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 Motions for Reconsideration

O R D E R N O. 25,358

May 7, 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 here. 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. The Court also stated that the tariff could be rewritten if the Commission chose to do so. *Appeal of Verizon New England*, 158 N.H. 693, 697-98 (2009). 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

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

determination that the CCL charge should only be imposed when FairPoint's common line was used.

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. 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withdrawal of its September 10, 2009 tariff pages requesting, in part, that the tariff pages it had filed should be withdrawn to the extent the Commission treated them as having been voluntarily made. FairPoint's Motion for Rehearing and Conditional Withdrawal of Tariff Filing (Oct. 12, 2009) at 9. The Commission had not yet ruled on those tariff pages, or the conditional 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 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. On November 21, 2011, FairPoint responded to the motion for a hearing and contended that it should be treated as a motion to bifurcate the proceeding. FairPoint also contended that a hearing was not needed on the CCL issues and requested that those issues be decided on the briefs from the parties. By Order No. 25,295 (Nov. 30, 2011) the Commission determined that it would accept briefs on particular questions 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, to be decided on the basis of briefs, as requested, and a portion relating to FairPoint's proposed increase to the Interconnection Charge, to be decided on a separate track culminating in evidentiary hearings. Briefs on the CCL portion of the docket were received on December 19, 2011.

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 FairPoint's 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, and 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 (BayRing); AT&T Corp.; Sprint Communications Company, L.P. and Sprint Spectrum, L.P. (Sprint); and Global Crossing Telecommunications, Inc., a Level 3 company (Global Crossing)[2] 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 competitive carriers 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 re-filed on

[2] These companies are all competitive local exchange carriers (CLECs) providing telecommunications services to customers and relying in part on wholesale services purchased from FairPoint.

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, the 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.

On February 3, 2012, the Commission issued Order No. 25,327 and concluded that due to a recent order issued by the Federal Communications Commission (FCC), *Connect America Fund et al.*, WC Docket No. 10-90 *et al*., Report and Further Notice of Proposed Rulemaking, FCC 11-161, (rel. Nov. 18, 2011) (CAF Order), FairPoint was not permitted to increase the Interconnection Charge as it had proposed. The Commission, therefore, granted the competitive carriers' motion to dismiss.

On February 17, 2012, FairPoint filed a motion for rehearing and/or reconsideration of both Order No. 25,319 and Order No. 25,327. On February 21, 2012, BayRing, AT&T, Sprint, and Global Crossing (collectively, the CLECs) filed a motion for reconsideration of Order No. 25,319. On February 27, 2012, the CLECs objected to FairPoint's motion for reconsideration and on February 28, 2012, FairPoint objected to the CLECs' motion for reconsideration. On March 7, 2012, BayRing filed a letter responding to FairPoint's objection and on March 13, 2012, AT&T filed a similar letter.

II. FAIRPOINT'S MOTION FOR RECONSIDERATION

A. FairPoint

Relative to Order No. 25,319, FairPoint first contends that the Commission erred because the tariff revisions ordered by the Commission, and implemented through Order No. 25,319, are beyond the scope of this proceeding. FairPoint contends that the record of this proceeding is insufficient to support the finding that the CCL is not a contribution element because the record was not developed with the intent of determining that issue. Moreover, FairPoint contends that the record contains uncontroverted evidence that the CCL is a contribution element. Accordingly, FairPoint contends that the Commission's "mandate to revise the CCL charge" should be reconsidered. FairPoint's February 17, 2012 Motion for Rehearing at 11.

FairPoint next argues that the Commission erred by denying FairPoint a meaningful opportunity to be heard. According to FairPoint, the Commission misconstrued FairPoint's legal position in Order No. 25,319. In that order the Commission stated that the change to the CCL charge could be implemented without a hearing and that FairPoint contended that due process would be satisfied without a hearing. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 8. FairPoint argues that when it noted that a hearing was not necessary, it "was not addressing a constitutional due process issue", but only that it was responding to the CLECs' contention that no further process was needed. FairPoint's February 17, 2012 Motion for Rehearing at 11. According to FairPoint:

> Whether tariff language complies with prior unlawful directives does not warrant an evidentiary hearing. Such review simply warrants a ministerial comparison of the content of the filing to the prior directives. In foregoing a hearing, FairPoint was making no concession as to whether it had, or would be, "heard" in this case, and indeed reserved numerous rights in its Response.

FairPoint's February 17, 2012 Motion for Rehearing at 12. FairPoint further contends that the Commission's restrictions prevented a meaningful opportunity to be heard on the issue of "whether the Commission was authorized to mandate a reduction in [FairPoint's] rates." FairPoint's February 17, 2012 Motion for Rehearing at 13. Thus, according to FairPoint, the Commission prejudged the matter and prevented it from meaningfully being heard.

