does.

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

July 11, 2007 - 9:10 a.m.
Concord, New Hampshire DAY II

RE: DT 06-067
FREEDOM RING COMMUNICATIONS, LLC
d/b/a BAYRING COMMUNICATIONS:
Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications against Verizon New Hampshire regarding access charges.

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Jody O'Marra, Clerk

APPEARANCES: Reptg. Freedom Ring Communications d/b/a BayRing Communications:
Susan S. Geiger, Esq.

Reptg. AT&T Communications of New England:
Jay E. Gruber, Esq.

Reptg. One Communications:
Gregory M. Kennan, Esq.

Reptg. Verizon:
Victor D. Del Vecchio, Esq.

Reptg. PUC Staff:
Lynn Fabrizio, Esq.

Court Reporter: Steven E. Patnaude, CCR

be around 24 cents a minute that you first proposed?
A. It does, but I didn't recall that Ms. Geiger had that in her question.
Q. No problem. No problem. Glad we got to the bottom of it. And, that was the money needed to support, in Verizon's view, local services, is that correct?
A. That was the amount of money needed to provide the same contribution that would have been received from that unit of toll to support --
Q. Would you answer my question?
A. -- to support local service, yes.
Q. Thank you. Now, despite that fact, Verizon entered into a compromise stipulation in which it agreed to lower rates, is that correct?
A. That's correct.
Q. All right. Can we take a look at the exhibit that we've already marked, all right, Exhibit 18? Do you have a copy of that? I'll provide you with it.

(Atty. Gruber handing document to the witness.)

BY MR. GRUBER
Q. All right. The witness has in front of him a copy of Exhibit 18, which is the Commission's order in DE 90-002, on June 10, 1993. Is it fair to say, Mr.

Shepherd, that in this order the Commission reviewed the initial stipulation that the parties entered into, lowering access rates from those proposed by Verizon?

A. It's fair to say the Commission looked at it, yes.

Q. And, it's fair to say that this is what the Commission said about the initial proposal -- I mean, I'm sorry, the initial stipulation?

A. I believe so.

Q. Okay. Could you turn to Page 11. All right. Do you have that?

A. Yes.

Q. On Page 11, there's a listing for "Originating Non-800 access", do you see that?

A. I do.

Q. Okay. And, there there are two columns for each year, and those appear to set out the access rates that were stipulated to, on the one hand, and the access rates that, in fact, the Commission proposed, the parties accept as settlement, is that correct?

A. That's correct.

Q. Okay. Now, the stipulated, as you've testified before, the stipulated rates are lower than the -- than the rates that Verizon proposed, correct?

A. They are. Again, the rates that Verizon proposed, if

you're looking at the 24 cents required for contribution or the 26 retail rate, I mean, those are time of day sensitive rates. These reflect all times of day, so they would be an averaging of day, evening, and night/weekend. If you are trying to make a direct comparison, you know, the direct comparison is impossible, unless you looked at what the all hours of day/day of week result would have been in Verizon's proposal, which is not available there. But --

Q. Agreed, Mr. Shepherd. And, --

A. But it does represent a compromise on the part of all the parties as to what the level of access rates would be.

Q. And, the weighted average ultimately in this stipulation is below that proposed by Verizon as part of the compromise, right?

A. That's correct.

Q. Okay. And, it's fair to say here that the Commission didn't accept that stipulation, did it?

A. They did not, or they requested the parties to consider changes to the stipulation.

Q. Is that the same thing as not accepting it? Or, are you making a distinction?

A. They asked the parties to consider their recommendation

as to what they would like to see. I'm not sure if that is saying that they would have rejected it. But they asked the parties to look at lowering access charges a little further, a little quicker.

Q. Okay. So, they didn't accept?

MR. DEL VECCHIO: Objection. You've asked it more than once, and you're asking for a legal opinion.

MR. GRUBER: I withdraw the question.

MR. DEL VECCHIO: I think the order itself --

MR. GRUBER: I withdraw the question.

MR. DEL VECCHIO: -- captions what it is, when it says "Order Conditionally Accepting the Stipulation of the Parties."

BY MR. GRUBER

Q. Mr. Shepherd, what happened to all those costs for which contribution was required, according to Verizon, in its initial proposal, when Verizon agreed to the final stipulation in this case with lower access rates? What happened to the costs that those -- that the initially proposed rates were intended to recover?

A. I'm not aware that anything happened to the costs.

Q. So, in other words, the rates that Verizon accepted

here are target rates unrelated to a specific level of cost, I think you even said that, is that correct?

A. That's correct. It's part of the negotiated settlement. The parties agreed to compromise on what the level of access charges would be. And, this is what the, you know, the outcome of a negotiated process produced.

Q. And, the Commission never found that the target rates were set at a level to recover any specific level or amount of costs, did it?

A. I'm not aware that it did. And, again, the Commission here was entering into a two-year trial to see what would happen with the opening of the market to intra-LATA toll competition. And, that was part -- part and parcel of the trial, to see what the effect would be before taking the next steps.

Q. I'd like to switch gears here, Mr. Shepherd. On Pages 29 and 30, Verizon provided an estimate of CCL charges billed to carriers for the two-year period January 2005 to December 2006. Do you have that in front of you?

A. Yes. Do you have a question?

Q. Yes. First of all, I just wanted to understand, this was initially provided back on February 8th, in response to a Commission request for we'll call it a

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC d/b/a BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Re: Access Charges

Order Interpreting Tariff

ORDER NO. 24,837

March 21, 2008

APPEARANCES: Orr and Reno, P.A. by Susan S. Geiger, Esq. on behalf of BayRing Communications; Gregory M. Kennan, Esq. on behalf of One Communications; Jay E. Gruber, Esq. on behalf of AT&T Communications of New England, Inc.; Garnet M. Goins, Esq. on behalf of Sprint Communications; Victor D. Del Vecchio, Esq. on behalf of Verizon New Hampshire; and Lynn Fabrizio, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On April 28, 2006, competitive local exchange carrier (CLEC) Freedom Ring Communications LLC d/b/a BayRing Communications (BayRing) filed a petition requesting that the Commission investigate the imposition of switched access charges, including carrier common line (CCL) access charges, by incumbent local exchange carrier (ILEC) Verizon New Hampshire (Verizon) on calls that originate on BayRing's network and terminate on a wireless carrier's network. In its petition, BayRing argued that CCL charges are associated with "access" to a Verizon end user via Verizon's local loop, and that calls between carriers using Verizon as an interim carrier do not involve switched access. According to BayRing, a call between a BayRing customer and a wireless customer does not involve a Verizon end user or a Verizon local loop and therefore CCL charges should not apply. BayRing further contended that if the Commission determines that a charge should apply to such a transaction, it should be deemed chargeable as

tandem transit service under Verizon's Tariff No. 84 and not as switched access under Tariff No. 85.

On May 12, 2006, the Commission transmitted a copy of BayRing's complaint to Verizon for response. On May 31, 2006, Verizon filed an answer disputing BayRing's complaint and contending that Tariff No. 85 provides that "all switched access services will be subject to carrier common line access charges." Verizon further stated, among other things, that tandem transit service is "not available to BayRing for the application at issue here."

On June 23, 2006, the Commission issued an order of notice scheduling a prehearing conference for July 27, 2006, scheduling a technical session for August 11, 2006, making Verizon a mandatory party, and determining that further investigation was warranted. In its order of notice, the Commission established the following issues for review in this docket: (1) whether the calls for which Verizon is billing BayRing involve switched access, (2) if so, whether Verizon's access tariff requires the payment of certain rate elements, including but not limited to CCL charges, for calls made by a CLEC customer to end users not associated with Verizon or otherwise involving a Verizon local loop, (3) if not, whether BayRing is entitled to a refund for such charges collected by Verizon in the past and whether such services are more properly assessed under a different tariff provision, (4) to what extent reparation, if any, should be made by Verizon pursuant to RSA 365:29, and (5) in the event Verizon's interpretation of the current tariffs is reasonable, whether any prospective modifications to the tariffs would be appropriate.

Timely petitions to intervene were filed by RNK Inc. d/b/a RNK Telecom (RNK) on July 17, 2006, by AT&T Communications of New England, Inc. (AT&T) on July 20, 2006, by One

Communications on July 24, 2006, by Otel Telekom, Inc. (Otel) by fax on July 26, 2006, and by segTEL, Inc. by fax on July 26, 2006.

The prehearing conference took place as scheduled on July 27, 2006, during which the pending petitions for intervention were granted. The parties and Staff met in a technical session on August 11, 2006. A follow-up technical session was conducted by conference call on September 29, 2006. As a result of disclosures made during the technical sessions, BayRing filed a motion on October 6, 2006, to amend its initial petition by adding the assertion that Verizon is improperly assessing access charges to BayRing for calls originated by BayRing end user customers and terminating at wireline (as well as wireless) end user customers served by carriers other than Verizon. In its motion, which effectively requested an expansion of the scope of the docket, BayRing requested further notice and opportunity for comment pursuant to N.H. Code Admin. Rules Puc 203.10(b). On October 10, 2006, AT&T filed a motion to clarify or amend the scope of the proceeding, outlining various call scenarios and corresponding charges levied by Verizon warranting review in this docket and not yet covered in BayRing's initial and amended complaints.

On October 12, 2006, Staff filed a report of the conference call held on September 29, 2006. In its report, Staff recommended alternate schedules for proceeding either to an evidentiary hearing or, in the alternative, to briefings and a decision on the pleadings.

On October 23, 2006, the Commission issued Order No. 24,683, which expanded the scope of the investigation and adopted a schedule for discovery, testimony and an evidentiary hearing. The scope was expanded to include any other CLECs or CTP (competitive telecommunications providers) affected by the relevant tariff applications, and to review calls

made or received by both wireless and wireline end users. Accordingly, the first two issues were revised as follows:

(1) whether calls made or received by end users which do not employ a Verizon local loop involve Verizon switched access; and

(2) if so, whether Verizon's access tariff requires the payment of certain rate elements, including but not limited to CCL charges.

Thus, the scope of the investigation now includes calls made or received by either wireless or wireline end users of carriers other than Verizon that do not employ a Verizon local loop. The Commission also issued a supplemental order of notice on October 23, 2006, scheduling a prehearing conference on the expanded scope of the proceeding.

On October 31, 2006, the New Hampshire Telephone Association (NHTA) filed a petition to intervene.

The second prehearing conference took place as scheduled on November 3, 2006, at which time NHTA's petition to intervene was granted. During the prehearing conference, BayRing asked the Commission to bifurcate the issues of "liability" (i.e., the proper interpretation and application of the Verizon tariffs) and "damages" (i.e., calculation of any refunds and/or reparations due from Verizon). Verizon opposed BayRing's request. Staff convened a technical session on November 14, 2006, and thereafter submitted a written report noting a lack of agreement among parties with respect to bifurcation and asking the Commission to push back the approved procedural schedule two weeks from the issuance of a decision on the issue of bifurcation. On November 17, 2006, AT&T filed a letter stating its support for bifurcation. On November 20, 2006, Verizon filed its opposition to bifurcation. On November 21, 2006, BayRing filed comments in support of bifurcation.

On November 29, 2006, the Commission issued Order No. 24,705, revising the procedural schedule to provide for the conduct of an initial phase of the proceeding to determine tariff interpretation issues. In its order, the Commission also directed each party intending to seek reparations pursuant to RSA 365:29 to submit by January 12, 2007 a calculation of the estimated financial impact of the disputed charges, and to include a description of the calculation method used, an explanation of any assumptions made, and worksheets illustrating how the calculation was determined. The Commission also requested Verizon to submit by January 12, 2007, (1) an estimate of the total financial impact on Verizon of the charges at issue in this proceeding, (2) to the extent practicable, individual estimates of the disputed charge totals Verizon had billed to BayRing and any intervenors, and (3) an estimate of the annual impact on Verizon if the disputed revenue is no longer collected.

On December 18, 2006, Staff filed a series of call flow scenarios developed with input from parties to illustrate the types of calls that can traverse the Verizon tandem switch[1] and applicable charges.

On January 8, 2007, Sprint Communications Company and Sprint Spectrum (Sprint/Nextel) filed a petition to intervene, stating that it had recently discovered that Verizon is billing it for switched access charges, including CCL access charges, on calls that do not involve a Verizon end user or local loop.

