THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2012 TERM

No. 2012-0398

Appeal of Northern New England Telephone Operation, LLC d/b/a FairPoint Communications-NNE

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

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

Susan S. Geiger
N.H. Bar No. 925
Orr & Reno, P.A.
One Eagle Square
Concord, NH 03302-3550
603-223-9154
sgeiger@orr-reno.com

AT&T CORP.

Daniel M. Deschenes
N.H. Bar No. 14889
Hinckley, Allen & Snyder, LLP
11 South Main Street, Suite 400
Concord, N.H. 03301-4846
603-225-4334
ddeschenes@haslaw.com

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

Amy Manzelli
N.H. Bar No. 17128
Baldwin & Callen PLLC
3 Maple Street
Concord, NH 03302
603-225-2585
manzelli@nhlandlaw.com

Gregory M. Kennan, *Of Counsel*
(Motion for admission *pro hac vice* pending)
Fagelbaum & Heller LLP
20 N. Main St., Suite 125
Sherborn, MA 01770
508-318-5611
gmk@fhllplaw.com

GLOBAL CROSSING TELECOMMUNICATIONS, INC., A LEVEL 3 COMPANY
Shaela McNulty Collins
N.H. Bar No. 10253
Eric J. Krathwohl
(Motion for admission *pro hac vice* pending)
Rich May, P.C.
176 Federal Street, 6th Floor
Boston, MA 02110
(617) 556-3800

SCollins@richmaylaw.com

EKrathwohl@richmaylaw.com

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications ; AT&T Corp. ; and 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 , and Global Crossing Telecommunications, Inc., a Level 3 company (collectively "Competitive Carriers" or "Appellees"), by and through their undersigned attorneys,[1] and submit the following Memorandum of Law in support of their Motion for Summary Affirmance of the orders of the Public Utilities Commission ("Commission") that are the subject of the Appeal by Petition filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint"). In particular, this Memorandum explains why, pursuant to Supreme Court Rule 25(2), the Court should summarily dispose of this matter by affirming the Commission's decisions.

ARGUMENT

The Court may enter an order of summary affirmance when "the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable." *Sup. Ct. R.* 25(1)(c).

FairPoint's Petition (at 4-5) presents eight questions for this Court's review. The Competitive Carriers explain in detail below, with regard to each question, why the case should be disposed of summarily and why the Commission's rulings should be affirmed. Simply put,

[1] Benjamin J. Aron, counsel for Sprint Communications Company, L.P. and Sprint Spectrum L.P. , a party to the proceeding below, has reviewed the within pleading and concurs with the relief sought herein.

the issues raised by FairPoint present no substantial question of law, and the Commission's actions were neither unjust nor unreasonable.

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

The first question FairPoint raises is that the Commission violated FairPoint's due process rights because it did not provide FairPoint with a "meaningful hearing" on "the central issue in this case": the status of the carrier common line ("CCL") charge as a contribution element. Petition at 15.[2] FairPoint does not raise a substantial question of law because, through its predecessor Verizon, it has already received a hearing on the CCL issue. In addition, the Commission's decision on the hearing question was reasonable because of FairPoint's actions in the docket.

First, Verizon – FairPoint's predecessor in interest – did participate in a multi-day evidentiary hearing before the Commission in 2007 that addressed the purpose and propriety of the CCL charge.[3] 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* Order No. 24,837 at 31-32 (Mar. 21, 2008) (Supp. App. at 59-60). When FairPoint petitioned to intervene in this docket – nine months after the evidentiary hearing and one month after the Commission found that the CCL charge was not a contribution element – it agreed to take the record "as is." *See* FairPoint Petition to Intervene at 2 (filed Apr. 21, 2008) (Supp. App. at 64). It also sought reconsideration of Order No. 24,837 "based upon the entirety of the record to date" (*id.* at 2-3; Supp. App. at 64-65), which obviously included the July 2007 evidentiary

[2] If the CCL charge were a contribution element, its purpose would be to recover FairPoint's costs of doing business more generally, rather than to recover the specific costs of providing a common line (or loop) to a customer. *See* Order No. 24,837 at 31 (Mar. 21, 2008) (Supp. App. at 59).

[3] *See* Order No. 24,837 at 7 (Supp. App. at 35).

hearing. FairPoint thereby accepted that a hearing had occurred and that it was bound by the result of that hearing, including whatever conclusion the Commission reached regarding the purpose of the CCL charge. FairPoint's motion for reconsideration of Order No. 24,837 incorporated by reference Verizon's motion for reconsideration of the order as well as FairPoint's own argument. *See* FairPoint Motion for Rehearing and/or Reconsideration at 3 n.2 (filed Apr. 21, 2008) (Supp. App. at 69). Neither company's motion raised the issue of whether the CCL charge was a contribution element. Indeed, because FairPoint never sought rehearing on the Commission's March 2008 decision on the status of the CCL charge as a contribution element, it has waived the issue. See RSA 541:4.

