STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

COMPETITIVE CARRIERS' OBJECTION TO FAIRPOINT'S MOTION FOR REHEARING AND/OR RECONSIDERATION OF ORDER NOS. 25,319 AND 25,327

The Competitive Carriers[1] object to FairPoint's motion for rehearing and/or reconsideration of Order Nos. 25,319 and 25,327 (the "Motion").

FairPoint's Motion fails to meet the standard for rehearing as it (1) consists largely of impermissible reargument of points the Commission has previously considered and rejected, and (2) purports to seek rehearing or reconsideration of orders issued previously in this docket long after the statutory deadline in RSA 541:3 for seeking rehearing of those orders has passed. To the minor extent that FairPoint's Motion advances new arguments, those arguments are legally or factually incorrect. The Commission's decisions to require FairPoint to cease imposing the carrier common line ("CCL") charge when no FairPoint common line is used and to dismiss FairPoint's proposal to increase a long-dormant Interconnection Charge as violative of the switched access rate caps established as a matter of federal law in the *Connect America Fund Order*[2] were appropriate and based on correct statements of fact and interpretations of law.

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[1] Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business; 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).

[2] *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 801 & Fig. 9 (released Nov. 18, 2011).

I. INTRODUCTION AND BACKGROUND[3]

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 evidentiary hearing in July 2007, and post-hearing briefs from multiple parties.

On February 25, 2008, the Commission approved Verizon's sale of its network and franchise to FairPoint. *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). 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." *Id.* at 75. 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, expressly disagreeing with Verizon's contention that the CCL rate element is purely a contribution rate element. Instead, the Commission found, based on the record before it, that the CCL rate element was intended to, and in fact, does recover a portion of the cost of the local loop (or

[3] 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 objection.

common line) and determined 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. *Id.* at 33. Accordingly, Verizon's practice of billing CCL charges for calls not involving a Verizon end user or Verizon-provided local loop was precluded as of March 21, 2008.[4] 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.

Verizon sought rehearing and/or reconsideration of the March 2008 Order on March 28, 2008. Although Verizon raised several grounds for reconsideration of the March 2008 Order, it did not challenge the Commission's factual finding that the CCL charge was intended to, and does, recover a portion of the cost of the local loop.

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." Like Verizon, FairPoint did not raise as a basis for rehearing the Commission's finding that the CCL charge recovered part of the cost of the local loop.

On August 8, 2008 the Commission issued Order No. 24,886 granting FairPoint's Petition to Intervene but denying rehearing of the March 2008 Order.

Verizon and 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

[4] 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.

allowed FairPoint to apply CCL charges when no FairPoint common line was involved. The Court stated, however, that if the CCL tariff should be amended, such amendment should occur through the regulatory process rather than by an order of the Court. *Id.* at 700.

On August 11, 2009, the Commission commenced the regulatory process suggested by the Supreme Court to amend the CCL tariff by issuing Order No. 25,002 on a *nisi* basis ("Order *Nisi*"). The Order *Nisi* noted that the original order of notice in this proceeding indicated that, if Verizon's interpretation of the tariff prevailed, then the Commission would decide whether any prospective modification to the tariff was appropriate. Order *Nisi* at 2. The Commission reiterated that, based upon the record in this proceeding, the tariff should permit imposition of CCL charges only when a carrier uses a FairPoint common line. *Id.* The Commission then 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." *Id.* The Commission also ordered FairPoint to file the revised tariff pages within 30 days. *Id.* at 3.

The Order *Nisi* further stated that it would become "effective September 10, 2009 [unless] (sic) the Commission provides otherwise in a supplemental order issued prior to the effective date." *Id.* The Commission did not issue such a supplemental order prior to the effective date.

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 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. The

submission of these additional tariff changes was not mandated, authorized, or invited by the Commission. FairPoint's cover letter, as well as the tariff pages themselves, specified an effective date of October 10, 2009 for elimination of the CCL and the increase to the Interconnection Charge. *See* Sept. 10, 2009 Letter of Kevin M. Shea and attachments.

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. Consistent with the schedule that the Commission established in that order, FairPoint submitted the pre-filed direct testimony of Michael T. Skrivan on September 28, 2009. Substantial parts of Mr. Skrivan's testimony addressed the development of the Interconnection Charge proposal and how the Interconnection Charge rate was set. Little or none of that testimony addressed how the language of FairPoint's CCL tariff amendment proposal complied with the Order *Nisi.*

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"). In particular, FairPoint sought to withdraw the tariff pages it filed on September 10, 2009, including its Interconnection Charge proposal, and have them treated as illustrative. *Id.* at 9.

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 Secretarial Letter of Debra A. Howland. This docket remained inactive while the bankruptcy proceeded. FairPoint emerged from bankruptcy on January 24, 2011.

Several 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 is not a contribution rate element, but rather, recovered a portion of the common line charge and thus was appropriately charged only when a FairPoint common line was used. May 2011 Order at 7. The Commission noted that this conclusion "was not addressed or overturned by the Supreme Court, which based its analysis on the terms of the tariff alone." *Id.* The Commission then expressly stated that it "will not entertain further argument about this conclusion." *Id.*

FairPoint did not challenge the May 2011 Order by filing a motion for rehearing in accordance with RSA 541:3. Instead, FairPoint filed a Motion to Certify Interlocutory Transfer Statement ("Motion to Certify") and Interlocutory Transfer without Ruling. The Motion to

Certify requested that the Commission transfer three questions of law to the New Hampshire Supreme Court, including the question of whether it was a settled finding of fact in this proceeding that the CCL charge does not contribute to FairPoint's common cost of service. Interlocutory Transfer without Ruling at 3.

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

The Commission denied FairPoint's Motion to Certify and partially granted the Joint Motion on October 28, 2011. Order No. 25,283 (Oct. 28, 2011) ("October 2011 Order"). In denying FairPoint's Motion to Certify, the Commission held that it was not barred from restating its conclusion about the purpose or intent of the CCL charge based upon the existing record because "the Supreme Court has done nothing to disturb that conclusion." October 2011 Order at 15. The Commission emphasized that, although there would be no relitigation of the issue of whether the CCL rate element recovers costs of the local loop (or common line) and the Commission's determination that FairPoint may not impose a CCL charge when no FairPoint common line is involved, FairPoint was free to raise other arguments regarding whether it needed contribution from other rate elements to meet its financial needs.[5] October 2011 Order at 17.

In ruling on the Joint Motion, 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*. The Commission determined that because the proposed CCL revisions were submitted to comply with a Commission order, FairPoint did not have the right unilaterally to

[5] Notwithstanding the Commission's invitation, FairPoint has not provided any evidence on this issue. Instead, contrary to the Commission's findings, rulings, and directives, it has continued to maintain that the CCL charge is purely a contribution rate element.

withdraw them. October 2011 Order at 35. The Commission also found that these tariff revisions were "suspended in application and effect" and subject to further proceedings. *Id.* at 31, 35. In addition, the Commission affirmed its earlier decision to allow the Interconnection Charge amendments to be withdrawn and treated as illustrative, finding that FairPoint's Interconnection Charge proposal was a voluntary filing. *Id.* FairPoint did not move for a rehearing of any aspect of the October 2011 Order within 30 days of that order as required by RSA 541:3.

