STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 06-067

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

Complaint Against Verizon New Hampshire Regarding Access Charges

Order on Motion to Certify Interlocutory Transfer Statement and Motion for Rehearing, Reconsideration and Clarification

O R D E R N O. 25,283

October 28, 2011

I. PROCEDURAL HISTORY

The history of this docket is set out extensively in prior orders of the Commission. Accordingly, only the history relevant to the instant motions is included here. On March 21, 2008, the Commission issued Order No. 24,837 which concluded, among other things, that Verizon New England was permitted to bill wholesale customers the carrier common line (CCL) charge only when the customer used a Verizon-provided common line or "loop".[1] *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,837 (Mar. 21, 2008) at 33. The Commission reached this conclusion based on its finding that the CCL is a charge that recovers a portion of the costs of the common line rather than a "contribution element" that generates revenue for the utility's overall operations, without also recovering some marginal costs for a service. The Commission stated this conclusion as follows:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the

[1] Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint) is the successor to Verizon's utility franchise and for simplicity further references in this order shall solely be to FairPoint, unless otherwise required by the context.

> common line itself. We disagree. Based on the record before us, we find that the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line. As a result, we find that the CCL charge may be applied only when Verizon provides the use of its common line.

Id. at 31. FairPoint appealed the Commission's determination to the New Hampshire Supreme Court which, on May 7, 2009, reversed the Commission's decision by ruling, that pursuant to the plain language of FairPoint's tariff No. 85, FairPoint was permitted to bill the CCL charge even when its common line was not used. *Appeal of Verizon New England*, 158 N.H. 693, 697-98 (2009). The Court also noted that "[i]f the tariff should be amended, it should be amended as a result of regulatory process, and not by a decision of this court." *Id.* at 698.

In response, on August 11, 2009, the Commission issued Order No. 25,002, on a *nisi* basis, and directed FairPoint to file a revised tariff clarifying that the CCL charge would be imposed only when FairPoint's common line was used. Order No. 25,002 also provided that interested persons could request a hearing by making a submission by August 28, 2009, and that the order would become effective on September 10, 2009, unless provided otherwise in a supplemental order issued prior to the effective date. On August 28, 2009, FairPoint filed comments and a conditional request for rehearing of Order No. 25,002 and, on September 4, 2009, other parties responded to FairPoint's August 28 filing. On September 10, 2009, FairPoint filed new tariff pages which clarified the application of the CCL charge consistent with the Commission's order. In addition, to achieve the "revenue neutrality" FairPoint considered necessary, FairPoint's filing also increased a separate interconnection charge to collect its estimate of the amount previously received from wholesale customers who were interconnected to the FairPoint network but did not use a FairPoint common line.

On September 23, 2009, the Commission issued Order No. 25,016 finding that an evidentiary hearing was "necessary to address the issues raised by FairPoint's August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers' September 4 filings." *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,016 (Sept. 23, 2009) at 3. On October 2, 2009, Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing) and AT&T Corp. jointly moved for clarification of Order No. 25,016 contending that FairPoint's September 10, 2009 filing was in fact two distinct filings – one relating to the CCL and another relating to the interconnection charge – and that the two filings should be treated separately. On October 12, 2009, FairPoint objected to the joint motion for clarification and filed its own motion conditionally revoking its tariff pages and seeking rehearing of Order No. 25,002 and Order No. 25,016. On October 26, 2009, FairPoint voluntarily sought Chapter 11 reorganization through the United States Bankruptcy Court. Before hearing and before the motions were ruled upon, activity on this and other dockets ceased while FairPoint attended to its bankruptcy restructuring. FairPoint emerged from bankruptcy on January 24, 2011.[2]

On May 4, 2011, in response to a request from FairPoint to reactivate the docket, the Commission issued Order No. 25,219 as a procedural order and supplemental order of notice. The Commission stated that it would not re-litigate the purpose or propriety of the CCL charge and reiterated its finding in Order No. 24,837 regarding the CCL charge recovering a portion of the common line charge and thus appropriately charged only when the common line was used. Order No. 25,219 also stated that the Commission would "undertake an examination of the

[2] In Re Fairpoint Communications, Inc., et al., Case No. 09-16335, Order Confirming Debtors' Third Amended Joint Plan of Reorganization, ¶_____, (Bankr. S.D.N.Y. Jan. 13, 2011).

proposed modifications to FairPoint's tariff, including the propriety of increased interconnection charges." *See Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,219 (May 4, 2011) at 7-8.

On May 24, 2011, FairPoint filed a motion pursuant to RSA 365:20 and New Hampshire Supreme Court Rule 9 to certify an interlocutory transfer statement. By that motion, FairPoint asked the Commission to certify three questions relative to whether the Commission should re-litigate the purpose of the CCL charge for transfer to the New Hampshire Supreme Court, and to stay the instant matter pending a ruling by the Supreme Court on the interlocutory transfer.

On May 25, 2011, the Commission held a previously-scheduled prehearing conference in this docket. At that prehearing conference FairPoint and other interested parties were given the opportunity to present their positions orally on the motion to certify. Parties were also afforded the opportunity to respond to FairPoint's motion in writing by June 3, 2011, in conformance with the Commission's rules.

On June 3, 2011, objections to FairPoint's motion were received from Global Crossing and a group of competitive carriers made up of: BayRing; Sprint Communications Company, L.P.; Sprint Spectrum; AT&T Corp.; Choice One of New Hampshire Inc.; Conversent Communications of New Hampshire, LLC; CTC Communications Corp.; and Lightship Telecom, LLC (collectively the Competitive Carriers). On June 10, 2011, FairPoint filed a motion requesting leave to reply to the Competitive Carriers' objection, as well as a reply to the objection.

Also on June 3, 2011, the Competitive Carriers filed a joint motion for rehearing, reconsideration, and clarification relative to Order No. 25,219. On June 10, 2011, FairPoint objected to the Competitive Carriers' motion for rehearing, reconsideration, and clarification.

II. MOTION TO CERTIFY INTERLOCUTORY TRANSFER STATEMENT

A. POSITIONS OF THE PARTIES

1. FairPoint

According to FairPoint, the Commission's statement in its May 4, 2011 order that it would not permit further argument on the purpose of the CCL is highly prejudicial. This is so, FairPoint argues, because the CCL charge is designed to be a contribution element and any inquiry into whether it would be just or reasonable to change it, says FairPoint, must consider the role of the CCL as a contribution element and the lost revenue if its terms are changed. FairPoint Motion to Certify Interlocutory Transfer Statement at 7. Further, FairPoint contends, because the rates in its tariff are interconnected and interdependent, and because this charge is a contribution element, the Commission cannot focus on the impact of the change to the CCL without considering other changes needed to provide the level of revenues FairPoint requires.