FairPoint next contends that the Commission erred by failing to approve the change to the Interconnection Charge in conjunction with the change to the CCL charge. FairPoint contends that the changes were interdependent and could not be made separately. Further, FairPoint contends that the Commission's justifications for not implementing the changes together are insufficient to support the Commission's decision and, as a result, the Commission has confiscated FairPoint's property in violation of the state and Federal constitutions.

Next, FairPoint argues that applicable law does not permit the Commission to act on less than the entire tariff filing. According to FairPoint, the Commission is constrained by RSA 378:6 to act on the filing as a whole and not on portions of the filing. Therefore, FairPoint argues, the Commission erred in treating different portions of the filing differently.

FairPoint also argues that the Commission erred in failing to consider its December 2011 tariff filing under the terms of RSA 378:6, I(b) rather than RSA 378:6, IV. According to FairPoint, the statutes are not clear on their face, and therefore the Commission should have relied upon legislative history. Had the Commission relied upon such history, FairPoint contends, it would have determined that the filing was to be reviewed under RSA 378:6, I(b).

With respect to Order No. 25,327, FairPoint contends that the Commission erred in its analysis of the CAF Order and the associated rules in granting dismissal. Specifically, FairPoint argues that the Commission misread the relevant FCC rules as distinguishing between interstate and intrastate access, when the rules are actually "agnostic as to interstate and intrastate rate elements . . .." FairPoint's February 17, 2012 Motion for Rehearing at 22. In addition, FairPoint contends that in analyzing the exemption from the rate cap defined in the CAF Order, the Commission overlooked a portion of the relevant FCC rules. Particularly, FairPoint contends that its proposed Interconnection Charge is not part of the End Office Access Service category that is subject to the rate cap because it is a local transport element. Accordingly, FairPoint contends that the Commission erred in concluding that the rate cap in the CAF Order applied to its proposed Interconnection Charge and, consequently, in granting the motion to dismiss.

B. CLECs

The CLECs argue, as a general matter, that the majority of the arguments raised by FairPoint are reassertions of arguments the Commission has already heard and rejected. They contend, therefore, that the Commission ought to deny FairPoint's motion for attempting to reargue previously rejected arguments. In addition, the CLECs generally object to FairPoint's motion as raising issues for which the rehearing period has already passed. Therefore, they argue that the untimeliness of the motion is cause for denial.

As to the specific arguments raised by FairPoint, the CLECs first contend that the Commission could properly order the revisions to FairPoint's tariff and that such an order was not outside the scope of the docket. The CLECs point out that while the Commission may have at one point removed the issue of prospective modifications from the docket, the issue of tariff

modification was returned to the docket by Commission order and FairPoint did not seek reconsideration of that order. They also argue that FairPoint's position that tariff modifications are outside the scope of the docket is contrary to a position it took while seeking reconsideration of a prior Commission order in this docket.

Next, the CLECs contend that the Commission has repeatedly rejected FairPoint's contention that the CCL charge is a contribution element and there is no basis upon which to reconsider that contention now. Further, the CLECs argue that FairPoint is incorrect to argue that the record contains unrebutted evidence of the purpose of the CCL. According to the CLECs, witnesses for AT&T provided evidence rebutting FairPoint's argument and demonstrated that the CCL charge should only be assessed on calls using the local loop. Further, according to the CLECs, when ruling upon the CCL as originally proposed, the Commission only approved a settlement that "broke the link between Verizon's costs and revenue requirements, on the one hand, and the CCL rate determination on the other." CLECs' Objection to FairPoint's Motion for Reconsideration at 21. Thus, according to the CLECs, it was long ago determined that the CCL is not purely a contribution element.

The CLECs next argue that the Commission has not deprived FairPoint of a meaningful opportunity to be heard. The CLECs contend that in discussing due process in its earlier pleading, FairPoint quoted a discussion of due process from a prior Commission order and that in claiming to reserve certain rights, it was not clear what rights FairPoint intended to reserve. Further, according to the CLECs, it is not clear what FairPoint believes the central due process issue to be, but that no matter which explanation is accepted, the Commission has either ruled upon the matter previously, or it is not ripe for consideration.

As to the issue of confiscation, the CLECs argue that FairPoint relies on inapplicable statutory provisions and attempts to apply rate making concepts in an area where such concepts are of only limited application. The CLECs argue that there is little merit in FairPoint's contention that the reduction in one rate element is a confiscation because that reduction may be balanced by generous rates on other services and it is the overall level of rates, revenues and costs that determine a company's financial status. The CLECs contend that FairPoint cannot support a claim of confiscation without allowing for consideration of its overall rates and costs and, therefore, there is no basis to grant reconsideration on that ground.

