**STATE OF NEW HAMPSHIRE**
**BEFORE THE**
**PUBLIC UTILITIES COMMISSION**

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| Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire re: Access Charges | DT 06-067 |

## COMPETITIVE CARRIERS' MOTION FOR RECONSIDERATION OF COMMISSION ORDER NO. 25,319

Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc. (a Level 3 company) (collectively, the "Competitive Carriers"), respectfully move that the New Hampshire Public Utilities Commission ("Commission") reconsider certain aspects of Order No. 25,319 issued on January 20, 2012 ("January 20 Order"). In particular, the Competitive Carriers seek reconsideration of the portion of the January 20 Order concluding that the revisions of FairPoint's tariff[1] concerning the application of the carrier common line ("CCL") charge went into effect on January 21, 2012. For the reasons set forth below, the Commission should reconsider that decision and conclude that the tariff revisions went into effect on October 10, 2009.

[1] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE ("FairPoint") took the place of Verizon New Hampshire ("Verizon") in this docket after it purchased Verizon's New Hampshire franchise and network.

## INTRODUCTION AND BACKGROUND[2]

This docket began on April 28, 2006, when BayRing filed a Petition requesting that the Commission investigate Verizon's practice of billing CCL charges for calls that did not involve a Verizon end user or a Verizon-provided local loop. On June 23, 2006, the Commission issued an Order of Notice announcing its determination that BayRing's complaint warranted further investigation and stating that, if the challenged interpretation of the CCL tariff were found reasonable, it would investigate whether prospective modifications were warranted. Over the next 21 months, the matter was fully litigated, including discovery, Staff-led technical sessions, extensive evidentiary submissions, a multi-day hearing, and post-hearing briefs from multiple parties.

On February 25, 2008, the Commission issued Order No. 24,823 in Docket No. DT 07-011, approving Verizon's sale of its network and franchise to FairPoint.[3] In that order, the Commission expressly approved, and made a condition of the sale, FairPoint's agreement "to honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis."[4] As part of its transaction with Verizon, FairPoint adopted Verizon's New Hampshire tariffs.

On March 21, 2008, the Commission entered Order No. 24,837 in this docket, finding that the CCL rate element was intended to recover the cost of the local loop (or common line) and determining that Verizon's imposition of CCL charges on calls not involving a Verizon end user or Verizon-provided local loop was "impermissible." Order No. 24,837 ("March 2008 Order") at 31, 32. The Commission ordered Verizon to cease billing CCL charges for such calls. March 2008 Order at 33. Accordingly, Verizon's practice of billing CCL charges for calls not

[2] The Competitive Carriers note that the background provided herein is not intended to be comprehensive, but instead highlights those events relevant to the Commission's consideration of the current motion.
[3] *In re Verizon New England et al. – Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823 (Feb. 25, 2009) ("07-011 Order").
[4] 07-011 Order at 75.

involving a Verizon end user or Verizon-provided local loop was precluded as of March 21, 2008.[5] The Commission also found that Verizon owed refunds to customers who had been billed the inappropriate CCL charges and that the extent of those refunds would be determined in a later phase of the case. March 2008 Order at 32-33.

On April 21, 2008, FairPoint filed a Motion for Rehearing and Petition to Intervene. In its Petition to Intervene, FairPoint agreed to take the record in the docket "as is." On August 8, 2008, the Commission granted FairPoint's Petition to Intervene but denied rehearing of the March 2008 Order.

FairPoint subsequently appealed to the New Hampshire Supreme Court. On May 7, 2009, the Court issued its order, which was confined to the issue of the Commission's interpretation of FairPoint's tariff. *Appeal of Verizon New England, Inc.*, 158 N.H. 693 (2009). The Court disagreed with the Commission's interpretation of whether the then-existing tariff allowed FairPoint to apply CCL charges when no FairPoint common line was involved. The Court stated, however, that there was no bar to the Commission amending the CCL tariff through the regulatory process. *Id.* at 700.

On August 11, 2009, the Commission issued Order No. 25,002 on a *nisi* basis ("Order *Nisi*"). The Commission ordered FairPoint to make specific modifications to the language of the CCL tariff to clarify that it would "charge CCL only when a FairPoint common line is used in the provision of switched access services." Order *Nisi* at 2. The Commission required FairPoint to file the revised tariff pages within 30 days. *Id.* at 3.