As to the propriety of certifying questions for interlocutory transfer, FairPoint notes that RSA 365:20 states that the Commission "may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." FairPoint then points to what it calls a two-pronged test under Supreme Court Rule 9 to determine whether to accept such a transfer from an administrative agency. Under the first prong, there must be a substantial basis for a difference of opinion on the question of law. Second, the interlocutory statement must state why interlocutory transfer: (1) may materially

advance the termination or clarify further proceedings of the litigation; (2) protect a party from substantial and irreparable injury; or (3) present the opportunity to decide, modify, or clarify an issue of general importance in the administration of justice. *See* New Hampshire Supreme Court Rule 9 (1)(d). FairPoint contends that its request for interlocutory transfer satisfies all elements of the Supreme Court's test.

As to the requirement that there be a substantial basis for a difference of opinion, FairPoint first contends that when the Supreme Court reversed the Commission's decision it nullified all findings and conclusions of the Commission in the underlying docket. This includes, according to FairPoint, the determination about the purpose of the CCL charge. Accordingly, FairPoint argues, the Commission may not now rely on any previous conclusions about the CCL charge and its purpose must be litigated anew.

In arguing that the Court's reversal without further clarification nullifies the Commission's findings, FairPoint looks to *Corliss v. Mary Hitchcock Memorial Hospital*, 127 N.H. 225 (1985). Relying on that case, FairPoint contends that in reversing the trial court the Supreme Court "restored the parties to the status quo prior to any ruling by the Court. By analytical extension, therefore, the doctrine should apply to final dispositions from any tribunal that are subsequently reversed on appeal." FairPoint Motion to Certify Interlocutory Transfer Statement at 6. FairPoint then argues that while the "law-of-the-case" doctrine prevents re-litigation of issues actually decided in prior appeals, the issue of the CCL being a contribution element was not decided by the Supreme Court. Thus, there is no basis for the Commission to apply its prior finding as law of the case. In sum, FairPoint contends that because the

Commission's findings have been nullified and the law of the case does not permit the Commission to rely on its earlier conclusions, the CCL charge must be open to re-litigation.

FairPoint also contends that the Commission's conclusion with regard to the CCL charge was not a "true" finding of the Commission, but only dicta. FairPoint Motion to Certify Interlocutory Transfer Statement at 7. FairPoint argues that the underlying proceeding was intended to determine whether the CCL charge was being lawfully applied according to the terms of the tariff, not whether modifications to the tariff should be made. Further, FairPoint contends that Verizon had provided testimony on the issue of contribution, "not as an issue to be determined, but only as evidence that the rate was not strictly designed to recover just the cost of the common line." FairPoint Motion to Certify Interlocutory Transfer Statement at 7. Thus, according to FairPoint, any finding about the CCL's purpose was dicta and not made on the basis of complete arguments about the purpose of the CCL.

Finally, FairPoint contends that there is a substantial basis for a difference of opinion because there is no support in the record for the Commission's finding that the CCL charge was not a contribution element. FairPoint argues that the evidence in the underlying proceeding was insufficient to support the Commission's conclusion and, therefore, it is entitled to be heard regarding treatment of the CCL as a contribution element.

In addition to its arguments that there is a substantial basis for a difference of opinion, FairPoint also contends that all elements of the second prong of the Supreme Court's test are met. As to whether the transfer will materially advance the termination or further clarify the proceedings, FairPoint contends that the issue of whether the CCL charge is a contribution element is central to its case in showing that its proposed tariff revisions are just and reasonable.

According to FairPoint, if it "is denied the ability to present this argument, it must appeal any final ruling by the Commission, *favorable or not*, in order that this contribution finding not be *res judicata* for any other proceeding or complaint on its tariff." FairPoint Motion to Certify Interlocutory Transfer Statement at 8-9 (emphasis in original).

Next, FairPoint contends that transfer will clarify an issue of general importance because there has been ongoing contention regarding the scope of the Supreme Court's decision in this case. FairPoint argues that a transfer will clarify the extent to which findings of fact and conclusions of law are valid following the decision. Finally, FairPoint contends that deciding this procedural issue at this stage will reduce the likelihood that the parties will incur the expense of delay and continuing litigation in this docket.

2. Global Crossing

Global Crossing objected to FairPoint's motion by stating that the request is contrary to principles of judicial economy and "is merely an attempt to delay implementation of the Commission's decision, reached first in March 2008 and then again in September 2009, that FairPoint should not assess a CCL charge on traffic that does not traverse its loops because that charge was not intended – and should not be used – to recover costs not related to FairPoint's loops." Global Crossing Objection at 2-3. According to Global Crossing there is no reason to request the Supreme Court to address this matter because the Supreme Court has already found that the Commission may order FairPoint to amend its tariff on a going-forward basis. As to FairPoint's claim that the purpose of the initial phase of this proceeding was not to address the purpose of the CCL charge, Global Crossing contends that the record in the early phase contains testimony on the CCL's purpose and whether it was intended to be a contribution element. In

concluding, Global Crossing states that "[u]nder the circumstances, re-litigating those issues is unnecessary, and asking the Supreme Court whether the Commission needs to re-litigate those issues would serve no purpose." Global Crossing Objection at 3.

3. Competitive Carriers

The Competitive Carriers contend that FairPoint's motion fails to fulfill the requirements of Supreme Court Rule 9 and should be denied. First, the Competitive Carriers argue that the Commission should deny FairPoint's motion because the Supreme Court did not reverse or vacate the factual finding that the CCL is not a contribution element. According to the Competitive Carriers, the Supreme Court confirmed that the Commission's findings of fact are *prima facie* lawful and reasonable and did nothing to address those findings of fact; instead, it relied upon the terms of the tariff alone.

With respect to FairPoint's contention that the Supreme Court's order vacated all findings of the Commission, the Competitive Carriers argue that the cases cited by FairPoint in support are inapposite, distinguishable, or contrary to the contention advanced by FairPoint. In referencing *Corliss*, *supra*, the Competitive Carriers point out that the Supreme Court, in reversing the trial court in that case, was actually reversing the trial court's order of judgment notwithstanding the verdict and reinstating the jury's verdict. To the Competitive Carriers, this decision contradicts FairPoint's position and illustrates that factual findings survive appellate decisions.