On October 28, 2011, the Commission issued a second order (Order No. 25,284) which established an expedited procedural schedule for the docket including testimony, data requests, a technical session in lieu of further discovery in mid-January 2012, and an evidentiary hearing after that on a date to be determined. The Order further indicated that the Commission would hear arguments concerning whether changes to FairPoint's tariffs should be "reconciled" to a prior date, such as the date of the original submissions in 2009, the date when FairPoint emerged from bankruptcy (January 24, 2011), the date of the Commission's May 2011 order, or some other appropriate date. Order No. 25, 284 (Oct. 28, 2011) at 2.

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. In support of their motion, the Competitive Carriers noted that the Commission's delays in considering modifications to FairPoint's CCL tariff had caused years of financial uncertainty, as FairPoint had continued to bill the Competitive Carriers and other access customers CCL charges when no FairPoint common line was being used. Competitive Local Exchange Carriers' Motion for Hearing (Nov. 10, 2011) at 2-3. FairPoint's response to the motion agreed that the CCL tariff issue involved only questions of "tariff interpretation and law" and that the effective date of the CCL tariff

revisions was ripe for adjudication by the Commission. FairPoint Response to Motion for Hearing (Nov. 21, 2011) at 3 ("FairPoint Response"). 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, in accordance with the positions of both sides, that no hearing was needed on the CCL issue. Order No. 25,295 (Nov. 30, 2011) at 4 ("November 2011 Order"). 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.

On November 30, 3011, FairPoint filed tariff pages that were nearly identical to those filed in September of 2009. Two weeks later, the Commission rejected that filing, without prejudice, to avoid the statutory timing constraints of RSA 378:6. Order No. 25, 301 (Dec. 14, 2011) at 2-3. The Commission also noted that the amendments to the CCL tariff and the Interconnection Charge were already before the Commission for determination. Further, the Commission observed that FairPoint had acquiesced to the procedural schedule and even sought an extension of time to better prepare its case. *Id.* at 3. FairPoint did not file a motion for rehearing of Order No. 25,301 in accordance with RSA 541:3.

On December 19, 2011, AT&T, BayRing, FairPoint, and Sprint submitted briefs responding to the two questions raised in the Commission's November 2011 Order.

On December 22, 2011, FairPoint again filed tariff pages substantively identical to its November 30 filing, which the Commission had rejected just days before in Order No. 25,301. The Competitive Carriers responded with letters dated December 23, 2011 and December 28, 2011 requesting that the Commission declare FairPoint's most recent tariff filing null and void. In addition, on January 9, 2012, the Competitive Carriers filed a Motion to Dismiss or for Summary Judgment on the Interconnection Charge Issue, and a Motion to Suspend or Modify Procedural Schedule and for Expedited Decision. FairPoint filed an Objection to both Motions on January 18, 2012.

On January 20, 2012, the Commission issued Order No. 25,319 ("January 20 Order") which, among other things, 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 directive (in the Order *Nisi*) to amend the tariff. January 20 Order at 9-10. The Commission concluded that as a matter of administrative efficiency, rather than require FairPoint to re-file tariff pages with a new effective date, those revised tariff pages would take effect on January 21, 2012, the effective date of the tariff pages filed by FairPoint on December 22, 2011. *Id.* at 19. The January 20 Order also 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. *Id.* at 13-16. The Competitive Carriers moved for rehearing of portions of this Order, contending that the effective date of the elimination of the CCL should have been October 10, 2009. FairPoint also has moved for reconsideration, to which the Competitive Carriers hereby object.

On February 3, 2012, the Commission issued Order No. 25, 327 granting the Competitive Carriers' Motion to Dismiss ("February 3 Order"). FairPoint has moved for rehearing of this Order, to which the Competitive Carriers hereby object.

II. STANDARD OF REVIEW

A. The Commission Will Not Rehear Prior, Rejected Arguments.

The Commission will not grant a rehearing or reconsideration on the basis of a motion that merely rehashes prior arguments that the Commission has rejected. *See, e.g.,* October 2011 Order at 28; *In re Rural Telephone Companies — CLEC Registrations within RLEC Exchanges,* DT 10-183, Order Denying Motion for Rehearing, Order No. 25,291, at 9-10 (Nov. 21, 2011); *In re Comcast Phone of New Hampshire — Application for Authority to Serve Customers in the TDS Service Territories,* DT 08-013, Order Denying Motion for Rehearing, Order No. 24,958 at 7 (Apr. 21, 2009). "A successful motion does not merely reassert prior arguments and request a different outcome." October 2011 Order at 28.

Yet, that is precisely what the vast majority of FairPoint's motion does. FairPoint has rehashed numerous arguments that it or Verizon, its predecessor, has previously made but that did not obtain the results FairPoint desired. The following chart outlines these instances:

FairPoint Contention	**Where Decided Previously**
Review of the CCL charge is outside the scope of this docket (Motion, Part III.A)	Procedural Order and Supplemental Order of Notice, Order No. 25,219, at 7-8 (May 4, 2011). The Commission issued an Order of Notice on these issues, but for administrative convenience did not assign a new docket number.

FairPoint Contention	Where Decided Previously
The record does not support the determination that the CCL recovered part of the cost of the common line (Motion, Part III.A.1)	Procedural Order and Supplemental Order of Notice, Order No. 25,219, at 7 (May 4, 2011). The Commission reiterated its earlier determination made in Order No. 24,837 (March 21, 2008), based on the record before it, that the CCL charge is not a contribution rate element. The Commission further determined that it "will not re-litigate the purpose or propriety of the CCL charge... and will not entertain further argument about this conclusion." Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification, Order No. 25,283, at 15-16 (Oct. 28, 2011). "The Commission, as the trier of fact, heard the testimony and read the arguments of the parties and rendered a finding on an issue in dispute in the case."

FairPoint Contention	**Where Decided Previously**
The Commission prejudged certain facts and denied FRP a hearing (Motion, Part III.A.2)	Procedural Order and Supplemental Order of Notice, Order No. 25,219, at 7 (May 4, 2011). The Commission reiterated its earlier determination made in Order No. 24,837 (March 21, 2008), based on the record before it, that the CCL charge is not a contribution rate element. The Commission further determined that it "will not re-litigate the purpose or propriety of the CCL charge... and will not entertain further argument about this conclusion." Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification, Order No. 25,283, at 16 (Oct. 28, 2011). "The Commission, as the trier of fact, heard the testimony and read the arguments of the parties and rendered a finding on an issue in dispute in the case." Order on Tariff Change to Carrier Common Line Charge, at 8 (Jan. 20, 2012). "The Commission now rules on the CCL portion of the tariff and its effective date without a hearing **pursuant to FairPoint's specific request that a hearing not be held.**" (Emphasis added.)
The Commission's failure to approve the Interconnection Charge in conjunction with eliminating the CCL is confiscatory (Motion, Part III.B)	Order on Motions for Rehearing and Motion to Intervene, Order No. 24,886 at 9 (Aug. 8, 2008). "The takings clauses of the state and federal constitutions do not require us to indemnify Verizon for failing to revise its tariff to the extent this was necessary to compensate the company for certain wholesale services provided in connection with calls that involve neither a Verizon end-user nor a Verizon local loop."