Verizon and FairPoint appealed the Commission's tariff interpretation to this Court. However, neither company challenged the Commission's determination that the CCL charge was not a contribution rate element. *See Appeal of Verizon New England,* 158 N.H. 693 (2009). While this Court reversed the Commission's interpretation of the language of the CCL tariff, it did not disturb the Commission's conclusion regarding the status of the CCL charge, as the Commission explained in an extensive discussion in Order No. 25,283 at 12-16 (Oct. 28, 2011) (App. at 34-38). This Court should not allow FairPoint the chance for a due process "do-over" simply because FairPoint does not like the result obtained by its predecessor Verizon.

Second, assuming *arguendo* that FairPoint is not bound by the results of the July 2007 evidentiary hearing, the Commission could reasonably conclude from FairPoint's actions in November 2011 that FairPoint did not believe that an evidentiary hearing was required. FairPoint asserts that the Commission misconstrued its Response to the Competitive Carriers' Motion for Hearing[4] because its proposal to dispense with a hearing on the CCL tariff revisions

[4] FairPoint's Response to the Competitive Carriers' Motion for Hearing dated November 21, 2011 (App. at 63) ("FairPoint Response").

"was not addressing a constitutional due process issue." Petition at 13. FairPoint also points out that it "reserved numerous rights" in its Response. Petition at 15. But in FairPoint's Response, it also agreed that whether its CCL tariff filing complied with the Commission's earlier orders was "'presently ripe for consideration by the Commission' (as are other questions related to the CCL charge)." App. at 64 (citation omitted). The Commission could have understandably concluded that FairPoint's reference to "other questions related to the CCL charge" encompassed the possible status of the charge as a contribution element. *See* Rehearing Order at 18 (App. at 226).

Moreover, the context of FairPoint's proposal in November 2011 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.[5] In addition, FairPoint's assertion that it was reserving its rights regarding "[a]ll relevant questions" (FairPoint Response at 3 n.11 (App. at 66 n.11)) hardly makes clear that it was reserving its right to a hearing as "a constitutional due process issue" (Petition at 13), while waiving its right to "an evidentiary hearing" (*id.* at 14). As the Commission found in the Rehearing Order, there was nothing in FairPoint's response "creating the nuanced distinctions FairPoint now contends are in issue." Rehearing Order at 18 (App. at 226). The Commission's decision was reasonable, and the Court should summarily affirm it.

B. The Commission Properly Ordered Tariff Modifications in Docket DT 06-067.

The second question FairPoint raises is that the Commission's required modification of FairPoint's CCL tariff was outside the scope of Docket DT 06-067. Petition at 15-16. The

[5] 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)) (App. at 65) (emphasis omitted).

Commission's decision on this question was just and reasonable, and FairPoint's position raises no substantial question of law.[6]

FairPoint apparently believes that the Commission's statement in Order No. 24,705 at 6 (Nov. 29, 2006) (App. at 6), regarding the scope of the docket, was immutable. What FairPoint ignores, however, is that the Commission clearly has authority to change its orders:

> At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it. *This hearing shall not be required when any prior order made by the commission was made under a provision of law that did not require a hearing* and a hearing was, in fact, not held.

RSA 365:28 (emphasis added). The Commission exercised this authority in the Order *Nisi*, when it directed FairPoint to modify the CCL tariff,[7] and in Order No. 25,219, when it explained that it would implement the substantive goal of Order No. 24,705 regarding tariff modifications by undertaking an examination of the CCL tariff without assigning a separate docket number. *See* Order No. 25,219 at 8 (May 4, 2011) (App. at 20). As a matter of administrative efficiency and economic use of the Commission's and the parties' resources, it was perfectly reasonable for the Commission to proceed under the existing docket, with the existing parties, and on the basis of the existing record – rather than elevating form over substance by opening a separate docket and starting again from scratch.

FairPoint's assertion that the Commission was required to provide it with "notice and hearing" before making any decision about tariff modification (Petition at 16) also presents no substantial question of law. The Commission is not required to conduct a hearing in connection with its procedural orders. *Cf. Appeal of the Office of the Consumer Advocate*, 148 N.H. 134,

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[6] As Appellees explain in their Motion for Summary Disposition (filed concurrently with this Memorandum), the Court should refuse the appeal of Question 3(b) because FairPoint failed to seek rehearing, in a timely manner, of the Commission orders underlying this question.

[7] *See* Order *Nisi* No. 25,002 at 2 (Aug. 11, 2009) (App. at 10).

136 (2002) (recognizing that Commission does not have to hold hearing before issuing order *nisi*). Under the second sentence of RSA 365:28 (italicized above), no hearing is required to amend a prior procedural order that was itself issued without a hearing.

Finally, FairPoint's position ignores what actually happened in the case. Order No. 25,219 gave FairPoint and the other parties notice of how, as a matter of docketing, the Commission planned to treat the issue of tariff modification, which the Commission had first required in the Order *Nisi*. *See* Order No. 25,219 at 8 (App. at 20).[8] Although FairPoint conditionally requested a hearing regarding the *Order Nisi*, including the tariff modification issue,[9] it subsequently suggested that the Commission "dispense with a hearing on the CCL [tariff language] question and move directly to briefs." FairPoint Response at 3 (App. at 65).