The Competitive Carriers also contend that FairPoint's motion ignores the Supreme Court's standard of review which states that a party seeking to set aside the Commission's ruling has the burden of demonstrating that the order is contrary to law or is unjust or unreasonable.

According to the Competitive Carriers, because FairPoint did not appeal the Commission's finding that the CCL is not a contribution element, it presented no evidence contrary to the Commission's decision and thus the Supreme Court could not have vacated that finding.

Similarly, the Competitive Carriers argue that FairPoint is currently prevented from challenging the Commission's decision that the CCL is not a contribution element on the basis of collateral estoppel. Specifically, the Competitive Carriers contend that the current contribution issue is identical to the previously decided issue following litigation on the matter and was resolved on its merits, and that FairPoint, as a party in privity with Verizon, appeared in the prior action.

Next, the Competitive Carriers argue that the Supreme Court did not disturb the prior factual record in this case, and that by restating its prior conclusion the Commission acted consistently with the Supreme Court's mandate. According to the Competitive Carriers, even if the Commission's prior decision was vacated by the Court's ruling, nothing barred the Commission from making the same finding on the same factual record. With regard to whether the Commission's prior decision on the CCL was dicta, the Competitive Carriers contend that the Commission's failure to rest its order on a particular factual conclusion does not mean that the conclusion is without force in later proceedings. Also, the Competitive Carriers state that the Commission's prior conclusion was based on "substantial amounts of evidence, testimony, and argument by parties on both sides of the proceeding." Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 12. Thus, they contend, "FairPoint's suggestion that the Commission's proper resolution of an issue presented and discussed by the parties in the

proceeding is mere dicta is disingenuous at best." Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 12.

Lastly, the Competitive Carriers contend that transferring the question presented by FairPoint will delay, not expedite, the proceeding. Because FairPoint is likely to appeal any decision the Commission makes, the Competitive Carriers argue, it cannot suggest that the time needed to compile evidence and issue an order will be so substantial as to justify the "extraordinary remedy" of transfer to the Supreme Court. Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 13. In addition, the Competitive Carriers argue that FairPoint's suggestion that interlocutory transfer will alleviate expense and delay in this docket ignores the cost and delay imposed by the transfer itself in asking the Supreme Court to consider matters previously "briefed, considered and resolved." Competitive Carriers' Objection to FairPoint's Motion to Certify and Transfer at 14.

B. COMMISSION ANALYSIS

RSA 365:20 states that "The commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." Further, pursuant to New Hampshire Supreme Court Rule 9:

> The supreme court may, in its discretion, decline to accept an interlocutory transfer of a question of law without ruling by a trial court or by an administrative agency. The interlocutory transfer statement shall contain . . . (d) a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory transfer may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice; and (e) the signature of the trial court or of the administrative agency transferring the question.

Accordingly, under the authorizing statute the Commission has the discretion whether to reserve, certify and transfer questions of law, and by its rules the Supreme Court has discretion whether to accept any transfer request it receives. For the reasons that follow we decline to reserve, certify and transfer the questions presented by FairPoint and deny its motion. In addition, we deny FairPoint's motion for leave to reply to the Competitive Carriers' objection.

Addressing FairPoint's arguments, we first concentrate on its contention that there is a substantial basis for a difference of opinion on the continuing effect of the Commission's factual conclusion following the Supreme Court's order of reversal. More specifically, we address the assertion that the Commission's CCL charge finding has been nullified because the Supreme Court has reversed the Commission's decision.

The New Hampshire Supreme Court articulated its understanding of the effect of reversal when it stated "a judgment of reversal by an appellate court . . . is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." *Taylor v. Nutting*, 133 N.H. 451, 455 (1990) (quotations omitted). Thus, the Supreme Court in New Hampshire has set out a framework for evaluating the impact of its decisions. In its decision in this case, the Supreme Court did not discuss or decide anything relative to the purpose of the CCL charge; instead, the Court held that FairPoint's tariff, as it was written, allowed the charge to be applied even when FairPoint's common line was not used. The Supreme Court specifically stated:

> Accordingly, under the plain language of Tariff No. 85, it was permissible for Verizon to assess the carrier common line access charge to the local switching and local transport services it provided in connection with the calls at issue. Because we find the tariff's language to be plain and unambiguous, we will not look beyond it to determine its intent.

Verizon, 158 N.H. at 697. Thus, the Supreme Court rendered no judgment on anything other than the language of the tariff itself and we do not presume that it judged any matter beyond that conclusion. FairPoint offers the opposite conclusion; that by not supporting the Commission's conclusion, the Supreme Court has rejected it. This approach, however, reads into the Supreme Court's opinion conclusions that were not made. Further, to follow this reasoning would mean that any and every item not specifically supported by the court, is rejected. Such a result would be contrary to the principle that the Commission's factual determinations will be presumed to be *prima facie* lawful and reasonable. *See Verizon*, 158 N.H. at 695.

With respect to the parties' arguments under *Corliss*, we find that case inapplicable here. In *Corliss*, the Supreme Court stated that the central issue in the underlying trial was the credibility of the witnesses to the case. *Corliss*, 127 N.H. at 226. After the jury returned a verdict for the plaintiff, the trial judge granted the defendant's motion for judgment notwithstanding the verdict (judgment n.o.v). *Id*. In the order granting the judgment n.o.v., the trial judge referred to statements made by some jurors indicating that they had relied on considerations other than the law set forth in the jury instructions, but stated that his decision to grant the judgment n.o.v. was made on his independent determination that the plaintiff was not credible. *Id*. The Supreme Court vacated the judgment n.o.v. because it determined that the trial judge, by ruling upon the credibility of the witnesses, had not applied the correct standard for granting a judgment n.o.v. *Id*. at 227-28. While the Supreme Court stated, without citation, that the "reversal of a judgment n.o.v. revitalizes the verdict of the jury," it also concluded that it could not allow the jury's verdict to stand "because we find that the court erred in failing to

inquire of the jury on the record about its deliberations after hearing the disturbing remarks of several jurors." *Id*. at 228. Thus, in *Corliss*, the Supreme Court did not, as argued by FairPoint, put the parties at the "status quo" prior to the trial court's ruling because the Supreme Court also vacated the jury's conclusions. Further, *Corliss* did not, as contended by the Competitive Carriers, reinstate the jury's verdict and findings of fact because the Supreme Court vacated the jury's verdict along with reversing the trial judge's order of judgment n.o.v. In this instance, we do not find *Corliss* to be particularly instructive with respect to the positions of any party.

