STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

In the Matter of	)	
	)	
FREEDOM RING COMMUNICATIONS, LLC	)	DT 06-067
D/B/A BAYRING COMMUNICATIONS	)	
	)	
Complaint Against Verizon New Hampshire	)	
Re: Access Charges	)	

OBJECTION TO MOTION FOR REHEARING

Global Crossing Telecommunications, Inc. ("Global Crossing") hereby objects to FairPoint's October 12, 2009 Motion for Rehearing in the above-captioned proceeding ("Motion"). In its Motion, FairPoint asks for rehearing with respect to the Commission's August 11, 2009 Order *Nisi* Directing FairPoint to Revise Tariff ("Order *Nisi*")[1] and September 23, 2009 Order Scheduling Hearing ("Scheduling Order")[2] in this proceeding. The Motion also attempts to "conditionally withdraw" FairPoint's September 10, 2009 revisions to Tariff 85 filed pursuant to the Order *Nisi*. As explained further below, FairPoint's Motion is procedurally infirm and entirely without merit. The Commission should therefore deny the Motion.

I. INTRODUCTION AND BACKGROUND

Following an extensive hearing in Phase I of this proceeding, the Commission issued an Order Interpreting Tariff ("CCL Order") on March 21, 2008 concluding that carrier common line ("CCL") charges should not be imposed on switched access traffic that does not traverse common lines belonging to Verizon.[3] Following that decision, FairPoint acquired Verizon's

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1 Order No. 25,002 (Aug. 11, 2009) ("Order *Nisi*").

2 Order No. 25,016 (Sept. 23, 2009) ("Scheduling Order").

3 Order No. 24,837 at 27 (Mar. 21, 2008) ("CCL Order").

local telephone operations in New Hampshire pursuant to the Commission's February 25, 2008 Order Approving Settlement Agreement with Conditions ("Merger Order"), which conditionally granted the Verizon-FairPoint merger application in DT 07-011.[4] The Merger Order was issued after an extensive hearing that addressed, in part, significant issues concerning what effect the proposed merger would have on the operations of competitive local exchange carriers ("CLECs") in New Hampshire.

More than a year after the CCL Order and the Merger Order were issued, the New Hampshire Supreme Court ruled on May 7, 2009 that Tariff 85, strictly interpreted in its then-current form, allowed the imposition of a CCL charge even on calls that did not traverse FairPoint common lines.[5] Nevertheless, the court also held that whether such a charge should be allowed going forward is a matter for the Commission to decide.[6] Based on that ruling, the Commission decided in the August 11, 2009 Order *Nisi* that FairPoint should modify its tariff prospectively to ensure the CCL charge is not imposed on calls that do not go over FairPoint common lines.[7] The Order *Nisi* also afforded FairPoint an opportunity to comment on this conclusion and for other interested parties to file responses.[8]

In its Comments and Conditional Request for Hearing dated August 28, 2009 ("Comments"), FairPoint argued that prospective tariff changes were outside the scope of this

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4 Order No. 24,823 (Feb. 25, 2008) ("Merger Order").

5 *Appeal of Verizon New England, Inc.*, 972 A.2d 996 (N.H. 2009).

6 *Id*. at 1001 ("If the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court.").

7 Order *Nisi* at 2.

8 *Id*. at 3.

proceeding,[9] that the CCL charge was not instituted to recover only loop costs[10] and that changes to the CCL without increases to other rate elements to ensure "revenue neutrality" would be "confiscatory" and a violation of due process.[11] FairPoint said it would make the Order *Nisi*'s modifications to Tariff 85 but would, at the same time, increase other rate elements to make up for what FairPoint characterized as a "shortfall" in revenues that would result from the changes to the CCL charge.[12] According to FairPoint, such a shortfall would contravene a requirement in the Merger Order — and the Settlement Agreement the Merger Order adopts among the Commission's Staff, FairPoint and Verizon — that the Commission not seek a decrease in FairPoint's "wholesale rates" for a period of three years following the closing date of FairPoint's acquisition of Verizon's local telephone operations.[13] FairPoint also requested that the Commission conduct a hearing in the event it did not intend for the Order *Nisi* to allow FairPoint to increase other rates to make up for the shortfall in CCL charges.[14]

AT&T, BayRing and Global Crossing filed responses to FairPoint's comments on September 4, 2009 ("Responses").[15] All three companies opposed FairPoint's plan to increase certain rate elements in response to the Order *Nisi*. All three companies also pointed out that the Supreme Court's decision does not prohibit the Commission from ordering prospective tariff

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9 Comments and Conditional Request for Hearing of FairPoint (Aug. 28, 2009) ("FairPoint Comments") at 2.