On August 28, 2009, FairPoint filed Comments and a Conditional Request for Hearing ("Conditional Request"), raising a variety of challenges to the Order *Nisi*. FairPoint filed the

[5] FairPoint's ability to impose the CCL charge on calls that do terminate over a FairPoint local loop has never been at issue in this docket.

revised CCL tariff pages, in compliance with the Order *Nisi*, on September 10, 2009, accompanied by a voluntary submission of other unrelated tariff pages through which it sought to increase, from zero to $0.010164 per minute, a long-dormant Interconnection Charge.[6] FairPoint's cover letter, as well as the tariff pages themselves, specified an effective date of October 10, 2009. *See* Sept. 10, 2009 Letter of Kevin M. Shea and attachments ("FairPoint Tariff Filing").

The Commission then issued Order No. 25,016 on September 23, 2009, establishing a procedural schedule for investigation, submission of testimony, and a hearing on FairPoint's proposed Interconnection Charge. On October 2, 2009, BayRing and AT&T filed a Joint Motion for Clarification and Expedited Relief ("Motion for Clarification") requesting that the CCL tariff changes be implemented immediately due to published reports of FairPoint's impending bankruptcy which, if true, could further delay resolution of the docket. On October 12, 2009, FairPoint filed a Motion for Rehearing on the Order *Nisi* and for Conditional Withdrawal of Tariff ("Rehearing/Withdrawal Motion").[7] On October 16, 2009, the Commission issued a letter suspending the procedural schedule established in the September 23 Order while it considered the various motions pending before it.

FairPoint filed for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code on October 26, 2009. *In re FairPoint Communications, Inc. et al.*, Case No. 09-16335 (S.D.N.Y.). Shortly thereafter, in response to FairPoint's request, the Commission issued a General Scheduling Order staying, for several weeks, the filing requirements and deadlines in numerous dockets, including this one, to allow FairPoint to concentrate on its bankruptcy restructuring efforts. *See* Nov. 10, 2009 Letter of Debra A. Howland. This docket remained

[6] The submission of these additional tariff changes was not mandated, authorized, or invited by the Commission.
[7] FairPoint sought to withdraw the tariff pages it filed on September 10, 2009, and have them treated as illustrative. *See* FairPoint Rehearing/Withdrawal Motion at 9.

inactive while the bankruptcy proceeded. FairPoint emerged from bankruptcy on January 24, 2011.

More than four months later, on May 4, 2011, in response to requests to reactivate the docket, the Commission issued a Procedural Order and Supplemental Order of Notice, in which it denied BayRing and AT&T's Motion for Clarification and partially granted and partially denied FairPoint's Conditional Request and its Rehearing/Withdrawal Motion. Order No. 25,219 (May 4, 2011) ("May 2011 Order"). The Commission stated that it would not re-litigate the purpose or propriety of the CCL charge and reiterated its finding from the March 2008 Order that the CCL charge recovered a portion of the common line charge and thus was appropriately charged only when a common line was used. May 2011 Order at 7.

The Competitive Carriers filed a joint motion for rehearing, reconsideration and clarification relative to the May 2011 Order on June 3, 2011. FairPoint filed an objection to that motion on June 10, 2011.

The Commission ruled on the Competitive Carriers' motion on October 28, 2011, partially granting it. Order No. 25,283 (Oct. 28, 2011) ("October 2011 Order"). In particular, the Commission amended the May 2011 Order and rejected FairPoint's attempted withdrawal of the revised CCL tariff pages it had submitted to comply with the Order *Nisi*. October 2011 Order at 35.[8] The Commission also found that these tariff revisions were "suspended in application and effect" and subject to further proceedings. *Id.* at 31, 35.