As to FairPoint's argument under the law of the case doctrine, "only such issues as have actually been decided, either explicitly, or by necessary inference from the disposition, constitute the law of the case." *Saunders v. Town of Kingston*, 160 N.H. 560, 566 (2010) (quoting *Nutting*, 133 N.H. at 456). FairPoint contends that this language means that since the Supreme Court did not affirmatively decide the issue in the prior appeal, the Commission's present decision based upon its prior conclusion is invalid. This argument misinterprets the doctrine. The Supreme Court has made clear that the "question decided on the first appeal is known as the law of the case, and becomes binding precedent to be followed in successive stages of the same litigation. Thus, where an appellate court states a rule of law, it is conclusively established and determinative of the rights of the same parties in any subsequent appeal or retrial of the same case." *Merrimack Valley Wood Products, Inc. v. Near*, 152 N.H. 192, 201 (2005). Thus, the law of the case doctrine limits re-litigation of issues of law determined by the appellate court. *Cf. State v. Patterson*, 145 N.H. 462, 466 (2000) (stating that the law of the case doctrine was inapplicable because the Supreme Court had not previously "stated any rule of law in this case"). Here, the only issue determined by the Supreme Court was the interpretation of FairPoint's tariff

as it existed and, therefore, it is only that finding that is the law of the case. There is nothing in the doctrine that, in addition to preventing re-litigation of settled issues, precludes or invalidates other factual conclusions. Nor is there anything that prevents the Commission from restating its conclusion about the purpose or intent of the CCL based upon the existing record when the Supreme Court has done nothing to disturb that conclusion. For the above reasons we do not agree that there is a substantial basis for a difference of opinion on whether the Commission's finding relative to the CCL has been invalidated by the Supreme Court.

FairPoint next argues that the Commission's determination about the CCL was only dicta, and not a "valid finding of fact." FairPoint Motion to Certify Interlocutory Transfer Statement at 7. FairPoint contends that the purpose of the underlying proceeding was to determine if the CCL was being lawfully applied and was not about prospective modification. Additionally, FairPoint contends that although Verizon provided evidence about contribution it did not do so "as an issue to be determined," but as proof about the CCL not strictly being for the recovery of the cost of the common line. FairPoint Motion to Certify Interlocutory Transfer Statement at 7.

We do not have any basis to conclude that the distinction drawn by FairPoint between dicta, meaning a determination not essential to the decision, and a "valid finding of fact" has any bearing on the correctness of the decision itself. Moreover, the conclusion reached by the Commission was in response to the arguments of the parties, including Verizon, regarding whether the CCL was a contribution element justifying its application even when a Verizon-provided common line was not used. *See, e.g.,* September 10, 2007 Brief of AT&T at 31-39;

September 10, 2007 Brief of One Communications at 15-21; September 10, 2007 Brief of Verizon at 26-28; September 10, 2007 Brief of BayRing at 14-15.

Also as noted, FairPoint contends that there is no support in the record for the Commission's decision. FairPoint, however, then points out that there was testimony and evidence on the issue, while arguing that its evidence was not presented in order for the Commission to decide the issue and while disputing the meaning or context of the testimony offered by those opposing FairPoint's arguments. 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. The fact that FairPoint disagrees with the Commission's finding is not a substantial basis for concluding that there is a difference of opinion in this case justifying interlocutory transfer.

Furthermore, whether the Commission's conclusion was dicta, or something else, is not relevant to whether it is a valid finding today. The Commission stated:

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

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order 24,837 (Mar. 21, 2008) at 31. Thus, the Commission has specifically found that the CCL is not a contribution element, and no ruling by any other body of competent jurisdiction has undermined that finding.

While failure of the first prong of the analysis is sufficient, in itself, to deny FairPoint's motion, for completeness we address the remainder of its arguments. As to the second prong of

the analysis under Supreme Court Rule 9, we also do not find that it meets the standard for interlocutory transfer. FairPoint has made clear that it disagrees with the Commission's conclusion with regard to the CCL and that it will appeal "any final ruling by the Commission in this proceeding, favorable or not." FairPoint Motion to Certify Interlocutory Transfer Statement at 8. Because FairPoint is likely to appeal any final decision by the Commission on this matter, we do not see how granting interlocutory transfer will advance the termination or clarify further proceedings. Also, FairPoint contends that transfer will clarify the scope of the Supreme Court's decision and its mandate as well as which findings of fact and conclusions of law remain valid. Given our determination, as stated above, that by reversing the Commission the Supreme Court has said nothing undermining the Commission's prior conclusion on the CCL, we do not agree that such clarification is needed. Lastly, the added delay and expense of litigating the contribution issue before the Supreme Court with the knowledge that the outcome of that proceeding will only lead to more proceedings here convinces us that interlocutory transfer is not justified in this instance.

As a final point of emphasis we note that our determination to not re-litigate our finding 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 and thus should not be charged when there is no use of a common line, does not prevent FairPoint from raising other arguments that elements of contribution are necessary to meet its financial needs. The Commission has rendered a conclusion about the purpose of the CCL which, for the reasons stated above, has not been invalidated by the Supreme Court. Nevertheless, to assure that FairPoint is not prejudiced or denied due process, FairPoint may propose other changes to its tariff, including contribution

elements, that it might consider necessary for achieving the revenues it needs. For avoidance of doubt, we will allow FairPoint to introduce evidence and make argument about the extent to which the CCL rate element has historically provided some contribution to general overhead and costs, but not to argue that it was solely a contribution element or that its tariff language on a going forward basis should allow it to be charged when there is no use of a common line. As was discussed at the May 25, 2011 prehearing conference, we believe that permitting those proposals and their attendant arguments will grant FairPoint the latitude it feels necessary without reopening matters the Commission considers closed. *See* Transcript of May 25, 2011 prehearing conference at 10-18. Of course other parties will have the opportunity to introduce contrary evidence and argument.

