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 TO CERTIFY**
**INTERLOCUTORY TRANSFER STATEMENT**

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") and moves for interlocutory transfer with respect to certain issues raised in Commission Order No. 25,219 (the "Supplemental Order") pursuant to RSA 365:20 and New Hampshire Supreme Court Rule 9. In support hereof, FairPoint states as follows:

## I. INTRODUCTION AND BACKGROUND

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

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

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

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

> We thus will conduct the proceeding in two phases, first determining the proper interpretation of the relevant tariff or tariffs and then deciding to what extent, if any, reparations are due. . . . We further find that the consideration of prospective modifications to Verizon's tariff will be removed from the present proceeding and designated for resolution in a separate proceeding to be initiated at a later date if necessary.

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

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

On September 10, 2009, the Order *Nisi* became effective in accordance with its terms. Also on that date, in compliance with the Order *Nisi*, FairPoint filed revised, revenue-neutral tariff pages removing CCL charges from certain switched access traffic and replacing the lost revenue by implementing changes to the "Interconnection Charge" switched access rate element contained in Tariff 85. On September 23, 2009, the Commission issued a Scheduling Order reiterating that "when the use of Verizon's common line does not involve a Verizon end user, the CCL charge may not be imposed."[3] Essentially, the Commission yet again sought to impose the CCL Order on FairPoint despite being reversed by the Supreme Court.

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

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

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[3] Scheduling Order at 1.

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

As further support, the Commission explained that "[t]hat conclusion was not addressed *or overturned* by the Supreme Court."[5]

The Commission's declaration, that this conclusion now controls the case and that FairPoint is estopped from litigating this issue, is highly prejudicial to FairPoint, since the CCL charge is expressly designed to be a contribution element and any inquiry leading to a ruling on its justness and reasonableness can only be conducted on that basis. FairPoint disagrees with this aspect of the Supplemental Order on the grounds that 1) it has been overturned and vacated by *Verizon*, 2) it is merely dicta and carries no legal weight and 3) it is not supported in the record. As a procedural issue involving FairPoint's right to be heard, it represents a question of law that qualifies for transfer to the Supreme Court.

## II. DISCUSSION

RSA 365:20 provides that "[t]he commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." The Supreme Court has developed a two-prong test to determine whether to accept an interlocutory transfer of a question of law from and administrative agency. Supreme Court Rule 9 ("Interlocutory Transfer without Ruling") provides that the first prong is whether a substantial basis exists for a difference of opinion on a material issue. The second prong is whether interlocutory review may: (1) materially advance the termination or clarify

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[4] Supplemental Order at 7.
[5] Supplemental Order at 7 (emphasis supplied).

further proceedings in the litigation; (2) protect a party from substantial or irreparable harm; or (3) present the opportunity to decide, modify, or clarify an issue of general importance in the administration of justice.[6] An interlocutory appeal is justified if any of the subparts of the second prong is satisfied. This case satisfies all three requirements, as well as the first prong.

### A. There is a "Substantial Basis" for a Difference of Opinion Regarding the Lawfulness of the Commission's Finding that the CCL Charge is not a Contribution Element.

FairPoint disagrees with the Commission that the contribution finding remains valid in light of *Verizon.* In *Verizon*, the Supreme Court conducted a *de novo* review of the Commission's interpretation of Tariff 85 and reversed the CCL Order based on the plain language of Tariff 85 and did "not look beyond it to determine its intent."[7] Furthermore, this reversal was not partial or conditional; the Court flatly ruled that "we reverse the PUC's decision."[8]

Courts in most states follow the general rule that the effect of reversal, without express direction from an appellate court regarding the scope, is "to nullify the judgment below and place the parties in the same position in which they were before judgment."[9] In addition, courts tend to view the reversal as vacating the underlying judgment: "The reversal of a judgment means that the judgment is vacated, and the case it put in the same posture in which it was before the judgment was entered."[10]

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[6] *See* Supreme Court Rule 9(1)(d).
[7] In re *Verizon New England, Inc.*, 158 N.H. at 697.
[8] *Id.* at 1001.
[9] *Sugarloaf Mills Limited Partnership of Georgia v. Record Town, Inc.*, 701 S.E.2d 881, 883 (Ga. App. 2010) (emphasis omitted); *see Hurley v. Heart Physicians, P.C.*, 3 A.3d 892, 901 (Conn. 2010) (quotation omitted) ("[I]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered.").
[10] *Murray v. Murray*, 856 P.2d 463, 467 (Alaska 1993) (quotation omitted).

This rule applies not only to legal rulings made below, but also to findings of fact. "To 'reverse' a judgment means to 'overthrow, vacate, set aside, make void, annul, repeal, or revoke it."[11] "The mandate of this court ordering a reversal of a judgment without other direction nullifies the judgment, findings of facts, and conclusions of law, and leaves the case standing as if no judgment or decree had ever been entered."[12]

These principles find support in New Hampshire jurisprudence. In *Corliss v. Mary Hitchcock Memorial Hospital*, 127 N.H. 225, 228 (1985), the Supreme Court held, without citation to other authority, that "[t]he reversal of a judgment n.o.v. [notwithstanding the verdict] revitalizes the verdict of the jury." In effect, Corliss restored the parties to the status quo prior to any ruling by the Court. By analytical extension, therefore, the doctrine should apply to final dispositions from any tribunal that are subsequently reversed on appeal. Furthermore, New Hampshire's application of the "law-of-the-case" doctrine does not hold that prior rulings of a trial court which are not appealed are somehow binding on the trial court after an appeal to the Supreme Court.[13] Rather, the law-of-the-case doctrine prevents re-litigation only of issues *actually decided* in prior *appeals*.[14] Thus, FairPoint asserts that to the extent that the issue whether the CCL charge is a contribution element was not both presented to *and decided* by the

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

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

[13] *See Redlon Co. v. Corporation*, 91 N.H. 502, 506 (1941) (trial court may reconsider issue until final judgment)

[14] *See, e.g., Taylor v. Nutting*, 133 N.H. 451, 454-57 (1990).