The Competitive Carriers then moved on November 10, 2011, for an expedited hearing on the issue of the effective date of the CCL tariff revisions. FairPoint's response to the motion agreed that the CCL tariff issue involved only questions of "tariff interpretation and law" and

[8] The Commission, however, affirmed its earlier decision allowing FairPoint to withdraw its revised tariff pages related to the Interconnection Charge and have those pages treated as illustrative. October 2011 Order at 35.

that the effective date of the CCL tariff revisions was ripe for adjudication by the Commission. FairPoint Response to Motion for Hearing at 3 (filed Nov. 21, 2011). It also stated that no hearing was needed on the CCL issue and that the Commission should move straight to briefing on the issue. *Id.* at 2.

As a result, the Commission issued an order on November 30, 2011, in which it concluded that no hearing was needed on the CCL issue. Order No. 25,295 (Nov. 30, 2011) at 4. It also directed the parties to brief two questions:

> 1) Do the changes to FairPoint's CCL tariff as proposed by FairPoint on September 10, 2009, comply with the Commission's orders requiring FairPoint to amend the CCL provisions in its tariff?; and
>
> 2) Presuming the changes identified in question 1 comply, or can be made to comply, with the Commission's orders, what should be the effective date of the amended language in FairPoint's switched access tariff relating to the CCL?

*Id.* In the October 2011 Order, the Commission had provided additional context for the second question, stating that it would hear arguments on whether, "in light of the unique circumstances of FairPoint's bankruptcy," the CCL tariff 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." October 2011 Order at 2.

On December 19, 2011, AT&T, BayRing, FairPoint, and Sprint submitted briefs responding to the Commission's two questions.[9] On January 20, 2012, the Commission issued Order No. 25,319, which is the subject of the Competitive Carriers' current motion. In that order, the Commission found that the revisions to FairPoint's CCL tariff, which were originally submitted on September 10, 2009, were sufficient to comply with the Commission's prior

[9] To the extent that the current motion refers to any of these briefs, it will cite them in the following format: "BayRing Brief at __" or "AT&T Brief at __."

directive (in the Order *Nisi*) to amend the tariff. January 20 Order at 9-10. The Commission also concluded that those revised tariff pages would take effect on January 21, 2012. *Id.* at 19.[10]

## STANDARD FOR REHEARING

The Commission may grant a motion for rehearing, under RSA 541:3, if an appropriate reason for rehearing is stated in a party's motion. The purpose of rehearing is "to direct 'attention to matters said to have been overlooked or mistakenly conceived in the original decision...'" *Dumais v. State*, 118 N.H. 309, 311 (1978) (citation omitted). The Commission also may grant rehearing if a party demonstrates that the agency's order is unlawful and unreasonable. *See Hollis Telephone, Inc. et al.*, Order Denying Motion for Stay, Rehearing or Reconsideration, Order No. 25,088, at 14 (Apr. 2, 2010).

## ARGUMENT

The Competitive Carriers seek rehearing of the January 20 Order on several grounds. First, the Order is unlawful and unreasonable because it misapplies the decision of the New Hampshire Supreme Court in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) ("*Pennichuck*"), and ignores other relevant precedent in determining the effective date for the revisions to FairPoint's CCL tariff. Second, the Order's conclusion that the Commission should not exercise equitable authority to set October 10, 2009 as the effective date of the CCL tariff revisions is unreasonable and an unlawful abuse of discretion.

[10] The January 20 Order also correctly rejected FairPoint's assertion that the revisions to the CCL tariff could only be implemented simultaneously with FairPoint's desired increase to the Interconnection Charge. January 20 Order at 13-16. The Commission subsequently granted the Competitive Carriers' motion to dismiss the Interconnection Charge portion of the case. *See* Order No. 25,327 (Feb. 3, 2012) at 17.

## A. The Order Misapplies or Ignores Relevant Precedent and Thus Is Unlawful and Unreasonable.

The Competitive Carriers argued in their briefs that the Commission had broad statutory authority to deal with matters within its jurisdiction and thus had the power to establish October 10, 2009 as the effective date for the changes to FairPoint's CCL tariff. *See, e.g.*, AT&T Brief at 4-5; BayRing Brief at 5. The January 20 Order rejects the notion of such authority, relying on the prohibition on retroactive ratemaking set forth in *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) ("*Pennichuck*"). *See* January 20 Order at 11-12. The order misapplies *Pennichuck* and overlooks another New Hampshire Supreme Court case[11] involving a more analogous situation. As a result, this portion of the Order should be reconsidered.