FairPoint Contention	Where Decided Previously
The Commission is not permitted to act on less than the entire filing (Motion, Part III.C)	Order on CLEC Motion for Hearing, Order No. 25,295, at 3-4 (Nov. 30, 2011). "Because parties on both sides of the instant matter agree that no further discovery, technical sessions, or testimony are needed regarding: (1)whether the changes to the CCL tariff proposed by FairPoint on September 10, 2009 comply with the Commission's order; and (2) the effective date of the changes to the CCL tariff, we conclude that addressing those questions in a separate and more expedited process is appropriate." Order Rejecting Tariff Filing Without Prejudice, Order No. 25,301, at 1-2 (Dec. 14, 2011). "[I]n Order No. 25,283 (October 28, 2011, the Commission...concluded that the portion of the tariff revisions relating to the CCL charge would be accepted, but would not take effect...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."

FairPoint Contention	Where Decided Previously
The Commission erred because it did not consider FairPoint's December 22nd tariff filing (Motion, Part III.D)	Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification, Order No. 25,283, at 31 (Oct. 28, 2011). "[T]he portion of the tariff filing covering FairPoint's interconnection charge is withdrawn and treated as illustrative...The portion of the filing covering the CCL is accepted and not considered withdrawn, but we conclude that it did not go into effect because the properly requested hearing on the matter has not been held and the Commission has yet to determine if the changes proposed by FairPoint conform to the requirements of the Commission as stated in Order No. 25, 002. As a result, the change to the CCL tariff remains filed, but suspended in application and effect." Order Rejecting Tariff Filing Without Prejudice, Order No. 25,301, at 1-2 (Dec. 14, 2011). "[I]n Order No. 25,283 (October 28, 2011, the Commission...concluded that the portion of the tariff revisions relating to the CCL charge would be accepted, but would not take effect...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."

The most egregious example of FairPoint's continued regurgitation of issues previously decided in a manner adverse to FairPoint is its repeated attempts to claim that the CCL charge is purely a contribution element. The Commission has admonished the parties that it would not relitigate its determination - a determination based on the record of a fully litigated adjudicative proceeding - that the CCL element was not a pure contribution element in at least two orders:

May 2011 Order at 7, and October 2011 Order at 3, 18.[6] Moreover, the Commission has expressly ordered that it "will not entertain any further argument about this conclusion." May 2011 Order at 7.

In an attempt to relitigate the issue yet again, FairPoint has blatantly ignored the Commission's orders by including in its Motion arguments and factual allegations (which the Commission has previously considered and expressly rejected) about the CCL charge. The Commission should not tolerate FairPoint's continued disobedience of its orders.

Because all of FairPoint's arguments have previously been considered and rejected, the Commission need not consider them again. FairPoint's Motion should be denied.

B. The Time for FairPoint to Seek Rehearing of Numerous Issues Raised in its Motion Has Long Passed.

Numerous issues on which FairPoint purports to seek rehearing or reconsideration were decided by the Commission in earlier orders in this docket. The statutory 30-day deadline established by RSA 541:3 for FairPoint to seek rehearing or reconsideration of such issues has long passed. FairPoint's attempts now to seek reconsideration of such issues are untimely and must be denied.

The statute is clear that the date from which the 30-day deadline begins to run is the date the order or decision was *made:* "Within 30 days after any order or decision has been made by the commission, any party . . . may apply for a rehearing . . . ." RSA 541:3. As will be detailed in the discussion below, FairPoint's current motion seeks rehearing or reconsideration of numerous Commission decisions that were made before January 20, 2012. One such example is the Commission's decision, made no later than in the May 4, 2011 Order, to resume consideration of prospective changes to the CCL tariff provision in this docket, rather than

[6] FairPoint did not seek reconsideration of either of these orders in accordance with RSA 541:3.

assigning a new docket number. FairPoint's claim that prospective changes to the CCL tariff are beyond the scope of this docket, therefore, is untimely. Other instances of such untimeliness are set out in the specific, substantive sections below.

III. FAIRPOINT'S MOTION PROVIDES NO VALID REASON FOR THE COMMISSION TO RECONSIDER THE JANUARY 20 ORDER.

A. The Commission Properly Ordered Revisions to FairPoint's CCL Tariff and Provided FairPoint with Sufficient Process.

The first section of FairPoint's motion for reconsideration of the January 20 Order — although divided into two subsections — actually makes three arguments. First, FairPoint asserts that the Commission's direction that FairPoint modify its CCL tariff exceeds the scope of this docket. Motion at 8. Second, FairPoint claims that the record does not support the Commission's conclusion that the CCL charge is not a contribution element and may only be assessed when a carrier uses a FairPoint-provided common line. *Id.* at 8-11. Third, FairPoint asserts that the Commission denied it a "meaningful" hearing. *Id.* at 11-14. As explained below, the Motion seeks rehearing of decisions the Commission made before January 20, 2012, and is therefore untimely. The Motion also simply repeats arguments FairPoint made previously in the case and, accordingly, does not present a proper basis for rehearing. Moreover, even when considered on their merits, FairPoint's arguments are unconvincing or wrong.

As an initial matter, it is clear that this portion of FairPoint's motion seems to exist in an alternate universe where the legal requirements applicable to rehearing motions do not apply – at least to FairPoint. Although FairPoint claims it is seeking reconsideration of the January 20 Order, it mentions that order only twice (*see* Motion at 11 & n.31, 13 & n.35) and explicitly

attacks only one of the order's findings. *Id.* at 11.[7] FairPoint instead focuses on alleged errors the Commission made in earlier orders for which FairPoint never sought rehearing[8] or on alleged errors in the Order *Nisi* for which FairPoint's subsequent rehearing request did not produce the outcome it desired.[9] To the extent that FairPoint now seeks rehearing of matters decided in Commission orders issued in May or November 2011, its motion is untimely and should be rejected. *See* RSA 541:3 (requiring party to seek rehearing within 30 days of any order or decision). To the extent that FairPoint seeks rehearing of matters decided in a Commission order (such as the Order *Nisi*) for which FairPoint already sought rehearing, it cannot resurrect those matters now through a second motion for rehearing. *See Petition of Ellis*, 138 N.H. 159, 161 (1993) (noting that RSA 541:3 authorizes only one rehearing motion for a Commission order and RSA 541:4 specifies that such motion must contain "every ground" on which movant claims commission's underlying order was unjust or unreasonable); and Order No. 24,886 at 9-10 (Aug. 8, 2008).

1. The Commission Could Properly Order Tariff Modifications in This Docket.

FairPoint's first contention - that prospective modification of the CCL tariff is outside the scope of this docket (Motion at 8) - must fail for at least three reasons. First, FairPoint apparently believes that the Commission's statement in the November 2006 Procedural Order[10] regarding the scope of the docket is immutable. What FairPoint ignores, however, is that the

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[7] FairPoint accuses the Commission of misconstruing its position on whether a hearing was necessary. Motion at 11.

[8] *See, e.g.*, Motion at 12 (challenging Commission's conclusions in May 2011 and November 2011 orders regarding scope of proceeding).

[9] *See, e.g.*, Motion at 8 (challenging Commission's conclusions in Order *Nisi* regarding whether tariff modification issue was within scope of docket and whether FairPoint could impose CCL charge only when it provided common line).

[10] Order No. 24,705 (Nov. 29, 2006) at 6.

Commission has authority to change its orders (*see* RSA 365:28) and that the Commission did exactly that in the May 2011 Order in this case. *See* May 2011 Order at 8 (stating that Commission will implement substantive goal of November 2006 Procedural Order regarding tariff modifications by undertaking examination of FairPoint tariff without assigning separate docket number). FairPoint did not seek reconsideration of the Commission's conclusion in the May 2011 Order,[11] and its attempt to do so now is untimely.