Verizon filed, on January 10, 2007, a motion to compel discovery responses from BayRing, AT&T and RNK. At that time, Verizon also moved to suspend the procedural schedule, pending the Commission's resolution of the pending discovery issues. On January 12, 2007, BayRing and AT&T jointly filed a motion to compel Verizon to provide certain discovery materials. On January 16, 2007, AT&T, BayRing and One Communications jointly filed a

[1] A tandem switch is an intermediate switch that is not involved in either originating or terminating calls.

response to Verizon's motion to suspend the procedural schedule, recommending a revised procedural schedule in lieu of the indefinite suspension requested by Verizon. Staff and Verizon concurred in the proposed revisions to the schedule. The Commission approved the proposed, revised procedural schedule by secretarial letter. On January 22, 2007, One Communications. BayRing, AT&T and RNK filed oppositions to Verizon's motion to compel. By secretarial letter dated February 5, 2007, the Commission granted the Verizon discovery motion in part and denied in part.

On February 8 and 9, 2007, One Communications, BayRing and AT&T each filed estimates of improperly billed Verizon access charges. On February 9, 2007, Verizon provided an estimate of the potential financial impact, including the total amount and individual calculations for each intervenor, in the event the Commission decides that Verizon had not properly applied its tariff and orders refunds of the disputed charges. Verizon also provided an estimate of the annual impact to Verizon NH if the disputed revenue were no longer collected.

On February 9, 2007, RNK formally withdrew its intervention.

On March 9, 2007, witness testimony was filed on behalf of the parties as follows: AT&T witnesses Ola Oyefusi, Christopher Nurse and Penn Pfautz; BayRing witnesses Darren Winslow and Trent Lebeck; and Verizon witness Peter Shepherd. Rebuttal testimony was filed by the same parties on April 20, 2007.

The Commission granted Sprint/Nextel's motion to intervene on April 17, 2007, by secretarial letter. On April 19, 2007, Sprint/Nextel filed its estimate of access charges improperly billed by Verizon.

On June 1, 2007, Verizon filed a motion to compel discovery responses from BayRing and AT&T. BayRing and AT&T objected to Verizon's motion on June 7, 2007. On June 7, 2007, the Commission issued Order No. 24,760, denying Verizon's motion.

On July 3, 2007, BayRing and AT&T jointly filed a request that the Commission conduct the July 10-12 hearing with all three commissioners present. In their filing, BayRing and AT&T also requested, with Verizon's concurrence, confirmation that each party will be permitted to present an oral summary of its written prefiled testimony during direct examination and to file post-hearing briefs with legal arguments. The Commission granted the requests by secretarial letter on July 6, 2007.

The hearing was held on July 10 and 11, 2007, as scheduled. On August 10, 2007, Verizon moved for leave to file supplemental discovery. AT&T responded on August 20, 2007, stating that Verizon had styled its motion as a request to supplement a discovery reply when in fact it was a motion to reopen the record and add new evidence. AT&T stated that although it did not object to Verizon's request, it wished to preserve the right to object to any further efforts of Verizon to supplement the record. BayRing concurred with AT&T's response. On August 22, 2007, the Commission granted Verizon's request to supplement the record, noting that the discovery response might have probative value and that the parties would have the opportunity to impeach or rebut the late-filed exhibit in their briefs.

SegTel filed a post-hearing brief on September 7, 2007. AT&T, One Communications, BayRing, and Verizon filed their post-hearing briefs on September 10, 2007.

II. POSITIONS OF THE PARTIES AND STAFF

A. Freedom Ring Communications LLC d/b/a BayRing Communications

A panel consisting of Trent Lebeck and Darren Winslow testified on behalf of BayRing at the July 10, 2007 hearing that BayRing had discovered, during a review of its August 2005 bills for intrastate access charges from Verizon, that the bills had increased substantially over prior bills for the same service. According to BayRing, the minutes of use assessed to CCL far exceeded the minutes of use assessed to local switching, which generally should be equal when accessing a Verizon end user through switched access.

According to BayRing, when a BayRing end user calls a Verizon end user, BayRing delivers the call to Verizon at Verizon's tandem switch and Verizon, in turn, delivers the call from its tandem to the end office switch to which the Verizon end user is physically connected via the local loop or common line. In such an instance, terminating switched access should apply because BayRing is using Verizon's end office and common line to access the Verizon end user, and, as a result, Verizon should bill for end office switching with a CCL charge and the minutes of use should be the same.

On the 2005 bills in question, BayRing discovered that the minutes of use that differed substantially from prior bills were labeled "Cellular Tandem Switched" and terminated to a wireless end user rather than a Verizon end user. Such calls, according to BayRing, do not go through a Verizon end-office or use a Verizon common line because they do not connect to a Verizon end user. After a review of Verizon's tariff, BayRing concluded that Verizon was billing CCL charges in error for Cellular Tandem Switched minutes of use. Following the BayRing complaint that triggered these proceedings, Verizon began charging the CCL rate element for other types of calls, including calls that terminated to end users of other CLECs or

independent telephone companies (ITCs), for which Verizon had never billed in the past. According to BayRing, Verizon had not previously imposed CCL charges for calls terminating to CLEC or ITC end users, nor had its third-party billing agent, New York Access Billing LLC (NYAB), imposed these charges in the past ten years.

BayRing submitted that these new CCL charges create a substantial new source of revenue for Verizon. BayRing pointed out that the majority of the disputed charges do not represent long-standing Verizon revenues since Verizon has been assessing the bulk of the disputed charges only since September 2006. BayRing theorized that its complaint had alerted Verizon that it was not billing CCL for CLEC-to-CLEC or CLEC-to-ITC calls and that, as a result, Verizon took the opportunity to impose the additional charges to generate additional revenues.

BayRing asserted that Verizon is not authorized to collect access charges for services it does not provide. BayRing's witness claimed that he had never seen an access bill from a carrier other than Verizon that billed for individual rate elements not provided by the billing carrier. Verizon is charging BayRing a CCL charge when Verizon does not provide the facilities connecting the end office and the end user. BayRing also claimed that at times it is being double-billed because in certain cases a wireless carrier may charge BayRing local termination charges to terminate a call to its end user, or a CLEC or ITC charges terminating switched access for access to its end user over the CLEC or ITC common line, while Verizon is applying a CCL charge for the same call, although the Verizon common line is not being used, so BayRing ends up paying two CCL charges.

BayRing contended that Verizon and wireless carriers obtain an unfair advantage over CLECs as a result of Verizon's unlawful CCL billing scheme, contrary to RSA 378:10.

According to BayRing, Verizon pays only 3 cents per minute in terminating access charges for a call from one of its customers to a CLEC end user, while BayRing pays a total of 5.6 cents per minute when terminating a call from one of its customers to the end user of another CLEC. BayRing contends it pays two terminating access charges for such calls: one to the terminating CLEC, and one to Verizon for a service Verizon does not provide. BayRing points out that Verizon pays a wireless carrier only 0.2 cents per minute to terminate a call, which is considered local pursuant to federal regulations, whereas when a BayRing customer calls the same wireless end user, Verizon charges BayRing 2.8 cents per minute for switched access to the wireless provider (considered by Verizon in this instance as a toll call) in addition to what BayRing pays the wireless carrier to terminate the call to its end user. BayRing contended that the cost differential is substantial and that Verizon's jurisdictional distinction between calls from Verizon end users to wireless customers and calls from CLEC end users to wireless customers is anticompetitive, unjust and unreasonable.

BayRing noted that the CCL charge is described in Tariff No. 85, Section 5.1.1A as follows: "Carrier Common Line access provides for the use of end user's Telephone Company [Verizon] provided common lines by customers for access to such end users to furnish intrastate communications." Section 1.3.2 defines "common line" as "a line, trunk or other facility provided under the general and/or local exchange tariffs of the Telephone Company, terminated on a central office switch." BayRing maintained that Verizon's tariff and the definition of "common line" clearly link the CCL rate element to the common line facilities between Verizon's end offices and end users.

BayRing argued that the tariff provisions indicate that the CCL is authorized to be charged only when a Verizon common line is actually used. BayRing asserted that Verizon's

own graphic exhibit, exhibit 6.1.2-1 in Section 6.1.2 of Tariff No. 85, shows the common line as the facility between the end office and the end user. In addition to the definitions above, BayRing contended that there were other provisions in the Verizon tariff that state CCL should be billed when provided and are specifically linked to other sections of Tariff No. 85 (Sections 4 and 6) and Verizon's FCC Tariff No. 11. BayRing argued that Verizon erroneously relies on a generic sentence within its tariff to assert that CCL applies even when common line facilities are not used. That sentence states that, "[e]xcept as set forth herein, all switched access service provided to the customer will be subject to Carrier Common Line access charges." BayRing submitted that Verizon's interpretation is incorrect because it ignores the phrase "except as set forth herein," which indicates there are exceptions to the general language.

Citing *City of Rochester v. Corpening*, 153 N.H. 571 (2006), and *Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511 (2006), BayRing argued that the tariff language must be interpreted in the context of the overall scheme of the tariff, should not be interpreted in isolation, must lead to a reasonable result and should entail a review of a particular provision, not in isolation, but with all the associated sections. BayRing emphasized that the interplay between tariff Sections 5 and 6 associated with the disputed charges indicates that the CCL charge applies only when another carrier makes use of Verizon's common line to reach a Verizon end use customer and that when a carrier uses the common line, it must also use the end office local switching service in Section 6 in order for Verizon to apply the usage-based CCL charge.

In its post-hearing brief, BayRing asserted that when interpreting provisions of a utility tariff, it is appropriate for the Commission to apply principles of statutory construction and contract interpretation and that, in doing so, the Commission should find that Verizon's Tariff No. 85 does not permit it to charge the CCL rate when Verizon is not providing use of its

common line. According to BayRing the Commission should interpret Verizon's tariff to lead to a reasonable rather than absurd result, citing *Weare Land Use Assoc.* at 511, and that the tariff should not be construed in a manner that produces an unjust and illogical result, citing *State v. Farrow*, 140 N.H. 473, 476 (2005). BayRing maintained that it is unreasonable, absurd, unjust and illogical that Verizon be allowed to impose a usage-based rate element such as the CCL charge when no corresponding service is being provided by Verizon.

BayRing also argued because the tariff language does not specifically describe or address charges associated with calls from CLECs to non-Verizon end users, the tariff does not permit Verizon to impose the disputed CCL charges for these calls. BayRing cited RSA 378:1, which requires that every public utility file "schedules showing rates, fares, charges and prices for any service rendered" and rule Puc 1603.02(m), which requires that a utility provide with each tariff "a full description of the rates and terms under which service shall be provided" to support its argument. BayRing asserted that Verizon is not adhering to state statutory and regulatory requirements or to federal requirements, which are made applicable at the state level through RSA 378:2, that all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations. *See* 47 C.F.R. § 61.2(a).

BayRing also claimed that Verizon's interpretation of the tariff is unjust and unreasonable because it is inconsistent with industry practices. BayRing pointed out that the diagram set forth in Section 6.1.2 of the tariff is consistent with industry-wide treatment of the CCL rate element. BayRing stated that the practice within the telecommunications industry is that a CCL charge is imposed only when the billing carrier actually provides access to its common line or loop and that Verizon admits it is not providing CCL service for the calls at issue. BayRing cited the definition of a CCL charge contained in *Newton's Telecom Dictionary*

as stating that the CCL charge is paid to local exchange carriers "for the privilege of connecting to the end user through the LEC local loop facilities." BayRing indicated that the most persuasive evidence of industry practice regarding the proper application of the CCL charge is the FCC decision in *AT&T v. Bell Atlantic Pennsylvania*, 14 F.C.C.R. 556 (Dec. 9, 1998), in which the FCC held that with respect to interstate calls, "a LEC may impose CCL charges only at points where an interstate or foreign call originates from, or terminates to, an end user via transmission over a common line. . . . Although common line costs are not traffic sensitive, this does not mean that CCL charges are not tied to common line usage."

In addition, BayRing asserted that Verizon's argument that it is entitled to impose the CCL charge as a contribution rate element must also fail as illogical and unreasonable. The plain and undisputed facts of this case undermine Verizon's claim that it is or ever was entitled to collect the CCL charge as a contribution rate for calls that do not traverse a Verizon common line.

B. AT&T Communications of New England, Inc.

A panel consisting of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz testified on behalf of AT&T at the July 10, 2007 hearing that AT&T was in agreement with BayRing's position. AT&T claimed that it noticed something amiss while examining its November 2005 bill from Verizon, unsuccessfully attempted reconciliation with Verizon, and subsequently intervened in this docket.