III. MOTION FOR REHEARING, RECONSIDERATION AND CLARIFICATION

A. POSITIONS OF THE PARTIES

1. Competitive Carriers

The Competitive Carriers begin by contending that the Commission must reconsider Order No. 25,219 because it: (1) overlooked the fact that FairPoint made two distinct tariff filings on September 10, 2009; and (2) mistakenly relied upon the passage of time as affecting the Commission's ability to determine the effective date of the tariff filing. The Competitive Carriers argue that these conclusions are erroneous as a matter of law and bear upon crucial substantive and procedural issues in this docket.

As to the first basis raised by the Competitive Carriers, they argue that Order No. 25,002, which ordered FairPoint to revise its tariff to change the application of the CCL charge, stated that it would become effective on September 10, 2009, unless otherwise provided in a

supplemental order issued prior to the effective date, and since no supplemental order was issued, Order No. 25,002 became a final order on September 10, 2009. The Competitive Carriers argue that when FairPoint complied with this final order by making a tariff filing on September 10, 2009, it made two distinct and separable filings. The first tariff filing, they argue, was a compliance filing on the CCL pursuant to a final order. In addition, the Competitive Carriers claim, FairPoint submitted a separate tariff filing amending the interconnection charge. According to the Competitive Carriers, these filings are different and severable and should be treated differently by the Commission; specifically, by implementing the CCL change effective October 10, 2009, and withholding the implementation of the increased interconnection charge pending further review by the Commission and other parties.

The Competitive Carriers contend that it is evident that FairPoint's September 10, 2009 submission was actually two separate filings because FairPoint's own cover letter stated that the change to the CCL charge was being made pursuant to the Commission's order, but that the change to the interconnection charge was being made "in conjunction with" the change to the CCL. According to the Competitive Carriers, the use of the phrase "in conjunction with" indicates that two separate acts were occurring.

The Competitive Carriers also contend that the tariff changes must be treated separately due to the requirements of RSA 378:6 and the Commission's rules. Under RSA 378:6, IV, any tariff for services filed by a telephone utility for Commission approval becomes effective as filed 30 days after filing, unless the Commission amends or rejects it within the 30-day period. Under RSA 378:6, IV the Commission may also, in its discretion and with explanation, extend the time for its determination by up to 30 days. Pursuant to RSA 378;7, if the Commission is of the

opinion, after a hearing on its motion or a complaint, that the rates, fares or charges demanded by a utility are unjust or unreasonable, the Commission may determine just and reasonable rates, fares and charges and fix those rates, fares or charges by order.

The Competitive Carriers argue that the Commission never amended, rejected, or suspended FairPoint's CCL filing and, although it issued Order No. 25,016 within the 30-day period, "that Order is devoid of any language that could reasonably be construed as amending, rejecting or suspending" the CCL filing. Competitive Carriers' Motion for Rehearing, Reconsideration and Clarification (Carriers' Motion) at 9. Therefore, the Competitive Carriers argue, consistent with RSA 378:6, IV the change to the CCL charge became effective 30 days after it was filed, October 10, 2009. The Competitive Carriers further contend that when Order No. 25,016 stated that a hearing was necessary, that hearing was related only to the interconnection charge filing. Thus, they argue, it was only the interconnection portion of the filing that did not become effective on October 10, 2009, because it was subject to further proceedings.

As to the Competitive Carriers' argument relative to the Commission's rules, they contend that under Puc 1603.05(b)(1)a utilities are required to designate changes in tariff regulation with the letter "C" in the margin and that the CCL changes bear that mark, whereas Puc 1603.05(b)(1)c requires utilities to mark rate increases with the letter "I" in the margin and the interconnection charge change bears that mark. The Competitive Carriers argue that this difference in marking shows that "FairPoint's two separate filings sought to accomplish two separate goals that are given separate treatment under the Commission's rules: changing part of FairPoint's CCL tariff *language* ("C" designation in the right margin) and increasing a zero-rated

charge to a positive *rate* ("I" designation in the right margin)." Carriers' Motion at 10-11 (emphasis in original). Applying the same logic, the Competitive Carriers contend that if FairPoint had been reducing the rate of the CCL, rather than changing its application, it was to have designated the alterations with "D" or "R" as required by Puc 1603.05(b)(1)b and e, but it did not do so. Thus, the Competitive Carriers contend, FairPoint's change to the CCL charge is not a rate change and is to be treated differently than the rate change relating to the interconnection charge.

The Competitive Carriers argue that because the change to the CCL was a complete filing made in response to the Commission's order, and because it was not amended, rejected, or suspended, it went into effect on October 10, 2009, by operation of law. Thus it would be unlawful and unreasonable to now "retroactively suspend" that change 18 months after its effective date. Carriers' Motion at 13. They further argue that because the Commission found the filing relating to the interconnection charge to be incomplete when filed, that change never went into effect. Therefore, the Competitive Carriers argue, the Commission erred when it did not conclude that the change to the CCL charge went into effect on October 10, 2009.

The Competitive Carriers also argue that the Commission erred in not recognizing that by requesting the change to the interconnection charge, FairPoint violated *Verizon New England, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Co., Verizon Select Services, Inc. and FairPoint Communications, Inc*., Order No. 24,823 (February 25, 2008) in Docket No. DT 07-011. Order No. 24,823 approved a settlement agreement that authorized the transfer of Verizon's assets and utility franchise to FairPoint. Order No. 24,823 notes that the underlying settlement agreement provides, at paragraph 4(h), that "[n]otwithstanding anything herein to the

contrary, FairPoint shall have the same rights and obligations as Verizon in connection with and arising out of any final order which may be issued within NHPUC Docket 06-067." *Id*. at 75. Order No. 24,823 then stated that the Commission understood "the agreement between the three CLECs and FairPoint to mean that FairPoint will honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis. However, in the event we decide Verizon was not authorized to collect the charges in dispute in Docket No. DT 06-067, and require a refund of the charges, we will require Verizon to refund the amount collected by it." *Id*.

The Competitive Carriers argue that under the terms of Order No. 24,823, the Commission reserved the right to resolve the dispute in this docket, and that it was obvious to FairPoint that such a resolution could include a prohibition on the collection of the CCL charge in certain instances. Rather than abide by this provision, the Competitive Carriers contend, FairPoint is attempting to alter the terms of the Commission's final order in the docket. The Competitive Carriers request that upon rehearing the Commission must find that FairPoint's interconnection charge increase was defective and that it never went into effect.

