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 Granting Motion to Dismiss

ORDER NO. 25,327

February 3, 2012

I. PROCEDURAL HISTORY

The complete procedural history of this docket is set out in prior orders in this case. Therefore, only the history relevant to this order is included. Following an investigation on a complaint by Freedom Ring Communications, LLC d/b/a/ BayRing Communications, on March 21, 2008, the Commission issued Order No. 24,837 in this docket concluding, in relevant part, that Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint) could assess the carrier common line (CCL) charge only when its common line was used in the provision of a telephone message.[1] FairPoint appealed that decision to the New Hampshire Supreme Court which reversed the Commission and concluded that under the terms of FairPoint's tariff as it was written, FairPoint was permitted to impose the CCL charge even when its common line was not used. *Appeal of Verizon New England*, 158 N.H. 693, 697-98 (2008). On August 11, 2009, following the New Hampshire Supreme Court's decision, the Commission issued Order No. 25,002 directing FairPoint to revise its tariff to comport with the Commission's determination that the CCL charge only be imposed when FairPoint's common line was used.

[1] FairPoint is the successor to the franchise of Verizon New England.

On September 10, 2009, FairPoint filed proposed tariff pages intended to comply with the Commission's order that it revise its tariff relative to the CCL. At the same time, to achieve "revenue neutrality" FairPoint filed proposed tariff pages increasing the Interconnection Charge, which, at that time, was $0.00000. FairPoint then filed a motion for rehearing and conditional withdrawal of its September 10, 2009 tariff pages requesting, in part, that the tariff pages it had filed should be withdrawn to the extent the Commission treated them as having been voluntarily made. Motion for Rehearing by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE and Conditional Withdrawal of Tariff Filing (Oct. 12, 2009) at 9. The Commission had not yet ruled on those tariff pages or the request to withdraw them prior to FairPoint filing for voluntary reorganization under Chapter 11 of the United States Bankruptcy Code on October 26, 2009. *See* Secretarial Letter dated November 10, 2009. Upon FairPoint's emergence from bankruptcy in January, 2011, the Commission resumed the docket and issued Order No. 25,219 (May 4, 2011) as a procedural order and supplemental order of notice. Also in that order, the Commission granted FairPoint's request to withdraw the tariff pages submitted on September 10, 2009.

On October 28, 2011, the Commission issued Order No. 25,283, in part as a response to a motion for rehearing, reconsideration, and clarification, and concluded, in relevant part, that it would revise the prior grant of FairPoint's request to withdraw its tariff pages. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 30. The Commission determined that because the portion of the tariff filing relating to the CCL charge was made in compliance with a Commission order, rather than made voluntarily, it was accepted, but deemed suspended. *Id.* The portion of the filing relating to the Interconnection

Charge, however, was voluntarily made and therefore the Commission granted the request that those pages be withdrawn and be treated as illustrative for purposes of further investigation and proceedings. *Id.* at 30-31.

Also on October 28, 2011, the Commission issued Order No. 25,284 setting a procedural schedule for discovery and a hearing for March 8, 2012 on the remaining issues in the docket. Rather than await the March 8 hearing, on November 10, 2011, various competitive local exchange carriers moved for an expedited hearing on the issue of the effective date of the proposed changes to the CCL portion of FairPoint's tariff. By Order No. 25,295 (Nov. 30, 2011) the Commission determined that it would accept briefs on issues relating to the CCL. This determination effectively bifurcated the docket into a portion covering FairPoint's proposed changes to the CCL in light of the Commission's orders, and a portion relating to FairPoint's proposed increase to the Interconnection Charge, with the portion covering the CCL to be decided on the basis of the briefs of the parties on a separate track from the portion of the docket covering the Interconnection Charge. Briefs on the CCL portion of the docket were received on December 19, 2011.

Also, on November 30, 2011 FairPoint made a tariff filing consisting of new pages relating to both the CCL and the Interconnection Charge with the stated purpose of placing the issues relating to both items "officially" before the Commission. Cover Letter to November 30, 2011 Tariff Filing at 2. On December 14, 2011, the Commission issued Order No. 25,301 rejecting the tariff filing without prejudice to avoid the statutory timing constraints of RSA 378:6, IV, noting that those timing constraints were incompatible with the procedural schedule that had recently been extended at FairPoint's request. On December 22, 2011, FairPoint

submitted tariff pages virtually identical to those submitted November 30, arguing that the filing was most appropriately and lawfully addressed under RSA 378:6, I(b), rather than RSA 378:6, IV.