Next, the CLECs contend that when bifurcating the proceeding, the Commission acted lawfully. More particularly, the CLECs argue that the Commission did not err in acting on the proposed changes to the CCL charge and the Interconnection Charge separately and FairPoint's contention that they be dealt with together was properly rejected.

As to FairPoint's December 2011 tariff filing, the CLECs contend that the Commission was correct to reject the Interconnection Charge portion of that filing. The CLECs contend that the Commission was correct to find that RSA 378:6, I(b) does not apply to non-general rate increase filings by a telephone utility. Further, the CLECs argue that this situation is distinct from that in Docket No. DT 11-248, concerning FairPoint's recovery of certain municipal property taxes, and the Commission's decision in that docket does not apply to this case.

As to the motion to dismiss FairPoint's Interconnection Charge and the Commission's ruling on that item in Order No. 25,327, the CLECs argue that footnote 1495 to the CAF Order – the footnote upon which FairPoint relies for an exemption from the rate cap imposed by the FCC – does not apply to FairPoint's filing. The CLECs contend that the footnote does not apply

because the Federal "trunking basket" is not covered by New Hampshire's intrastate tariffs. According to the CLECs, the Federal regulatory structure covering rate elements in the "trunking basket" is significantly different from, and not reflected in, the telecommunications regulations in New Hampshire, and that the "trunking basket" exists as an interstate rate-setting device. Moreover, the CLECs note that there is nothing in the CAF Order creating, or requiring states to create, an intrastate equivalent to the "trunking basket". Therefore, according to the CLECs, FairPoint's proposed Interconnection Charge is not within the "trunking basket" as defined by Federal law and, as a result, it is not covered by the exception from the rate cap in footnote 1495.

In addition, the CLECs argue that FairPoint's claim that the Interconnection Charge is a local transport rate element does not exempt the Interconnection Charge from the rate cap. The CLECs contend that the note to new regulation 47 C.F.R. §51.903 specifically includes state transport elements within the definition of End Office Access Services, which are not exempted from the rate cap. Further, the CLECs argue, if the Interconnection Charge could be interpreted to fall outside the definition of End Office Access Services, then it is within the definition of Tandem-Switched Transport Access Service, which is also subject to the rate cap. In either event, the CLECs contend, the Interconnection Charge is subject to the rate cap in the CAF Order and the exception in footnote 1495 does not apply.

The CLECs also contend that the exception in footnote 1495 does not apply because FairPoint did not have a lawful tariff pending at the time the new regulations in the CAF Order took effect. According to the CLECs, FairPoint had previously requested that the tariff be withdrawn and treated as illustrative and that the Commission granted FairPoint's request to withdraw the Interconnection Charge portion of the tariff and have it treated as illustrative for

purposes of investigation in this docket. The CLECs contend that rather than abide by the Commission's decision, FairPoint attempted to file the tariff in November, 2011 and, following the Commission's rejection of the filing, again in December. The CLECs argue that FairPoint did not have a legitimate basis for making the December filing and therefore a lawful tariff was not pending before the Commission in December, 2011.

In addition to the above arguments, the CLECs contend that allowing FairPoint to increase its Interconnection Charge would be contrary to state and Federal policies on telecommunications and ultimately would be wasteful. The CLECs note that through its order the FCC has begun the transition to a "bill-and-keep" framework and, as part of that transition, intercarrier compensation rates have begun a step-down process. According to the CLECs, allowing an increase to the Interconnection Charge – an intercarrier compensation rate – at this time would contravene the FCC's goals. The CLECs argue that FairPoint may have other means to make up any revenues it may lose as a result of the change in Federal policy, but that FairPoint has not availed itself of them. Further, the CLECs contend that any limitations placed upon FairPoint's ability to alter its rates are not as restrictive as claimed by FairPoint.

Furthermore, the CLECs contend that pursuant to RSA 378:17-a, III(a), as soon as possible after a reduction in interstate access rates, this Commission is to consider corresponding reductions to intrastate rates. The CLECs argue that in enacting this statute, the Legislature understood that such reductions might result in increases in local rates, but that increases to local rates are preferable to increases in intercarrier compensation rates. Lastly, the CLECs contend that because the FCC has ordered a reduction to various rates beginning on July 1, 2012,

allowing for an increase in the rates at this time would be "futile". CLECs' Objection to FairPoint's Motion for Reconsideration at 38.

III. CLECs' MOTION FOR RECONSIDERATION

A. CLECs

The CLECs contend that the Commission erred in its ruling in Order No. 25,319 that the effective date of the change to the CCL portion of FairPoint's tariff would be January 21, 2012, rather than October 10, 2009. According to the CLECs, in making its ruling the Commission erred in relying upon *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980) for the proposition that retroactive rate changes are not permitted. The CLECs contend that the Commission misapplied the *Pennichuck* case because setting an effective date of October 10, 2009 does not conflict with the restrictions on retroactive rate changes discussed in *Pennichuck*. Moreover, the CLECs argue, that case's concerns about retroactive ratemaking apply only to lawful contracts or tariffs, and the Commission had previously concluded that the CCL, as it was charged, resulted in unjust and unreasonable rates.