Second, FairPoint's current position on whether the tariff modification issue is within the scope of this docket contradicts the position it took in an earlier motion for rehearing. In that motion, which sought reconsideration of the March 2008 Order, FairPoint faulted the Commission for not addressing the issue of tariff modification, and FairPoint made no mention of the November 2006 Procedural Order that is now its talisman.[12] If FairPoint chooses to talk out of both sides of its mouth, the Commission should give no credence to what it says.

Finally, FairPoint's contention that it failed to receive "notice and hearing" on this issue (Motion at 8) is pure malarkey. The May 2011 Order gave FairPoint and the other parties notice of how, as a matter of docketing, the Commission planned to treat the issue of tariff modification. *See* May 2011 Order at 8. And it was FairPoint that suggested that the Commission "dispense with a hearing on the CCL [tariff language] question and move directly to briefs." FairPoint Response at 3. FairPoint has presented no valid reason to reconsider whether tariff modifications are part of this docket.

[11] Indeed, the Commission reached this conclusion when ruling on FairPoint's motion for reconsideration of the Order *Nisi*'s treatment of the tariff modification issue. *See* FairPoint Rehearing/Withdrawal Motion at 4-5. Thus, FairPoint cannot seek reconsideration of this issue a second time.

[12] *See* FairPoint Motion for Rehearing and/or Reconsideration at 8 (filed Apr. 21, 2008).

2. The Commission Has Correctly and Repeatedly Rejected the Notion that the CCL Charge Is a Contribution Element.

FairPoint's second contention – that the record does not support the conclusion that the CCL charge may only be imposed when a carrier uses a FairPoint common line (Motion at 8-11) – also fails for at least two reasons. First, FairPoint is precluded from raising such an argument at this stage of the case. The Commission's March 2008 Order expressly rejected FairPoint's assertion about the role of the CCL charge:

> 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 [FairPoint] provides the use of its common line.

See March 2008 Order at 31. Neither Verizon nor FairPoint moved for rehearing on this issue, the New Hampshire Supreme Court's decision did not disturb this finding, and the Commission reaffirmed it in the Order *Nisi*. Order *Nisi* at 2 (ordering FairPoint to modify its tariff to clarify that it "shall charge CCL only when a FairPoint common line is used"). Although FairPoint sought reconsideration of this aspect of the Order *Nisi*,[13] the Commission denied this aspect of FairPoint's motion, stating that it would "not re-litigate the purpose or propriety of the CCL charge." May 2011 Order at 7. FairPoint did not appeal that decision,[14] and it cannot resurrect the issue now through a second motion for rehearing. *See Petition of Ellis*, *supra*, 138 N.H. at 161.

Second, FairPoint's description of what the record showed about the purpose of the CCL charge, and its role in Verizon's rate structure, is simply wrong. The April 20, 2007, Prefiled Panel Rebuttal Testimony of AT&T witnesses Ola A. Oyefusi, Christopher Nurse and Penn

[13] *See* FairPoint Rehearing /Withdrawal Motion at 5-6.

[14] FairPoint instead filed, on May 24, 2011, a Motion to Certify Interlocutory Transfer Statement and Interlocutory Transfer without Ruling, which the Commission denied in the October 2011 Order.

Pfautz (at pp. 5-11) completely rebuts FairPoint's argument that the CCL charge recovers joint and common costs, and therefore may be imposed irrespective of common line usage. As the AT&T witnesses pointed out, while Verizon witness Peter Shepherd may have testified that Verizon's predecessor, New England Telephone Company, originally "designed" the CCL charge as a contribution element to recover joint and common costs along with loop costs, the Commission did not approve the rate as filed, nor did it approve a subsequent settlement stipulation containing access charges reduced from Verizon's proposal. *See* Panel Rebuttal Testimony of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, on Behalf of AT&T at 8 (Apr. 20, 2007). Through their comprehensive discussion and analysis of the two dockets that led up to the institution of switched access charges in the state,[15] these witnesses demonstrated that the CCL charge was linked to the recovery of loop costs allocated to toll services and therefore should be assessed only on calls that traverse the local loop. *See* Panel Rebuttal Testimony of Ola A. Oyefusi, Christopher Nurse and Penn Pfautz, on Behalf of AT&T at 11 (Apr. 20, 2007).

Moreover, Mr. Shepherd – whom FairPoint hypes as "the *actual* Verizon employee who was on the scene and managed the development of the original CCL charge" (Motion at 10 (emphasis in original)) – admitted during the July 11, 2007, evidentiary hearing in this docket that the Commission did not accept Verizon's proposal for setting the CCL rate (Transcript Vol. 2, at 78-79), and that the settlement stipulation that the Commission ultimately accepted broke the link between Verizon's costs and revenue requirements, on the one hand, and the CCL rate determination on the other. *See id.* at 79-80. In other words, Mr. Shepherd admitted that the CCL rate had no relationship to any cost level or revenue requirement Verizon may have had. As a result, FairPoint's current assertion that the record here contains "unrebutted evidence" that

[15] The two dockets are Nos. 89-010 and 90-002.

the CCL charge "was designed to recover joint and common costs related to its business as a whole" (Motion at 9) is delusional.

The Commission correctly concluded, as a factual finding on the record before it, that the CCL charge should be assessed only when the carrier uses a FairPoint common line. FairPoint's Motion presents no valid basis to reconsider that conclusion.

3. The Commission Did Not Deprive FairPoint of a "Meaningful" Hearing.

FairPoint's third contention – that it did not receive a "meaningful" hearing (Motion at 11-14) – also is based on revisionist history. FairPoint first asserts that the Commission misconstrued FairPoint's legal position in its Response to the Competitive Carriers' Motion for Hearing because its proposal to dispense with a hearing on the CCL tariff revisions "was not addressing a constitutional due process issue." Motion at 11. FairPoint also points out that it "reserved numerous rights" in its Response. *Id.* at 12. But the context of FairPoint's proposal last November to dispense with a hearing makes clear that FairPoint had due process issues in mind, because its Response quotes a discussion of due process from an earlier Commission decision.[16] In addition, FairPoint's assertion that it was reserving its rights regarding "[a]ll relevant questions" (FairPoint Response at 3 n.11) hardly makes clear that it was reserving its right to a hearing as "a constitutional due process issue" (Motion at 11), while waiving its right to "an evidentiary hearing" (*id.* at 12) – whatever that tortuous distinction might mean. Such contortions prove the Commission's prescience in cautioning FairPoint about "intentionally trying to delay a decision through procedural maneuvers" regarding the need for a hearing. January 20 Order at 8.

[16] The Response stated: "The Commission previously has determined that '[d]ue process requires a meaningful opportunity to be heard, i.e., a hearing, where issues of fact are presented for resolution by an administrative agency.'" FairPoint Response at 3 (quoting *Birchview by the Saco, Inc.*, DE 97-255, Order No. 23,649 Denying Motion for Rehearing, at 5 (Mar. 7, 2001) (emphasis omitted)).

Moreover, FairPoint is equally evasive about the "central issue" (Motion at 13) this "meaningful" hearing was supposed to address. FairPoint sometimes suggests that the hearing would consider the status of the CCL charge as a contribution element (*see* Motion at 13-14), while it suggests elsewhere that a hearing was necessary on whether the Commission could mandate a reduction in FairPoint's CCL revenues without also allowing a compensatory rate increase. *See id.* at 13. Under either scenario, the Commission did not abridge any right FairPoint may have had to a "meaningful" hearing.

