

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**

MOTION FOR SUMMARY DISPOSITION

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

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**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**

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**GLOBAL CROSSING
TELECOMMUNICATIONS, INC., A
LEVEL 3 COMPANY**

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June 26, 2012

MOTION FOR SUMMARY DISPOSITION

NOW COME Freedom Ring Communications, LLC d/b/a BayRing Communications; AT&T Corp.; 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 attorneys¹, and respectfully move this Honorable Court to dismiss the Appeal by Petition (“Petition”) filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”). The Court should dismiss two of the questions for which FairPoint seeks review because FairPoint failed to bring timely motions for rehearing, within the deadline set forth in RSA 541:4, of the orders of the New Hampshire Public Utilities Commission (“Commission”) that form the basis for those appeal questions. Should this Honorable Court determine that it has jurisdiction to hear all portions of the Petition because they have been properly and timely filed, the Appellees respectfully move, pursuant to Supreme Court Rule 25(2), that this Court summarily dispose of this entire matter by affirming the decisions of the Commission from which FairPoint appeals. In support of these Motions, the Appellees state as follows:

MOTION TO DISMISS FOR PROCEDURAL DEFICIENCIES

1. RSA 541:4 sets forth the specifications for rehearing of Commission decisions and states that “[n]o appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided.” FairPoint filed its Petition pursuant to RSA 541:6, which requires that appeals from orders of administrative

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.

agencies be filed with this Court “[w]ithin thirty days after the application for rehearing is denied.” In addition, the Petition states that each issue FairPoint raises “has been presented to the Commission and has been properly preserved for appellate review.” Petition at 27.

2. Notwithstanding the foregoing statement, FairPoint failed to seek rehearing in a timely manner of the Commission orders underlying two of the seven questions for which FairPoint seeks review – specifically, Questions 3(b) and 3(c). It thus cannot properly appeal them under RSA 541:4 and 541:6, and the Court should summarily reject any appeal of those two questions.

3. FairPoint filed a Motion for Rehearing and/or Reconsideration of Order Nos. 25,319 and 25,327 (“Rehearing Motion”) (App. at 112) on February 17, 2012, which the Commission denied on May 7, 2012, pursuant to Order No. 25,358, dated May 7, 2012 (“Rehearing Order”) (App. at 209). In opposing FairPoint’s motion,² the Competitive Carriers argued that some of FairPoint’s arguments were untimely because they sought rehearing of matters that the Commission had decided many months earlier in Order No. 25,219 (dated May 4, 2011) and Order No. 25,283 (dated Oct. 28, 2011). Objection to Rehearing at 16-17 (App. at 170-171). Those arguments include the matters raised by Questions 3(b) and 3(c). *Id.* at 19, 20 (App. at 173, 174).

4. In its decision on the Rehearing Motion, the Commission accordingly drew a distinction among FairPoint’s various arguments for rehearing, addressing some of those arguments “on their merits,” while refusing to entertain two other arguments “as a basis for rehearing.” Rehearing Order at 17 (App. at 225). Specifically, the Commission found that FairPoint had previously raised the argument that the prospective common carrier line (“CCL”)

² Competitive Carriers’ Objection to FairPoint’s Motion for Rehearing and/or Reconsideration of Order Nos. 25,319 and 25,327 (“Objection to Rehearing”) (App. at 155).

tariff revisions ordered by the Commission were outside the scope of Docket DT 06-067 – Question 3(b) – and that the Commission had previously rejected this argument two times. Rehearing Order at 17 (App. at 225) (citing Order No. 25,219 at 8; Order No. 25,283 at 15-16, 28-29). Similarly, the Commission found that FairPoint had previously raised the argument that the record contained uncontroverted evidence that the CCL charge was a contribution element³ – Question 3(c) – and that the Commission also had previously rejected that argument. Rehearing Order at 17 (App. at 225) (citing Order No. 25,283 at 15-16).⁴

5. FairPoint did not seek reconsideration of either Order No. 25,219 or Order No. 25,283. Moreover, 13 months and 7 months, respectively, have passed since the Commission issued those orders. It is therefore clear that FairPoint failed to seek rehearing from the Commission in a timely manner on the issues raised by Questions 3(b) and 3(c). *See* RSA 541:3 (requiring party to apply for reconsideration within 30 days of Commission order).

6. The rules of this Court are clear that a party seeking to appeal a decision of an administrative agency to the Court “must have *timely* filed for a rehearing with the administrative agency.” *Sup. Ct. R.* 10(1) (note) (emphasis added). Because FairPoint cannot demonstrate that it met the requirements of RSA 541:4 and Supreme Court Rule 10(1) in a timely manner with regard to two of the questions presented in the Petition, the Court should “refuse [those portions of] the appeal or dismiss [them] on [its] own motion.” *Appeal of White Mountains Education*

³ 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 (Supp. App. at 59).

⁴ In fact, as the Competitive Carriers argued in opposing the Rehearing Motion, 1) the Commission, in Order No. 24,837, at 31 (Supp. App. at 59), expressly rejected FairPoint’s assertion about the role of the CCL charge as a contribution element; 2) neither Verizon nor FairPoint moved for rehearing on the issue; and 3) this Court’s earlier decision in the case (*In re Verizon New England, Inc.*, 158 N.H. 693 (2009)) did not disturb the Commission’s finding. *See* Objection to Rehearing at 20 (App. at 174). The Commission subsequently reaffirmed this finding in August 2009 in Order *Nisi* No. 25,002 at 2 (App. at 10) and then declined, in May 2011, to revisit the issue. Rehearing Order at 7 (App. at 19) (stating that Commission would “not re-litigate the purpose or propriety of the CCL charge”). FairPoint did not seek to appeal the Commission’s May 2011 order, and it cannot keep this issue alive for appeal purposes by filing a second motion for rehearing a year later. *See Petition of Ellis*, 138 N.H. 159, 161 (1993).

Ass'n, 125 N.H. 771, 774 (1984); *see also In re Walsh*, 156 N.H. 347, 352 (2007) (rejecting three of five issues raised by appellants because of failure to seek reconsideration from agency on those issues).

MOTION FOR SUMMARY AFFIRMANCE

Should this Court determine that FairPoint timely sought rehearing of all orders underlying all the questions raised in the Petition, the Appellees respectfully request that the Court summarily affirm the Commission's decision.

7. 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).

8. The instant case should be disposed of summarily because the rulings of the Commission, which FairPoint seeks to appeal, present no substantial question of law, and are neither unjust nor unreasonable. In support of this Motion for Summary Affirmance, Appellees submit the accompanying Memorandum of Law.

WHEREFORE, for the reasons discussed above and in their Memorandum of Law, the Appellees respectfully request that this Honorable Court:

- A. Refuse the appeal of Questions 3(b) and 3(c);
- B. Summarily affirm the Commission's orders below; and
- C. Grant such other relief as it deems appropriate.

Date: June 26, 2012

Respectfully submitted,

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

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**CHOICE ONE OF NEW HAMPSHIRE INC.,
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**GLOBAL CROSSING
TELECOMMUNICATIONS, INC., A LEVEL 3
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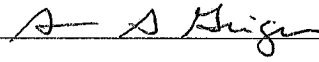
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CERTIFICATION OF COMPLIANCE

I hereby certify that on this 26th day of June, 2012, I have forwarded a copy of the foregoing Motion 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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