On January 9, 2012, while the Commission's decision on the CCL portion of the docket was pending, Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as EarthLink Business; Freedom Ring Communications, LLC, d/b/a BayRing Communications; AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P.; and Global Crossing Telecommunications, Inc., a Level 3 company (collectively, the CLECs) filed a motion to dismiss or for summary judgment (motion to dismiss) on the portion of the docket addressing FairPoint's proposal to increase the Interconnection Charge. Coincident with this filing, the CLECs requested that the procedural schedule be suspended in light of the dispositive nature of their motion. On January 13, 2012, the Commission issued a secretarial letter suspending the procedural schedule. On January 18, 2012, FairPoint objected to the motion to dismiss and the motion to suspend the procedural schedule.

On January 20, 2012, the Commission issued Order No. 25,319 concluding that the changes to the CCL as originally proposed by FairPoint on September 10, 2009 and refiled on December 22, 2011 complied with the Commission's directives, and that the changes would become effective on January 21, 2012. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 9-10, 16. In addition, that order found that RSA 378:6, I(b) did not apply to the December 22, 2011 filing and that to the extent it was a

proper filing under RSA 378:6, IV it was amended by the Commission rejecting the portion relating to the Interconnection Charge for the reasons set out in prior orders. *Id.* at 18-19.

Accordingly, the Commission has made a determination on the portion of the docket relating to the change to the CCL charge, and therefore the only portion of the docket remaining concerns the Interconnection Charge. The portion of the docket regarding the Interconnection Charge is the subject of the instant motion to dismiss.

II. POSITIONS OF THE PARTIES

A. CLECs

According to the CLECs, an order released by the Federal Communications Commission (FCC) on November 18, 2011 caps all intrastate switched access rates at the levels in effect on the effective date of the rules contained in the order, December 29, 2011. *See generally Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, (rel. Nov. 18, 2011) (CAF Order). The CLECs contend that as part of the CAF Order, the FCC determined that it would comprehensively reform and modernize the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation, and that as part of that effort the FCC adopted bill-and-keep as the default methodology for all intercarrier compensation traffic. CLEC Motion to Dismiss at 4-5. To implement these reforms, the FCC adopted regulations that took effect on December 29, 2011, 30 days following their publication in the Federal Register. According to the CLECs, these regulations provide for caps on certain intrastate rate elements, including the Interconnection Charge proposed by FairPoint. More particularly, the CLECs argue that the Interconnection

Charge is included in the "residual rate elements" identified in the newly adopted rules, and which are capped at the rate in effect on December 29, 2011. *See* 47 C.F.R. §§51.903(d), 51.907. Because the charge is capped at the $0.00000 in effect on December 29, 2011, the CLECs contend FairPoint may not raise the charge as it has proposed.

The CLECs further contend, citing paragraph 801 of the CAF Order, that the FCC explicitly capped all intrastate rates for price cap carriers, such as FairPoint, and that these caps begin the transition to the bill-and-keep format. The CLECs note that the FCC found that it had jurisdiction over intrastate switched access rates and that it had authority to adopt the mechanisms it uses in the CAF Order. Moreover, the CLECs contend that the FCC pointed out that the states would play a role in ensuring that carriers abide by the tariffing requirements of the CAF Order. Accordingly, the CLECs contend that the Commission should reject FairPoint's proposed increase to the Interconnection Charge.

The CLECs also argue that FairPoint's December 22, 2011 tariff filing does not alter the analysis. They contend that making the filing represents a kind of gamesmanship against which the FCC urged the states to defend. Further, the CLECs argue that "[n]othing in the federal regulations grants an exception from the December 29th rate caps to proposed rate increases or illustrative filings pending on that date." CLECs' Motion to Dismiss at 10. Therefore, they argue, neither FairPoint's December 22, 2011 filing, nor its previously retained illustrative filing, grant relief from the caps in the CAF Order. Accordingly, the CLECs contend that the Commission must reject the Interconnection Charge filing and dismiss the matter or grant summary judgment in their favor.