AT&T stated that it disputes Verizon's interpretation of the tariff language regarding CCL charges. AT&T is not disputing switched access charges when it uses Verizon's end office and common line for access to a Verizon end user. The problem, according to AT&T, is that Verizon has begun charging CCL charges on the terminating side, even though Verizon is no

longer supplying access to a Verizon end user via a Verizon local loop or common line. In addition, according to AT&T, Verizon is charging for originating CCL service even when the customer has left Verizon for another company. AT&T stated that even though Verizon has no loop on either end of a call, Verizon is charging AT&T for both originating and terminating CCL service. AT&T emphasized that, as a long distance provider, it already pays those charges to the two CLECs that actually provide use of the originating and terminating loops and believes it is unreasonable to have to pay Verizon as well, when Verizon is not providing the service.

AT&T believes that if the tariff is applied in accordance with Verizon's interpretation, the results are unreasonable. AT&T indicated that it is illogical for Verizon to expect that, when Verizon loses a customer, Verizon would continue to receive revenue from that loop for the CCL that Verizon no longer provides. AT&T pointed out that the CCL component is by far the largest component of the access charges, representing approximately 90 percent. AT&T stated that the tariff language allows Verizon to collect CCL charges only when Verizon supplies the loop, and that Verizon cannot charge for an access rate element unless it actually provides the service associated with that rate element.

In its post-hearing brief, AT&T stated that Section 6 of Tariff No. 85 delineates three major components of what it describes as a "Complete Switched Access Service": local transport, local switching, and common line, along with the applicable rate categories. AT&T stated that Section 6.1.2.B.3 of Tariff No. 85 expressly excludes CCL service as a service provided under Section 6; rather, CCL service is provided under Section 5, which describes CCL access service as follows: "Carrier common line access provides for the use of end users' Telephone Company provided common lines by [IXC] customers for access to such end users to furnish intrastate communications. . . . The Telephone Company will provide carrier common

line access service to customers in conjunction with switched access service provided in Section 6." AT&T concluded that in order to use Verizon's Section 5 CCL services, it must also use Section 6 local switching services.

AT&T asserted that by Verizon's own design, the language in Tariff No. 85 mirrors that of Verizon's FCC Tariff No. 11, under which Verizon concedes it may not charge for CCL for calls that do not involve a Verizon common line. AT&T averred that interpreting the same language differently in federal and state tariffs violates contract and statutory interpretations. AT&T pointed out that the Commission applies well-established principles of statutory construction and contractual interpretation to tariffs.

AT&T stated that Verizon's interpretation of its tariff is anti-competitive and anti-consumer. According to AT&T, following Verizon's interpretation of the tariff would undermine local competition and the benefits it produces, when the tariff's very purpose is to obtain the benefits of competition. AT&T argued that the commission adopted Tariff No. 85 and access rate levels, in particular, for the purpose of promoting competition and lowering rates for telecommunications services. AT&T submitted that when the Commission rejected a proposed settlement agreement in 1993 that included the issue of access charges for intrastate toll competition in New Hampshire in Order No. 20,864 (entered in Docket No. DE 90-002), it was sending a clear message that the proposed access rates were too high and left no doubt that it was endorsing competition as a means of reducing prices for New Hampshire ratepayers.

Finally, AT&T argued that Verizon's past billing practices are in direct conflict with its new tariff interpretation. Tariff No. 85 was adopted in 1993, while Verizon did not begin billing CCL charges without local switching (from the end office connecting the common line to the end user) until the fall of 2005. AT&T stated that Verizon's sudden reinterpretation of its tariff to

generate new revenues for itself and impose substantial costs on competitors is inconsistent with the settled meaning of Tariff No. 85, as established not only by its language, but also by Verizon's behavior and that of its billing agent.

C. One Communications

In its post-hearing brief, One Communications argued that the Commission should hold that the access charges at issue in this proceeding are improper and inappropriate because Verizon's access tariff does not permit the imposition of a per-minute usage charge for the CCL when no Verizon common line is involved. One Communications further argued that when the call is originated or terminated to a CLEC or wireless carrier, Verizon does not provide access to the end user via a common line, and the CCL charge should not apply. One Communications asserted that Verizon's tariff language is clear that it may not impose the CCL charge without providing CCL access to a Verizon end user, and therefore no inquiry beyond the language of the tariff is required.

One Communications reiterated the positions of BayRing and AT&T, stating that the Commission should apply the principles of contractual interpretation and statutory construction contained in common law and should ascribe the plain and ordinary meaning to the words used, while interpreting the tariff language in light of the tariff's overall scheme and not in isolation. The Commission should examine any particular section together with all associated sections and should interpret the tariff so as to produce a reasonable outcome, not an absurd one.

One Communications argued that Tariff No. 85 prohibits Verizon from imposing a CCL charge when it does not provide CCL service. The tariff clearly states (in Section 5) that Verizon "will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6." According to One Communications, this language means

Verizon will provide access to the common line only in conjunction with local switching and/or local transport as described in Section 6.

One Communications also reiterated that Verizon's tariff is clear that it may charge only for services it actually provides; therefore, under the tariff, Verizon may not impose a CCL charge unless the call traverses a Verizon common line.

One Communications claimed that calls originated by wireline carriers and terminated to a wireless carrier within New Hampshire are local calls and should not be charged for CCL access. One Communications contended that, under FCC requirements, calls originated by or terminated to a wireless carrier in the same major trading area as the other party are deemed local and subject to reciprocal compensation, not access charges.

One Communications also stated that it does not agree with Verizon's argument that the tariff allows per-minute CCL usage charges even when no Verizon CCL is involved, because Order No. 20,864 authorized Verizon to recover all residual contribution from intraLATA toll revenues through CCL. One Communications asserted that the tariff language is clear that Verizon is not allowed to impose the CCL charge when no Verizon common line is used to access a Verizon end user.

One Communications emphasized that Verizon's billing practice is contrary to industry standard practice and that Verizon's imposition of CCL charges is anomalous even by its own standards. One Communications stated that Verizon does not impose the CCL charge in all or most other jurisdictions, and that it does not impose the charge in any other New England state where no CCL is involved. Under its federal tariff, Verizon does not impose a CCL charge when no common line is used. And finally, One Communications asserts that the failure of Verizon's billing agent, NYAB (which specializes in billing access charges for telecommunications

carriers), to bill CCL charges in such a case speaks volumes about the industry's view of the reasonableness of imposing CCL charges when no CCL is involved. Verizon's historical failure to bill CCL charges undermines its claim that they are an important revenue source.

Finally, One Communications stated that imposing a CCL charge when no Verizon common line is used is contrary to the public interest, creates a competitive advantage for Verizon and Verizon Wireless, while posing a competitive disadvantage for competitors, and undermines the competitive atmosphere in New Hampshire, to the detriment of ratepayers.

D. segTEL

SegTEL averred that Verizon is forbidden from charging rates for services that are not properly set out in its tariff, and that there is no applicable rate for CCL access in the absence of a Verizon end user. SegTEL argued that the charges Verizon seeks to assess are not specified in its tariff and are therefore unlawful. Tariff language, according to segTEL, must be clear and unambiguous. SegTEL posits that Verizon's tariff does not entitle it to collect CCL charges for calls to wireless carrier end users because the tariff does not allow for CCL charges where there is no Verizon end user customer. SegTEL stated that in the absence of clear and unambiguous language in Tariff No. 85 specifying the inclusion of CCL charges beyond the limitations established by the tariff, Verizon is prohibited by state law from imposing charges. SegTEL claimed that the Supreme Court has consistently articulated that such "rates, fares, charges and prices for any service rendered" must be set forth in clear and unambiguous language to be enforceable. According to segTEL, the Commission has likewise held that a tariff must be clear and unambiguous in order to permit its enforcement. segTEL alleged that Verizon seeks to charge for services it does not provide and for use of facilities it does not own. segTEL held that

it is precisely to avoid this type of uncertainty that carriers are required to set forth their charges clearly and unambiguously in a tariff.

SegTEL stated that the language governing federal tariff interpretation is equally explicit and supports its argument. 47 U.S.C. § 203(c) states that it is unlawful under federal law for a carrier to charge, demand, collect, or receive a greater or less or different compensation other than the charges specified in a tariff.

SegTEL argued that Verizon's tariff does not provide for CCL charges in the absence of a Verizon-provided common line. The plain language of Verizon's Tariff No. 85 states that CCL charges apply when common lines provide other carriers with access to Verizon's end users. segTEL pointed out that Section 5.1.1.A. states that CCL access provides for the use of Verizon-provided common lines by customers for access to such end users to furnish intrastate communications. SegTEL concluded that Verizon should not be allowed to charge CCL charges for services it does not provide.

E. Verizon New Hampshire

Peter Shepherd of Volt Services Group, a division of Volt Information Science Company, testified on behalf of Verizon at the July 11, 2007 hearing. Mr. Shepherd testified that although the arguments of BayRing and AT&T have merit and may be ripe for a separate proceeding to determine if the tariff should be changed in the future, their logic has little relevance to the basis upon which the access charges were established and the intent, interpretation and lawful application of the existing tariff. Mr. Shepherd explained that switched access is a wholesale service for toll calls that provides carriers with the use of transmission, transport and switching facility components of Verizon's network. Mr. Shepherd noted that Section 2.1 of Tariff No. 85 defines "switched access" as follows: "This tariff contains regulations, rates and charges

applicable to switched access services, which essentially are services provided by Verizon New England to interexchange carriers and wireless carriers, including resellers and/or other entities engaged in the provision of public utility common carrier services which utilize the network of the Telephone Company." Verizon argued that it provides the use of its network for the toll services offered by competitive carriers, services which are subject to the carrier common line charge. Verizon further alleged that the CCL rate was deliberately established in the generic competition docket, No. DE 90-002, as a contribution rate element applicable to all switched access services and not as an element to recover use of loop-related costs. Verizon maintained that the tariff is very specific in saying that the CCL charge applies to all switched access minutes of use.

In its brief, Verizon maintained that New England Telephone (NET) Tariff No. 78 (now Verizon Tariff No. 85) introduced the carrier common line (CCL) charge into NET's access rate design and that the CCL charge to long distance providers for all switched access calls including those originated from or terminated to wireless carrier end users has been billed since 1993. In 1996, Verizon elected to outsource billing of switched access services for calls originating from CLECs and ITCs where Verizon provided intermediate switched access transport and tandem switching to deliver calls to another CLEC, ITC, or long distance provider. According to Verizon, its third party billing agent failed to properly assess CCL charges on these calls from 1996 until Verizon ended the out-sourced billing arrangement in 2006.

According to Verizon, this case revolves primarily around the interpretation of one sentence in Section 5.4.1.A of Tariff No. 85, which states that "[e]xcept as set forth herein, all switched access service provided to the customer will be subject to carrier common line access charges." In its brief, Verizon argued that the Commission has deemed it appropriate to apply

the principles of contractual interpretation and statutory construction contained in common law when interpreting a rate-setting tariff. Under New Hampshire common law, this requires that the Commission ascribe the plain and ordinary meaning to the words used in a tariff, citing *Appeal of Town of Bethlehem*, 154 N.H. 314, 316 (2002), and *West v. Turchioe*, 144 N.H. 509, 515 (1999). Verizon concluded that the preamble to Section 5.1 provides important context for interpreting Section 5.4.1.A. The preamble states that "[c]arrier common line access service is billed to *each switched access service* provided under this tariff in accordance with the regulations as set forth herein and in Section 4.1 [relative to the issuance, payment and crediting of customer bills], and at the rates and charges contained in Section 30.5" (emphasis added by Verizon), and, according to Verizon, makes clear the intention that the CCL would be billed to every call involving switched access.

Verizon claimed that the clause "except as set forth herein" in Section 5.4.1.A pertains only to an exception for enhanced service providers as required by FCC regulations. Verizon avers that nowhere in Section 5.4.1 is the CCL charge limited to intrastate toll calls involving Verizon end users; rather, it applies broadly to all switched access service components that may be purchased by carriers on a stand-alone or combined basis. Verizon claimed that Sections 5.4.1 and 5.4.2 explicitly require the payment of CCL access service charges for "all" and "each" switched access service provided by Verizon.

Addressing the arguments of BayRing and AT&T that assert that Verizon is not permitted to assess CCL charges on intrastate toll calls involving non-Verizon end users even when Verizon provides an intermediate switched access function, such as tandem switching, Verizon contends that such a view is predicated on an erroneous interpretation of Sections 5.1.1 and 5.2.1 of the tariff. Verizon maintained that while the tariff provides for the use of a Verizon-

provided end user loop for the furnishing of intrastate toll service when a carrier uses Verizon's network, it does not mandate such use. According to Verizon, language in the tariff at Section 5.1.1.A.1, which states that "[Verizon] will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6," means only that access to the common line is required to be provided in conjunction with switched access service. Verizon claimed that nothing in Section 5.2.1 mandates that the carrier must make use of the Verizon common lines every time it utilizes switched access components. According to Verizon, use of the common line is unrelated to the application of CCL charges, which are governed by Section 5.4 requiring payment of CCL whether the common line is used or not, and nothing in Section 5.2.1 contradicts or qualifies the explicit requirement that each and all of the switched access services provided by Verizon be assessed the CCL charge.