A close examination of *Pennichuck* shows that the New Hampshire Supreme Court's concerns about retroactive ratemaking are not applicable here. In *Pennichuck*, the Court considered the propriety of a Commission order that denied portions of a utility's request for temporary rates while it also evaluated the utility's request for a permanent rate increase. 120 N.H. at 563. The utility had sought approval for temporary rates that would be effective for bills issued on or after January 31, 1979, but the Commission allowed the temporary rates to apply only to bills issued on or after April 30, 1979, the date of its order on the temporary rate issue. *Id.* at 564. The Court found that the Commission could not have lawfully established the January 31 effective date sought by the utility because the use of that date would have allowed customers to be billed at the higher, temporary rates for a time period before the utility had sought any rate increase. *Id.* at 565.[12]

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[11] That case is *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980).

[12] The utility billed its customers on a staggered quarterly basis, and it filed its request for a permanent rate increase on December 29, 1978. *See* 120 N.H. at 563. As a result, if the higher temporary rate applied to bills issued on or after January 31, 1979, some customers would be charged a higher rate for water they had already used (e.g., in November or December 1979) prior to the date of the rate increase request. *See id.*

The Court found that utility customers "have a right to rely on the rates which are in effect at the time that they consume the services provided by the utility, *at least until such time as the utility applies for a change*." *Id.* at 566 (emphasis added). The Court also found that allowing a rate increase to take effect as of a date before the utility even had a rate change request on file would be "retroactively altering the law and the established contractual agreement between the parties." *Id.*

The situation with FairPoint's CCL tariff changes differs substantially from the tariff change at issue in *Pennichuck* for at least two reasons. Either is sufficient to distinguish it from *Pennichuck.*

First, under the reasoning in *Pennichuck*, a retroactive tariff change is proper as long as it does not become effective as of a date prior to the date that "the utility applies for a change." 120 N.H. at 566. This allows customers to have notice that a different rate may be imposed. Indeed, after the Court remanded the case, the Commission described two key holdings of *Pennichuck* as follows: 1) "no utility can collect increased rates for service rendered prior to the filing of a permanent rate request"; and 2) "rates are a contracting obligation as well as a legal obligation between the consumer and the utility and as such notice is important if either is attempting an alteration of that relationship." *In re Pennichuck Water Works*, DR 79-3, Sixth Supplemental Order No. 14,681, 66 NH PUC 30, 31 (Jan. 23, 1981).

In the instant docket, FairPoint filed the revised CCL tariff pages on September 10, 2009, and expressly indicated on the tariff pages and in the cover letter accompanying them that the changes were to become effective on October 10, 2009. That date is exactly the effective date advocated by the Competitive Carriers, and it is a month after FairPoint's submission of the revised tariff pages. Thus, an effective date of October 10, 2009 for tariff changes filed a month

earlier does not conflict with *Pennichuck*.[13] Moreover, to the extent that *Pennichuck*'s concern about retroactive ratemaking was motivated by lack of notice to an affected party, the facts in *Pennichuck* are very different than those in this docket. Given that FairPoint made the tariff filing, it was certainly aware that the tariff revisions would alter the terms of its relationship with its existing switched access customers. In addition, the customers affected by the tariff change, i.e., customers such as the Competitive Carriers, were most certainly aware of the tariff filing as they had been seeking and anxiously awaiting the tariff change eliminating the unfair CCL charges. Thus, the notice/due process issues underpinning the *Pennichuck* decision are not present here.

Second, it is clear that *Pennichuck*'s concern about retroactive ratemaking applies only to lawful contracts or tariffs. The decision repeatedly relies on an earlier New Hampshire Supreme Court decision addressing the retroactive application of legislative acts: *Geldhof v. Penwood Associates*, 119 N.H. 754 (1979). *See Pennichuck*, 120 N.H. at 565, 566 (discussing *Geldhof*). In *Geldhof*, the Court rejected the argument that a newly-enacted statute requiring landlords to pay interest on tenant security deposits was applicable to a lease entered into prior to the passage of the statute. 119 N.H. at 754. The Court affirmed the principle that, "when corporations or citizens *lawfully contract* to exchange rights and obligations, they may have confidence that those rights and obligations will not subsequently be disturbed." *Id.* at 755 (emphasis added).