B. FairPoint

FairPoint contends that the authority cited by the CLECs in support of their motion does not support their claims, and actually contradicts their arguments. FairPoint points to the same rules and the same provisions of the CAF Order as the CLECs, but contends that in making their arguments the CLECs omitted a footnote that alters the analysis. While acknowledging that generally the omission of a footnote is a minor issue, FairPoint argues that footnote 1495, referenced in paragraph 801 of the CAF Order, contains language "fatal" to the CLECs' argument. FairPoint Objection to Motion to Dismiss at 2. Footnote 1495 states, in relevant part:

> 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.

CAF Order, fn. 1495. FairPoint contends that paragraph (d)(3) of the FCC rule cited in the footnote encompasses the residual interconnection charge at issue here. Accordingly, FairPoint contends that the CAF Order does not bar the increase to the Interconnection Charge because it was filed, though not yet in effect.

FairPoint also contends that the CLECs are incorrect when they argue that the increase to the Interconnection Charge is not pending before the Commission as contemplated in the CAF Order. FairPoint counters the CLECs' argument that by its December 22, 2011 filing it is, in reality, seeking rehearing of the decision to reject its November 30, 2011 filing by noting that it would have been within its rights to request rehearing. Rather than it being a request for rehearing, FairPoint argues that its December 22 tariff filing was an "entirely separate and distinct filing" from the November one, "with a different proposed effective date and with

reference to the appropriate statutes for such a filing." FairPoint Objection to Motion to Dismiss at 3. Further, FairPoint notes that the Commission rejected the November 30, 2011 filing "without prejudice" and FairPoint was, therefore, within its rights to submit new tariff pages and argue on behalf of the change to the Interconnection Charge. Lastly, FairPoint contends that though the CLECs may have made arguments with respect to the motion to dismiss, they failed to make any argument that they are entitled to summary judgment and could not support such arguments if they did. Accordingly, FairPoint contends that the Commission must reject the motion to dismiss or for summary judgment.

III. COMMISSION ANALYSIS

Prior to addressing the motion to dismiss, we note that on January 26, 2012 the CLECs filed a reply to FairPoint's objection, but we do not consider the reply in our ruling here. Our administrative rules specifically authorize the filing of motions and objections to those motions, *see* N.H. Admin. R. Puc 203.07, but replies to objections are not authorized and we do not consider them absent specific authorization. *See City of Nashua*, Order No. 24,488 (July 18, 2005) at fn. 4.

In ruling on a motion to dismiss, we, like the New Hampshire Supreme Court, ascertain whether the allegations pleaded in the plaintiff's petition are reasonably susceptible of a construction that would permit recovery. *Pesaturo v. Kinne*, 161 N.H. 550, 552 (2011). In this instance, we assume that all facts pleaded by FairPoint are true, and we construe all reasonable inferences drawn from those facts in its favor. *Id.* We then engage in a threshold inquiry that tests the facts in the petition against the applicable law and if the facts fail to constitute a basis for legal relief, granting the motion is proper. *Id.*

In ruling upon a motion for summary judgment, we consider the evidence presented, and inferences properly drawn from it, in the light most favorable to the non-moving party. *Sabinson v. Trustees of Dartmouth College*, 160 N.H. 452, 455 (2010). If this review does not reveal any genuine issues of material fact, *i.e.*, facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law, the motion will be granted. *Id.*

Given the recent vintage of the CAF 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. In general, the CAF Order seeks to move all carriers to a bill-and-keep framework for all interstate and intrastate rates within the next decade. Bill-and-keep means that "carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary." CAF Order, ¶ 34. Once begun, the transition to bill-and-keep lasts six years for price cap carriers and nine years for rate of return carriers. CAF Order, ¶ 801 and Figure 9. Under the FCC's regulatory scheme FairPoint is a price cap carrier in its Northern New England service areas, including New Hampshire. The transition to bill-and-keep set out in the CAF Order begins with the FCC placing caps on certain access and transport rates on December 29, 2011, the effective date of the order and its related rules. CAF Order, ¶ 801.