Verizon also maintained that the interpretations of BayRing and AT&T contradict standard industry practice of collaboration among carriers for the provision of switched access services, as well as the provisions of the tariff governing "meet point billing" arrangements. Verizon maintained that Section 3.1.2.D of Tariff No. 85 provides for the allocation of local transport elements among multiple exchange carriers collaborating in the provision of switched access to a carrier for use of the exchange carriers' network in furnishing toll service. Verizon claimed that this provision plainly authorizes Verizon to bill carriers for switched access when Verizon functions as an intermediate carrier for calls originating or terminating with another carrier; *i.e.,* without the use of a Verizon end user loop. Verizon contended that if CLECs avail themselves of Verizon's switched access services, they must pay the rates and charges set forth in Tariff No. 85, including CCL charges.

Verizon further disagreed with the claim of BayRing and AT&T that the tariff provisions are not applicable because Verizon is not providing switched access services. Verizon supplies the use of its network, including transmission, transport and switching components for the provision of toll service. Verizon stated that the use of its network to provide an intrastate toll call, regardless of the number of components involved, constitutes "switched access."

Verizon asserted that a billing error of its vendor, NYAB, does not absolve carriers of their obligations to pay CCL charges on switched access services provided by Verizon. Carriers are presumed to know the content of Verizon's tariff, which premise renders the error immaterial. Verizon alleged that carriers have received services from Verizon for several years for which they have paid less than the tariffed rates. Verizon became aware of the billing error and took steps to rectify the error.

Verizon took the position that the history of the development of Tariff No. 78 (now Tariff No. 85) in Docket No. DE 90-002 informs the debate. According to Verizon, the tariff language "was the product of negotiations among carriers." Verizon goes on to state that a plain-language reading of the tariff will give effect to the underlying purpose of the CCL charge, which was designed by Verizon to provide contribution for the support of other services. Verizon refers to its witness's testimony in DE 90-002 that "the CCL rate element was designed to apply to all switched access because retail toll and wholesale switched access are the same service, and should therefore provide the same level of contribution per minute of use." According to Verizon, NET provided extensive testimony in DE 90-002 to support its position that access and toll were the same service and therefore should be priced approximately the same. Verizon cited additional testimony from DE 90-002, which said "[t]he sole purpose of the carrier common line rate element is to bring the end-to-end access rate from the incremental costs of transport and

switching up to a level which results in the proper relationship between toll and access," and concluded that since the Commission approved the tariff with the language in dispute today, it gave effect to NET's express intent.

Verizon also pointed to testimony of an AT&T witness in DE 90-002 in support of Verizon's understanding that CCL is a contribution element and not a mechanism to recover the cost of using the local loop. Verizon pointed out that its ultimate agreement to a stipulation on this issue altered its initial position but did not change the fact that CCL was designed to recover contribution.

Verizon points to a similar case in New York where a CLEC argued it should not have to pay CCL and local switching for access to a wireless carrier. The New York Public Service Commission rejected the carrier's argument, similar to the argument here, that "Verizon cannot charge for a service it does not perform" and found that the plain and ordinary meaning of the tariff's terms controlled.

Finally, Verizon dismissed as irrelevant BayRing's assertion that CCL charges are anti-competitive. Verizon intimated that this proceeding is limited to determining the proper interpretation of the relevant tariffs, and that any consideration of modifications to the tariffs or whether the tariffs are anti-competitive is irrelevant to this docket and must be addressed in a future proceeding.

III. COMMISSION ANALYSIS

The June 23, 2006 order of notice in this proceeding set forth a number of issues for review that were subsequently modified in the October 23, 2006 supplemental order of notice. The issues posed were: (1) whether calls made or received by end users that do not employ a Verizon local loop involve Verizon switched access, (2) if so, whether Verizon's access tariff

requires the payment of certain rate elements, including but not limited to CCL charges, for such calls, (3) if not, whether BayRing or other carriers are entitled to a refund for such charges collected by Verizon in the past, (4) if not, whether such services are more properly assessed under a different tariff provision, (5) if not, to what extent reparation, if any, should be made by Verizon under RSA 365:29, and (6) in the event Verizon's interpretation of the current tariffs is reasonable, whether any prospective modifications to the tariffs are appropriate.

Subsequently, in Order No. 24,705 (November 26, 2006), the Commission determined to conduct this proceeding in two phases, with Phase I concerning the proper interpretation of the relevant tariff provisions and, if necessary, Phase II concerning the determination of refunds. It was also noted in Order No. 24,705 that a separate proceeding would be initiated if tariff modifications were determined necessary as a prospective matter.

A. Phase I—Interpretation of Tariff Provisions.

At issue before us is the proper interpretation and application of Sections 5 and 6 of Verizon's access tariff, Tariff No. 85. When interpreting the provisions of a utility's tariff, we apply principles of statutory construction and contract interpretation. *Public Service Company of New Hampshire*, 79 NH PUC 688, 689 (1994). Accordingly, we look first at the plain and ordinary meaning of the terms of the tariff. *City of Rochester v. Corpening*, 153 N.H. 571, 573 (2006) (citing *Carignan v. New Hampshire Int'l Speedway*, 151 N.H. 409, 419 (2004)).

Section 5 of Tariff No. 85 governs the provisioning of "carrier common line access service." Section 5.1.1.A describes that service as providing "for the use of end users' Telephone Company provided common lines by customers [i.e., carriers] for access to such end users to furnish intrastate communications." A "common line," in turn, is defined in Section 1.3.2 as a "line, trunk or other facility provided under the general and/or local exchange service

tariffs of the Telephone Company, terminated on a central office switch." Section 5.1.1.A.1 further states that Verizon "will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6" of the same tariff. Section 6.1.2.A of Tariff No. 85 states that "switched access services" provided under Section 6 includes originating and terminating access, as well as two-way and 800 database access. Of particular interest in this proceeding are originating and terminating access services, as they address the origination and termination of calls to and from end users who place and receive calls.

Section 6.1.2.B outlines the rate categories applicable in the provision of switched access services, including local transport (as described in Section 6.2.1), local switching (described in Sections 6.2.2 and 6.2.3), and carrier common line (described in Section 5). Thus, the individual, billable elements of "switched access" are local transport, local switching, and carrier common line. Section 6.1.2.D recognizes that when local transport, local switching and carrier common line are combined, they provide a "complete switched access service."

"Local transport" is described in Section 6.2.1.A as the provision of the transmission facilities between the customer's [i.e., the carrier's] equipment[2] and the end office switch(es) where traffic is switched to originate or terminate an end user's call. Local transport includes tandem switching. The petitioners and intervenors use tandem switching and, therefore, local transport for the calls that are the focus of this dispute.

[2] Tariff 85 generally applies to interexchange carriers, commonly referred to as IXCs, which provide long distance service on a competitive basis. "Customer" is defined as "any individual . . . which subscribes to the services offered under this tariff, including ICs [interexchange carriers], resellers or other entities engaged in the provisioning of interexchange services which utilize the network of the Telephone Company ." The reference to the customer's premises in Section 6.2.1.A is to the interexchange carrier's equipment or switch. Local transport is the component of switched access service that transports the call between the end office switch through Verizon's tandem switch to the interexchange carrier on the originating side of a call and the reverse on the terminating side of a call. Local transport includes three components: local transport termination (termination of an interoffice facility in the end office and tandem switch); local transport facility (the interoffice wire or fiber facility) and local transport tandem switching (the switch between carriers).

"Local switching" is described in Section 6.2.2 as the provision "for the use of common lines and the local end office switching and end user termination functions necessary to complete the transmission of switched access communications to the end users served by the local end office." Because the end user is not Verizon's in the calls at issue in this case, local switching is not involved.

"Carrier common line access service" is described in Section 5, separately from Section 6 "Switched Access Service." Section 5 begins with an introductory sentence that states: "Carrier common line access service is billed to each switched access service provided under this tariff in accordance with the regulations *as set forth herein* and in Section 4.1 and at the rates and charges contained in Section 30.5" (emphasis added). Section 4.1 sets forth specifics of billing procedures. Thus, our analysis here turns on the regulations specified in Section 5 governing carrier common line access service charges.

Carrier common line access service under Section 5.1.1.A "provides for the use of end user's Telephone Company provided common lines [i.e., Verizon's common lines to Verizon end users] by customers [i.e., other carriers] for access to such end users." Thus, carrier common line access, for which CCL access charges apply, is provided when the CLEC customer uses a Verizon-provided common line to access a Verizon end user. Accordingly, the CCL charge is properly imposed when (1) Verizon provides the use of its common line and (2) it facilitates the transport of calls to a Verizon end user. It is also reasonable to conclude the inverse to be true, that is, when the use of Verizon's common line and the presence of a Verizon end user are lacking, the CCL charge may not be imposed. The tariff provisions are complex and interpreting them requires a sophisticated understanding of the telecommunications industry, nonetheless, we make our findings based on the language within the four corners of the tariff.

Verizon argues as well, however, that under Section 5.4.1.A of Tariff No. 85, "[e]xcept as set forth herein, *all* switched access service provided to the customer will be subject to carrier common line access charges" (emphasis added). According to Verizon, the wording of Section 5.4.1.A suggests that any and all "switched access service" is subject to a CCL charge.

Tariff No. 85 does not include a specific definition of "switched access." Assuming *arguendo* that an ambiguity exists to the extent that there is an uncertainty of meaning or intent, we look beyond the four corners of the tariff to resolve the ambiguity. We therefore turn to the context of the provisions pertaining to the term "switched access," with a view toward its relation to carrier common line access services. The record in this proceeding reveals that when the language of Section 5 of Tariff No. 85 was initially introduced, it was not contemplated that a carrier would use switched access without using Verizon's common line[3]. In 1993, switched access rates were primarily designed to provide interexchange carriers access to end users of local exchange carriers. At the time, every wireline end user was served by an incumbent local exchange carrier; either NET (a predecessor of Verizon) or an independent telephone company. Interexchange carriers were required to use incumbent carrier common lines or local loops in order to connect with or gain access to the incumbent's end users for the provision of toll calls. Each time an interexchange carrier used local switching and local transport it had to use the common line of an incumbent carrier.

Under Verizon's interpretation of Section 5.4.1.A and the preamble to Section 5.1, Verizon would have billed interexchange carriers CCL when Verizon jointly provisioned switched access with an ITC for a toll carrier's access to an ITC end user. However, the record evidence shows that neither NET nor Verizon billed CCL to toll providers when an ITC end user

[3] Switched access was not contemplated without the use of either a Verizon common line or, alternatively, an ITC common line under a meet-point billing arrangement. For purposes of this discussion, we focus on whether a Verizon common line is used.

was involved until 2006, after this docket was initiated.[4] Nevertheless, Verizon's billing history, including whether it charged or did not charge for certain elements at different times, and the actions of its billing agent are not factors we have relied on in our interpretation of the tariff.

One of the changes Congress wrought through the Telecommunications Act of 1996 was to allow carriers other than incumbents to provide local exchange service. Once CLECs entered the market, incumbents no longer provided local switching and common line service to every end user. The FCC clarified the application of common line charges for the interstate switched access tariff in the 1998 *AT&T* decision cited by BayRing. In that decision, the FCC established that "a [local exchange carrier] may impose CCL charges only at points where an interstate or foreign call originates from, or terminates to, an end user via transmission over a common line." AT&T, 14 F.C.C.R. 556 at ¶ 28.

We agree with Verizon that, at the time the switched access rate was approved in 1993, retail toll service and switched access service used the same physical components of Verizon's network and, therefore, effectively provided the same service. However, as an NET witness testified in Docket No. DE 90-002, which established Verizon's current switched access rate design, the proceeding conducted in that docket was:

> not intended to address issues of separate competing networks or multiple exchange carriers in the same franchise territory. These issues may ultimately require extensive policy decisions on the part of the Commission should this form of competition become a reality in New Hampshire. However, the current state of competition does not require resolution of those issues at this time and is not included in the list of items to be litigated in this docket.

Exh. 2 at 56. Since the issuance in 1993 of Orders No. 20,864 and No. 20,916 resolving the issues in that docket, the telephony market in New Hampshire has seen the entry of numerous

[4] Likewise, Verizon does not bill two separate carrier common line charges when both local switching and local transport are used. *See generally* Tr. Day II at 102-105.