Further, the CLECs contend that the Commission's reliance upon *Pennichuck* is "baffling", CLECs' Motion for Reconsideration at 11, because the Commission failed to acknowledge another, more relevant decision, *Appeal of Granite State Electric*, 120 N.H. 536 (1980). According to the CLECs, the *Granite State* decision is comparable to the instant matter and was relied upon by the Commission in an earlier order in this proceeding in determining that Verizon would owe restitution for inappropriately billing CCL charges. The CLECs contend that the Commission does not explain why it did not rely upon *Granite State* in Order No. 25,319 despite having used it in a prior order.

Next, the CLECs contend that because they had urged the Commission to use "what could be viewed as equitable powers" and that because the Commission did not offer a "convincing" reason for failing to do so, Order No. 25,319 is unreasonable. CLECs' Motion for Reconsideration at 13. The CLECs argue that FairPoint's "procedural maneuvering" prejudiced them and thus it is unreasonable for the Commission to have allowed FairPoint to profit from its "procedural posturing." CLECs' Motion for Reconsideration at 14.

On March 7, 2012, BayRing filed a letter stating that although it seeks to have the Commission declare FairPoint's CCL tariff in effect as of October 10, 2009, it is not asserting that FairPoint owes any refunds or credits for billings prior to August 1, 2010. BayRing contends that aligning any possible refund or credit with that date would comply with the settlement agreement reached in the context of FairPoint's bankruptcy proceedings and approved by the bankruptcy court. On March 13, 2012, AT&T filed a similar letter contending that FairPoint's bankruptcy and the settlement of that proceeding does not bar the Commission from setting the effective date of the CCL changes at a date prior to FairPoint's emergence from bankruptcy.

B. FairPoint

FairPoint first contends that the CLECs themselves misapply the *Pennichuck* decision. According to FairPoint, that decision restricts certain Commission actions relative to temporary rates and that temporary rates were never set in this case. Further, FairPoint contends that the CLECs place undue emphasis on the references to due process in the *Pennichuck* decision. In addition, FairPoint contends that the CLECs inappropriately rely on the reference to the term "lawful contract" in *Pennichuck* and that they ignore that the CCL was lawful based upon the

Supreme Court's conclusions in the *Verizon* decision. For these reasons, FairPoint contends that *Pennichuck* does not operate in the manner claimed by the CLECs.

Moreover, FairPoint contends that the CLECs' reliance on *Granite State* is misplaced since that case is distinguishable from the instant matter in part because the Supreme Court overturned the Commission's decision on the CCL. In addition, FairPoint contends that *Granite State* is distinguishable because the rates that have been authorized and approved are the rates in FairPoint's tariff as it existed at the time of the *Verizon* decision and that although the Commission ordered the rates changed, the new rates had never become effective. Thus, FairPoint contends, even under *Granite State*, no refund is due, and a new rate may not be retroactively applied.

FairPoint next counters that the Commission was correct to find that it did not have a basis to apply equitable authority in this instance. According to FairPoint, the CLECs' arguments that FairPoint manipulated the process to cause delay by requesting a hearing and then later stating that a hearing was not needed, ignore distinctions in different uses of the word "hearing." According to FairPoint, the CLECs attempt to blur the distinctions to make it appear that FairPoint was acting unreasonably. FairPoint also contends that the CLECs are incorrect to fault the Commission for failing to adjust the procedural schedule based upon rumors of FairPoint's bankruptcy, or upon the length of the proposed tariff to be reviewed, or upon the Commission's professed ability to proceed with this matter despite FairPoint's bankruptcy. According to FairPoint, the CLECs have "sat" on any rights they may have had with regard to that schedule. FairPoint Objection to CLECs' Motion for Reconsideration at 8.

FairPoint next argues that the CLECs' improperly rely upon *Appeal of Gas Service Co.*, 121 N.H. 602 (1981). According to FairPoint, in *Gas Service* the Supreme Court found that the Commission erred by failing to consider the claims of the utility. Therefore, FairPoint argues, *Gas Service* supports the reasonableness of the Commission's decision to establish a schedule to address FairPoint's claims. Further, according to FairPoint, *Gas Service* actually supports FairPoint's arguments that the Commission has abused its discretion by barring FairPoint from presenting evidence about the CCL charge being a contribution element. As FairPoint argues, to interpret *Gas Service* in the manner the CLECs suggest would be to deny FairPoint due process.