In addition, the Competitive Carriers state that under section 9.1 of the settlement agreement in Docket No. DT 07-011, the Commission was prevented from seeking a decrease, and FairPoint was prohibited from seeking an increase, in FairPoint's access rates for three years following the close of the transaction. According to the Competitive Carriers, there are flaws with the argument advanced by FairPoint that the Commission's order requiring it to amend its tariff violated the agreement and must be balanced by a rate increase. The Competitive Carriers state that the Commission's order did not require FairPoint to reduce its rates, only that it amend the language of the tariff to avoid the application of CCL charges in certain cases. Secondly, the

Competitive Carriers state that even if the Commission could not alter FairPoint's rates, the Commission's actions in Docket No. DT 06-067 were excepted from the agreement in Docket No. DT 07-011. Therefore, according to the Competitive Carriers, the Commission had the authority to order cessation of certain CCL billing.

Further, the Competitive Carriers argue that FairPoint did not request rehearing of Order No. 24,823. They contend FairPoint was barred from submitting the changes to the interconnection charge because the increase in that rate was proposed in violation of the settlement agreement and order. Thus, the Competitive Carriers state, "to the extent that the Commission's action allowing FairPoint to withdraw its [interconnection tariff] may be construed as a decision that the [interconnection filing] was validly made, that decision is mistaken." Carriers' Motion at 17.

The Competitive Carriers next contend that Order No. 25,219 provided no valid reason for denying their earlier motion for clarification. The Competitive Carriers agree that the passage of time was a sufficient basis to reset the procedural schedule, but argue that it is insufficient to deny the primary argument in the prior motion – that FairPoint made two distinct filings subject to differing treatment, as described above. The Competitive Carriers contend that the reason for submitting the original motion for clarification was a desire to remove uncertainty, but that the uncertainty remains to this day.

The Competitive Carriers also indicate that Order No. 25,219 states that FairPoint's tariff filing did not go into effect, but also grants FairPoint's request to withdraw the pages, and they argue that if the pages did not go into effect there would be no basis to allow them to be withdrawn. They point out that even FairPoint concedes that the tariff filing made to comply

with the Order *Nisi*, No. 25,002, was not voluntary under RSA 378:6, IV and that FairPoint merely declared that "[t]o the extent that the Commission is treating the tariff page filing as having been voluntarily made pursuant to RSA 378:6, IV, FairPoint hereby withdraws the filing and requests that the filing be treated as illustrative." Carriers' Motion at 19. The Competitive Carriers further argue that when FairPoint filed the tariff changing the CCL charge, it became effective without further action and therefore FairPoint could not unilaterally withdraw it. Instead, if FairPoint had sought further changes, it was required to file amended tariff pages sometime after making a filing complying with Order No. 25,002. The Competitive Carriers further contend that FairPoint was obligated by RSA 365:23 and 365:40 to comply with Order No. 25,002 which, in their view became final on September 10, 2009, and that by attempting to withdraw its tariff pages FairPoint was out of compliance with the Commission's order.

Lastly, the Competitive Carriers contend that Order No. 25,219 is unreasonable because it "rewards the party least worthy of the Commission's indulgence." Carriers' Motion at 21. In addition to the reasons already set forth, the Competitive Carriers contend that the Commission has repeatedly stated that FairPoint may not bill for CCL charges when a common line is not used, and has ordered that FairPoint amend its tariff to ensure this conclusion is met. Rather than comply with this directive, the Competitive Carriers contend, FairPoint has engaged in various forms of delay including by attempting to impose the increase to the interconnection charge. The Competitive Carriers ask the Commission to modify its prior orders, state that the change to the CCL went into effect on October 10, 2009, and set a procedural schedule to address the proposed increase to the interconnection charge.

2. FairPoint

In its objection, FairPoint disputes the factual summary offered by the Competitive Carriers. According to FairPoint, the Competitive Carriers pointed out that the Commission's Order of Notice in this docket allowed for prospective tariff modifications, but omitted reference to a later procedural order removing the issue of tariff modifications from this docket. *See Freedom Ring Communications d/b/a BayRing Communications*, Order No. 24,705 (Nov. 29, 2006) at 6. FairPoint argues that because the issue of tariff modifications had been removed, it was beyond the scope of this proceeding.

FairPoint then contends that the Competitive Carriers are incorrect, both as a matter of fact and law, that FairPoint's September 10, 2009 submission was two separate and distinct tariff filings. To that end, FairPoint argues that the Competitive Carriers misread Order No. 25,016 as stating that the Commission concluded only the submission relative to the interconnection charge was deemed to be incomplete. According to FairPoint, the Commission stated that the "filing" was incomplete and that filing was comprised of tariff revisions covering both the CCL and the interconnection charge. According to FairPoint, the "filing" was not complete until it had submitted the testimony of Michael Skrivan on September 28, 2009, and, therefore, could not have been effective before October 28, 2009. FairPoint notes that by October 28, 2009, it had withdrawn its tariff revisions and the Commission had suspended the procedural schedule.

Similarly, FairPoint contends that when extending the procedural schedule, the Commission referred to suspension of the proposed "changes," as opposed to a single "change" within the September 10, 2009 filing. Also, FairPoint contends that the Commission's October 16, 2009 secretarial letter suspending the procedural schedule references "a" tariff filing which

affected the CCL charge "and" the interconnection charge. Accordingly, FairPoint argues, the Competitive Carriers have misunderstood the filings made by FairPoint and the Commission's treatment of them.

FairPoint next argues that the Competitive Carriers' motion is moot because it is seeking reconsideration of an order that the Commission could not issue. More specifically, FairPoint argues that when the Supreme Court reversed the Commission's decision, all analyses and conclusions in that decision were also reversed. Thus, according to FairPoint, the Commission could not issue Order No. 25,002 ordering it to amend its tariff, because the Commission was without any basis to do so following the Supreme Court's decision.

Next, FairPoint argues that the Competitive Carriers' motion is, in essence, the same as their prior motion and seeks the same relief for the same reasons. FairPoint contends that the Competitive Carriers' motion merely reiterates the argument that FairPoint made two distinct filings on September 10, 2009, but offers no new or mistakenly conceived information to support that claim. FairPoint contends that it has repeatedly stated that the revisions to its tariff were to be treated as "a single revenue neutral adjustment." FairPoint Objection to Motion for Rehearing, Reconsideration and Clarification (FairPoint Objection) at 6. FairPoint states that it has always intended its adjustments to be treated in concert with each other and "any suggestion that FairPoint's September 10, 2009 filing can be separated is simply not correct." FairPoint Objection at 6.