Beginning at paragraph 798, the FCC sets out a default transition path for terminating end office switching and certain transport elements, and begins the process of other rate reforms by capping "all" interstate rate elements as of December 29, 2011 to "ensure that no rates increase during reform, and that carriers do not shift costs between or among other rate elements, which would be counter to the principles [the FCC] adopt[s] today." CAF Order, ¶ 798. In paragraph 801, the FCC reiterates that at the outset of the transition, "all interstate access and reciprocal

compensation rates will be capped at the rates in effect as of the effective date of the rules." It explains that it is capping the rates "as of the effective date of the Order, as opposed to a future date such as January 1, 2012, to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order." CAF Order, ¶ 801. It further states that for price cap carriers "all *intrastate* rates will also be capped . . . ." CAF Order, ¶ 801 (emphasis added). Figure 9 following paragraph 801 also states that as of the effective date of the order and rules "*All* intercarrier switched access rate elements, including *interstate and intrastate originating and terminating rates* and reciprocal compensation rates are capped." (Emphasis added.)

The footnote FairPoint contends supports its increase to the Interconnection Charge, footnote 1495, follows the first sentence in paragraph 801 which, as noted, states "Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules." CAF Order, ¶ 801. Rather than actually apply the cap to "all" rate elements as the FCC states elsewhere, footnote 1495 sets out a specific list of rate elements that are excepted, to a limited degree, from the cap. As noted by FairPoint, the list in the footnote provides that all rate elements in the "traffic sensitive basket" and the "trunking basket" as described in 47 C.F.R. §§ 61.42(d)(2)-(3) are capped on the effective date of the order and the rules, "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." CAF Order, fn. 1495.

Under paragraph 803, the states are to aid the FCC by ensuring that carriers comply with the transition requirements. Specifically, the FCC anticipates that the states will oversee changes

to intrastate access tariffs to "ensure that modifications to intrastate tariffs are consistent with the framework and rules we adopt today. For example, states will help guard against carriers improperly moving costs between or among different rate elements to reap a windfall from reform." CAF Order, ¶ 803.

In footnote 1547 to paragraph 818, the FCC further clarifies that:

> This prohibition on increasing access rates also applies to any remaining Primary Interexchange Carrier Charge in section 69.153 of the Commission's rules, the per-minute Carrier Common Line charge in section 69.154 of the Commission's rules, and the per-minute Residual Interconnection Charge in section 69.155 of the Commission's rules. 47 C.F.R. §§ 69.153, 69.154, 69.155. *Price cap carriers and CLECs that benchmark to price cap rates are also prohibited from increasing their originating intrastate access rates.*

(Emphasis added.) Also, under new rule 47 C.F.R. § 51.907, cited by the CLECs, a price cap carrier is, as of December 29, 2011 to cap the rates for "all interstate and intrastate rate elements" contained in Interstate End Office Access Service, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Under the new 47 C.F.R. § 51.903(d), End Office Access Service includes the Residual Interconnection Charge.

Based on our review of the FCC's order and its attendant rules, the only exception to the requirement that access rates be capped at the rates in effect on December 29, 2011 is the exception provided in footnote 1495. The CAF Order does not, in any other place, provide any exceptions to that cap. Moreover, FairPoint contends only that the exception in footnote 1495 provides the permission necessary for it to increase the Interconnection Charge. For the reasons that follow, and in furtherance of the expectation of the FCC that states shall ensure that companies abide by the provisions of the CAF Order, we conclude that FairPoint's proposed increase to the Interconnection Charge as noted for Section 6, page 5 and Section 30, page 9 of

FairPoint's Tariff No. 3 is not permitted. That rate cannot be increased because it is capped at the rate in effect on December 29, 2011, which was $0.00000, irrespective of FairPoint's prior filing.