FairPoint concludes by arguing that even if the Commission were to reverse itself on the effective date of the change to the CCL charge, Federal law would prevent any change from being effective prior to FairPoint's emergence from bankruptcy on January 24, 2011. According to FairPoint, in emerging from bankruptcy, it received a discharge applicable to all debts that arose prior to January 24, 2011 and it received an injunction by operation of law that protects it from the commencement or continuation of any action to collect on a discharged debt. According to FairPoint, any charges at issue in the proceeding relating to the CCL were not part of any exception to the discharge or injunction and therefore the CLECs cannot collect on any alleged debt from the CCL charge.

IV. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311

(1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977) and *Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9-10. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Comcast Phone of New Hampshire*, Order No. 24,958 (Apr. 21, 2009) at 6-7, and *Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9-10.

A. FairPoint's Motion for Reconsideration

We begin by noting that many of FairPoint's arguments are little other than reassertions of arguments already addressed by the Commission. For example, FairPoint first contends that the prospective tariff revisions ordered by the Commission were outside the scope of this proceeding following the Supreme Court's decision in *Verizon*. FairPoint has previously raised the argument that prospective revisions were not permitted, and the Commission has determined otherwise. *See, e.g., Freedom Ring Communications, LLC d/b/a BayRing Communications,* Order No. 25,283 (Oct. 28, 2011) at 15-16, 28-29; *see also Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,219 (May 4, 2011) at 8. The Commission will not entertain such arguments as a basis for rehearing. We reach the same conclusion with respect to FairPoint's claim that there was "uncontroverted" evidence about the purpose of the CCL, which was also addressed in Order No. 25,283. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 15-16. For completeness, we address the remainder of FairPoint's claims on their merits, though despite doing so we acknowledge that many of the arguments are restated versions of prior arguments.

FairPoint contends that the Commission erred by denying it a meaningful opportunity to be heard when the Commission misunderstood FairPoint's legal position relative to the need for a hearing. In FairPoint's November 21, 2011 response to the CLECs' motion for a hearing, it was FairPoint that determined that the CLECs' motion for a hearing on the change to the CCL portion of the tariff should be treated as a motion to bifurcate the proceeding. In responding on that basis, FairPoint did "allow" that "the question of 'whether FairPoint's CCL tariff filing complies with the Commission's prior orders is presently ripe for consideration by the Commission' (as are other questions related to the CCL charge). . .." FairPoint November 21, 2011 Response to CLECs' Motion for Hearing at 2. Further, FairPoint requested that "in addition to dispensing with further development of the factual record, the Commission also dispense with a hearing on the CCL question and move directly to briefs." FairPoint November 21, 2011 Response to CLECs' Motion for Hearing at 3. On that basis, the Commission concluded that it would accept briefs on two specific questions related to the CCL, and those briefs were submitted on December 19, 2011. The Commission thereafter issued Order No. 25,319 in response to the briefs.

FairPoint now contends that the Commission erred by not allowing for a hearing on certain issues relating to the CCL. FairPoint's current claim that there was some specific and meaningful type of hearing on the CCL that was not being waived is not borne out by our review of its response to the CLECs' motion for a hearing. There was nothing in that request creating the nuanced distinctions FairPoint now contends are in issue. At no time did FairPoint qualify its request for a hearing , despite its assertions that it did so. Accordingly, we will not grant reconsideration on that basis.

Next, FairPoint argues that the Commission erred by not approving the change to the CCL portion of its tariff simultaneously with the change to the Interconnection Charge portion of the tariff because to do otherwise would amount to a confiscation of its property. First, as the Commission stated in Order No. 25,319, we do not agree with FairPoint's claim that the two changes are inextricably linked. We reiterate our conclusion that we do not accept FairPoint's claim that because the Commission had determined that the CCL charge must change, the Interconnection Charge must as well. *Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,319 (Jan. 20, 2012) at 13-14. Furthermore, in Order No. 25,319, the Commission concluded that FairPoint had not requested rate relief or allowed the Commission to investigate its current rates and that FairPoint's mere assertion that a rate change was necessary was not a sufficient basis for the Commission to adjust other rates:

> While it is true that the Commission may not force a utility to serve the public at rates that are confiscatory, it is likewise the case that public utilities, like other businesses, must monitor the costs of doing business and employ sound business judgment in determining when they should seek rate increases for future services. *Appeal of Pennichuck*, 120 N.H. at 567. FairPoint has not made any request or attempt to undo any restrictions on rate relief in the agreements it has made, nor has it made any other attempt to revise its rates that would allow the Commission to investigate whether the rates under which it currently operates are, in fact, confiscatory. Instead it merely asserts that change to the application of a single charge – a charge that, prior to 2006, had not been applied for at least 10 years, *see, e.g.,* Verizon New Hampshire's September 10, 2007 Post-Hearing Brief at 3-4, in a tariff that had not changed since 1993 – is a confiscation of constitutional dimension.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 25,319 (Jan. 20, 2012) at 15.