CLECs, many of which employ large portions of their own networks, formerly provided by NET, in the provision of toll service.[5]

In 1993, when Verizon's switched access rate was first approved, end users in Verizon's franchise territory were exclusively Verizon's. Today, CLECs own, operate and maintain local loop[6] and end-office switches serving their own end users. As a result, a CLEC need not purchase "complete switched access service" from Verizon when it is not accessing a Verizon end user. Moreover, we agree with the original NET position that Docket No. DE 90-002 was "not intended to address issues of separate competing networks or multiple exchange carriers in the same franchise territory." Consequently, we do not rely on Docket No. DE 90-002 as precedent for our decision here, where the crux of the dispute arises from the use of separate network facilities owned by competitors.

Section 5.1.1.A.1 states that "[t]he Telephone Company will provide carrier common line access service to customers in conjunction with switched access service provided in Section 6." In the calls at issue here, Verizon is providing a component of switched access from Section 6 (i.e., local transport) but cannot physically provide carrier common line access service to the carrier as required by Section 5.1.1.A.1 because Verizon does not have a common line to the CLEC, ITC or wireless end user. Although, at its initiation, switched access appears to have required access to Verizon's[7] common line by reason of the structure of the network itself, that is no longer the case. Where a non-Verizon carrier provides the local loop that connects an end-user to the public switched network, Verizon does not (and cannot) provide carrier common line

[5] When competition became a reality and multiple carriers were competing in the same franchise area, rather than constructing an interpretation of the tariff to charge customers for a service they did not receive, it was Verizon's responsibility to seek revisions to its tariff if it believed it was somehow not recovering its costs or if the tariff no longer fit changing market and technical conditions.

[6] Some CLECs lease and pay for an unbundled local loop from Verizon. In this case, Verizon maintains the loop, but the CLEC pays Verizon to do so.

[7] See footnote 3.

access in conjunction with local transport. Since access to the common line is required to be provided in conjunction with switched access service and Verizon cannot provide access to the common line in the calls at issue here, we conclude that local transport, used independently without the benefit of Verizon's common line, does not constitute switched access service.

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.

We note as well in regard to Verizon's interpretation of Section 5.4.1.A that it effectively concludes that a carrier will be "subject to" CCL charges regardless of whether CCL service is provided. We interpret this section, however, to mean that a carrier will be "subject to" CCL charges to the extent CCL service is provided in conjunction with switched access. The phrase "subject to" is plainly meant to be conditional in the sense that a carrier will be "liable for" CCL charges when the condition of CCL service is precedent. Verizon's interpretation improperly nullifies the obvious conditional nature of Sections 5.1.1.A.1 and 5.4.1.A.

We find, furthermore, that Verizon's assertion that the New York Public Service Commission determined that the plain and ordinary meaning of the New York tariff allowed Verizon to charge the CCL rate element for calls terminating to wireless carriers is inapposite because the situation there is distinguishable from the case before us here. The language in the New York tariff explicitly states that "[f]or traffic which originates or terminates at RTU [wireless] Interconnections, Carrier Common Line Service and Switched Access Service Local

Switching rates and charges as specified in [the tariff] will apply." New York Public Service Commission Tariff No. 11 § 2.4.8, *cited in* Verizon Post-Hearing Brief at 28. In contrast, there is no analogous language in Verizon's New Hampshire tariff that explicitly permits the application of CCL charges for calls to or from wireless end users.

In summary, based on our review of the tariff language and the record developed in this proceeding, we interpret Verizon's access tariff to permit the imposition of CCL charges only in those instances when a carrier uses CCL services. We therefore find that Verizon is, and has been, impermissibly imposing a CCL access charge in those instances where neither Verizon's common line nor a Verizon end-user is involved for either terminating or originating calls.

B. Phase II--Determination of Refunds.

As previously noted, in Order No. 24,705 it was determined that this proceeding would be conducted in two phases. Based on our review of the record, we have concluded, as more fully described above, that Verizon's misinterpretation of the provision pertaining to CCL charges under Tariff No. 85 has resulted in it impermissibly imposing CCL charges on certain customers. Therefore, we find that Verizon owes restitution. As a result, we will proceed to Phase II in order to determine the extent to which restitution should be made.

We note in this regard that refunds are an appropriate means for providing restitution for improperly applied charges. *See* Appeal *of Granite State Electric Co.*, 120 NH 536 (1980) (PUC has inherent power to award restitution if one has been unjustly enriched at the expense of another). Furthermore, RSA 365:29 provides for reparations covering payments made within two years prior to the date of filing a petition for any illegally or unjustly discriminatory rate, fare, charge or price demanded and collected by a public utility.

For purposes of the second phase, and pursuant to Order No. 24,705, we received estimates of potential claims from BayRing, One Communications, AT&T, and Sprint Nextel, and we also received from Verizon its estimate of the overall financial impact. Based on this information, some of which has been accorded confidential treatment on a company-by-company basis, the aggregate potential Verizon liability appears to be on the order of $15 million to $20 million. The exact amount of refunds or reparations shall be determined in Phase II of this docket, as will the manner of such refunds or reparations.

On February 25, 2008, Order No. 24,823 was issued in Docket No. DT 07-011 approving the proposed transfer of certain assets from Verizon to FairPoint and Verizon's discontinuance of landline operations in the State of New Hampshire. One condition of approval in that order was the provision that, in the event it was decided that Verizon was not authorized to collect the charges in dispute in the present proceeding, Verizon would be required to refund the amount collected by it. See, Order No. 24,823, p. 75. Furthermore, it was made clear as an ordering clause in that order, at p. 89, that Verizon's discontinuance of operations in New Hampshire was "subject to the ongoing jurisdiction of the Commission for purposes of enforcing the conditions described in the order." Inasmuch as we have determined that Verizon was not authorized to collect the charges at issue here, we will issue an order initiating Phase II, in which the extent of restitution will be determined.

Based upon the foregoing, it is hereby

ORDERED, that Verizon cease the billing of carrier common line charges for calls that do not involve a Verizon end user or a Verizon-provided local loop.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of March 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director

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

Petition of Northern New England Telephone Operations LLC To Intervene

Pursuant to RSA 541-A:32 and N.H. Admin. Rules Puc 203.17, Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE, a Delaware limited liability company having its principal office at 521 E. Morehead Street, Charlotte, NC ("Telco" or "FairPoint") hereby petitions to intervene in the above-docketed proceeding and, in support of its Petition, states as follows:

1. On February 25, 2008, the Commission by Order No. 24,823, issued in Docket DT 07-011 (the "Transfer Order"), approved the transfer of Verizon New England Inc.'s local exchange and long distance businesses in New Hampshire to Telco and other entities controlled by FairPoint Communications Inc. Verizon and FairPoint closed the transactions referenced in the Transfer Order effective March 31, 2008.

2. As a result, FairPoint succeeded Verizon New England Inc. ("Verizon") as the largest incumbent local exchange carrier (ILEC) in New Hampshire.

3. As an ILEC, FairPoint provides (among other services) switched access and local transport services to competitive local exchange carriers (CLECs), including the CLECs

involved in these proceedings. FairPoint also offers basic and other telecommunications service to the vast majority of New Hampshire residential customers.

4. As the successor-in-interest to Verizon, FairPoint now has an interest in participating in this Docket. According to the Supplemental Order of Notice dated October 23, 2006, the Commission decided to investigate the Verizon access charge rate elements applicable to various kinds of interexchange calls, including calls for which FairPoint now provides switched access services.

5. In addition, in the Commission's Order No. 24,837, dated March 21, 2008 (the "Order"), the Commission held, in relevant part, that "...Verizon cease the billing of carrier common line charges for calls that do not involve a Verizon end user or a Verizon-provided local loop." *See* Order at p. 33. The calls at issue now involve FairPoint's telecommunications infrastructure and what FairPoint can (or can not) bill for such calls directly impacts FairPoint's financial position. Thus, the Commission Order directly impacts FairPoint.

6. Pursuant to RSA 541-A:32, II, the Commission may grant petitions for intervention ***at any time*** if that intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings (emphasis added).

7. The fact that FairPoint's operations, financial and otherwise, are at issue in this Docket surely demonstrates the necessity of FairPoint's participation in the proceedings. Fundamental issues of fairness and justice favor granting this petition in order to allow FairPoint to protect its interests. FairPoint's intervention will not prejudice any other party or impair the orderly and prompt conduct of the proceedings. FairPoint agrees to take the present record in this docket "as is" and plans to file a Motion for Reconsideration of Oder 24,837 based upon the

entirety of the record to date.[1] *See* RSA 541:3 (noting in relevant part that "...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..." (emphasis added).

8. Based on the foregoing, FairPoint satisfies the requirements for intervention under RSA 541-A:32.

9. Based upon discussions with counsel, the undersigned understand that AT&T Corp., One Communications Corp. and Freedom Ring Communications LLC take no position with respect to this Petition. Verizon consents to the relief requested herein.

[The remainder of this page intentionally has been left blank.]

[1] As the time period to file motions for reconsideration expires at the close of business on April 21, 2008, FairPoint's Motion for Reconsideration of Order 24,837 is submitted with this Petition.

WHEREFORE, FairPoint respectfully requests that the Commission grant this Petition to Intervene.

Respectfully submitted,

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

By Its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: April 21, 2008

By: _____

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CERTIFICATE OF SERVICE

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

Dated: April 21, 2008

By: _____

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

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 06-067

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

Motion for Rehearing and/or Reconsideration of Northern New England Telephone Operations LLC. d/b/a FairPoint Communications - NNE

Pursuant to RSA 541:3 and N.H. Admin. Rules Puc 203.33, Northern New England Telephone Operations LLC, d/b/a FairPoint Communications-NNE, a Delaware limited liability company having its principal office at 521 E. Morehead Street, Charlotte, North Carolina ("FairPoint") hereby moves the Public Utilities Commission (the "Commission") to reconsider Order No. 24,387, dated March 21, 2008 (the "Order"), or order a rehearing in the above-docketed proceeding (this "Docket") and, in support of this Motion, states as follows:

I. INTRODUCTION

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

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

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

II. STANDARD OF REVIEW

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

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

RSA 541:3 (emphasis added).

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings. *See Dumais v. State*, 118 N.H. 309, 312 (1978). *See also Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

A: Yes, it does.

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

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

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

A: Would you please state that again please.

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

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

Q: *A toll call?*

A: *Yes.*

Tr. Day 1 at 73 (emphasis added).

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

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

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

*****

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

A. (Nurse) Yes.

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

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

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

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

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

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

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

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

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

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

Assuming, *arguendo*, that Tariff 85 does not allow FairPoint to impose a CCL charge for the "access" service provided, the Commission should have decided (i) what "access" was being provided and (ii) the appropriate charge Verizon should have imposed in the past, leading to a charge that FairPoint could impose in the present and on a "go forward" basis. By simply ordering the cessation of billing for the service, however, the Commission confiscated Verizon and now FairPoint's property in violation of Part I, Article 12 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. Allowing the Competitive Carriers to secure service absent the payment of compensation provides the carriers with a windfall and a competitive advantage over FairPoint. FairPoint submits that a rate of zero for a telecommunications service can not be deemed to be anything other than confiscatory and exploitive. *See also,* RSA 378:14 (prohibiting free service). For these reasons alone, the Commission should reconsider its decision and order a rehearing in this Docket.

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

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

> Whenever the commission shall be of the opinion . . . that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, . . . the commission shall determine the just and reasonable or lawful rates, fares and charges to be ***thereafter observed and enforced***.

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

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

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

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

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

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

WHEREFORE, FairPoint respectfully requests that the Commission:

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

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

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

Respectfully submitted,

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

By Its Attorneys,

DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: April 21, 2008

By: _____

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CERTIFICATE OF SERVICE

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

Dated: April 21, 2008

By: _____

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

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Procedural Order

O R D E R N O. 25,284

October 28, 2011

On June 2, 2011, following a prehearing conference and technical session held on May 26, 2011 in this docket, Staff submitted a report of technical session outlining a proposed procedural schedule commencing after the Commission issued its order on FairPoint's pending motion to certify interlocutory transfer statement. On October 28, 2011, the Commission issued Order No. 25,283, denying FairPoint's motion and also addressing a pending motion for reconsideration filed by a group of competitive local exchange carriers. Because the Commission has now issued the order anticipated by the parties, the Commission hereby adopts the proposed schedule in the report of technical session and sets out the relevant dates as follows:

FairPoint update and supplement testimony of Michael Skrivan	11/03/11
CLECs single, joint set of data requests to FairPoint	11/17/11
FairPoint responses	12/1/11
CLEC rebuttal testimony	12/15/11
Data Requests on rebuttal	12/21/11
Responses to rebuttal requests	12/28/11
FairPoint reply testimony	1/4/12

Technical Session in lieu of further discovery	between 1-11-12 and 1-16-12
Hearing on the merits	TBD

We acknowledge that there are numerous holidays included in the above schedule dates which may necessitate revisions to the schedule. We encourage the parties to work together to propose appropriate modifications to the procedural schedule set forth above, as needed. .