10 *Id*. at 2-3.

11 *Id*. at 4-6.

12 *Id*. at 6.

13 *Id*.

14 *Id*.

15 *See* Joint Response of BayRing Communications and AT&T to FairPoint's Comments (Sept. 4, 2009) ("AT&T/BayRing Reponse"); Response of Global Crossing Telecommunications, Inc. (Sept. 3, 2009) ("Global Crossing Response").

changes;[16] that the Commission had held, after a hearing in Phase I of this proceeding, that the CCL charge should not apply to traffic that does not traverse FairPoint common lines;[17] that prospective tariff modifications are not outside the scope of this proceeding;[18] and that the Order *Nisi* does not amount to a "confiscation" or otherwise violate due process.[19] AT&T and BayRing also quoted from extensive testimony in Phase I that directly rebuts FairPoint's assertion that the CCL charge was designed to recover joint and common costs.[20] And Global Crossing pointed out that while the Commission may not seek a decrease in rates for unbundled network elements ("UNEs") and *special* access as part of the commitments reflected in the Merger Order and the Settlement Agreement, rates for *switched* access — which are at issue in this proceeding — are not part of those commitments.[21]

On September 10, 2009, FairPoint filed revised tariff pages that changed the imposition of the CCL charge in accordance with the Order *Nisi* but that also increased the "Interconnection Charge" in Tariff 85 from $0.000000 to $0.010164 per minute.[22] On September 23, the Commission issued the Scheduling Order, which established the schedule for a hearing to address FairPoint's tariff changes and issues raised in the comments concerning the Order *Nisi*. In accordance with that schedule, FairPoint filed written testimony on September 28[23] and

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16 AT&T/BayRing Response at 6; Global Crossing Response at 3.

17 AT&T/BayRing Response at 3-4; Global Crossing Response at 2-3.

18 AT&T/BayRing Response at 7; Global Crossing Response at 2-3 n.8.

19 AT&T/BayRing Response at 5-6; Global Crossing Response at 3-4.

20 AT&T/BayRing Response at 3-4.

21 Global Crossing Response at 4.

22 *See* Scheduling Order at 3.

23 *See* Prefiled Testimony of Michael T. Skrivan on Behalf of FairPoint Communications-NNE (Sept. 28, 2009).

responded to data requests from AT&T and One Communications on October 12.[24] Separately, on October 2 AT&T and BayRing filed a Joint Motion for Clarification and Expedited Relief ("Joint Motion") asking the Commission to issue an order clarifying that the hearing procedures set forth in the Scheduling Order apply only to FairPoint's new Interconnection Charge and that the changes concerning the CCL charge are effective October 10, 2009 as a matter of law.[25] FairPoint filed an objection to the Joint Motion on October 12, stating that its CCL-related changes and new Interconnection Charge should both be the subject of the hearing set forth in the Scheduling Order.[26]

Also on October 12, FairPoint filed the Motion for Rehearing that is the subject of the instant objection. In that Motion, FairPoint asks for "rehearing" with respect to the Order *Nisi* and Scheduling Order for all of the reasons FairPoint objected to the Order *Nisi* in its comments of September 4 — that "prospective tariff revisions were excluded from this proceeding";[27] the New Hampshire Supreme Court found Tariff 85's current language to support application of the CCL charge to all switched access traffic;[28] and requiring FairPoint to modify its CCL charge without raising other rate elements violates the commitments in the Merger Order and Settlement Agreement.[29] FairPoint argues that the CCL charge modifications required by the Order *Nisi* are not "clarifications," and thus must follow the notice and comment procedures set forth in RSA

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24 *See* Letter of Patrick C. McHugh, Counsel for FairPoint, to Kimberly J. Gold, Counsel for AT&T (Oct. 12, 2009); Letter of Patrick C. McHugh, Counsel for FairPoint, to Gregory M. Kennan, Counsel for One Communications (Oct. 12, 2009).