C. The Commission Correctly Rejected the Notion That the CCL Charge Is a Contribution Element.

The third question FairPoint raises is whether the record before the Commission contained sufficient support for its conclusion that the CCL charge was not a contribution element. Petition at 16-18. FairPoint's argument here simply challenges the Commission's factual conclusions, which are presumed on appeal to be lawful and reasonable. *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (2002). Indeed, FairPoint's assertions about what the record showed about the purpose of the CCL charge, and the role of that charge in Verizon's rate structure, are simply wrong.[10]

Testimony submitted by AT&T Corp.'s panel of witnesses completely rebuts FairPoint's assertion (Petition at 17) that, under the tariff the Commission approved in 1993, the CCL charge

[8] FairPoint did not seek rehearing of Order No. 25,219.
[9] *See* Order No. 25,219 at 5 (App. at 17) (discussing FairPoint's request for hearing).
[10] As Appellees explain in their Motion for Summary Disposition (filed concurrently with this Memorandum), the Court should refuse the appeal of Question 3(c) because FairPoint failed to seek rehearing, in a timely manner, of the Commission order underlying this question.

was intended as a contribution element, and therefore could be imposed irrespective of common line usage. As the AT&T witnesses pointed out, although Verizon may have originally "designed" the CCL charge as a contribution element to recover joint and common costs along with loop costs, the Commission did not approve Verizon's rates 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) (Supp. App. at 11).

Moreover, the witness whom FairPoint hypes as "the *actual* Verizon employee who was on the scene and managed the development of the original CCL charge" (Petition at 17-18 (emphasis in original)) admitted during the July 11, 2007, evidentiary hearing in Docket DT 06-067 that the Commission did not accept Verizon's proposal for setting the CCL rate. Transcript of Docket DT 06-067, Day II, at 78-79 (Supp. App. at 26-27). He also admitted that the revised 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 (Supp. App. at 27-28). As a result, FairPoint's current assertion that the record here contains "unrebutted evidence" that the CCL charge "was designed to recover joint and common costs related to its business as a whole" (Petition at 17) is plainly incorrect.

The Commission correctly concluded, as a factual finding on the record before it, that the CCL charge is not a contribution element and should be assessed only when the carrier uses a FairPoint common line. This conclusion is just and reasonable, and the Court should summarily affirm it.

D. The Commission Acted Lawfully in Approving FairPoint's CCL Tariff Language Without Simultaneously Reviewing FairPoint's Request to Implement a New, Illustrative Interconnection Rate.

Although stated separately, Questions 3(d) and 3(f) of FairPoint's Petition are related. Question 3(d) poses a question concerning unconstitutional confiscation of property, i.e., whether the Commission erred in not approving FairPoint's CCL tariff language change in a revenue neutral manner (by not simultaneously approving FairPoint's proposed interconnection rate increase), and Question 3(f) asks whether the Commission erred by failing to consider both tariff changes together, not separately. Neither of these questions constitutes a substantial question of law for this Court's consideration. In addition, because the Commission's ruling on these issues is lawful and reasonable, it should be summarily affirmed.

1. The Commission did not engage in unconstitutional confiscation.

The Commission acted lawfully, justly and reasonably in accepting FairPoint's CCL tariff language changes without simultaneously adopting FairPoint's proposed Interconnection Charge rate increase. *See* Order No. 25,358 at 19-21 (App. at 227-229). The Commission's failure to approve the illustrative Interconnection Charge does not constitute an unconstitutional confiscation of FairPoint's property. That the implementation of the CCL language change had the potential to reduce FairPoint's CCL revenues does not automatically compel the Commission to adopt the proposed Interconnection Charge increase in an effort to offset the alleged revenue decrease claimed by FairPoint. A determination of whether confiscation has occurred entails an examination of FairPoint's overall revenues in the context of a general rate proceeding (*see, e.g. Petition of Public Service Company of New Hampshire,* 130 N.H. 265 (1988)), not simply a review of whether two tariff changes proposed by FairPoint offset one another. Indeed, while a lower rate for one service may be balanced by generous rates for other services, it is a company's

overall levels of rates, revenues and costs that determine a company's financial integrity and attractiveness to investors. As FairPoint has failed to file a rate case that would permit the Commission to examine FairPoint's overall revenues, its constitutional confiscation claim is without merit. As the Commission correctly noted: "FairPoint's mere assertion that a rate change was necessary was not a sufficient basis for the Commission to adjust other rates." Order No. 25,358 at 19 (App. at 227).

In addition, the Commission specifically stated that FairPoint was not foreclosed from arguing "for some appropriate level of overall revenues to avoid the possibility [of]...confiscation." *Id.* at 20 (App. at 228). However, the Commission also acknowledged that permitting such an argument does not automatically mean that a decrease in one particular source of revenue (i.e., CCL charges) "must be offset by some other change" (i.e., an increase in the Interconnection Charge). *Id.* The Commission therefore committed no legal error in failing to approve FairPoint's request for an increase in the Interconnection Charge.