We refer the parties to the conclusions in Order No. 25,283 to determine the matters within and without this proceeding. In addition, the Commission will permit arguments about whether any changes made or proposed to FairPoint's tariff rates on the CCL, or other charges that may be presented, should be reconciled to a prior date. In particular the Commission will hear arguments on whether, in light of the unique circumstances of FairPoint's bankruptcy, any changes should be reconciled to the date of FairPoint's original submissions in 2009, to January 24, 2011, when FairPoint emerged from bankruptcy, to the Commission's supplemental order on May 4, 2011, or to some other appropriate date.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of October, 2011.

Clifton C. Below
Commissioner

Amy B. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING COMMUNICATIONS

Complaint Against Verizon New Hampshire Regarding Access Charges

Order Rejecting Tariff Filing Without Prejudice

O R D E R N O. 25,301

December 14, 2011

On November 30, 2011, Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint) filed with the Commission various revisions to its Tariff No. 3, for effect on December 30, 2011. Specifically, the tariff revisions amend the language in FairPoint's tariff regarding the application of the carrier common line (CCL) charge, and increase the Interconnection Charge. The history regarding these charges is set out in prior orders of the Commission in this docket and will not be recounted here, except as may be relevant.

FairPoint previously filed, on September 10, 2009, nearly identical proposed revisions to its tariff. In its cover letter for the November 30, 2011 filing, FairPoint recounts that in Order No. 25,219 (May 4, 2011) the Commission granted FairPoint's request to withdraw the September 10, 2009 tariff filing and have it treated as illustrative. Subsequently, in Order No. 25,283 (October 28, 2011), the Commission amended its decision and concluded that the portion of the tariff revisions relating to the CCL charge would be accepted, but would not take effect. *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 31. Also by that order, the Commission affirmed its decision to allow the portion of the tariff relating to the Interconnection Charge to be withdrawn and treated as

illustrative. *See id.* Specifically, the Commission concluded that "the portion of the tariff filing covering FairPoint's interconnection charge is withdrawn and will be treated as illustrative so that it may be the basis for further consideration in this proceeding without invoking the statutory timing constraints of RSA 378:6." *Id.*

In its cover letter, FairPoint acknowledges that "both the interconnection charge and the CCL charge are subject to investigation in DT 06-067. However, only one of these is considered to be on file by the Commission . . . and to ensure that both questions are officially before the Commission FairPoint is refiling the revised tariff incorporating both charges while continuing to reserve all rights to dispute the Commission's authority to impose any of these revisions." FairPoint November 30, 2011 Cover Letter at 1-2. FairPoint also notes that it made the filing with an effective date 30 days following the submission of the tariff "in accordance with applicable law", but that it "presumes that the Commission will suspend this filing pending resolution of the questions in DT 06-067." FairPoint November 30, 2011 Cover Letter at 2.

While we understand FairPoint's assumption that the Commission might suspend the tariff 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. This will allow us to conduct our investigation of the tariff consistent with the schedule in this docket, which we recently extended at FairPoint's request. The schedule now calls for hearing on the merits on March 8, 2012. *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,295 (Nov. 30, 2011) at 5. As stated earlier in this proceeding, the Commission's intent is to review FairPoint's tariff without invoking the statutory timing constraints of RSA 378:6, *Freedom Ring Communications, LLC d/b/a BayRing Communications*,

Order No. 25,283 (Oct. 28, 2011) at 31. It is for that same reason that the Commission rejects this most recent filing. This rejection is without prejudice to any further process in this docket and is not a finding on the merits of the tariff itself.

For clarity, we note that because the original decision to allow FairPoint's tariff to be withdrawn in May, FairPoint and the other parties have continued to pursue this case on the understanding that the amendments to both the CCL charge and the Interconnection Charge are before the Commission for determination. FairPoint acknowledges as much in its cover letter on the tariff revisions in issue here when it notes that "both the interconnection charge and the CCL charge are subject to investigation in DT 06-067." FairPoint November 30, 2011 Cover Letter at 1. We do not intend this rejection to alter that understanding. Thus, although we reject this filing, we will continue to review this matter, including by reviewing both the CCL charge and the Interconnection Charge, in accordance with the approved procedural schedule in this docket.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's proposed tariff pages dated November 30, 2011 for effect on December 30, 2011 are hereby rejected, without prejudice.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of December, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 27, 2011 **Released: November 18, 2011**

Comment Date on Sections XVII.A-K:	**January 18, 2012**
Reply Comment Date on Sections XVII.A-K:	**February 17, 2012**
Comment Date on Sections XVII.L-R:	**February 24, 2012**
Reply Comment Date on Sections XVII.L-R:	**March 30, 2012**

By the Commission: Chairman Genachowski and Commissioners Copps and Clyburn issuing separate statements; Commissioner McDowell approving in part, concurring in part and issuing a statement.

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specify the transition to reduce these rates further at this time. Instead, we seek comment regarding the transition and recovery for such other rate elements in the FNPRM.[1494]

801. Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules.[1495] We cap these rates as of the effective date of the rules[1496] to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order. For price cap carriers, all intrastate rates will also be capped, and, for rate-of-return carriers, all terminating intrastate access rates will also be capped. Consistent with many proposals in the record, our transition plan provides rate-of-return carriers, whose rates typically are higher, additional time to transition as appropriate. Specifically, we conclude that a six-year transition for price cap carriers and competitive LECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and competitive LECs that benchmark to rate-of-return carrier rates to transition rates to bill-and-keep strikes an appropriate balance that will moderate potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes.[1497]

Figure 9

Intercarrier Compensation Reform Timeline		
Effective Date	**For Price Cap Carriers and CLECs that benchmark access rates to price cap carriers**[1498]	**For Rate-of-Return Carriers and CLECs that benchmark access rates to rate-of-return carriers**[1499]
Effective Date of the rules	All intercarrier switched access rate elements, including interstate and intrastate originating and terminating rates and reciprocal compensation rates are capped.	All interstate switched access rate elements, including all originating and terminating rates and reciprocal compensation rates are capped. Intrastate terminating rates are also capped.

[1494] We do, however, cap price cap interstate and intrastate originating access rates to combat potential arbitrage and other efforts designed to increase or otherwise maximize sources of intercarrier revenues during the transition.

[1495] Although the ABC Plan and Joint Letter proposed that rates should be capped on January 1, 2012, ABC Plan at 11, Joint Letter at 3, we cap such rates as of the effective date of the rules. This will ensure that carriers do not seek to inflate their access charges in advance of our reforms. Specifically, 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.

[1496] *See supra* n. 1495.

[1497] As a baseline, we adopt the transition proposed in the ABC Plan and Joint Letter with the addition of an extra year to allow each set of carriers to complete a transition to bill-and-keep. *See id.*

[1498] ABC Plan, Attach. 1 at 11. We note that CMRS providers are subject to mandatory detariffing. Nonetheless, CMRS providers are included in the transition to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here.

[1499] Joint Letter at 3 & n.1. We note that carriers remain free to make elections regarding participation in the NECA pool and tariffing processes during the transition. *See* 47 C.F.R. § 69.601 et seq. At the same time, we decline to adopt the Rural Associations' proposal to require carriers that withdraw from NECA association tariffs for switched access elements to continue to contribute to the pool as if they had remained part of the NECA pool. *See* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos.10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Attach. at 25 (filed Oct. 17, 2011). Such a requirement would frustrate efficiencies generated by our reforms and could unnecessarily burden carriers with costs that are no longer necessary.

813. Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate elements, and capping other intrastate rates,[1529] states will play a critical role implementing and enforcing intercarrier compensation reforms. In particular, state oversight of the transition process is necessary to ensure that carriers comply with the transition timing and intrastate access charge reductions outlined above. Under our framework, rates for intrastate access traffic will remain in intrastate tariffs.[1530] As a result, to ensure compliance with the framework and to ensure carriers are not taking actions that could enable a windfall and/or double recovery, state commissions should monitor compliance with our rate transition; review how carriers reduce rates to ensure consistency with the uniform framework; and guard against attempts to raise capped intercarrier compensation rates, as well as unanticipated types of gamesmanship. Consistent with states' existing authority, therefore, states could require carriers to provide additional information and/or refile intrastate access tariffs that do not follow the framework or rules adopted in this Order. Moreover, state commissions will continue to review and approve interconnection agreements and associated reciprocal compensation rates to ensure that they are consistent with the new federal framework and transition. Thus, we will be working in partnership with states to monitor carriers' compliance with our rules, thereby ensuring that consumers throughout the country will realize the tremendous benefits of ICC reform.

814. *Price Cap Conversions.* The Commission has regulated the provision of interstate access services by incumbent LECs, pursuant to either rate-of-return regulation or price cap regulation. The Commission has previously described the benefits that flow from the adoption of price cap regulation,[1531] and has allowed carriers to convert from rate-of-return to price cap regulation.[1532] The Commission continues to encourage carriers to undergo such conversions. The application of our reforms to proposed conversions will be addressed in the context of those proceedings based on the individualized situation of the carrier seeking to convert to price cap regulation.[1533]

815. *Existing Agreements.* With respect to the impact of our reforms on existing agreements, we emphasize that our reforms do not abrogate existing commercial contracts or interconnection agreements or otherwise require an automatic "fresh look" at these agreements.[1534] As the Commission

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[1529] We do not cap intrastate originating access for rate-of-return carriers in this Order. We note that states remain free to do so, provided states support any recovery that may be necessary, and such a result would promote the goals of comprehensive reform adopted today.

[1530] As we describe in Section XIII, we require carriers to file with their interstate tariffs all data, including as relevant intrastate rates and MOU, necessary to verify eligibility for ARC replacement funding.

[1531] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6790-91, para. 33 (1990).

[1532] *See, e.g., CenturyTel, Inc. Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, WC Docket No. 08-191, Order, 24 FCC Rcd 4677 (WCB 2009); *Windstream Petition for Conversion to Price cap Regulation and for Limited Waiver Relief*, WC Docket No. 07-171, Order, 23 FCC Rcd 5294 (2008).

[1533] Similarly, transition issues related to rate-of-return affiliates of price cap holding companies, *see supra* para. 271, will be addressed in the context of such proceedings as well.

[1534] In the past, several commenters have requested that the Commission give them a fresh look at existing contracts in the context of comprehensive reform. *See, e.g.*, Letter from Richard R. Cameron and Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-152, 99-68; CC Docket Nos. 01-92, 96-45 at 2 (filed Sept. 18, 2008) (asking that the Commission "provide an 18-month window within which carriers can reconfigure their interconnection facilities without incurring reconfiguration charges or early termination liabilities under existing transport contracts"); Sage Telecom *2008 ICC/USF FNPRM* Comments at 13 ("The Commission should be aware that wholesale agreements for local service (unbundled network element platform replacement agreements) often contain rates for transport and termination of traffic . . . . While these agreements (continued...)

Bill-and-keep arrangements are those in which carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services.

29. Revise §51.715 paragraphs (a) introductory text, (a)(1), (b) introductory text, (b)(2), and revise the first sentence in paragraph (d) to read as follows:

§ 51.715 Interim transport and termination pricing.

(a) Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of Non-Access Telecommunications Traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under sections 251 and 252 of the Act.

(1) This requirement shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of Non-Access Telecommunications Traffic by the incumbent LEC.

* * * * *

(b) Upon receipt of a request as described in paragraph (a) of this section, an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of Non-Access Telecommunications Traffic at symmetrical rates.

* * * * *

(2) In a state in which the state commission has not established transport and termination rates based on forward-looking economic cost studies, an incumbent LEC shall set interim transport and termination rates either at the default ceilings specified in §51.705(c) or in accordance with a bill-and-keep methodology as defined in §51.713.

* * * * *

(d) If the rates for transport and termination of Non-Access Telecommunications Traffic in an interim arrangement differ from the rates established by a state commission pursuant to §51.705, the state commission shall require carriers to make adjustments to past compensation.

* * *

§51.717 [Removed and Reserved]

30. Remove and reserve §51.717.

31. Add new subpart J to part 51 to read as follows:

Subpart J—Transitional Access Service Pricing

Sec.

51.901 Purpose and Scope of transitional access service pricing rules.

51.903 Definitions.

§ 51.901 Purpose and scope of transitional access service pricing rules.