To determine whether the cap applies, we must ascertain whether the Interconnection Charge proposed by FairPoint is among those in the list of excepted items in footnote 1495. If the charge is not in the list of those excepted from the cap, then, of necessity, it is capped at the rate in effect on the effective date of the order and the rules, regardless of whether a tariff filing was pending on that date. Part 61 of 47 CFR covers tariffs of common carriers of telecommunications and 47 C.F.R. § 61.42 reads:

> 61.42 Price cap baskets and service categories.
> (a)–(c) [Reserved]
>
> (d) Each price cap local exchange carrier shall establish baskets of services as follows:
>
> (1) A basket for the common line, marketing, and certain residual interconnection charge interstate access elements as described in §§ 69.115, 69.152, 69.153, 69.154, 69.155, 69.156, and 69.157 of this chapter. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the ''CMT basket.''
>
> (2) A basket for traffic sensitive switched interstate access elements. For purposes of §§ 61.41 through 61.49 of this chapter, this basket shall be referred to as the "traffic-sensitive basket."
>
> (3) A basket for trunking services as described in §§ 69.110, 69.111, 69.112, 69.125(b), 69.129, and 69.155 of this chapter. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the "trunking basket."

Footnote 1495 excepts only subparts (d)(2)-(3) from the cap, so the elements identified in subpart (d)(1) are not in issue here. Further, by the plain language of the regulation, those access elements in the "traffic-sensitive basket" of subpart (d)(2) are specifically "traffic sensitive

switched *interstate* access elements." 47 C.F.R. § 61.42(d)(2) (emphasis added). Therefore, because these are interstate rate elements, any filing relative to those elements would not be relevant to a filing with this Commission. *See, e.g.*, FairPoint NH PUC Tariff No. 3, Section 1.3.2 (defining "Access Minutes" as "[t]hat usage of exchange facilities in *intrastate* service for the purpose of calculating chargeable usage" (emphasis added)). As noted, however, FairPoint contends that the Interconnection Charge falls into the "trunking basket" in subpart (d)(3), which covers the trunking services described in sections 69.110, 69.111, 69.112, 69.125(b), 69.129, and 69.155. Of these provisions, section 69.155 is the section specifically referenced by FairPoint as applicable to its proposed charge. FairPoint Objection to Motion to Dismiss at 3.

Part 69 of 47 C.F.R. addresses access charges, and subparts 151 to 158 cover the computation of charges for price cap local exchange carriers, such as FairPoint. 47 C.F.R. § 69.155 permits a carrier to recover a "Per-minute residual interconnection charge." Under 47 C.F.R. § 69.155(a) "Local exchange carriers may recover a per-minute residual interconnection charge on originating access." Under 47 C.F.R. § 69.155(b), to the extent the carrier cannot recover all of the permitted residual interconnection charge revenues via originating access, the remainder may be collected through terminating access. Thus, the interconnection charge in the trunking basket has a limited exception from the newly imposed rate cap on originating access, and, potentially, terminating access. However, the charges covered by subpart (d)(3) are, like those in subpart (d)(2), interstate. Under 47 C.F.R. § 69.1:

> 69.1 Application of access charges.
> (a) This part establishes rules for access charges for *interstate or foreign access services* provided by telephone companies on or after January 1, 1984.

(Emphasis added.) Therefore, all access charges in part 69 are for interstate or foreign access services, whereas the Interconnection Charge proposed here is an intrastate charge. Thus, based on the order and the rules, the exception in footnote 1495 applies only to specific baskets of interstate rate elements and does not apply to the intrastate charge in issue here.

Furthermore, even presuming the exceptions in footnote 1495 could somehow be read to cover intrastate charges, under the new 47 C.F.R. § 51.907 a price cap carrier is, as of December 29, 2011 to cap the rates for "*all interstate and intrastate rate* elements" contained in Interstate End Office Access Service, Tandem Switched Transport Access Services, and Dedicated Transport Access Services. Pursuant to the new 47 C.F.R. § 51.903(d), End Office Access Service includes the Residual Interconnection Charge. Thus, to the extent there may be some argument that footnote 1495 excepts both interstate and intrastate rates or charges, the newly adopted rules specifically require both interstate and intrastate charges, including the Interconnection Charge, to be capped at the rates in effect as of December 29, 2011.