25 Joint Motion for Clarification and Expedited Relief (Oct. 2, 2009) ("AT&T/BayRing Joint Motion").

26 *See* Objection to Joint Motion for Clarification and Expedited Relief of FairPoint (Oct. 12, 2009).

27 FairPoint Motion at 4-5.

28 *Id*. at 5-6.

29 *Id*. at 7-8.

378:7.[30] FairPoint also argues that the schedule set forth in the Scheduling Order is "unjust and unreasonable" because it is "highly expedited" and because certain data requests propounded by AT&T were "onerous."[31] Finally, in its Motion FairPoint attempts to withdraw its tariff filing "[t]o the extent that the Commission is treating the tariff page filing as having been voluntarily made pursuant to RSA 378:6, IV" as opposed to a required filing made pursuant to the Commission's ratemaking authority under RSA 378:7.[32]

As explained further below, the Motion is procedurally flawed with respect to the Order *Nisi*, and there is no merit to any of FairPoint's substantive arguments concerning the required changes to its CCL charge. In any event, the issues raised by FairPoint can be addressed as part of the hearing proceeding set forth in the Scheduling Order. As that order makes clear, the Commission has designated a hearing in response to the concerns raised by FairPoint in its Comments.[33] But apparently FairPoint now wishes that it had not requested a hearing in its Comments and that it had simply ignored the Order *Nisi* and not filed any tariff revisions. For the sake of procedural consistency, fairness to all the parties in this proceeding, and the Commission's perfectly valid determination that the CCL charge should not be imposed on traffic that does not traverse FairPoint's common lines, the Commission should deny FairPoint's Motion and move forward with the hearing pursuant to the Scheduling Order.

II. FAIRPOINT'S MOTION IS PROCEDURALLY FLAWED.

RSA 541:3 requires motions for rehearing to be filed "[w]ithin 30 days after any order or decision has been made by the commission …." The Commission issued the Order *Nisi* on

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30 *Id*. at 5.

31 *Id*. at 8-9.

32 *Id*. at 9.

33 Scheduling Order at 3 ("We find that an evidentiary hearing is necessary to address the issues raised by FairPoint's August 28 and September 10 filings ….").

August 11, 2009. FairPoint filed its Motion sixty-two days later on October 12. The Motion was therefore filed thirty-two days late, and the Commission should deny the Motion on that basis alone. Moreover, the Motion contains another procedural flaw in that it requests a "rehearing" for an order (the Order *Nisi*) on which the Commission is already about to hold a hearing. It is at best odd and at worst an abuse of Commission process for FairPoint to ask for a "rehearing" on the Order *Nisi* based on issues previously identified in FairPoint's Comments, when the Commission has already agreed to hold a hearing based on those issues. This demonstrates the inherent procedural and conceptual flaws in the Motion and why it needs to be denied.

III. FAIRPOINT'S ARGUMENTS FOR REHEARING WITH RESPECT TO THE ORDER *NISI* ARE WITHOUT MERIT.

As described above, FairPoint's Motion requests a rehearing of the Order *Nisi* because: (1) prospective tariff revisions should not be part of this proceeding; (2) the change to FairPoint's CCL charge required by the Order *Nisi* is not a clarification but rather an amendment to Tariff 85; (3) the Order *Nisi* contravenes the New Hampshire Supreme Court's decision concerning the CCL Order; and (4) modification of the CCL charge without making up FairPoint's "revenue shortfall" through increases to other rate elements violates the merger-related commitments in the Merger Order. Each of these issues is addressed below.