If the "central issue" is the status of the CCL charge, as explained in the preceding section, Verizon – FairPoint's predecessor in interest – did participate in an evidentiary hearing in 2007 that addressed the purpose and propriety of the CCL charge. The Commission subsequently entered an order finding that the CCL charge was not a contribution element and could only be imposed when a FairPoint common line was used. *See* March 2008 Order at 31-32. The Supreme Court's decision on appeal did not disturb that aspect of the Commission's order, as the Commission explained in an extensive discussion in the October 28, 2011 Order. Accordingly, FairPoint, through its predecessor Verizon,[17] has received any hearing it was due on this issue.

If the "central issue" is FairPoint's ability to be compensated for the reduced CCL revenue through other means, all that FairPoint has lost is the ability to make up that revenue in the exact manner and on the exact schedule that FairPoint has dictated. Although the Commission's ability to address FairPoint's revenue concerns via an increased Interconnection Charge has been checked by the actions of the FCC in the *Connect America Fund Order*, it is that federal action, rather than anything in the January 20 Order, that foreclosed FairPoint's

[17] When FairPoint petitioned to intervene in this docket, it agreed to take the record "as is." *See* FairPoint Petition to Intervene ¶ 2 (filed Apr. 21, 2008).

proposal to replace the revenue generated by the CCL charge with the Interconnection Charge. As the Commission has pointed out, FairPoint has other ways to seek to change its rates and improve its financial position — none of which it has sought to implement. *See* January 20 Order at 15. Given these options, FairPoint has not been deprived of anything meaningful. Even if the issue were ripe for rehearing at this advanced stage of the case, the Commission should deny the motion for rehearing.

B. The January 20 Order Did Not Unconstitutionally Confiscate FairPoint's Property.

FairPoint next argues that the Commission's mandated revisions to the CCL tariff, which reduce FairPoint's wholesale/access revenues, result in a confiscation of its property in violation of the state and federal constitutions. Motion at 16. Once again, FairPoint's arguments reflect a confused and myopic view of the applicable law, and the Commission should reject them.

FairPoint sets forth at length the various reasons why the Commission concluded it was not obligated to implement any change to the CCL tariff without simultaneously implementing a change to the Interconnection Charge. Motion at 15-16. FairPoint then asserts that the Commission's reasons do not conform "to the applicable statutory criteria," which it indicates are set forth in RSA 378:27. *Id.* at 16. However, RSA 378:27 deals only the Commission's authority to set temporary rates, and it is puzzling why FairPoint believes that the standards for temporary rates are applicable here. Indeed, FairPoint seemed to take a conflicting position in a pleading filed just two months ago, in which it stated that the Commission "never set a temporary rate" in this case. FairPoint Brief on CCL Language and Effective Date at 8 (filed Dec. 19, 2011). If FairPoint cannot keep its positions straight, the Commission has no reason to take its arguments seriously.

Putting aside FairPoint's apparent statutory confusion, its confiscation argument suffers from a more fundamental flaw: it attempts to apply a ratemaking concept designed for general rate cases to an issue to which that concept is not germane. FairPoint relies exclusively on the description of a non-confiscatory rate provided in *Kearsarge Telephone Co.*, DR 87-110, Order No. 19,154, 73 NH PUC 320, 324 (1988). *See* Motion at 16. However, *Kearsarge* and the cases on which it relies[18] all concern themselves with rate-setting - *i.e.,* the establishment of rates that a utility is permitted to charge to recover its overall costs of service (including capital costs) necessary to provide the services it offers. Moreover, the cases address issues that affect the utility's overall rate of return resulting from the revenues from all services and the costs of providing them. The subsequent sentence in *Kearsarge* — which FairPoint does *not* quote — makes that clear: "The import of *Hope* is that the constitution is only concerned with the end result of a rate order: i.e., that it be just and reasonable. Under *Hope*, the particular ratemaking methodology employed by the regulatory agency is, for the most part constitutionally irrelevant." *Kearsarge*, 73 NH PUC at 325 (quoting *In re Public Service Co. of New Hampshire*, 130 N.H. 265, 275 (1988)).

As a result, the constitutional standards on which FairPoint relies are inapposite and have no meaning when applied in the context of a particular rate for an individual service. It makes no sense to suggest, as FairPoint does here, that a reduction in one particular rate element — the CCL for some, but not all, calls — would not allow it to operate successfully, maintain its financial integrity, attract capital, or appropriately compensate its investors. Indeed, a lower rate for one service may be balanced by generous rates for other services. It is the overall level of rates, revenues and costs that determine a company's financial integrity and attractiveness to

[18] *Kearsarge* cites *Federal Power Comm'n v. Hope Natural* Gas *Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"), and *New England Tel. & Tel. Co. v. New Hampshire*, 95 N.H. 353, 361 (1949).

investors. As noted elsewhere in this Objection (*e.g.,* Parts II.C and IV.E), FairPoint has options to increase revenues other than increasing the Interconnection Charge available to it, but it has not taken advantage of those opportunities.

The Commission correctly recognized this concept in the January 20 Order when it rejected FairPoint's assertion that a "change to the application of a single charge... was a confiscation of constitutional dimension." January 20 Order at 15.[19] Since FairPoint cannot state a cognizable claim for confiscation in the absence of a consideration of the adequacy of its overall rate levels, it has failed to provide the Commission with a basis to reconsider its decision.

C. The Commission Acted Lawfully In Bifurcating Consideration of the CCL Tariff Changes From Consideration of FairPoint's Requested Interconnection Rate Increase.

FairPoint's Motion argues that the Commission acted unlawfully by deciding the CCL tariff change issue separately from the Interconnection Charge issue. FairPoint argues that "the Commission could only act on the entire filing." Motion at 17. In addition to being legally flawed, the argument must be rejected because FairPoint itself expressly assented to the bifurcation of these issues. *See* FairPoint Response at 2-3 ("FairPoint ...does not dispute ...that the question of 'whether FairPoint's CCL tariff filing complies with the Commission's prior orders is presently ripe for consideration by the Commission'...FairPoint concurs 'that [t]he effective date of the CCL tariff language is also ripe for adjudication by the Commission'... FairPoint assent[s] to bifurcation of the issues.")

Just because FairPoint sought to link the CCL tariff changes to its request for an Interconnection Charge increase, does not mean the Commission must act in accordance with

[19] Moreover, FairPoint's *argument* seems grounded in the position that, unless the Commission allows FairPoint the exact revenue amount it wants at the exact time it wants that revenue, the Commission will have imposed an unconstitutional confiscation. Such a position would tie the Commission's hands and ignore its obligation to ensure both that customers "will not pay higher rates than are required" and that the utility earns a reasonable return. *New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 95 (1973).

FairPoint's wishes. The Commission has the authority to review and implement separately (not *en masse*, as FairPoint argues) portions of filings made on the same day. *See, e.g., Legislative Utility Consumers' Council v. Granite State Electric Company,* 119 N.H. 359, 362 (1979) (Commission must be given wide latitude to exercise its judgment in determining components of a utility's rate of return) (emphasis added). This is especially so if the components of the filing concern totally different issues that may properly be resolved, as here, in a manner that does not provide a revenue neutral result for the filing utility.