Lastly, as to the provisions of footnote 1495, we note that the footnote directly follows the first sentence of paragraph 801which references "all interstate switched access and reciprocal compensation rates" and which makes no reference to intrastate rates or charges. The inference from this positioning is that the footnote serves to clarify the first sentence of paragraph 801 and thus applies only to interstate rates – a conclusion borne out by review of the elements excepted from the cap. Only later in paragraph 801 does the FCC state that intrastate rates will "also" be capped. At that point the FCC makes no reference to any footnotes or provisions of any orders or rules indicating that it intended intrastate rates to be excepted from the cap. Accordingly, the intrastate rates are capped at the rates in effect on December 29, 2011, pursuant to the CAF

Order and the relevant rules. Because the Interconnection Charge proposed by FairPoint does not fit the limited exception to the cap set out by the FCC in footnote 1495, it is subject to the general cap on access charges effective December 29, 2011. Thus, even construing all facts in its favor as true, because FairPoint does not have a legal right to increase the Interconnection Charge beyond the rate in effect on December 29, 2011, we must grant the motion to dismiss.

Beyond the language of the footnote and the relevant regulations, for the additional reasons below we conclude that the FCC did not intend to exclude charges such as the one proposed here from its cap. As noted, footnote 1495 provides that the cap applies unless a price cap carrier has made a tariff filing increasing particular rate elements, but the change has not yet taken effect. To the extent the FCC excepts from its rules any tariff filings in process with its office it is obviously acting within its purview. The FCC is presumed to be aware of the filings made with it and the length of time it would take to review and implement those filings. For the FCC to except filings in process at the state level relating to intrastate charges, however, would invite contentions that certain state processes are unfair, biased, inefficient or otherwise contrary to the intent of the FCC in the CAF Order. It is illogical to presume the FCC would allow for such situations and, moreover, it is potentially injurious to the reforms the FCC is attempting.

For the FCC to allow state filings to be excepted from the cap it could mean, for example, that a carrier could submit numerous tariff filings any time before December 29, 2011 through operating companies in various jurisdictions to increase one or more intrastate rate elements that would otherwise be capped. If the cap in the CAF Order did not apply, those tariffs would go into effect in each jurisdiction whenever the state commission was able to approve them, assuming the state commission would do so. Such approvals could be as early as a few days, or

perhaps many months, and would inevitably vary among jurisdictions. As a particular example, FairPoint, in its December 22, 2011 filing as well as its objection to the motion to dismiss, contends that the proper state statute for review of its filing is RSA 378:6, I(b), under which the Commission could take up to eight months to implement the filing. Presuming for purposes of this example that the argument is valid, that would mean the Commission had until August 22, 2012 to address the filing. Under the CAF Order not only are rates capped on December 29, 2011, but on July 1, 2012, carriers are to reduce their intrastate access rates, if above the interstate rates, by 50 percent of the differential between the intrastate and interstate rates. CAF Order, Figure 9. If the Commission has not finished its review of the proposed tariff by July 1, irrespective of the reason, there will be no way to apply that change since the true differential would not be known. The filing would, therefore, avoid not only the cap on rates, but also would disrupt the transition to bill-and-keep laid out by the FCC. A similar disruption could also occur in any other jurisdiction where a carrier managed to make a filing prior to December 29, 2011, but it was not in effect as of that day.

Furthermore, in the CAF Order the FCC repeatedly states – including in footnote 1495 – that it would not agree to postpose the application of the cap, even by two days from December 29, 2011 to January 1, 2012, because it intended to thwart carriers' attempts to inflate their rates ahead of the reforms. To allow carriers to file tariff revisions in any state in which they operate in the period between the issue date and the effective date of the order, and to allow those rates to become effective at different times in each state would render various portions of the order not only ineffective, but virtually impossible to administer and would permit the very rate inflation the FCC sought to avoid.

For the above reasons, we conclude that the CAF Order caps all intrastate access rate elements at the rates in effect on December 29, 2011. We further conclude that it is irrelevant whether a company has made a filing with a state commission for a rate increase, but the filing has not yet gone into effect, because the exception provided by the FCC does not apply to intrastate filings. Accordingly, we conclude that FairPoint may not increase the Interconnection Charge above the $0.00000 that was in effect on December 29, 2011. Consequently, we grant the motion to dismiss FairPoint's request to increase the Interconnection Charge. Because we grant the motion to dismiss, we do not address the motion for summary judgment.

Based upon the foregoing, it is hereby

ORDERED, that the CLECs' motion to dismiss is granted.

By order of the Public Utilities Commission of New Hampshire this third day of February, 2012.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director

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