A. The Order *Nisi*'s Prospective Tariff Revisions May Legitimately Be Required as Part of this Proceeding.

In both its Motion and its Comments, FairPoint argues that the Commission removed prospective tariff changes from the scope of this proceeding in an order dated November 29, 2006.[34] According to FairPoint, the Commission's decision in the Order *Nisi* to require

[34] *See* FairPoint Comments at 2; FairPoint Motion at 4-5.

prospective tariff changes deprives FairPoint of a hearing on the matter.[35] But as stated in the Order *Nisi*, the Commission already held a hearing in Phase I of this proceeding on whether there should be prospective tariff modifications and concluded that there should be.[36] The fact that the Commission made a statement in 2006 that prospective tariff modifications would be put off to another proceeding does not change the fact that a hearing was in fact held on that issue. Moreover, as AT&T and BayRing correctly noted in their Response, under RSA 365:28 "the Commission may amend its prior procedural orders without a hearing."[37] Thus, even if a hearing on the subject of prospective tariff modifications had not already been held in Phase I, the Order *Nisi* and Scheduling Order are more than adequate to amend the 2006 order concerning the inclusion of prospective modifications in this proceeding and to provide FairPoint with notice, an opportunity for comment and a hearing on the matter.

B. Whether the Tariff Change Required by the Order *Nisi* Is a "Clarification" or an "Amendment" is Irrelevant, and the Required Notice and Opportunity for Comment and a Hearing Has Been Provided.

In the Order *Nisi*, the Commission requires FairPoint "to modify its tariff to clarify that FairPoint shall charge CCL only when a FairPoint common line is used in the provision of switched access services."[38] In its Motion, FairPoint takes issue with the Commission's characterization of the required tariff modification as a "clarification" and argues instead that the modification is really an "amendment."[39] Apparently FairPoint believes that the Commission used the word "clarify" in order to get out from under the requirement in RSA 378:7 that the

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35 FairPoint Motion at 5.

36 *See* Order *Nisi* at 2; *infra* note 42 and accompanying text.

37 AT&T/BayRing Response at 7.

38 Order *Nisi* at 2.

39 FairPoint Motion at 5.

Commission hold a hearing when it sets rates. But the Commission is not setting rates here; it is merely requiring the modification of CCL language in Tariff 85 that the Commission has found to be inconsistent with the manner in which the CCL should be applied. Even if the Commission were setting rates under RSA 378:7, the notice and hearing procedures required in that provision have been complied with in Phase I of this proceeding (during which a hearing was held) and in the Order *Nisi* (on which a hearing will be held). There are simply no procedural infirmities with the required tariff modifications, regardless of whether they are called "clarifications" or "amendments."

C. The Supreme Court's Ruling Does Not Preclude the Order *Nisi*'s Prospective Tariff Modifications.

FairPoint argues, in both its Motion and Comments, that because the New Hampshire Supreme Court ruled that the current language of Tariff 85 allows a CCL charge on all calls, the Commission cannot now order prospective tariff changes.[40] The Supreme Court's decision, however, only addressed what the tariff, *as currently written*, allows; it did not in any way prohibit the Commission from ordering prospective changes to the tariff based on the Commission's regulatory authority.[41] The record from Phase I of this proceeding clearly addresses the issue of what costs should be recovered through the CCL charge and in what manner. Following the hearing in Phase I, the Commission specifically concluded as follows:

> Verizon … argues … 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

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40 *See* FairPoint Comments at 4; FairPoint Motion at 5-6.

41 *See Appeal of Verizon New England*, 972 A.2d at 1001 ("If the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court.").

> 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.[42]

The Supreme Court's ruling did not change this conclusion; it merely ruled that the language of Tariff 85, strictly interpreted, allowed the CCL charge to be assessed on all switched access traffic. That the Commission has now ordered prospective changes to Tariff 85 based on its ruling from the CCL Order is not at all inconsistent with the Supreme Court's decision.

D. Nothing Requires That the Order *Nisi*'s Prospective Tariff Modifications Be "Revenue Neutral" or that FairPoint Continue to Receive Revenue from its Unreasonable CCL Charges.

In its Comments and Motion, FairPoint argues that Section 9.1 of the Settlement Agreement concerning the Verizon-FairPoint merger, as adopted by the Merger Order in DT 07-011, does not allow the Commission to require a change in FairPoint's CCL rate structure.[43] This argument fails for at least four different reasons.