The mere fact that FairPoint intended its CCL and Interconnection Charge filings as inexorably linked does not bind the Commission. Compelling the Commission to review unrelated components of a filing made on the same day by a utility seeking a *quid pro quo* would severely undermine the Commission's ratemaking power which, except in a few specifically excepted instances, is "plenary." *Legislative Utility Consumer Council v. Public Service Company of New Hampshire,* 119 N.H. 332, 341 (1979). For all of the reasons set forth above, FairPoint's argument that the Commission erred by not considering the CCL tariff changes along with the Interconnection Charge issue is without merit and should be rejected.

D. The Commission Correctly Rejected FairPoint's December 2011 Filing.

FairPoint argues that the Commission erred in rejecting the portion of FairPoint's December 2011 Tariff filing that sought to increase the Interconnection Charge. FairPoint argues that the tariff rejection was improper because the Commission erroneously applied RSA 378:6, IV, which requires that telephone utility filings (except those concerning general rate increases) be acted upon by the Commission within 30 days. FairPoint argues that the Commission should have applied RSA 378:6, I(b) (which provides for a review period longer than 30 days) and therefore should not have rejected the filing due to the Commission's inability

to meet the 30 day deadline established in RSA 378:6, IV.[20] FairPoint argues that the legislative history of RSA 378:6, I(b) and a recent Commission decision in Docket No. DT 11-248, Order No. 25,293 (Nov. 28, 2011) both support its position. FairPoint is incorrect for the reasons discussed below.

First, as the Commission has correctly noted, if the plain language of statutory provisions is unambiguous, legislative history need not be examined.[21] *See Sutton v. Town of Gilford,* 160 N.H. 43, 55 (2010). The Commission was able to interpret the provisions of RSA 378:6 based upon the plain meaning of the words used therein. In so doing, the Commission correctly noted that the statutory scheme embodied in RSA 378:6 requires that a telephone utility's filings must be reviewed under RSA 378:6, IV, unless those filings relate to a rate schedule representing a general rate increase made pursuant to RSA 378:6, I(a). The Commission reached this conclusion, in part, because RSA 378:6, I(b) expressly states that telephone utility filings under RSA 378:6, IV are exempt from the provisions of RSA 378:6, I(b). Therefore, contrary to FairPoint's assertion, RSA 378:6, I(b), by its very terms, cannot apply to non-general rate increase filings (such as the Interconnection Charge) made by a telephone utility.

Second, FairPoint's argument that Commission Order No. 25,293 in DT 11-248 directly contradicts the Commission's decision that the Interconnection Charge increase must be considered under RSA 378:6, IV is totally misplaced. As Order No. 25,293 plainly indicates, Docket DT 11-248 concerns the investigation of a rate schedule representing a general increase

[20] Note, however, that this is another expedient flip-flop in FairPoint's position. In October 2009, FairPoint contended that RSA 378:6, I. did not apply to its Interconnection Charge filing. Objection to Joint Motion for Clarification and Expedited Relief, Oct. 12, 2009, at 4.

[21] Even if the piece of legislative history offered by FairPoint as support for its interpretation of RSA 378:6, I (b) were to be considered, it is not dispositive of the legislature's intent as it consists of only one piece of testimony.

in rates[22] to the vast majority of FairPoint's retail and wholesale customers, not an increase to a specific rate like the Interconnection Charge that affects wholesale customers only. Thus, because the general rate increase filing in DT 11-248 clearly must be considered under RSA 378:6, I(a), the Commission, in Order No. 25, 293 correctly determined that RSA 378:6, IV did not apply to that filing.

IV. THE COMMISSION PROPERLY DISMISSED FAIRPOINT'S INTERCONNECTION CHARGE FILING IN THE FEBRUARY 3 ORDER.

A. The Last Sentence in Footnote 1495 Is Inapplicable.

FairPoint continues to assert that its proposed increase in the Interconnection Charge is excepted from the rate caps imposed in the FCC regulations adopted in the *Connect America Fund Order*, because its tariff filing was subject to an exception set forth in one sentence in one footnote of that 759-page order:

> 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.

Connect America Fund Order, ¶ 801, fn. 1495, last sentence. First, FairPoint bases its contention on a claim that the Interconnection Charge rate element, a proposed *state* access rate element relating to purely *intrastate* access rates, is within the "trunking basket" established in *federal* regulations that set *interstate* access rates under the FCC's price-cap access rate structure. Second, FairPoint claims that its tariff filing proposing to increase the Interconnection Charge

[22] The surcharge for which FairPoint sought approval in DT 11-248 was to recover increased costs resulting from increased municipal property taxes billed to FairPoint. FairPoint sought to apply this surcharge to customers on a per access line basis following the same methodology as the application of the E911 surcharge. Thus, the Commission correctly determined that because the surcharge is not for any particular service, it is the equivalent of a general rate increase affecting all or a majority to FairPoint's retail customers, as well as access lines that are provided to wholesale customers. Order No. 25,293 (Nov. 28, 2011), at 2.

was validly pending on the effective date of the rate caps adopted in the *Connect America Fund Order*. Neither premise is true.

1. The Federal "Trunking Basket" Has No Relation to New Hampshire Intrastate Tariffs.

FairPoint claims that the Interconnection Charge is within the FCC "trunking basket" defined in 47 C.F.R. § 61.42(d)(3). Motion at 22. This is absurd.

The "trunking basket" is a set of services subject to the FCC's "price-cap" regulations. 47 C.F.R. §§ 61.41 - .49. Carriers subject to "price-cap" regulation submit to the FCC an annual price cap tariff filing that proposes rates for the coming year. *Id.* § 61.43. These filings must make adjustments to the carrier's Price Cap Index (PCI), Actual Price Index (API), and Service Band Index (SBI) values. *Id.* Each of these values is calculated using a complex formula with multiple variables. For example, the formula to calculate the PCI value is:

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

Some of the variables in the formula are:

> 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.
>
> 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.

Id., § 61.45(b)(1)(i). Similarly complex formulas govern calculation of the API:

$$API_t = API_{t-1}[\sum i\ v_i\ (P_t/P_{t-1})i]$$

and SBI:

$$SBI_t = SBI_{t-1}[\sum_i v_i(P_t/P_{t-1})_i]$$

Id., §§ 61.46 & 61.47.

Needless to say, this regulatory structure bears no resemblance to the way intrastate access rates are set in New Hampshire. A "trunking basket" does not appear anywhere in the Commission's telecommunications regulations, Puc 400, or its tariff regulations related to telephone utilities, Puc 1600 and Appendix III. Telephone utilities in New Hampshire do not submit annual rate filings or adjust their rates annually based on various revenue, growth, and productivity factors, as they must do under the interstate regime. FairPoint's Tariff No. 3 contains no mention of a trunking basket. Simply put, the "trunking basket" does not exist in New Hampshire.

The trunking basket is an interstate rate-setting device. It appears in the FCC's Part 61 rules, which govern tariffing of interstate services. Section 61.1(a) provides, "The purpose of this part is to prescribe the framework for the initial establishment of and subsequent revisions to tariff publications." In addition, "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." 47 C.F.R. § 61.1(c) (emphasis added). Nothing in the Part 61 rules establishes, or requires state Commissions to establish, "trunking baskets" for intrastate rates.