Supreme Court, the law of the case doctrine is inapposite and the Commission's finding is invalid.

All of this presumes, of course, that this determination was a true "finding" and not *dicta*, *i.e.* a statement made by a court "that is not essential to the decision."[15] FairPoint disagrees with the Commission that the contribution finding was a valid of finding of fact. The purpose of the proceeding was to determine if the CCL was being lawfully applied in accordance with the tariff. Pursuant to the Commission's November 29, 2006 Procedural Order, it was expressly *not* about whether any prospective modifications to the tariffs are appropriate, which would inquiry an inquiry grounded in whether the rate is just and reasonable.[16]

Verizon provided testimony about contribution, not as an issue to be determined, but only as evidence that the rate was not strictly designed to recover just the cost of the common line. New Hampshire case law provides that "[i]f issues are determined but the judgment is not dependent upon the determinations, re-litigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta . . . ."[17] In the CCL Order the Commission expressly stated that "we make our findings based on the language within the four corners of the Tariff," not on issues involving contribution to joint and common costs. FairPoint asserts that findings on this issue are no longer binding in this proceeding. Accordingly, a difference of opinion exists in regard to this issue.

Finally, FairPoint asserts that at a basic level there is no support in the record for the Commission's finding that the CCL charge is not a contribution element. Verizon presented

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[15] Black's Law Dictionary (9th ed. 2009).
[16] RSA 378:7. ". . . the commission shall determine the *just and reasonable* or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed . . . .". (emphasis supplied).
[17] *Tyler v. Hannaford Brothers*, 161 N.H. 242, 247 (2010).

uncontroverted evidence by the *actual* Verizon employee who was on the scene and managed the development of the original CCL charge, and who testified under oath that the CCL charge was designed as a contribution element, *i.e.,* as a means of recovering its joint and common costs generally, including loop costs.[18] Other parties provided testimony purporting to rebut Verizon's testimony, but this consisted only of policy arguments,[19] analysis of the proceedings in DT 90-002,[20] or observations that the Commission had never expressly acknowledged that the CCL charge was a contribution element.[21] FairPoint asserts that none of testimony in the record rises to the level of fact, and so it does not support the Commission's finding in the CCL Order, which did not set out the facts in support of that finding. The Commission may believe as a matter of policy that FairPoint's CCL charge *should* not be a contribution element, but this does not mean that it can declare by fiat that it *is* not a contribution element. If the Commission is going to establish a policy that CCL may not be a contribution element, FairPoint believes that it is entitled to be heard on that issue. Accordingly, there is a difference of opinion on this issue.

### B. This Motion Satisfies All Elements of the Second Prong of the Supreme Court's Rule 9 Analysis.

This motion satisfies all elements of the second prong of the Supreme Court's Rule 9 analysis. First, an interlocutory transfer will materially advance the termination or clarify further proceedings of the litigation. The issue of whether the CCL charge is a contribution element is central to FairPoint's case in establishing that its proposed tariff revisions are just and reasonable. If FairPoint is denied the ability to present this argument, it must appeal any final ruling by the Commission in this proceeding, *favorable or not*, in order that this contribution

[18] Verizon Direct, March 9, 2007 at 22:11-20.
[19] *See* AT&T Direct, March 9, 2007 at 22:7-24:2.
[20] *See* AT&T Rebuttal, April 20, 2007 at 5:11-11:6.
[21] *See* BayRing Rebuttal, April 20, 2007 at 10:20.

finding not be *res judicata* for any other proceeding or complaint on its tariff. In the event that the Supreme Court were to grant such an appeal of the Commission's ruling, it would be necessary for the parties to develop a substantially new record, which would create delay. Grant of this transfer will ensure that all of the justiciable issues are before the Commission from the beginning of the proceeding and will contribute to the efficient and timely administration of justice.

Second, an interlocutory transfer may clarify an issue of general importance in the administration of justice. Ever since the issuance of the Order *Nisi*, there has been contention regarding the scope of the Supreme Court's *Verizon* decision and the mandate that issued from it. Grant of this transfer will clarify the extent to which findings of fact and conclusions of law are valid following *de novo* review and subsequent reversal of a Commission order on narrow grounds.

Finally, deciding this procedural issue early in the proceeding will reduce the likelihood that all parties will incur the expense of burdensome delay and repeated efforts through several more years of litigating this Docket.

WHEREFORE, FairPoint respectfully requests that the Commission:

a. Sign the attached Interlocutory Transfer Statement thereby certifying and transferring the identified issues to the New Hampshire Supreme Court;

b. Return the original, signed Interlocutory Transfer Statement to FairPoint's counsel so that it may be filed with the Supreme Court in accordance with Supreme Court Rule 9;

c. Stay all proceedings in this matter pending a ruling on the interlocutory transfer;

d. Grant such other and further relief as the Commission deems just and equitable.

Respectfully submitted,

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

By its Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: May 24, 2011

By: _____

Harry N. Malone
Robert C. Dewhirst
111 Amherst Street
Manchester, NH 03101
(603) 695-8532
hmalone@devinemillimet.com

Patrick C. McHugh
Vice President & Assistant General Counsel
FairPoint Communications, Inc.
900 Elm Street
Manchester, NH 03101
(207) 535-4190
pmchugh@fairpoint.com

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Certify Interlocutory Transfer Statement was forwarded this day to the parties by electronic mail.

Dated: May 24, 2011

By: _____
Harry N. Malone, Esq.