Under New Hampshire law, the Commission has the obligation to ensure that a utility charges only just and reasonable rates. RSA 378:7. The Commission first found in March 2008 that the then-existing CCL tariff constituted an unjust and unreasonable rate (*see* March 2008

[13] The Commission's 1981 supplemental order in *Pennichuck* – issued nearly two years after the utility filed its request for temporary rates – made those rates effective for all services rendered by the utility after January 31, 1979. 66 NH PUC at 31. That is, the temporary rates ultimately applied to the two-year period preceding the order approving those rates. This is comparable to the Competitive Carriers' request here.

Order at 31), it reiterated that finding in the Order *Nisi* (Order *Nisi* at 2), and it has repeated it multiple times subsequently. *See* May 2011 Order at 7; October 2011 Order at 16, 17; January 20 Order at 11. A tariff imposing rates that have been held to be unjust and unreasonable rates cannot also be a lawful tariff, and FairPoint cannot be allowed to continue to impose charges under such a tariff. It thus would not be improper "retroactive ratemaking" for the Commission to put a stop to FairPoint's unjust and unreasonable billing practices as of the earliest date proposed by the parties: i.e., October 10, 2009.

Moreover, the Order's reliance on *Pennichuck* is baffling, because it fails to mention another New Hampshire Supreme Court decision – *Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980) ("*Granite State*") – that involves a more analogous procedural situation and that the Commission relied on earlier in this docket. The Competitive Carriers that submitted briefs on the CCL effective date issue in December 2011 each relied on *Granite State* in those briefs. *See* BayRing Brief at 5; AT&T Brief at 4-5; Sprint Brief at 4-5.

*Granite State* involved the second time that the Court had reviewed the Commission's actions in that particular rate case. The Commission originally issued an order in May 1978, granting the utility a $913,912 annual increase in its permanent rates. 120 N.H. at 538. On appeal from that order, the Supreme Court held that the Commission's inclusion of certain items in the utility's rate base was improper and remanded the matter to the Commission to deduct those items from the rate base and establish a new rate. *Legislative Utility Consumers' Council v. Granite State Electric Co.*, 119 N.H. 359 (1979). On remand, the Commission approved new rates embodying the rate reduction ordered by the Court, and it ordered the utility to refund charges collected under the improper, higher rates that the Commission had previously approved. 120 N.H. at 538.

In the second appeal, the Court upheld the Commission's ability to order the refund, finding that the higher rates established by the May 1978 order did not become final at that time because the appeal process had yet to play out. *Id.* As a result, the situation did not involve the possibility of retroactive ratemaking. *Id.* at 539. The Court also stated that the Commission's "broad statutory power" gave it the authority to order a refund of "revenues collected under rates authorized and approved by the PUC but later found ... to have been collected under improper rates." *Id.* at 539, 540.[14] Comparable circumstances exist here.

Indeed, in the March 2008 Order, the Commission relied on *Granite State* as support for the proposition that "refunds are an appropriate means for providing restitution for improperly applied charges" and described the case as holding that the Commission had "inherent power to award restitution if one has been unjustly enriched at the expense of another." March 2008 Order at 32. The Commission also found that Verizon would owe restitution to customers who had been billed CCL charges inappropriately and that the extent of such restitution would be determined in a later phase of the case. *Id.* at 32-33.

The January 20 order makes, at best, oblique reference to *Granite State* through its refusal "to unwind an unjust enrichment" that occurred here. January 20 Order at 11. The order certainly does not explain why the Commission relied on *Granite State* as applicable precedent requiring Verizon to refund improper CCL charges, but then failed to acknowledge it in the January 20 Order as authority to remedy FairPoint's imposition of the same inappropriate charge. The Competitive Carriers are merely seeking in 2012 what the Commission promised in 2008.

[14] *Cf. Clapp v. Goffstown School District*, 159 N.H. 206, 211 (2009) (stating that recovery of unjust enrichment may be available to contracting parties "where the contract was breached, rescinded, or otherwise made invalid").