(a) The purpose of this section is to establish rules governing the transition of intercarrier compensation from a calling-party's-network pays system to a default bill-and-keep methodology. Following the transition, the exchange of traffic between and among service providers will, by default, be governed by bill-and-keep arrangements.

(b) Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] , the provisions of this subpart apply 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.

Note to § 51.901 See FCC 11-161, figure 9 (chart identifying steps in the transition).

§ 51.903 Definitions.

(a) Competitive Local Exchange Carrier. A Competitive Local Exchange Carrier is any local exchange carrier, as defined in §51.5, that is not an incumbent local exchange carrier .

(b) Composite Terminating End Office Access Rate. Composite Terminating End Office Access Rate means terminating End Office Access Service revenue, calculated using demand for a given time period, divided by end office switching minutes for the same time period.

(c) Dedicated Transport Access Service. Dedicated Transport Access Service means originating and terminating transport on circuits dedicated to the use of a single carrier or other customer provided by an incumbent local exchange carrier or any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. Dedicated Transport Access Service rate elements for an incumbent local exchange carrier include the entrance facility rate elements specified in §69.110 of this chapter, the dedicated transport rate elements specified in §69.111 of this chapter, the direct-trunked transport rate elements specified in §69.112 of this chapter, and the intrastate rate elements for functionally equivalent access services. Dedicated Transport Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access services.

(d) End Office Access Service. End Office Access Service means: (1) The switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises;

(2) The routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or facilities used; or

(3) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier. End Office Access Service rate elements for an incumbent local exchange carrier include the local switching rate elements specified in §69.106 of this chapter, the carrier common line rate elements specified in §69.154 of this chapter, and the intrastate rate elements for functionally equivalent access services. 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. End office Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.

Note to paragraph (d): For incumbent local exchange carriers, residual rate elements may include, for example, state Transport Interconnection Charges, Residual Interconnection Charges, and PICCs. For non-incumbent local exchange carriers, residual rate elements may include any functionally equivalent access service.

(e) Fiscal Year 2011. Fiscal Year 2011 means October 1, 2010 through September 30, 2011.

(f) Price Cap Carrier. Price Cap Carrier has the same meaning as that term is defined in §61.3(aa) of this chapter.

(g) Rate-of-Return Carrier. A Rate-of-Return Carrier is any incumbent local exchange carrier not subject to price cap regulation as that term is defined in §61.3(aa) of this chapter, but only with respect to the territory in which it operates as an incumbent local exchange carrier.

(h) Access Reciprocal Compensation. For the purposes of this subpart, Access Reciprocal Compensation means telecommunications traffic exchanged between telecommunications service providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access.

(i) Tandem-Switched Transport Access Service. Tandem-Switched Transport Access Service means:

(1) Tandem switching and common transport between the tandem switch and end office; or

(2) Any functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier via other facilities. Tandem-Switched Transport rate elements for an incumbent local exchange carrier include the rate elements specified in §69.111 of this chapter, except for the dedicated transport rate elements specified in that section, and intrastate rate elements for functionally equivalent service. Tandem Switched Transport Access Service rate elements for a non-incumbent local exchange carrier include any functionally equivalent access service.

(j) Transitional Intrastate Access Service. A Transitional Intrastate Access Service means terminating End Office Access Service that was subject to intrastate access rates as of December 31, 2011; terminating Tandem-Switched Transport Access Service that was subject to intrastate access rates as of December 31, 2011; and originating and terminating Dedicated Transport Access Service that was subject to intrastate access rates as of December 31, 2011.

§ 51.905 Implementation.

(a) The rates set forth in this section are default rates. Notwithstanding any other provision of the Commission's rules, telecommunications carriers may agree to rates different from the default rates.

(b) LECs who are otherwise required to file tariffs are required to tariff rates no higher than the default transitional rates specified by this subpart.

(1) With respect to interstate switched access services governed by this subpart, LECs shall tariff rates for those services in their federal tariffs. Except as expressly superseded below, LECs shall follow the procedures specified in part 61 of this chapter when filing such tariffs.

(2) With respect to Transitional Intrastate Access Services governed by this subpart, LECs shall follow the procedures specified by relevant state law when filing such tariffs, price lists or other instrument (referred to collectively as "tariffs").

(c) Nothing in this section shall be construed to require a carrier to file or maintain a tariff or to amend an existing tariff if it is not otherwise required to do so under applicable law.

§ 51.907 Transition of price cap carrier access charges.

(a) Notwithstanding any other provision of the Commission's rules, on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], 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 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.

(b) Step 1. Effective July 1, 2012, notwithstanding any other provision of the Commission's rules:

(1) Each Price Cap Carrier shall file tariffs, in accordance with §51.905(b)(2), with the appropriate state regulatory authority, that set forth the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service.

(2) Each Price Cap Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology:

(i) Calculate total revenue from Transitional Intrastate Access Service at the carrier's interstate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.

(ii) Calculate total revenue from Transitional Intrastate Access Service at the carrier's intrastate access rates in effect on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], using Fiscal Year 2011 intrastate switched access demand for each rate element.

(iii) Calculate the Step 1 Access Revenue Reduction. The Step 1 Access Revenue Reduction is equal to one-half of the difference between the amount calculated in paragraph (b)(2)(i) of this section and the amount calculated in paragraph (b)(2)(ii) of this section.

(iv) A Price Cap Carrier may elect to establish rates for Transitional Intrastate Access Service using its intrastate access rate structure. Carriers using this option shall establish rates for Transitional Intrastate Access Service such that Transitional Intrastate Access Service revenue at the proposed rates is no greater than Transitional Intrastate Access Service revenue at the intrastate rates in effect as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] less the Step 1 Access Revenue Reduction, using Fiscal Year 2011 demand. Carriers electing to establish rates for Transitional Intrastate Access Service in this manner shall notify the appropriate state regulatory authority of their election in the filing required by §51.907(b)(1).

(v) In the alternative, a Price Cap Carrier may elect to apply its interstate access rate structure and interstate rates to Transitional Intrastate Access Service. In addition to applicable interstate access rates, the carrier may, between July 1, 2012 and July 1, 2013, assess a transitional per-minute charge on Transitional Intrastate Access Service end office switching minutes (previously billed as intrastate access). The transitional per-minute charge shall be no greater than the Step 1 Access Revenue Reduction divided by Fiscal Year 2011 Transitional Intrastate Access Service end office switching minutes. Carriers electing to establish rates for Transitional Intrastate Access Service in this manner shall notify the appropriate state regulatory authority of their election in the filing required by §51.907(b)(1).

(vi) Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions to increase such rates.

(c) Step 2. Effective July 1, 2013, notwithstanding any other provision of the Commission's rules:

(1) Transitional Intrastate Access Service rates shall be no higher than the Price Cap Carrier's interstate access rates. Once the Price Cap Carrier's Transitional Intrastate Access Service rates are equal to its functionally equivalent interstate access rates, they shall be subject to the same rate structure and all subsequent rate and rate structure modifications. Nothing in this section obligates or allows a Price Cap Carrier that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions to increase such rates.

(2) In cases where a Price Cap Carrier does not have intrastate rates that permit it to determine composite intrastate End Office Access Service rates, the carrier shall establish End Office Access Service rates such that the ratio between its composite intrastate End Office Access Service revenues and its total intrastate switched access revenues may not exceed the ratio between its composite interstate End Office Access Service revenues and its total interstate switched access revenues.

AUTHORITY: Secs. 1, 4(i), 4(j), 201–205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403, unless otherwise noted.

SOURCE: 49 FR 40869, Oct. 18, 1984, unless otherwise noted.

Subpart A—General

§ 61.1 Purpose and application.

(a) The purpose of this part is to prescribe the framework for the initial establishment of and subsequent revisions to tariff publications.

(b) Tariff publications filed with the Commission must conform to the rules in this part and with Commission rules regarding the payment of statutory charges (see subpart G of part 1 of this title) and the use of FCC Registration Numbers (FRNs) (see subpart W of part 1 of this title). Failure to comply with any provisions of these rules may be grounds for rejection of the non-complying publication, a determination that it is unlawful or other action. Where an FRN has been omitted from a cover letter or transmittal accompanying a tariff publication filed under this part or the FRN included in that letter is invalid, the submitting carrier or carrier representative shall have ten (10) business days from the date of filing to amend the cover letter or transmittal to include a valid FRN. If within that ten (10) business day period, the carrier or carrier representative amends the cover letter or transmittal to include a valid FRN, that FRN shall be deemed to have been included in the letter as of its original filing date. If, after the expiration of the ten (10) business day period, the cover letter or transmittal has not been amended to include a valid FRN, the related tariff publication may be rejected if it has not yet become effective, declared unlawful if it has become effective, or subject to other action.

(c) No carrier required to file tariffs may provide any interstate or foreign communication service until every tariff publication for such communication service is on file with the Commission and in effect.

[49 FR 40869, Oct. 18, 1984, as amended at 66 FR 47896, Sept. 14, 2001]

order, and to all local exchange carriers, other than average schedule companies, that are affiliated with such carriers; and

(3) On an elective basis, to local exchange carriers, other than those specified in paragraph (a)(2) of this section, that are neither participants in any Association tariff, nor affiliated with any such participants, except that affiliation with average schedule companies shall not bar a carrier from electing price cap regulation provided the carrier is otherwise eligible.

(b) If a telephone company, or any one of a group of affiliated telephone companies, files a price cap tariff in one study area, that telephone company and its affiliates, except its average schedule affiliates, must file price cap tariffs in all their study areas.

(c) Except as provided in paragraph (e) of this section, the following rules in this paragraph (c) apply to telephone companies subject to price cap regulation, as that term is defined in §61.3(ee), which are involved in mergers, acquisitions, or similar transactions.

(1) Any telephone company subject to price cap regulation that is a party to a merger, acquisition, or similar transaction shall continue to be subject to price cap regulation notwithstanding such transaction.

(2) Where a telephone company subject to price cap regulation acquires, is acquired by, merges with, or otherwise becomes affiliated with a telephone company that is not subject to price cap regulation, the latter telephone company shall become subject to price cap regulation no later than one year following the effective date of such merger, acquisition, or similar transaction and shall accordingly file price cap tariffs to be effective no later than that date in accordance with the applicable provisions of this part 61.

(3) Notwithstanding the provisions of §61.41(c)(2), when a telephone company subject to price cap regulation acquires, is acquired by, merges with, or otherwise becomes affiliated with a telephone company that qualifies as an "average schedule" company, the latter company may retain its "average schedule" status or become subject to price cap regulation in accordance with §69.3(i)(3) of this chapter and the requirements referenced in that section.

(d) Except as provided in paragraph (e) of this section, local exchange carriers that become subject to price cap regulation as that term is defined in §61.3(ee) shall not be eligible to withdraw from such regulation.

(e) Notwithstanding the requirements of paragraphs (c) and (d) of this section, a telephone company subject to rate-of-return regulation may return lines acquired from a telephone company subject to price cap regulation to rate-of-return regulation, provided that the acquired lines will not be subject to average schedule settlements, and provided further that the telephone company subject to rate-of-return regulation may not for five years elect price cap regulation for itself, or by any means cause the acquired lines to become subject to price cap regulation.

[55 FR 42382, Oct. 19, 1990; 55 FR 50558, Dec. 7, 1990, as amended at 56 FR 55239, Oct. 25, 1991; 64 FR 46589, Aug. 26, 1999; 65 FR 38695, June 21, 2000; 65 FR 57741, Sept. 26, 2000; 69 FR 25336, May 6, 2004; 76 FR 43213, July 20, 2011]

EFFECTIVE DATE NOTES: 1. At 69 FR 25336, May 6, 2004, §61.41 was amended by revising paragraphs (c) introductory text and (d) and adding a new paragraph (e). These paragraphs contain information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

2. At 76 FR 43213, July 20, 2011, §61.41 was amended by revising paragraph (a)(2). This text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§61.42 Price cap baskets and service categories.

(a)-(c) [Reserved]

(d) Each price cap local exchange carrier shall establish baskets of services as follows:

(1) A basket for the common line, marketing, and certain residual interconnection charge interstate access elements as described in §§69.115, 69.152, 69.153, 69.154, 69.155, 69.156, and 69.157 of this chapter. For purposes of §§61.41 through 61.49, this basket shall be referred to as the "CMT basket."

(2) A basket for traffic sensitive switched interstate access elements.

For purposes of §§ 61.41 through 61.49 of this chapter, this basket shall be referred to as the "traffic-sensitive basket."

(3) A basket for trunking services as described in §§ 69.110, 69.111, 69.112, 69.125(b), 69.129, and 69.155 of this chapter. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the "trunking basket."