2. FairPoint has failed to exhaust its administrative remedies relative to its confiscation claim.

The Court should not entertain FairPoint's confiscation argument because FairPoint has failed to exhaust its administrative remedies regarding such an argument. The Commission noted that "FairPoint remains free to propose changes to its tariff to produce additional revenue to the extent it views such revenue as necessary" and is "free to petition for an increase in revenue through the adjustment to a properly vetted charge." *Id.* at 20 (App. at 228). Instead of pursuing its administrative remedies as suggested by the Commission, FairPoint has filed this appeal challenging as confiscatory the Commission's rejection of a single rate component – the Interconnection Charge. Inasmuch as the Commission has invited FairPoint to seek other forms

of rate relief to address expected CCL revenue decreases, its confiscation claim should be summarily dismissed.

3. The Commission acted lawfully in bifurcating its review of the CCL tariff language change and the proposed interconnection rate increase.

In Question 3(f) of its Petition, FairPoint argues that the Commission erred in failing to act upon the "entire filing": i.e., both the CCL tariff language change, as well as the Interconnection Charge increase. However, FairPoint presents no substantial question of law for this Court's review, as FairPoint itself agreed below that the Commission could decide the propriety of the CCL revisions on brief, which, in essence, bifurcated the proceeding. *Id.* at 21 (App. at 229). As the Commission logically and correctly noted, "[s]uch bifurcation would, by definition mean that the two [tariff] revisions would be addressed separately rather than by having the Commission act upon the entire filing." *Id.* FairPoint's unilateral attempt to link the CCL tariff change to its request for an Interconnection Charge increase did not bind the Commission to consider those changes simultaneously. The Commission has the authority to review and separately implement 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 – as here – concern totally different issues. This position is further supported by RSA 378:6, IV, which expressly authorizes the Commission to amend tariff filings. The Commission noted that under that statute, it "was not bound to accept or reject a filing in its entirety" and, therefore, could lawfully approve the CCL language change and reject the Interconnection Charge rate increase. Order No. 25,358 at 21 (App. at 229).

Compelling the Commission to review unrelated components of filings 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 Counsel v. Public Service Company of New Hampshire,* 119 N.H. 332, 341 (1979). Thus, the Commission's treatment of the CCL tariff change separately from the proposed increase in the Interconnection Charge was entirely appropriate, and therefore should be summarily affirmed.

E. FairPoint's Criticism of the Legal Standard the Commission Applied to Its Dismissal of the December 22, 2011 Interconnection Charge Filing Presents No Substantial Question of Law.

FairPoint argues, in Question 3(e), that the Commission erred by applying an incorrect standard of review — RSA 378:6, IV, instead of RSA 378:6, I(b) — in dismissing its December 22, 2011, purported re-filing of the Interconnection Charge proposal. Petition at 21-23. FairPoint's arguments are both irrelevant and incorrect. They are irrelevant because FairPoint's appeal on this point is improper, as FairPoint had no legitimate right to refile its tariff proposal on December 22. Even if relevant, FairPoint's arguments are incorrect, since the Commission applied the proper legal standard.

Therefore FairPoint presents no substantial question of law. Instead, the question for the Court is: Who controls the Commission's docket and the orderly conduct of its business — FairPoint or the Commission? At FairPoint's request and for FairPoint's benefit, the Commission established a process to examine FairPoint's Interconnection Charge tariff proposal on an illustrative basis (that is, without an official tariff filing), including a procedural schedule and a March 2012 hearing on the merits. FairPoint did not seek timely reconsideration of any of the Commission's procedural orders issued in 2011 prior to the December 22 filing. Instead,

FairPoint merely refiled the identical proposal a third time, demanding that the Commission undo the established, orderly process and act on FairPoint's caprice. The Court should summarily affirm the Commission's decision.

1. FairPoint's Arguments Are Irrelevant.

FairPoint's arguments are irrelevant because FairPoint had no legitimate right to file its December 22, 2011 tariff proposal. That filing circumvented a procedure and schedule that the Commission had established — a procedure and schedule established in Commission orders that FairPoint did not timely challenge. Further, the December 22 filing contravened a Commission order issued just days before, in which the Commission rejected an identical tariff filing in favor of an established, ongoing process under which the Commission was reviewing the Interconnection Charge proposal.

As FairPoint acknowledges, in October 2009, it requested that the Commission allow it to withdraw its tariff filing and treat it as illustrative. Petition at 7. After FairPoint emerged from bankruptcy in 2011, the Commission established a process and schedule under which it would, as FairPoint had requested, evaluate the Interconnection Charge proposal as an illustrative tariff. Order No. 25,283 (Oct. 28, 2011) (App. at 23); Order No. 25, 284 (Oct. 28, 2011) (Supp. App. at 79-80). In so doing, the Commission stated that it would treat the tariff as illustrative to allow proper time for review without the time constraints imposed by RSA 378:6. Order No. 25,283 at 31 (App. at 53).

FairPoint did not seek reconsideration of either of the orders issued on October 28, 2011. Accordingly, the Commission subsequently ruled, "Therefore, our finding in Order 25,283 that the portion of the filing relative to the Interconnection Charge would be withdrawn and treated as

illustrative pursuant to FairPoint's request has not been challenged and remains in effect." Order No. 25,319 at 9 (Jan. 20, 2012) (App. at 82).