In addition, FairPoint contends that the definition of the term "rate" covers the charge or price as well as the related service provisions. Thus, according to FairPoint, the rate change in

the tariff covered both the CCL amendment as well as the change to the interconnection charge and the two cannot be evaluated separately.

As to the Competitive Carriers' claim that the Commission's order did not require FairPoint to change its rate, but only the language in its tariff regarding the CCL, FairPoint contends that this argument is flawed in multiple respects. In particular, FairPoint notes that changes in the language of the tariff could have a strong impact on the costs of and charges for services, without any alteration of the amount of the charge. Thus, according to FairPoint, the Commission's treatment of its September 10, 2009 tariff filing as a single submission was not mistakenly conceived or grounds for rehearing.

Regarding the Competitive Carriers' argument that the CCL change became effective 30 days after filing by operation of law, FairPoint argues that the Competitive Carriers have overlooked the fact that the Commission extended the review period for the filing. Again noting its argument that the September 10, 2009 submission was a single filing, FairPoint contends that when the review of the filing was extended, that extension covered the entire submission, and not merely the interconnection charge.

As to the Competitive Carriers' contention that the Commission denied their previous motion for clarification based solely on the lapse of time, FairPoint contends that the Competitive Carriers ignore other language in the Commission's order. Specifically, FairPoint notes that Order No. 25,002 was issued on a *nisi* basis, that FairPoint requested a hearing on that order and that by issuing Order No. 25,016, the Commission granted FairPoint's request for a hearing relative to the requirements of Order No. 25,002. Therefore, according to FairPoint, it was proper for the Commission to deny the Competitive Carriers' motion on that ground.

FairPoint also contends that the Competitive Carriers are incorrect in stating that Order No. 25,002 became a final order. This is so according to FairPoint because it was issued as an order *nisi* "which by definition is conditionally moot and for which, in this case, the condition has been triggered." FairPoint Objection at 9. Further, FairPoint contends that pursuant to the settlement agreement in Docket No. DT 07-011, it has the same rights and obligations as Verizon would have had, including the right to seek rehearing and appeal. Thus, FairPoint contends, there is no final order which it could be charged with failing to honor.

B. COMMISSION ANALYSIS

To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable. *See* RSA 541:3; RSA 541:4; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,194 (February 4, 2011) at 3. Good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued. *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (April 2, 2010) at 14 (citing *Dumais v. State*, 118 N.H. 309, 312 (1978)). A successful motion does not merely reassert prior arguments and request a different outcome. *Freedom Ring Communications d/b/a BayRing Communications*, Order No. 24,886 (August 8, 2008) at 7.

First, in response to FairPoint's claim that the Commission was without authority to issue Order No. 25,002 because the Supreme Court had invalidated the Commission's findings, for the

reasons stated above relative to FairPoint's motion to certify interlocutory transfer statement, we reject this argument.

As to the merits of the Competitive Carriers' motion, they contend that the Commission erred as a matter of law when it concluded that FairPoint's September 10, 2009 filing was not composed of two separate filings which were subject to differing treatment. Many of the Competitive Carriers' claims are premised on their view that FairPoint submitted two distinct tariff filings on September 10, 2009, and that the language of FairPoint's cover letter supports that view when it states the CCL change was made "pursuant to the Commission's order" while the new interconnection charge was made "in conjunction with" the change to the CCL. We disagree. It was clear from the submissions that FairPoint viewed the two proposals as intertwined and intended they be dealt with as a package.

The Competitive Carriers observe that Order No. 25,002 stated that it would become final on September 10, 2009, unless superseded by an order prior to the effective date. They contend that because no superseding order was issued, Order No. 25,002 became final on September 10, 2009. Further, because FairPoint's CCL filing was in compliance with what the Competitive Carriers consider a final order, the CCL tariff went into effect on October 10, 2009, in accordance with RSA 378:6. The Competitive Carriers argue that the interconnection charge filing, in contrast, was not made in response to a Commission order and, therefore, did not become effective as a matter of law.

We disagree with the Competitive Carriers' interpretation of the finality of Order No. 25,002. The order provided that any party could request a hearing within a specified timeframe and FairPoint made such a request in a timely manner. Following FairPoint's request, the

Commission issued Order No. 25,016, which concluded that the Commission would hold a hearing to review FairPoint's filings. Though not issued until after September 10, 2009, Order No. 25,016 clearly stated that "an evidentiary hearing is necessary to address the issues raised by FairPoint's August 28 and September 10 filings as well as the issues raised by the competitive local exchange carriers' September 4 filings." Order No. 25,016 at 3. Thus, because the condition triggering a hearing was met and the Commission found that a hearing was needed, there was not a "final order" of the Commission regarding the CCL tariff provisions.

In reviewing this issue, however, we conclude that there is justification for some revision to our prior orders on this matter. In Order No. 25,219, the Commission stated that it granted FairPoint's request to withdraw its previously filed tariff pages and have them treated as illustrative. Order No. 25,219 at 6. This statement was in error. In FairPoint's conditional withdrawal and request for treating withdrawn tariff pages as illustrative, it stated that:

> The tariff filing was not a voluntary filing under RSA 378:6, IV; instead, it is a response by FairPoint to comply lawfully to the exercise by the Commission of its ratemaking authority under 378:7. To the extent that the Commission is treating the tariff page filing as having been voluntarily made pursuant to RSA 378:6, IV, FairPoint hereby withdraws the filing and requests that the filing be treated as illustrative.

Motion for Rehearing by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE and Conditional Withdrawal of Tariff Filing at 9. While we consider FairPoint's submission a single filing, we do believe that there is a basis for treating portions of the filing differently based upon the distinction drawn by FairPoint and others.

As noted, FairPoint acknowledges that the change to the CCL charge was not made voluntarily but was made pursuant to a Commission directive under the Commission's authority

in RSA 378:7. Unlike RSA 378:6, IV, there is no statutory timeframe for the Commission to review and authorize or reject submissions made to comply with Commission orders. Also, though it was filed in response to a Commission directive, the change to the CCL did not go into effect because intervening Commission orders concluded that hearings were required and FairPoint's bankruptcy further suspended the procedural schedule.