Likewise, nothing in the new regulations adopted in the *Connect America Fund Order* serves to create, or to mandate that the Commission create, an intrastate "trunking basket" in New Hampshire. The *Connect America Fund Order* amended only three provisions in the FCC Part 61 rules: creating a new definition of "access stimulation," § 61.3(aaa); amending the rules

relating to tariffing of competitive interstate switched exchange access services so as to include termination of traffic to end users of a VoIP provider and to address access stimulation, § 61.26; and addressing access stimulation by ILECs serving 50,000 or fewer lines in a given study area, § 61.39. *See* pages 567-70 of the *Connect America Fund Order.* None of these has anything to do with the intrastate access rates of FairPoint in New Hampshire that are at issue here.

FairPoint's proposed intrastate Interconnection Charge simply is not within the "trunking basket" used in part to set the interstate switched access rates of price-cap carriers under the federal regulatory regime. FairPoint's argument that the last sentence in footnote 1495 provides an exception to the rate cap imposed by 47 C.F.R. § 51.907(a) therefore fails. That being the only ground on which FairPoint claims that the Commission should reconsider the dismissal of FairPoint's Interconnection Charge in the February 3 Order, FairPoint's motion for reconsideration of the dismissal order lacks merit and should be denied.

2. FairPoint's Claim That the Interconnection Charge Is a Local Transport Rate Element Does Not Change the Result.

FairPoint additionally claims that its Interconnection Charge is not an End Office Access Service and therefore fits within the exception in the last sentence of footnote 1495. Motion at 22-23. Instead, FairPoint claims that its "Interconnection Charge [is] a *local transport* element." *Id.* at 23 (emphasis in original). This argument is unavailing for at least two reasons.

First, in making this argument, FairPoint ignores the plain language of the Note to paragraph (d) of 47 C.F.R. § 51.903. The Note expressly includes "state *Transport* Interconnection Charges [and] Residual Interconnection Charges" within the definition of End Office Access Services (emphasis added).

Second, assuming for sake of argument that FairPoint's Interconnection Charge is a local transport rate element that is outside the definition of End Office Access Services, then that

charge is a Tandem Switched Transport Access Service under 47 C.F.R. § 51.903(i): "Tandem Switched Transport Access Service means: (1) Tandem switching and common transport between the tandem switch and end office . . . ."

As the Commission correctly found, Tandem Switched Transport Access Services, just like End Office Access Services, are squarely within the rate cap imposed by 47 C.F.R. § 51.907(a). February 3 Order at 14. This is because, under § 51.907(a), the question whether a rate element is within the "trunking basket" only arises if a rate element is not an End Office Access Service, a Tandem Switched Transport Access Service, or a Dedicated Transport Access Service.

> 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.

47 C.F.R. § 51.907(a) (p. 508 of the *CAF Order*) (italicized emphasis added; capitalized emphasis in original).

Here, the Interconnection Charge is an End Office Access Service or (under FairPoint's view) a Tandem Switched Transport Access Service. Either way, the question of whether it is in the trunking basket is irrelevant. The rate cap in § 51.907(a) precludes any increase to the Interconnection Charge. The exception in footnote 1495 does not apply.

Moreover, if FairPoint is correct and its Interconnection Charge is not within the definition of "End Office Access Service" (despite the FCC's clear statement to the contrary),

then it cannot be within the "trunking basket" so as to bring it within the exception of the last sentence of footnote 1495. Federal regulations state that "Residual Interconnection Charges" are included within End Office Access Services. 47 C.F.R. § 51.903, note to paragraph (d). If, as FairPoint claims, its Interconnection Charge is not an End Office Access Service, it cannot also be a Residual Interconnection Charge under 47 C.F.R. § 69.155. However, FairPoint claims that its Interconnection Charge is within the trunking basket because it is a Residual Interconnection Charge under § 69.155. Motion at 20-21.

FairPoint cannot have it both ways. If its Interconnection Charge is a Residual Interconnection Charge under § 69.155, then it is an End Office Access Service and not subject to the exception in the footnote. If it is not an End Office Access Service, it is not a Residual Interconnection Charge under § 69.155, and not within the § 61.42 "trunking basket." In either case, the last sentence of footnote 1495 does not apply. FairPoint's Interconnection Charge filing is squarely under the rate cap imposed by § 51.907(a).

3. FairPoint Did Not Have a Lawful Tariff Proposal Pending.

FairPoint's convoluted attempt to shoehorn its Interconnection Charge proposal into the narrow exception in the last sentence of footnote 1495 fails for another reason: FairPoint did not have a legitimate tariff proposal pending on the effective date of the rate cap established by the new federal regulations.

FairPoint, yet again, conveniently forgets that it, itself, requested that its Interconnection Charge filing be withdrawn and treated it as illustrative for purposes of investigation. FairPoint Objection to Joint Motion for Clarification and Expedited Relief (Oct. 12, 2009) at 4. As the Commission has pointed out several times in its orders, the Commission established a process and set a schedule in this docket to investigate the Interconnection Charge proposal. January 20

Order at 17-18; February 3 Order at 3. To implement that process, the Commission issued a number of procedural orders. One of these, in particular, granted FairPoint's request for additional time to prepare its case in support of the illustrative Interconnection Charge proposal. November 2011 Order at 5.

Rather than work within the process that the Commission established for FairPoint's benefit, FairPoint took matters into its own hands, not once, but twice, by purporting to refile the identical Interconnection Charge tariff provisions that the Commission was in the process of reviewing on an illustrative basis in this docket. Worse, just days after the Commission, in Order No. 25,301, had rejected FairPoint's purported November 30th filing in favor of the process that was already underway, FairPoint flagrantly disregarded the Commission's order and refiled the identical proposal on December 22, 2011.

The Commission should not countenance FairPoint's procedural shenanigans. Contrary to FairPoint's claim, FairPoint may not "mak[e] *any* tariff filing it chooses." FairPoint's Objection to Motion to Dismiss or for Summary Judgment, Jan. 18, 2012, at 4 (emphasis in original). Under FairPoint's hubristic view, Commission procedures and Commission orders directing FairPoint to comply with those procedures mean nothing. Having just been told that the Commission was addressing the Interconnection Charge increase under the proceeding already underway and the schedule already established, FairPoint made its "in your face" December 22nd filing that was directly contrary to what the Commission had just ordered.

FairPoint had no legitimate right to refile the Interconnection Charge proposal on December 22nd. Its action blatantly contravened the Commission's Order No. 25,301 issued days before. The Commission was correct to find that the December 22nd Interconnection Charge

filing was not a legitimate proposal and did not permit FairPoint to escape the rate caps established by the FCC regulations.

B. FairPoint's Interconnection Charge Proposal Contravenes National and State Telecommunications Policy and Is Futile and Wasteful.

FairPoint's Interconnection Charge proposal is contrary to national telecommunications policy as set forth in the *Connect America Fund Order* and New Hampshire telecommunications policy as set forth in RSA 378:17-a, III. In addition, given the step-down process for intrastate access rates established by the *Connect America Fund Order,* adopting, or even scrutinizing, the Interconnection Charge proposal would be a futile and wasteful gesture.

As a matter of national telecommunications policy, the FCC has established bill-and-keep as the default methodology for all intercarrier compensation traffic. *Connect America Fund Order,* ¶ 736. To implement that goal, the FCC has established a multi-year step-down process for reducing intercarrier compensation rates to the bill-and-keep end point. 47 C.F.R. § 51.907; *Connect America Fund Order,* ¶ 801 & Figure 9. FairPoint's proposed increase to its Interconnection Charge contravenes that national goal.