First, the Order *Nisi* does not require that FairPoint decrease its CCL rate or any other rate. It merely requires that FairPoint make it clear in its tariff that the CCL will not be charged on calls that do not traverse FairPoint common lines. The CCL rate itself remains the same. Nothing in the Merger Order or Settlement Agreement requires that the Commission refrain from changing the manner in which certain charges are assessed. Nor do they require that such rate structure changes be "revenue neutral." The Settlement Agreement clearly states that "[t]he Commission shall not seek to decrease [wholesale] *rates* to take effect during the three-year period following the Closing Date."[44] There is nothing in this language or the language of the Merger Order prohibiting the Commission from changing the manner in which rates are charged or about ensuring "revenue neutrality" in the event such changes are ordered.

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42 CCL Order at 31.

43 FairPoint Comments at 6; FairPoint Motion at 7-8.

44 Settlement Agreement § 9.1.

Second, the Settlement Agreement exempts any ruling in this proceeding from its requirements. Section 4.h of the Stipulated Settlement Terms document, which was entered into by FairPoint and certain carriers and adopted by the Settlement Agreement, says: "Nothwithstanding anything herein to the contrary, FairPoint shall have the same rights and obligations as Verizon in connection with and arising out of any final order which may be issued within NHPUC Docket 06-067." The Order *Nisi*, then, is not subject to the requirements of the Settlement Agreement.

Third, even if the Settlement Agreement does apply to the Order *Nisi* and does require revenue neutrality, which it does not, the Order *Nisi*'s changes to the CCL charge are in fact revenue neutral. The Commission determined in Phase I of this proceeding that the CCL charge was designed not to recover joint and common costs but loop costs.[45] Assessing the charge on calls that do not traverse those loops is therefore unjust and unreasonable, and the Commission has authority to ensure the charge is not assessed in that manner going forward. Since assuming Verizon's local telephone operations in 2008, FairPoint has been on notice that the Commission had made this ruling and that it would not be entitled to revenues from such CCL charges. Without a legitimate expectation to receive revenues from unreasonably assessed CCL charges, FairPoint cannot claim that a change to its tariff requiring CCL charges to be assessed reasonably is not "revenue neutral."

Fourth, even if FairPoint were correct that the Order *Nisi*'s changes represent a rate decrease under the Settlement Agreement or that the Settlement Agreement requires revenue neutrality and the Order *Nisi*'s changes are not revenue neutral, the Settlement Agreement does not actually apply to the CCL charge at issue here because it is a *switched* access charge and not

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[45] *See supra* note 42 and accompanying text.

special access charge. As the Merger Order makes clear, the Settlement Agreement requires FairPoint to cap, and other interested parties not to seek a decrease in, "UNE rates and *special* access rates,"[46] not *switched* access rates. This is consistent with the purpose behind having wholesale rate–related conditions on the Verizon-FairPoint merger, which was to ensure the status quo with respect to local competition in New Hampshire.[47] Switched access services are used for the termination of interexchange traffic, not local traffic. Special access services, on the other hand, are often used by CLECs to obtain connectivity between their point of presence in a particular market and the premises of their customers. In this way, special access can be a wholesale input in the provision of local services in the same way that UNEs are. So in attempting to ensure a predictable set of wholesale rates and services for CLECs following the Verizon-FairPoint merger, the Merger Order and Settlement Agreement required a rate freeze for "UNE rates and special access rates." There would have been no analogous reason to require a freeze in switched access rates because switched access is not an input used in the provision of local services.

The Settlement Agreement confirms this. In Section 9.3 it says that "[t]he Signatories to this Agreement agree to the adoption herein of the Stipulated Settlement Terms agreed to by and among FairPoint and certain CLECs, attached hereto as Exhibit 2." Section 5.a of the Stipulated Settlement Terms says that FairPoint "will not advocate any increase in any of its tariffed rates for interstate or intrastate tariffed *special* access circuits to be effective within the three years following the Merger closing date." Section 5.c goes on to state that "[n]o CLEC will advocate any decrease in any of Telco's interstate or intrastate tariffed *special* access rates to be effective

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46 Merger Order at 31 (emphasis added).