In response to a FairPoint request, the Commission extended some of the deadlines to enable FairPoint to respond to discovery and better prepare its case, and set March 8, 2012 for the hearing on the merits. Order No. 25,295 at 5-6 (Nov. 30, 2011) (App. at 73-74). As with Order No. 25,283, FairPoint did not seek reconsideration of Order No. 25,295.

Instead of complying with the Commission-established procedural schedule, however, FairPoint took matters into its own hands. On November 30, 2011, it purported to refile the identical proposed tariff amendments that the Commission was already reviewing on an illustrative basis pursuant to Order Nos. 25,283 and 25,295. *See* Order No. 25,301 at 1-2 (Dec. 14, 2011) (Supp. App. at 81-82).

In an effort to re-establish an orderly process, the Commission rejected, without prejudice, FairPoint's Interconnection Charge filing in Order No. 25,301. *Id.* The Commission explained, "This will allow us to conduct our investigation of the tariff consistent with the schedule in this docket, which we recently extended at FairPoint's request. The schedule now calls for hearing on the merits on March 8, 2012." *Id.* at 2 (Supp. App. at 82). The Commission reiterated its conclusion that, to properly review FairPoint's proposal, it should not do so under the tight time constraints of RSA 378:6, IV. *Id.* at 2-3 (Supp. App. at 82-83). As before, FairPoint did not seek reconsideration of Order No. 25,301.

Instead, and again in disregard of a recently-issued Commission order, FairPoint merely refiled its tariff proposal on December 22, 2011 — exactly the same tariff proposal that the Commission had rejected just a few days before, and that the Commission was already examining in Docket DT 06-067.

The proper way for FairPoint to have challenged the Commission's procedural treatment of its Interconnection Charge filing was to seek rehearing of the orders that established the process for review of the illustrative tariff.[11] In particular, if FairPoint disagreed with the Commission's rejection of its refiled Interconnection Charge proposal in Order No. 25,301, or the rationale for that decision (that the review was governed by RSA 378:6, IV and the review timeframes in that provision were too short for adequate review), it should have sought reconsideration of that specific order. But FairPoint did not seek reconsideration of any of these orders within the applicable statutory deadlines.

The Court should not countenance FairPoint's attempts to take the law into its own hands. FairPoint refused to work within the process that the Commission established for FairPoint's benefit or to comply with statutory procedures and timelines for seeking review of Commission orders. Instead, when it did not get its way, FairPoint merely refiled the identical proposal multiple times, demanding that the Commission undo the established, orderly process and act on FairPoint's caprice. The Commission was correct in rejecting FairPoint's inappropriate demands. The Court should uphold the Commission's right to manage its own docket.

2. The Commission Applied the Correct Standard in Dismissing FairPoint's Re-filed Interconnection Charge Proposal.

The Commission correctly determined that RSA 378:6, IV applied to its review of FairPoint's Interconnection Charge tariff filing. Because that statute provided too short a time for a proper review, the Commission agreed with FairPoint's request to treat the filing as illustrative, and established a schedule to accomplish that.

[11] Those orders are the October 28 Order Nos. 25,283 (App. at 23) and 25,284 (Supp. App. at 79), the November 30 Order No. 25,295 (App. at 69), and the December 14 Order No. 25,301 (Supp. App. at 81).

FairPoint contends that the Court should have applied RSA 378:6, I(b), and, presumably, should not have dismissed the filing. First, the Court should note that FairPoint's position that RSA 378:6, I(b) governs the Commission's review of the Interconnection Charge filing is a new position that is diametrically opposite to FairPoint's position earlier in the proceeding. Three years ago, FairPoint claimed that RSA 378:6, I did not apply at all. FairPoint Objection to Joint Motion for Clarification and Expedited Relief at 4 (filed Oct. 12, 2009) (Supp. App. at 100) (stating that, "if RSA 378:6, I were to apply here (*and FairPoint's position is that it does not*) . . . .") (emphasis added).

Further, Order No. 25,301 "reiterated a prior conclusion of the Commission to grant FairPoint's request to withdraw the portion of its filing that had been made pursuant to RSA 378:6, IV covering the Interconnection Charge . . . . Only now does FairPoint claim that treating the Interconnection Charge filing under RSA 378:6, IV was in error." Order No. 25,319 at 18 (Jan. 20, 2012) (App. at 92).[12]

Regarding the substance of the issue whether RSA 368:8, IV applies, the Court should accord substantial deference to the interpretation of the agency charged with the administration of the statute, in this case, the Commission, *Appeal of Town of Seabrook,* No. 2011-381, 2012 N.H. Lexis 70 at *11 (N.H. May 22, 2012); *Appeal of Vicki Morton,* 158 N.H. 76, 78 (2008). The Commission correctly held that RSA 378:6, IV applied to FairPoint's Interconnection Charge filing:

> RSA 378:6, IV provides "[a]ny tariff for services filed for commission approval by a telephone utility, except a tariff reviewed pursuant to RSA 378:6, I(a) dealing with general rate increases] shall become effective as filed 30 days after filing, unless the commission amends or rejects the filing within the 30-day period. . . ." Thus, by express language the statute only allows an exception to the

[12] As noted previously, these prior conclusions were made in Order Nos. 25,283 (Oct. 28, 2011) and 25,301 (Dec. 14, 2011), and FairPoint did not seek reconsideration of either order within its respective statutory 30-day deadline.