As both the Commission and the FCC recognized, FairPoint is not without alternatives to make up revenues it may be losing because of this federal policy change. *See* January 20 Order at 13-15; *Connect America Fund Order,* ¶¶ 745-46, 750. While the Commission's order approving the Verizon/FairPoint transaction limits FairPoint's options to some degree, that order permitted FairPoint *at any time* to seek a revenue-neutral rebalancing of access and local exchange rates. *In re Verizon New England Inc., et al. and Fairpoint Communications, Inc. — Transfer of Assets,* DT 07-011, Settlement Agreement Among the Joint Petitioners and the Commission Staff, § 8.1 (Feb. 25, 2008) ("FairPoint/Staff Settlement"). Thus, nothing precluded FairPoint from seeking to rebalance access and retail rates in August 2009, immediately upon

issuance of the Order *Nisi,* so as to make up the revenue shortfall it claimed would result from the elimination of the CCL charge on certain calls.

In addition, FairPoint retained the right to petition for a retail rate case in the event of exigent circumstances, including a claim of alleged excessively low earnings. *Id.* FairPoint, of course, has made such claims of revenue deficiencies in numerous filings in this docket. *E.g.,* Motion at 16 (citing Skrivan Supplemental Testimony at 17). While § 8.1 of the FairPoint/Staff Settlement precluded the change in rates from any such rate proceeding from taking effect until the fourth anniversary of the transaction's closing (that is, March 31, 2012), that anniversary is just weeks away. Thus, if FairPoint had a sincere concern about excessively low earnings, it could have sought a rate case months ago.

But, as the Commission knows, FairPoint has done nothing to explore such alternatives. January 20 Order at 13-15. Instead, it continues to seek the easy money of excessive intercarrier compensation.

Nonetheless, shifting FairPoint's access charges to end-user charges would be consistent with the goals of national telecommunications policy as set forth in the *Connect America Fund Order.* The FCC noted that end-users benefit from both making and receiving interexchange calls. *Id.,* ¶ 744. According to the FCC, allowing a carrier to recover those costs from another provider rather than the end-user beneficiary confuses the pricing signals sent to those end-users. Eliminating the ability of carriers to shift costs from their local networks to other carriers helps to reveal the true cost of the network to potential subscribers. *Id.,* ¶ 745. The FCC further noted, "Such an approach provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers." *Id.,* ¶ 745.

The FCC anticipated arguments like FairPoint's that increasing local rates will harm carriers competitively, noting instead that consumers likely would benefit from the measures the FCC adopted. "[W]e expect carriers will engage in substantial innovation to attract and retain consumers. New services that are presently offered on a limited basis will be expanded, and innovative services and complementary products will be developed. . . . All these changes will bring substantial benefits to consumers." *Id.*, ¶ 750.

The New Hampshire Legislature also has expressed an expectation that intrastate access rates will be reduced and rebalanced by increases in local service rates. RSA 378:17-a, III(a) requires that, as soon as possible after the federal government reduces interstate access rates, the Commission should consider a corresponding reduction in intrastate access rates, in so doing balancing the disadvantages of higher intrastate rates and the disadvantages of raising local rates.[23] Thus, the Legislature clearly understood the tradeoff between access rate reductions and increased local rates, yet it nonetheless required the Commission to consider raising local rates — *not* other intercarrier compensation rates — when access rates are lowered.

Moreover, reviewing FairPoint's Interconnection Charge proposal would be largely a futile exercise and a waste of the Commission's and parties' time and resources. Under the FCC regulations adopted in the *Connect America Fund Order,* FairPoint is obligated to significantly reduce its intrastate access rates on July 1, 2012 as the next step in the transition to a nationwide bill-and-keep regime. 47 C.F.R. § 51.907(b); *Connect America Fund Order,* ¶ 801 and Figure

[23] RSA 378:17-a, III(a) states:

> The commission should, as soon as possible after each significant decrease of interstate access charges by the federal government, consider corresponding reductions in intrastate access charges, taking into account both the disadvantages to customers of intrastate access charges that exceed interstate access charges and the disadvantages to customers of increases in charges for basic services.

9.[24] There is little to be gained by allowing FairPoint to increase its Interconnection Charge access rate element, only to have to substantially lower such access rates again in a few months' time. There are many more productive uses of the Commission's and parties' time and money.[25]

Allowing FairPoint to increase intercarrier compensation by means of the Interconnection Charge will delay realization of the benefits projected by the FCC. The Commission correctly dismissed FairPoint's Interconnection Charge proposal because it is contrary to federal and New Hampshire law and policy. FairPoint has offered no valid reason for the Commission to reconsider that decision. The Commission should deny FairPoint's Motion.

CONCLUSION

As demonstrated above, FairPoint's Motion, for the most part, merely reasserts matters it previously argued and the Commission correctly rejected. In addition, many of the Commission decisions of which FairPoint complains were made in earlier orders for which the time for seeking rehearing or reconsideration has long passed. For these reasons, without more, the Motion must be denied. Moreover, given that the Commission has expressly ordered that it would entertain no further arguments concerning its conclusion that the CCL charge is not a contribution rate element, FairPoint's Motion on that issue is improper and must be denied. In addition, because FairPoint's proposal to increase the Interconnection Charge contravenes federal and state law and policy, its Motion concerning that issue must fail.

[24] Price cap carriers are obligated to reduce most intrastate terminating access rates by one-half the difference between such intrastate rates and the carrier's interstate rates. *Id.*

[25] In addition, under FairPoint's theory that RSA 378:6, I(b) applies to its purported filing, the Commission could take eight months, or until August 22, 2012, to complete its review of the proposed Interconnection Charge increase, some seven weeks after the first mandatory step-down in intrastate rates — an absurd result.

February 27, 2012

Respectfully Submitted,

Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all d/b/a EarthLink Business

By their attorney,

Gregory M. Kennan (/sg/)

Gregory M. Kennan
Fagelbaum & Heller LLP
20 N. Main St., Suite 125
Sherborn, MA 01770
508-318-5611 Tel.
508-318-5612 Fax
gmk@fhllplaw.com

Freedom Ring Communications LLC d/b/a BayRing Communications

By its attorney,

Susan S. Geiger

Susan S. Geiger
Orr & Reno, P.A.
One Eagle Square
Concord, NH 03302-3550
603-223-9154
sgeiger@orr-reno.com

AT&T Corp.

By its attorney,

James A. Huttenhower (/sg/)

James A. Huttenhower
AT&T Services Inc.
225 W. Randolph Street
Suite 25-D
Chicago, IL 60606
312-727-1444
jh7452@att.com

Sprint Communications Company, L.P. and Sprint Spectrum, L.P.

By their attorney,

Benjamin J. Aron (/sg/)

Benjamin J. Aron
Sprint Nextel Corporation
2001 Edmund Halley Drive, Room 208
Reston, Virginia 20191
(703) 592-7618 Tel.
(703) 592-7404 Fax
benjamin.aron@sprint.com

Global Crosing Telecommunications, Inc.,
a Level 3 Company

By its attorney,

R. Edward Price (esq)

R. Edward Price
Senior Counsel
Level 3 Communications
225 Kenneth Drive
Rochester, NY 14623
p: 585.255.1227
e: ted.price@level3.com

Certificate of Service

I hereby certify that on this 27th day of February, 2012, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.

S S Geiger

Susan S. Geiger

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