Rehearing of this portion of the January 20 Order thus is appropriate for two reasons. The order's reliance on *Pennichuck* is "mistakenly conceived," and the order appears to have "overlooked" the applicability of *Granite State*. *Dumais v. State*, 118 N.H. 309, 311 (1978).

**B. <u>The Commission's Refusal to Exercise Its Equitable Authority Is Unreasonable.</u>**

The Competitive Carriers argued in their briefs that the Commission, in several prior cases, had exercised what could be viewed as equitable powers to craft an appropriate remedy where it had determined that a utility had been charging improper rates. *See* AT&T Brief at 4-5; BayRing Brief at 4-5; Sprint Brief at 4.[15] The January 20 Order, however, found that any use of equitable authority to set October 10, 2009, as the effective date of the CCL tariff revisions was inappropriate for two reasons: 1) FairPoint was entitled to ask for a hearing on its tariff revisions (and it did so); and 2) the Commission's decision on whether those tariff revisions were compliant was delayed by circumstances beyond its control. January 20 Order at 12. Neither reason is convincing, and thus this aspect of the order is unreasonable. Moreover, the order appears to be based, in part, on a misconstruction of record facts regarding the delays in this docket.

Shortly before FairPoint submitted the required changes to its CCL tariff in September 2009, it also made a conditional request for hearing. *See* FairPoint Conditional Request (filed Aug. 28, 2009). FairPoint then revealed, more than two years later, that it actually did not want a hearing. Although FairPoint asserted in November 2011 that the CCL issue involved only questions of "tariff interpretation and law" with no need for fact finding (FairPoint Response to Motion for Hearing at 3 (filed Nov. 21, 2011)), it has provided no explanation of what had

[15] The New Hampshire Supreme Court approved the Commission's actions in each case. *See Appeal of Granite State Electric Co.*, 120 N.H. 536 (1980); *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394 (1961).

changed since it requested a hearing in August 2009.[16] The Commission cautions FairPoint elsewhere in the January 20 Order about "intentionally trying to delay a decision through procedural maneuvers" (January 20 Order at 8), but that appears to be precisely what happened with FairPoint's "first we want a hearing; now we don't" position regarding the CCL tariff revisions. FairPoint's procedural maneuvering has prejudiced the Competitive Carriers by inappropriately subjecting them to improper CCL charges over a prolonged period and by delaying a final resolution of this issue. It is unreasonable for the Commission to allow FairPoint to profit from its prejudicial procedural posturing.

The conclusion in the January 20 Order that any decision on the CCL tariff revisions was delayed due to "circumstances beyond the Commission's control" (January 20 Order at 12) also, respectfully, does not bear the weight of scrutiny. Although the Commission obviously had no control over FairPoint's decision to file for bankruptcy, the procedural history of this docket shows that the Commission's actions or inactions otherwise controlled the pace of this docket.

FairPoint filed its revised CCL tariff pages on September 10, 2009. *See* FairPoint Tariff Filing. Those revisions involved only two pages of the tariff and together comprised – at most – the equivalent of three sentences, or one-third of a page of text. *See id.* (Tariff No. 85, Section 5, first revision of pp. 1 and 4).[17] The revisions also altered only the three tariff sections that the Order *Nisi* specifically directed FairPoint to revise. *Compare id. with* Order *Nisi* at 2. Nonetheless, despite urging from BayRing and AT&T in early October 2009[18] to implement the

[16] It is doubtful that FairPoint even wanted a hearing on the specific issue of whether its CCL tariff revisions complied with the Order *Nisi*. FairPoint presumably believed its tariff changes were compliant when it filed them, and it asked for a hearing only if the Commission did not intend to allow it to make up for lost CCL revenue through other means. *See* FairPoint Conditional Request at 6.

[17] FairPoint subsequently renumbered its tariff, so the relevant pages are now designated as the First Revision of pages 1 and 4 of Section 5 of Tariff No. 3. *See* January 20 Order at 19.

[18] BayRing and AT&T sought an expedited decision from the Commission in a motion dated October 2, 2009 regarding the effectiveness of the CCL tariff revisions. *See* Joint Motion for Clarification and Expedited Relief.