> process for telephone utility tariffs under RSA 378:6, IV for a rate schedule representing a general rate increase pursuant to RSA 378:6, I(a), and not for any tariff changes pursuant to RSA 378:6, I(b). In fact RSA 378:6, I(b) begins by stating "[e]xcept as provided in RSA 378:6, IV, for all other schedules . . ." which steers all telephone utility tariff filings that do not represent a general increase in rates to RSA 378:6, IV rather than RSA 378:6, I(b).

Order No. 25,319 at 18 (Jan. 20, 2012) (App. at 92). The Commission correctly pointed out that the exception in RSA 378:6, I(b) meant that telephone tariff filings are to be governed by subsection IV (unless they were for a general rate case, in which case they are governed by subsection I(a)). Thus, telephone tariffs are reviewed under subsections I(a) and IV, but not under any other provision. The Commission's interpretation neither "clearly conflicts with the express statutory language" nor "is plainly incorrect." *See Town of Seabrook,* 2012 N.H. Lexis at *11-12. The Commission's interpretation, therefore, is entitled to substantial deference, and the Court should uphold it.

F. The Commission Acted Lawfully in Approving FairPoint's CCL Tariff Language Without Simultaneously Reviewing FairPoint's Request to Implement a New, Illustrative Interconnection Rate.

FairPoint Questions 3(d) and 3(f) involve closely related issues. Please refer to Section D(3) *supra* for Appellees' argument explaining why the Court should summarily dispose of FairPoint Question 3(f).

G. The Commission Properly Dismissed FairPoint's Interconnection Charge Filing In The February 3 Order.

FairPoint's last appeal question (Question 3(g)) asserts that the Commission incorrectly determined that FairPoint's Interconnection Charge filing had to be dismissed under the Federal Communications Commission's ("FCC") recently revised rules that forbid increases in intrastate

access rates. Petition at 24-27. FairPoint presents no substantial question of law. The Commission's decision was correct and appropriate, and the Court should summarily affirm the Commission's February 3, 2012 order.

The Commission dismissed FairPoint's proposed Interconnection Charge increase because it was contrary to FCC regulations that became effective on December 29, 2011, which prohibited any increase in any intrastate access rate element. Specifically, on that date, FairPoint was required to cap its rates for all interstate and intrastate rate elements for services contained in the federal definitions of End Office Access Services, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. 47 C.F.R. § 51.907(a) (Supp. App. at 91).[13] The Commission correctly found that FairPoint's Interconnection Charge proposal was squarely within the definition of an "End Office Access Service" set forth in 47 C.F.R. § 51.903, Note to paragraph (d) (Supp. App. at 90). FairPoint's proposed rate increase, which had not taken effect as of December 29, was therefore subject to the rate cap in § 51.907(a). The Commission properly and reasonably dismissed FairPoint's illustrative Interconnection Charge proposal on that basis. Order No. 25,327 at 13-15 (App. at 107-09).

FairPoint bases its entire claim that the Commission erred in dismissing its Interconnection Charge proposal, not on the text of the FCC's regulations, but on a single sentence in a single footnote in the FCC's 752-page *Connect America Fund Order.* Petition at 24 (citing *Connect America Fund Order,* ¶ 801, n. 1495, last sentence). But, as the Commission correctly found, FairPoint's effort to bring its Interconnection Charge proposal within the exception in the last sentence of footnote 1495 fails. This decision should be affirmed for at least

[13] The FCC promulgated new, comprehensive, nationwide regulations governing intercarrier compensation in *In re Connect America Fund,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (Nov. 18, 2011) ("*Connect America Fund Order*") (available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1_Rcd.pdf).

three reasons. First, this particular appeal question involves complicated issues of federal and state telecommunications law that this Court could appropriately leave to the FCC and the Commission. Second, FairPoint did not have a legitimate tariff proposal pending on December 29, 2011. Third, even if FairPoint did have a legitimate proposal pending, its proposal was not within the terms of the exception set forth in footnote 1495.

1. There is No Substantial Question of Law Warranting an Appeal to this Court.

Question 3(g) raised by FairPoint involves an esoteric question about the interpretation of brand-new federal telecommunications regulations and how they apply to FairPoint's purported Interconnection Charge proposal (if they apply at all; *see* section 2 below). The potential application of the Interconnection Charge concerns only a narrow group of parties — FairPoint and certain telecommunications companies in New Hampshire, like Appellees, rather than to the public at large. Further, FairPoint's Interconnection Charge proposal does not involve a retail tariff that governs its relationships with thousands of retail customers throughout the state. Instead, the tariff in this case relates only to FairPoint and the other telecommunications companies that acquire services from FairPoint under the applicable tariff. Under these circumstances, no substantial question of law exists for this Court's consideration.