The conclusion in Order No. 25,319 that the change to the CCL does not result in a confiscation without further evidence on FairPoint's overall rates is in line with the conclusion we reached in Order No. 25,283 that:

> 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. . .. 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.

Freedom Ring Communications, LLC d/b/a BayRing Communications, Order No. 25,283 (Oct. 28, 2011) at 17-18. The Commission has consistently acknowledged that FairPoint may argue for some appropriate level of overall revenues to avoid the possibility that its rates would be so insufficient as to create a confiscation. Allowing such argument concerning overall revenue levels, however, does not presuppose that any change to the tariff potentially decreasing a particular source of revenue must be offset by some other change. Moreover, we again emphasize that FairPoint remains free to propose changes to its tariff intended to produce additional revenue to the extent it views such revenue as necessary. Should it do so, the Commission will review that request pursuant to an appropriate process which could include an analysis of the sufficiency of FairPoint's overall revenues. In short, FairPoint was, and remains,

free to petition for an increase in its revenue through the adjustment to a properly vetted charge. Therefore, we reject FairPoint's argument that the Commission erred in its conclusion that the two changes could be made separately.

FairPoint next contends that the Commission erred in acting on less than the entire filing by separating treatment of the CCL and Interconnection Charge portions of the proposed tariff. This argument appears to ignore FairPoint's agreement to bifurcate the proceeding in its response to the CLECs' motion for a hearing. Such bifurcation would, by definition, mean that the two revisions would be addressed separately rather than by having the Commission act upon the entire filing. Further, RSA 378:6, IV specifically states that the Commission may amend a tariff filing by a telephone utility. By giving the Commission authority to amend a filing, the statute presumes that the Commission could act independently on different sections of the filing. Thus, the Commission is not bound to only accept or reject a filing in its entirety, but may alter a filing in appropriate circumstances. In this case, the Commission amended FairPoint's filing by accepting the portion relating to the CCL while rejecting the portion relating to the Interconnection Charge pending further investigation. We conclude that such action is consistent with, not counter to, the provisions of RSA 378:6, IV.

Also relative to RSA 378:6, IV, FairPoint contends that the Commission erred in basing its ruling upon that statute when the proper statute based on legislative history, it contends, is RSA 378:6, I(b). We disagree. As we noted in Order No. 25,319, RSA 378:6, I(b) begins with a specific exception placing filings by telephone utilities under RSA 378:6, IV to the extent they are anything other than a general rate increase. Given this language, we remain unpersuaded that the statute is ambiguous and that reliance on legislative history is necessary in this instance.

FairPoint also argues that RSA 378:6, I applies here based upon our approach in Docket No. DT 11-248 allowing for review of FairPoint's proposed new charge accounting for a change in its property tax burden under RSA 378:6, I. That case is inapposite to this one. As noted in Order No. 25,293, in Docket No. DT 11-248, FairPoint's proposed charge is "the equivalent of a rate increase affecting all or a majority of the telephone utility's retail customers or every retail residential or business telephone exchange line and public access line . . ., as well as such lines that are provided at wholesale to resellers." *Northern New England Telephone Operations LLC*, Order No. 25,293 (Nov. 28, 2011) at fn. 2. Thus, the proposal was for a charge applicable to all or nearly all retail end users as well as certain lines provided to wholesale resellers. In this instance the Interconnection Charge would be applied to 36 wholesale customers only. *See, e.g.*, Supplemental Testimony of Michael T. Skrivan, filed December 22, 2011, at 10-11. In this instance we do not find that FairPoint's proposed interconnection charge is analogous to a general rate increase. Accordingly, application of RSA 378:6, I is not appropriate and the Commission does not grant reconsideration on that ground.

With respect to FairPoint's motion to reconsider the Commission's conclusions in Order No. 25,327 that the proposed increase to the Interconnection Charge was barred by the FCC, and to dismiss the case because the Interconnection Charge has been the only remaining issue in this docket, we conclude that reconsideration is not warranted. FairPoint contends that the Commission erred in its conclusion that the exception in footnote 1495 of the CAF Order concerned only interstate rate elements. FairPoint further contends that in its analysis of the CAF Order, the Commission incorrectly concluded that the exception to the rate cap did not apply to the proposed Interconnection Charge. Even if we assume that FairPoint is correct that

the Commission erred in its conclusion that the exception in footnote 1495 of the CAF Order concerned only interstate rate elements, FairPoint is still not entitled to reconsideration because the rate cap in the CAF Order applies to its proposed Interconnection Charge, for reasons cited below.