In contrast to the above analysis relative to the change to the CCL charge, the change to the interconnection charge was a voluntary filing, not made to comply with a Commission order issued pursuant to RSA 378:7. The Commission did not, at any point, require or request that FairPoint make any revision to the interconnection charge, or any charge other than the CCL. It is, therefore, only this section of the filing involving the interconnection charge that FairPoint could withdraw and request to make illustrative because it was the only portion made voluntarily. As such, we hereby reconsider that finding of Order No. 25,219 that stated that it granted FairPoint's request and now conclude that the portion of the tariff filing covering FairPoint's interconnection charge is withdrawn and will be treated as illustrative so that it may be the basis for further consideration in this proceeding without invoking the statutory timing constraints of RSA 378:6. 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.

Further, we note that Order No. 25,016, was issued on September 23, 2009, prior to the proposed effective date of October 10, 2009, and Order No. 25,016 found that a hearing on FairPoint's submission was necessary. Therefore, we conclude that because a hearing was found necessary before the tariff went into effect, the Competitive Carriers were not prejudiced as they might have been had the tariff gone into effect and later been revoked or suspended. *See, e.g., Kerouac v. Dir., N.H. Div. of Motor Vehicles*, 158 N.H. 353, 357 (2009).

Moreover, we note that the Competitive Carriers dispute that Order No. 25,016 contained language sufficient to amend, reject, or suspend the submission. As regards the interconnection charge, for the above reasons concluding that it was withdrawn, we do not find the argument applicable to this change. As to the CCL change, Order No. 25,016 stated that a hearing was needed on the "issues raised by FairPoint's August 28 and September 10 filings" which, in effect, rejected or suspended that submission and required a hearing. We do not believe that any special words are required to reject or suspend a filing and we conclude that the language of Order No. 25,016 was sufficient to achieve this purpose.

Also, in light of the above, we do not further consider the Competitive Carriers' argument that the Commission's administrative rules on tariff changes subject the portions of the tariff to different treatment. While it is true that the notation requirements are different, the Competitive Carriers cannot articulate a basis to conclude that the differing notations require some special review. Interpreting otherwise would elevate form over substance and would not promote efficient use of Commission and industry resources.

Furthermore, as to the distinction drawn by the Competitive Carriers between a filing intended to change the tariff *language* as opposed to one changing a tariff *rate*, we cannot say

that this distinction is one that matters in this case. As noted by FairPoint, changes in tariff language can have consequences as pronounced as changes in rates and our rules define "rates" as "any charge or price, and all related service provisions for services regulated and tariffed by the commission, including, but not limited to, availability . . . ." Puc 1602.03. Thus we see no reason, on the bases asserted by the Competitive Carriers, for treating the interconnection and CCL tariffs substantially differently.

Regarding the Competitive Carriers' claims that FairPoint's filing violated the terms of the settlement agreement and order in Docket No. DT 07-011, FairPoint, though bound by the terms of a final order, had all the rights and obligations Verizon would have had, including the right to appeal the Commission's order to the New Hampshire Supreme Court. In addition, as noted above, there is no final order in this docket that FairPoint can be said to have ignored or altered, as FairPoint was granted the opportunity for a hearing on the order requiring it to file a revised tariff.

Next, the Competitive Carriers contend that pursuant to section 9.1 of the settlement agreement in Docket No. DT 07-011, FairPoint was barred from submitting the increase to the interconnection charge. Therefore, the Competitive Carriers argue, the Commission cannot allow FairPoint to withdraw that tariff, because FairPoint was without authority to submit it in the first instance. Thus, the Commission should have disregarded the interconnection charge proposal and accepted the CCL tariff as a stand-alone document.

The settlement agreement in Docket No. DT 07-011 states, in relevant part at section 9.1: "FairPoint will not seek to increase wholesale rates to take effect during the three years following the Closing Date. The Commission shall not seek to decrease such rates for effect

during the three-year period following the Closing Date." The Closing Date referred to in the settlement agreement was March 31, 2008. Clearly, the Commission has not sought to lower FairPoint's rates and thus there is no violation of that term of the settlement agreement. In any event, the Commission's decisions in this docket were expressly exempted from that agreement.

Whether FairPoint's request in 2009 to increase the interconnection charge was proscribed by the settlement agreement in Docket No. DT 07-011 is immaterial because the charge never went into effect and the "stay out period" established in section 9.1 of that agreement has now expired.

The Competitive Carriers argue that in their view FairPoint was not entitled to seek the change in the interconnection charge and that by doing so, it caused a delay from which FairPoint benefits. In its conditional request for hearing, however, FairPoint had raised issues beyond the interconnection charge and permitting FairPoint to withdraw the portion of the tariff relative to that change does not necessarily eliminate those issues. In issuing Order No. 25,002 on a *nisi* basis, the Commission allowed for the possibility of hearings, which FairPoint requested in a timely fashion. Though the result is an extension of time before the matters at hand are resolved, we cannot say that FairPoint improperly manipulated the process to cause a delay.

Next, the Competitive Carriers contend that the Commission's statement in Order No. 25,219 regarding the passage of time is an insufficient basis for denial of their prior motion. We disagree. It is not the passage of time alone that led to denial. As stated in Order No. 25,219, when the Commission issued Order No. 25,016 in September 2009, it concluded that it needed a hearing on FairPoint's submission. Further, Order No. 25,219 explained that the hearing was

never held because of FairPoint's intervening bankruptcy filing. The Commission's inability to hold a hearing on the original schedule due to FairPoint's bankruptcy does not mean that it rescinded the determination that a hearing was necessary.

Finally, the Competitive Carriers argue that Order No. 25,219 is unreasonable because it rewards FairPoint, when, in their estimation, FairPoint is unworthy of such reward. We disagree. The Competitive Carriers point to no evidence that was overlooked or misconstrued, but only claim that FairPoint does not deserve to prevail. We find nothing in this argument to lead us to rehear or reconsider our order.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's Motion to Certify Interlocutory Transfer Statement is DENIED; and it is

FURTHER ORDERED, that the Competitive Carriers' Motion for Rehearing, Reconsideration and Clarification is DENIED in large part, consistent with this order, and GRANTED in part, in as much as Order No. 25,219 is hereby amended to disallow the withdrawal of FairPoint's CCL tariff compliance filing, but does still grant FairPoint's request to withdraw its proposed change to the interconnection tariff and treat it as illustrative; and it is

FURTHER ORDERED, that both the filed CCL tariff changes and the withdrawn, but illustrative interconnection tariff changes are subject to further proceedings consistent with this order.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of October, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

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