Further, there is no question that the FCC's new regulations are controlling. The question that FairPoint raises involves the interpretation of those federal regulations and their application to FairPoint's purported rate increase. These are highly technical issues squarely within the administrative expertise of the Commission. In fact, the FCC established a special role for state commissions in interpreting and enforcing the new regulations.

> Because carriers will be revising intrastate access tariffs to reduce rates for certain terminating switched access rate elements, and capping other intrastate rates, states will play a critical role implementing and enforcing intercarrier

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

Connect America Fund Order, ¶ 813 (Supp. App. at 87) (emphasis added). The Commission realized here that it was entering barely-explored territory and took particular care to discharge its responsibilities: "Given the recent vintage of the [*Connect America Fund Order*] and the consequent dearth of precedent relating to it, we take some time to set out our understanding of the provisions of the order applicable here." Order No. 25,327 at 9 (Feb. 3, 2012) (App. at 103).

The Commission is statutorily vested with broad administrative and supervisory powers over the utilities it regulates. *See Appeal of Granite State Electric Co.,* 120 N.H. 536, 539 (1980) and RSA 374:3. Particularly where the federal agency charged with enforcing national telecommunications law and policy has created a special niche for the Commission in the enforcement of particular federal regulations, the Court should not second-guess the decisions of the expert agency. The Court gives the Commission's policy decisions "considerable deference." *See Appeal of the Office of Consumer Advocate*, 148 N.H. 134, 136 (2002). The Court should so defer in this case by summarily disposing of FairPoint Question 3(g).

2. FairPoint Had No Legitimate Tariff Proposal Pending on December 29, 2011.

FairPoint's convoluted attempt to shoehorn its Interconnection Charge proposal into the narrow exception for pending rate increases in the last sentence of footnote 1495 of the *Connect America Fund Order* fails at the threshold. FairPoint did not have a legitimate tariff proposal pending on December 29, 2011, the effective date of the rate cap established by § 51.907(a). FairPoint's actions involve precisely the type of "gamesmanship" the FCC warned state commissions to guard against. *See Connect America Fund Order,* ¶ 813 (Supp. App. at 87).

In arguing otherwise, FairPoint conveniently forgets that it requested that its Interconnection Charge filing be withdrawn and treated as illustrative for purposes of investigation. FairPoint admits as much: "FairPoint . . . withdrew the tariff filing, deeming it merely illustrative." Petition at 7. As discussed above, the Commission was proceeding to examine FairPoint's proposed increase in the very manner that FairPoint requested, and it had established a process and set a schedule to investigate FairPoint's proposal. Order Nos. 25,283 (App. at 52-53); 25,284 (Supp. App. at 79); 25,301 (Supp. App. at 81); 25,319 (App. at 97-98).

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 Docket DT 06-067. Thus, FairPoint's December 22 Interconnection Charge filing was not a legitimate proposal and did not permit FairPoint to escape the rate caps established by the FCC regulations.

3. The Last Sentence in Footnote 1495 Is Inapplicable.

Even if FairPoint's Interconnection Charge proposal were validly pending on December 29, 2011 (which it was not), FairPoint's proposal does not fit within the terms of the exception in

footnote 1495 of the *Connect America Fund Order*. It therefore is squarely covered by the rate caps in 47 C.F.R. § 51.907(a), and the Commission was correct to dismiss it.

FairPoint's argument is based exclusively on a handful of words in the FCC's 752-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 (Supp. App. at 86). Specifically, 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. *See* Petition at 25-26. That contention is, on its face, irrelevant and incorrect.

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

In the first instance, there is no need to decide whether FairPoint's Interconnection Charge proposal is within the federal "trunking basket." Under the rate caps imposed by 47 C.F.R. § 51.907(a), the issue arises only if FairPoint's Interconnection Charge is *not* within the federal definition of End Office Access Services or Tandem Switched Transport Access Services. However, as the Commission found, the Interconnection Charge is an End Office Access Service, or if it is not, it is a Tandem Switched Transport Access Service. Order No. 25,327 at 14 (App. at 108). In either case, it falls under the rate caps of section 51.907(a) without regard to whether it is in the "trunking basket."

This is because, under § 51.907(a), whether a rate element is within the "trunking basket" matters only if that 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 [December 29, 2011], 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) (Supp. App. at 91) (emphasis added).[14]

The Commission correctly found that the Interconnection Charge was squarely within the definition of End Office Access Services. The "note to paragraph (d)" of 47 C.F.R. § 51.903 specifically lists "state Transport Interconnection Charges" and "state . . . Residual Interconnection Charges" as examples of "residual rate elements," which are within the definition of End Office Access Service:

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

47 C.F.R. § 51.903(d) (emphasis added) (Supp. App. at 90).[15]

[14] There is no dispute that FairPoint is a "price cap carrier" to which the regulation applies. *See* Order No. 25,327 at 9 (Feb. 3, 2012) (App. at 103).

[15] There is also no dispute that FairPoint is an incumbent local exchange carrier.