FairPoint states that "according to the Commission, even if the footnote 1495 exception did apply to certain intrastate elements, FairPoint's proposed Interconnection Charge is not one of those elements because it is an element of End Office Access Service." FairPoint's February 17, 2012 Motion for Rehearing at 22. FairPoint, however, contends that the Commission's reasoning is "misplaced" because its proposed Interconnection Charge is actually for local transport access and is not, therefore, covered by the definition of End Office Access Service. FairPoint's February 17, 2012 Motion for Rehearing at 22.

First, paragraph (d)(3) of 47 C.F.R. §51.903, which defines End Office Access Service, states in relevant part, that "*End Office Access Service rate elements for an incumbent local exchange carrier also include* any rate elements assessed on local switching access minutes, including the information surcharge and *residual rate elements*." (emphasis added). The note to paragraph (d) of the regulation states "For incumbent local exchange carriers, residual rate elements may include, for example, *state Transport Interconnection Charges, Residual Interconnection Charges*, and PICCs." (emphasis added). Since FairPoint is an incumbent local exchange carrier, its residual rate elements may include both state Transport Interconnection Charges and Residual Interconnection Charges[3] pursuant to the FCC's explanation. Thus, if the

[3] The term "Residual Interconnection Charge" is synonymous with the term "Interconnection Charge" as used by FairPoint. *See* Supplemental Testimony of Michael T. Skrivan submitted December 22, 2011 at 8-9.

Interconnection Charge is within the definition of End Office Access Service, it is subject to the cap in the CAF Order.

Despite the above, we note that, as proposed, the Interconnection Charge would change the portion of FairPoint's intrastate tariff covering local transport. To the extent, however, that FairPoint's proposed Interconnection Charge is rightly called a transport element existing outside the definition of End Office Access Service, the rate cap still applies. As described, the proposed Interconnection Charge is a state Transport Interconnection Charge included in the local transport section of FairPoint's tariff. Whether the Interconnection Charge at issue is a state Transport Interconnection Charge covered under the note to 47 C.F.R. § 51.903(d), (the definition of End Office Access Service), or a local transport rate element applicable to Tandem-Switched Transport Access Service, both are subject to the cap imposed by the FCC. *See* 47 C.F.R. §§ 51.903, 51.907(a). Accordingly, irrespective of the classification FairPoint gives to the Interconnection Charge, it is subject to the cap in the CAF Order and may not be raised above the rate in effect on December 29, 2011. Therefore, the Commission will not reconsider the determination that the proposed change to the Interconnection Charge is barred by the CAF Order, nor the resulting determination that the case be dismissed.

B. CLECs' Motion for Reconsideration

As with FairPoint's motion, we note at the outset that the CLECs' motion is, in large part, a reassertion of claims they have made before, including in their brief on the CCL. Nevertheless, we address the CLECs' arguments individually and find no basis upon which to grant reconsideration.

The CLECs first argue that the Commission misapplied the relevant law in relying upon *Appeal of Pennichuck Water Works* and ignoring *Appeal of Granite State Electric*. According to the CLECs, *Pennichuck* is less relevant than *Granite State* and the Commission ought to have relied upon the latter case, particularly since it did so in an earlier phase of this proceeding. We do not agree that *Pennichuck* was misapplied, or that any failure to cite *Granite State* compels a contrary result.

As to *Pennichuck*, the CLECs contend that it is distinguishable from the instant matter because FairPoint originally filed for the change to the CCL to become effective on October 10, 2009, and therefore, the Commission could make the tariff effective on that date without implicating the retroactivity issues present in *Pennichuck* because there was notice of the change. Initially, we note that *Pennichuck* states that rates are in effect "at least" until there is a request to make a change. There is no requirement that the rate change become effective at the earliest conceivable date. Further, as noted by FairPoint, the *Pennichuck* decision related to the date upon which temporary rates were set as being the earliest date back to which permanent rates could be imposed. Here, no temporary rate was set. In addition, the Supreme Court clarified the purpose of its holding in *Pennichuck* by stating that "Our decision today merely requires that public utilities, like other businesses, monitor their costs of doing business and employ sound business judgment in determining when they should seek a rate increase for future services." *Pennichuck*, 120 N.H. at 567. Thus, in *Pennichuck* the focus was on the provision of future services and the Commission's conclusion that the revision to the CCL portion of the tariff would apply prospectively in Order No. 25,319 is consistent with that decision. As such, we do

not agree that *Pennichuck* is as distinguishable as the CLECs argue and we do not agree that the Commission erred in its application of that decision.

Alternatively, the CLECs contend that the concerns about possible retroactivity in *Pennichuck* apply only to lawful tariffs, and because the Commission had determined that the CCL was being improperly billed, there was not a lawful tariff at issue. This argument ignores the ruling of the Supreme Court that the tariff permitted FairPoint to bill for the CCL in the manner it had been. Therefore, until the tariff actually changed it was lawful, despite the Commission's prior conclusion.