CCL tariff changes immediately due to published reports of FairPoint's impending bankruptcy (which the carriers indicated might delay resolution of this docket), the Commission failed to review these three sentences for compliance with the instruction in the Order *Nisi* over the next several weeks.

Instead of reviewing the CCL tariff changes, on October 16, 2009, the Commission suspended the procedural schedule in the case to consider the parties' various motions regarding the effect of the Order *Nisi*. *See* Oct. 16, 2009 Letter of Debra A. Howland. Shortly thereafter, on October 26, 2009, FairPoint filed for bankruptcy, and the Commission issued a General Scheduling Order, at FairPoint's request, staying various dockets involving FairPoint (including this docket) for a period of several weeks. *See* Nov. 10, 2009 Letter of Debra A. Howland. However, the Commission did not revisit the limited stay of this docket before FairPoint emerged from bankruptcy 14 months later, in January 2011.

Although the existence of the bankruptcy may have placed some bounds on the Commission's freedom to conduct this docket, the Commission certainly had the authority to proceed with the case, including review of the CCL tariff revisions. *See* 11 U.S.C. § 362(b)(4) (creating exception to bankruptcy stay for proceedings to enforce regulatory powers of government unit); *In re Public Service Co.*, 98 B.R. 120, 126 (Bankr. D.N.H. 1989) (allowing Commission to continue "ordinary and routine regulatory oversight and supervision" of bankrupt utility, including certain ratemaking functions). The January 20 Order's statement about the circumstances causing delay in this docket thus appears to overlook certain aspects of the record and should therefore be reconsidered. *See Dumais*, *supra*, 118 N.H. at 311.

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Since that motion expressly stated that the two carriers accepted the revisions as effectuating the Commission's intent in the Order *Nisi* (*id.* at 3 n.2), the Commission simply would have had to look over the revisions and concur.

All the while that any decision on the CCL tariff was on the back burner, FairPoint continued to bill its access customers, including the Competitive Carriers, charges under a tariff that the Commission had repeatedly found to be unjust and unreasonable, and that it had ordered FairPoint to revise. Although the Competitive Carriers had no control over the delay in the Commission's consideration of the CCL tariff changes, they are the ones who the Commission apparently expects to pay the price for more than two years of regulatory delay, since FairPoint either has been paid or expects to be paid for all the unlawful CCL charges it has billed the Competitive Carriers during this period.[19] This result is unreasonable and therefore the January 20 Order should be reconsidered. In addition, as explained below, the order should be reconsidered because it conflicts with applicable case law.

The New Hampshire Supreme Court found that the Commission acted unreasonably and abused its discretion when it required a utility to wait more than two years before considering its request for a rate increase. *Appeal of Gas Service, Inc.*, 121 N.H. 602, 603 (1981) ("*Gas Service*"). It is equally unreasonable and an abuse of discretion for the Commission to subject a utility's customers, such as the Competitive Carriers, to a comparable waiting period for rate relief they have been seeking for several years, by finding that the CCL tariff revisions can only go into effect more than two years after the Commission mandated that the revisions be made. In light of the holding in *Gas Service,* the Commission should reconsider this aspect of the January 20 Order.

[19] According to FairPoint, its 2010 revenue from the subset of CCL charges at issue in this case was approximately $2.9 million. Supplemental Testimony of Michael T. Skrivan at 11 (dated Nov. 3, 2011, but filed Dec. 22, 2011). To the extent that any of the Competitive Carriers have not paid the improper CCL charges due to the pendency of this docket, it is likely that FairPoint may claim that the carrier is also liable for late payment charges of approximately 18 percent annually under FairPoint's tariff. See N.H.P.U.C. Tariff No. 3, page 1, Section 4.1.2(B).

## CONCLUSION

Based on the foregoing, the Competitive Carriers respectfully urge the Commission to reconsider its January 20, 2012 Order and issue an order holding that the revisions to FairPoint's CCL tariff went into effect on October 10, 2009.

February 21, 2012

Respectfully Submitted,

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Certificate of Service

I hereby certify that on this 21st day of February, 2012, I have forwarded a copy of the foregoing Motion either by first class mail, postage prepaid, or by electronic mail to the parties listed on the Service List for this docket.

Susan S. Geiger

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