As an element of End Office Access Services, FairPoint's Interconnection Charge is not subject to whatever exception from rate caps that footnote 1495 might provide for *interstate* rate elements in the FCC "traffic sensitive basket" or "trunking basket."[16]

In an effort to escape the prohibition against increasing intrastate rate elements, FairPoint claims that its Interconnection Charge is not an End Office Access Service at all. Instead, FairPoint contends that the Interconnection Charge is a "*local transport* element . . . and is not restricted by the unqualified rate cap." Petition at 27 (emphasis in original). But FairPoint ignores the plain language of 47 C.F.R. § 51.903, the definition of End Office Access Services. The Note to paragraph (d) of § 51.903 expressly includes "state *Transport* Interconnection Charges [and] Residual Interconnection Charges" within the definition of End Office Access Services. 47 C.F.R. § 51.903(d) (Note) (Supp. App. at 90) (emphasis added).

Even if FairPoint's proposed Interconnection Charge were a local transport rate element that is outside the definition of End Office Access Services, then that charge would be 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 . . . ." (Supp. App. at 90).

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). Order No. 25,327 at 14 (App. at 108). Therefore, whether the Interconnection Charge is an End Office Access Service or (under FairPoint's view) a Tandem Switched Transport Access Service, the rate cap in § 51.907(a) precludes any increase to the

[16] Even if intrastate access rate elements somehow can be brought within the scope of the interstate rate baskets set forth in 47 C.F.R. § 61.42, FairPoint's claim that its Interconnection Charge is within the interstate trunking basket is contradicted by 47 C.F.R. § 61.42(d)(1), which includes residual interconnection charges under § 69.155 in the "CMT basket."

Interconnection Charge. The question of whether it is in the trunking basket is irrelevant, and the exception in footnote 1495 does not apply.

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

Finally, as explained above, the question whether FairPoint's proposed Interconnection Charge is within the "trunking basket" is of no moment to the issue of whether the charge is capped by § 51.907(a). Even if the question were relevant, however, the Interconnection Charge is not within the "trunking basket," which simply does not include New Hampshire intrastate access rate elements. The exception in footnote 1495 of the *Connect America Fund Order*, therefore, does not take the Interconnection Charge out from under the § 51.907(a) rate cap.

The "trunking basket" defined in 47 C.F.R. § 61.42(d)(3) (Supp. App. at 95) is a set of services subject to the FCC's "price-cap" regulations. 47 C.F.R. §§ 61.41 - .49. It is an *interstate* rate-setting device and appears in the FCC's Part 61 rules, which govern tariffing of interstate services. See 47 C.F.R. § 61.1(a) (Supp. App. at 93) ("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.

FairPoint's convoluted argument that its *intrastate* access rate proposal is governed by requirements applicable on their face to *federal* regulations governing *interstate* tariffs has no merit. Its 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. That being the only ground on which FairPoint rests its claim that the rate caps in § 51.907(a) are inapplicable to the proposed increase in its Interconnection Charge, FairPoint's challenge to the Commission's dismissal order lacks merit. The Court should summarily affirm the orders FairPoint has challenged.

CONCLUSION

For all of the foregoing reasons, the Appellees respectfully request that this Honorable Court summarily affirm the Commission's orders below.

Date: June 26, 2012

Respectfully submitted,

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

By its Attorneys,

ORR & RENO, P.A.

By: S. S. Geiger

Susan S. Geiger
N.H. Bar No. 925
One Eagle Square, P. O. Box 3550
Concord, NH 03302-3550
603-223-9154
sgeiger@orr-reno.com

AT&T CORP.

By its Attorneys,

HINCKLEY, ALLEN & SNYDER, LLP

By: Daniel M. Deschenes (ssg)

Daniel M. Deschenes
N.H. Bar No. 14889
11 South Main Street, Suite 400

Concord, N.H. 03301-4846
603-225-4334
ddeschenes@haslaw.com

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

By their Attorneys,

BALDWIN & CALLEN PLLC

By: Amy Manzelli (sog)
Amy Manzelli
N.H. Bar No. 17128
3 Maple Street
Concord, NH 03302
603-225-2585
manzelli@nhlandlaw.com

By: Gregory M. Kennan (sog)
Gregory M. Kennan, Of Counsel
(Motion for admission pro hac vice pending)
Fagelbaum & Heller LLP
20 N. Main St., Suite 125
Sherborn, MA 01770
508-318-5611
gmk@fhllplaw.com

GLOBAL CROSSING TELECOMMUNICATIONS, INC., A LEVEL 3 COMPANY

By its Attorneys,

RICH MAY, P.C.

By: Shaela McNulty Collins (sog)
Shaela McNulty Collins
N.H. Bar No. 10253

Eric J. Krathwohl
(Motion for admission *pro hac vice* pending)
176 Federal Street, 6th Floor
Boston, MA 02110
(617) 556-3800
scollins@richmaylaw.com
ekrathwohl@richmaylaw.com

CERTIFICATION OF COMPLIANCE

I hereby certify that on this 26th day of June, 2012, I have forwarded a copy of the foregoing Memorandum of Law by first class mail, postage prepaid, to the parties of record, opposing counsel, the Attorney General of the State of New Hampshire and the New Hampshire Public Utilities Commission.

Susan S. Geiger

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