As to the CLECs' reliance on *Granite State*, they claim that the Commission has broad power to correct an unjust enrichment and that the Commission did not properly address that decision and its conclusions in Order No. 25,319. Underlying the CLECs' claim is a conclusion that there is an unjust enrichment to rectify by equitable means. We continue to conclude as we did in Order No. 25,319 that there is no cause to resort to equity in the current matter. Further, in discussing the use of equitable authority to refund money to rectify an unjust enrichment the Supreme Court stated that, "A refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired." *Granite State Electric*, 120 N.H. at 539-40. In this case, the Supreme Court concluded that FairPoint's tariff permitted it to bill the CCL as it had done despite the Commission's conclusion to the contrary. Further, the Commission has previously determined that the amended CCL tariff was suspended, *see Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 25,283 (Oct. 28, 2011) at 31, and did not take effect until January 21, 2012. Because the prior version of the tariff remained in effect FairPoint did not improperly acquire anything that

must now be returned. FairPoint has charged for the CCL under its tariff as it was permitted to do until the tariff was changed. Thus, even if the Commission had cited *Granite State*, any reliance upon that decision would not compel the Commission to alter its prior determination.

The CLECs also contend that it was unreasonable for the Commission not to use its equitable authority in this instance because when FairPoint recently agreed no hearing was needed on the CCL change, it was implying that its request for a hearing in 2009 was a form of "procedural maneuvering." Therefore, the CLECs contend, it is appropriate for the Commission to invoke equity to counter this "maneuver." In addition, the CLECs argue that the Commission's conclusion that the prolonging of the docket was due to circumstances beyond its control ignores the fact that the Commission retained a level of control over the docket despite FairPoint's bankruptcy, and should not be a basis for avoiding the exercise of equity.

As to the CLECs' first point, in its request for a hearing in 2009, FairPoint contended that a hearing was necessary on the general issues of its revenue and cost recovery. Its request was not bound specifically to the change to the CCL. Further, though the filings created substantial confusion and resulted in lengthy delays of this docket we do not view FairPoint's concession in late 2011 that a hearing was not needed on the changes to the CCL portions of its tariff, to be a form of "procedural maneuvering" requiring an equitable remedy.

As to the claim that the Commission did have authority to conduct the docket despite FairPoint's bankruptcy and that failing to do so justifies an equitable remedy, neither the CLECs, either individually or as a group, nor FairPoint requested that the Commission take any action on this docket during FairPoint's bankruptcy. After the Commission stayed this and other dockets involving FairPoint, and prior to FairPoint's March 2011 request for a scheduling conference, the

only filings received in this docket were a letter from AT&T and BayRing intended to "make the Commission aware" that FairPoint continued to bill for CCL charges as it had been, and a response from FairPoint stating that it disagreed with assertions in the letter. Neither submission requested an action be taken. In fact, the CLECs now contend that "the Competitive Carriers had no control over the delay in the Commission's consideration of the CCL tariff changes . . .." CLECs' Motion for Reconsideration at 16. The CLECs appear to contend that they had no ability to request that the Commission take any action on this docket. In a circumstance where neither the CLECs, nor FairPoint requested that the Commission take any action following its imposition of a stay, the Commission will not reconsider its prior decision based upon a claim that it should have acted.

Finally, the CLECs contend, citing *Gas Service*, that it was an abuse of the Commission's discretion to have required the CLECs to wait more than two years to have the changes to the CCL portion of the tariff declared to be in effect. In *Gas Service*, the Supreme Court concluded that it was an abuse of the Commission's discretion to require a utility to wait more than two years for its claim to be considered when the utility had requested that the Commission address its concerns about under-earning despite having recently received a rate increase. *Gas Service*, 121 N.H. at 603. The Supreme Court's conclusion that the Commission abused its discretion rested on the fact that the Commission had simply refused to address the arguments of the subject company. The Commission has not done so here. With the exception of the time that FairPoint was in bankruptcy – during which time, as noted, no party requested the Commission to act – the Commission has addressed the arguments and issues of the parties. As such, we do

not agree that there is reason to conclude, based upon *Gas Service*, that the Commission has abused its discretion, and we will not grant reconsideration on that ground.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's motion to reconsider or rehear Order No. 25,319 and Order No. 25,327 is denied; and it is

FURTHER ORDERED, that the CLECs' motion to reconsider Order No. 25,319 is denied.

By order of the Public Utilities Commission of New Hampshire this seventh day of May, 2012.

Amy L. Ignatius
Chairman

Michael D. Harrington (KNS)
Commissioner

Robert R. Scott
Commissioner

Attested by:

Debra A. Howland
Executive Director