(4)(i) To the extent that a price cap local exchange carrier specified in § 61.41(a)(2) or (a)(3) offers interstate interexchange services that are not classified as access services for the purpose of part 69 of this chapter, such exchange carrier shall establish a fourth basket for such services. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the "interexchange basket."

(ii) If a price cap local exchange carrier has implemented interLATA and intraLATA toll dialing parity everywhere it provides local exchange services at the holding company level, that price cap carrier may file a tariff revision to remove corridor and interstate intraLATA toll services from its interexchange basket.

(5) A basket for special access services as described in § 69.114 of this chapter.

(e)(1) The traffic sensitive switched interstate access basket shall contain such services as the Commission shall permit or require, including the following service categories:

(i) Local switching as described in § 69.106(f) of this chapter;

(ii) Information, as described in § 69.109 of this chapter;

(iii) Data base access services;

(iv) Billing name and address, as described in § 69.128 of this chapter;

(v) Local switching trunk ports, as described in § 69.106(f)(1) of this chapter; and

(vi) Signalling transfer point port termination, as described in § 69.125(c) of this chapter.

(2) The trunking basket shall contain such switched transport as the Commission shall permit or require, including the following service categories and subcategories:

(i) Voice grade entrance facilities, voice grade direct-trunked transport, voice grade dedicated signalling transport,

(ii) High capacity flat-rated transport, including the following service subcategories:

(A) DS1 entrance facilities, DS1 direct-trunked transport, DS1 dedicated signalling transport, and

(B) DS3 entrance facilities, DS3 direct-trunked transport, DS3 dedicated signalling transport.

(iii) Tandem-switched transport, as described in § 69.111 of this chapter; and

(iv) Signalling for tandem switching, as described in § 69.129 of this chapter.

(3) The special access basket shall contain special access services as the Commission shall permit or require, including the following service categories and subcategories:

(i) Voice grade special access, WATS special access, metallic special access, and telegraph special access services;

(ii) Audio and video services;

(iii) High capacity special access, and DDS services, including the following service subcategories:

(A) DS1 special access services; and

(B) DS3 special access services;

(iv) Wideband data and wideband analog services.

(f) Each price cap local exchange carrier shall exclude from its price cap baskets such services or portions of such services as the Commission has designated or may hereafter designate by order.

(g) New services, other than those within the scope of paragraph (f) of this section, must be included in the affected basket at the first annual price cap tariff filing following completion of the base period in which they are introduced. To the extent that such new services are permitted or required to be included in new or existing service categories within the assigned basket, they shall be so included at the first annual price cap tariff filing following completion of the base period in which they are introduced.

[54 FR 19842, May 8, 1989]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 61.42, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

EFFECTIVE DATE NOTE: At 76 FR 43214, July 20, 2011, § 61.42 was amended by revising paragraphs (d) introductory text, (d)(4), (e)(1) introductory text, and (f). This text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 61.43 Annual price cap filings required.

Price cap local exchange carriers shall submit annual price cap tariff filings that propose rates for the upcoming tariff year, that make appropriate adjustments to their PCI, API, and SBI values pursuant to §§ 61.45 through 61.47, and that incorporate new services into the PCI, API, or SBI calculations pursuant to §§ 61.45(g), 61.46(b), and 61.47(b) and (c). Price cap local exchange carriers may propose rate, PCI, or other tariff changes more often than annually, consistent with the requirements of § 61.59.

[76 FR 43214, July 20, 2011]

EFFECTIVE DATE NOTE: At 76 FR 43214, July 20, 2011, § 61.43 was revised. This text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 61.44 [Reserved]

§ 61.45 Adjustments to the PCI for Local Exchange Carriers.

(a) Price cap local exchange carriers shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year exogenous cost changes.

(b)(1)(i) Adjustments to price cap local exchange carrier PCIs, in those carriers' annual access tariff filings, the traffic sensitive basket described in § 61.42(d)(2), the trunking basket described in § 61.42(d)(3), the special access basket described in § 61.42(d)(5) and the Interexchange Basket described in § 61.42(d)(4)(i), shall be made pursuant to the following formula:

"$PCI_t = PCI_{t-1}[1+w[GDP—PI—X] + Z/R]$."

$PCI_{t-1} = PCI_{t-1}[1+w[GDP-PI-X] + Z/R]$

Where the terms in the equation are described:

GDP-PI = For annual filings only, the percentage change in the GDP-PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year. For all other filings, the value is zero.

X = For the CMT, traffic sensitive, and trunking baskets, for annual filings only, the factor is set at the level prescribed in paragraphs (b)(1)(ii) and (iii) of this section. For the interexchange basket, for annual filings only, the factor is set at the level prescribed in paragraph (b)(1)(v) of this section. For the special access basket, for annual filings only, the factor is set at the level prescribed in paragraph (b)(1)(iv) of this section. For all other filings, the value is zero.

g = For annual filings for the CMT basket only, the ratio of minutes of use per access line during the base period, to minutes of use per access line during the previous base period, all minus 1.

Z = The dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations.

Targeted Reduction = the actual possible dollar value of the (GDP-PI—X) reductions that will be targeted to the ATS Charge pursuant to § 61.45(i)(3). The reductions calculated by applying the (GDP-PI—X) portion of the formula to the CCL element within the CMT basket will contain the "g" component, as defined above.

R = Base period quantities for each rate element "I", multiplied by the price for each rate element "I" at the time the PCI was updated to PCI_{t-1}.

w = R + Z, all divided by R (used for the traffic sensitive, trunking, and special access baskets).

w_{ix} = R—(access rate in effect at the time the PCI was updated to PCI_{t-1} * base period demand) + Z, all divided by R.

PCI_t = The new PCI value.

PCI_{t-1} = the immediately preceding PCI value.

(ii) The X value applicable to the baskets specified in §§ 61.42(d)(1), (d)(2), and (d)(3), shall be 6.5%, to the extent necessary to reduce a tariff entity's ATS charge to its Target Rate as set forth in § 61.3(qq). Once any price cap local exchange carrier tariff entity's ATS Charge is equal to the Target Rate as set forth in § 61.3(qq) for the first time (the former NYNEX telephone companies may be treated as a separate tariff entity), then, except as provided in paragraph (b)(1)(iii) of this section, X is

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 Joint Motion for Clarification and Expedited Relief of Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and objects to the Joint Motion of Freedom Ring Communications, LLC d/b/a BayRing Communications ("BayRing") and AT&T Corp. ("AT&T," and together "AT&T/BayRing.") In support, FairPoint states as follows:

I. INTRODUCTION

In its Order of Notice ("Order") dated September 23, 2009, the Commission found that in regard to FairPoint's recent tariff filing, "an evidentiary hearing is necessary to address the issues raised by FairPoint's August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers' September 4 filings."[1] Accordingly, the Order established a procedural schedule in which FairPoint could present its case, albeit in a compressed timeframe.[2]

However, on October 2, 2009, AT&T/BayRing filed a pleading styled as a motion for

[1] Order at 3.

[2] FairPoint notes that it has filed this same day a Motion for Rehearing with respect to the Commission's Order Nisi (Order No. 25,002) dated August, 11, 2009 (the "Order Nisi"). FairPoint incorporates that pleading by reference as if fully set forth herein and reiterates that the Order Nisi is unlawful and unreasonable.

"clarification" that is in effect a petition to *amend* the Commission's Order of Notice to exclude certain issues from consideration. Rather than consider all of the issues that the parties have raised in the current proceeding, AT&T/BayRing have requested that the revisions to the CCL rate regulations in Section 5, to which they do not object, become effective as a matter of law under RSA 378:6,IV, while the effectiveness of the revised Interconnection Charge in Section 6, to which they do object, be subject to investigation and delayed effectiveness.

FairPoint's September 10th filing, however, is not a collection of individual changes, but a single integrated revision that can only be evaluated as a whole. FairPoint respectively objects to any procedure that evaluates any aspect of the tariff filing independently of the rest of the filing. Moreover, as established in FairPoint's Motion for Rehearing, FairPoint has conditionally withdrawn the tariff filing of September 10, 2009. Thus, there is no need for the Commission to consider the motion for clarification as said motion is moot.

II. THE TARIFF REVISIONS ARE A REVENUE NEUTRAL, INTEGRATED WHOLE.

Citing no legal authority, precedent or statement of fact, AT&T/BayRing assert that "[t]he compliance tariff changes needed to effectuate the requirements of the Commission's August 11, 2009 order are separable and distinct from the proposed rate increase issue and therefore should not be tied to or further delayed by the procedural schedule necessitated by FairPoint's rate filing."[3] This is incorrect as a matter of fact and law.

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'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

[3] Joint Motion at 3.

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."[4] 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." 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.[5] Consequently, there can be no doubt of FairPoint's intention that the revised tariff pages encompass a single revision of interdependent prices and terms. Any suggestion to the contrary by AT&T/BayRing simply is not correct.

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 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 . . . ."[6] Consequently, the new CCL rate regulations can not be divorced from the interconnection charge and evaluated separately.

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[4] FairPoint Comments at 6.
[5] Skrivan Testimony at 5:3-10.
[6] Tariff Transmittal § 6.2.1.E.2.

III. APPLICABLE LAW DOES NOT PERMIT THE COMMISSION TO ACT ON LESS THAN THE ENTIRE TARIFF FILING.

Although FairPoint does not necessarily agree, the Commission has indicated that the September 10th tariff filing is subject to some provision of RSA 378:6.[7] Regardless of which provision of RSA 378:6 may apply to this proceeding (and FairPoint contends that none of them applies), the Commission can only act on the entire filing. Section 378:6,I provides that the Commission may suspend a "rate schedule", 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."[8] This suspension applies to entire "rate schedules," not simply rates or provisions. Thus, if RSA 378:6,I were to apply here (and FairPoint's position is that it does not), the rate schedule to be considered for suspension would be the entire filing, not a portion of it.

To the extent that RSA 328:6,IV governs this proceeding, FairPoint has withdrawn the tariff filing, and the issue is moot. To the extent that this Docket continues, FairPoint has requested that the tariff pages be treated as illustrative, and AT&T/BayRing can argue their positions during such further proceedings.

IV. GRANTING THE MOTION WOULD AMOUNT TO FIXING OF FAIRPOINT'S RATES WITHOUT AN OPPORTUNITY TO BE HEARD.

Section 9.1 of the Staff Settlement Agreement in the FairPoint-Verizon asset transfer proceeding provides that the Commission will not seek a decrease in FairPoint's wholesale rates for three years following the acquisition.[9] Furthermore, state law provides that the Commission

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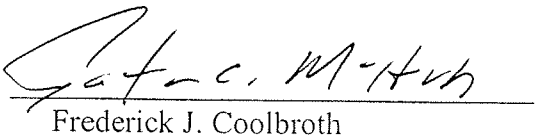
[7] Order at 4.
[8] Puc 1602.04 (emphasis supplied).
[9] DT 07-011, *Petition of Verizon et al. for Authority to Transfer Assets*; Order No. 24,823 Approving Settlement Agreement with Conditions at 31 (Feb. 25, 2008) ("Settlement Order") ("For a period of three years following the Closing Date, FairPoint shall continue providing the

may not fix the rate of a public utility except "after a hearing,"[10] and it must conduct the proceeding in a manner that does not violate FairPoint's contract or due process rights.[11] Granting the AT&T/BayRing motion, even on a temporary basis, would effectively be setting a rate of zero for a significant component of FairPoint's access service. As FairPoint noted in its Motion for Rehearing, any reduction of wholesale rates potentially implicates several provisions of the Settlement Agreement. FairPoint submits such an analysis of the Settlement Agreement can not be accomplished via a motion for clarification and it should be noted that AT&T/BayRing's motion fails to address the issue.

WHEREFORE, FairPoint respectfully requests that this Commission DENY the Joint Motion for Clarification and Expedited Relief.

Respectfully submitted,
NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC, D/B/A FAIRPOINT COMMUNICATIONS-NNE
By Its Attorneys,
DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION

Dated: October 12, 2009

By: 

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wholesale services offered by Verizon as of the Closing Date. FairPoint will not seek to increase wholesale rates to take effect during the three years following the Closing Date. *The Commission shall not seek to decrease such rates for effect during the three-year period* following the Closing Date.") (emphasis supplied).

[10] RSA 378:7.

[11] *Richter v. Mountain Springs Water Co., Inc.*, 122 N.H. 850, 851 (1982).

CERTIFICATE OF SERVICE

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

Dated: October 12, 2009

By: Patrick C. McHugh

Patrick C. McHugh, Esq.