47 *See id.* at 72-78 (discussing competition in the context of wholesale services provided to CLECs, not interexchange carriers).

within three years following the Merger closing date." Switched access is not mentioned. While Section 4 of the Stipulated Settlement Terms does require FairPoint to "cap existing rates under wholesale tariffs," it refers for illustrative purposes only to Tariff 84 (interconnection and UNEs for CLECs) and Tariff 86 (resale for CLECs), not to Tariff 85 (access services). Section 5 deals specifically with access services and mentions only special access. If access services were governed by Section 4 as part of FairPoint's "wholesale tariffs," it would not be necessary to have a separate section dealing with access services in Section 5. Thus, switched access is not governed by the Settlement Agreement.[48]

For all of the foregoing reasons, the Merger Order and Settlement Agreement do not in any way prohibit the Order *Nisi*'s required changes to Tariff 85.

IV. THERE SHOULD BE NO REHEARING WITH RESPECT TO THE SCHEDULING ORDER.

In addition to its complaints about the Order *Nisi*, FairPoint's Motion also asks for a rehearing concerning the Scheduling Order. This request is also without merit. In its Comments FairPoint asked that the Commission conduct a hearing, and it is now doing so. In light of the fact that the Commission concluded in early 2008 that the CCL charge should not be imposed on traffic that does not traverse Verizon/FairPoint common lines, and that it is now late 2009, the Commission has established a reasonable schedule to provide for written testimony, discovery and a hearing on the issues in the Order *Nisi* and FairPoint's Comments. Since the release of the Scheduling Order, FairPoint has submitted written testimony and responded to data requests from AT&T and One Communications. FairPoint has also found the time to oppose the

[48] This does not mean, of course, that FairPoint is free to raise its switched access rates or that it is entitled to guaranteed revenues through an increase in its Interconnection Charge. As AT&T and BayRing point out in their Response, the Commission has ruled that "it is inappropriate to set access rates to guarantee revenues at any particular level." AT&T/BayRing Response at 2-3 (citing 74 NH PUC 283, 287 (1993)).

AT&T/BayRing Joint Motion as well as file the Motion for Rehearing that is the subject of this objection. There is therefore no reason for the Commission to change the hearing schedule, and FairPoint's Motion should be denied.

V. FAIRPOINT SHOULD NOT BE PERMITTED TO WITHDRAW ITS REVISIONS TO TARIFF 85.

In its Motion, FairPoint says it is withdrawing the revised tariff pages it filed on September 10, 2009, "[t]o the extent that the Commission is treating the tariff page filing as having been voluntarily made pursuant to RSA 378:6, IV …."[49] While FairPoint does not say why it is doing this, it appears to be concerned that under RSA 378:6, IV, the revisions pertaining to the CCL charge would take effect as of October 10, 2009, and FairPoint's increased Interconnection Charge would be subject to a delay while the Commission investigates the charge pursuant to RSA 378:6, I(a). FairPoint also apparently believes that if it can argue that RSA 378:7 governs the tariff filing, "due process" will require an extended hearing procedure without any of the revisions taking effect until a final Commission order on the subject. This simply is not the case.

Any and all due process requirements were met as a result of: (1) the hearing held in Phase I of this proceeding, based upon which the Commission determined that it is unreasonable to impose a CCL charge on traffic that does not traverse Verizon/FairPoint common lines; and (2) the hearing that will be held on November 4 concerning FairPoint's tariff filings and the issues raised by the Order *Nisi*. Due process requires nothing further, whether RSA 378:7 applies or not. Additionally, FairPoint has not provided any basis for its belief that RSA 378:6, IV, does not apply here. FairPoint says only that its tariff revisions were not filed voluntarily, but nothing in 378:6, IV says it applies only if a tariff filing is made voluntarily. Therefore, the

[49] FairPoint Motion at 9.

Commission should not permit FairPoint to withdraw its tariff filing simply because it was not made voluntarily. Rather, as AT&T and BayRing request in their Joint Motion, the Commission should investigate FairPoint's increased Interconnection Charge pursuant to RSA 378:6, I(a), while confirming that the revisions required by the Order *Nisi*, because they are not a rate increase, took effect on October 10, 2009, pursuant to RSA 378:6, IV.

VI. CONCLUSION

For all of the foregoing reasons, the Commission should deny FairPoint's Motion for Rehearing and grant such other relief as it deems necessary.

Respectfully submitted,

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