

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 11-248

Northern New England Telephone Operations, LLC
Petition To Implement Municipal Property Tax Surcharge

MOTION FOR REHEARING OF ORDER NO. 25,384

Pursuant to RSA 541:3 and N.H. Admin. Rules Puc 203.33, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”), hereby moves the New Hampshire Public Utilities Commission (the “Commission”) to reconsider Order No. 25,384 dated June 27, 2012 (the “Order”). In support of this Motion, FairPoint states as follows:

I. INTRODUCTION AND BACKGROUND

On November 15, 2011, FairPoint filed a revision to its Tariff NHPUC No. 1 seeking to implement a \$0.99 surcharge on most end user access lines. This surcharge recovers a portion of the municipal property taxes FairPoint must now pay on its utility poles and conduits as a result of the expiration of the exemption granted under RSA 72:8-a. By Order No. 25,293 dated November 28, 2011, the Commission concluded that the proposed tariff revisions represented a general increase in rates under RSA 378:6, I(a), rather than a tariff for services under RSA 378:6, IV and suspended the revisions pending an investigation.

On December 28, 2011, the Commission issued Order No. 25,308 which, among other things, permitted FairPoint to implement its proposed surcharge of \$0.99 as a temporary rate under RSA 378:27, on the condition that it be effective April 1, 2012, in accordance with the terms of the settlement agreement in Docket No. DT 07-011. Temporary rates accomplish two primary functions. First, they “protect utilities against confiscatory rates and . . . permit

recoupment of any deficiency in return suffered under a temporary order.”¹ Second, and of most importance to this Motion, “the effective date of temporary rates *fixes and preserves* the period during which the rates allowed in the underlying permanent rate proceeding may apply . . .”²

On June 27, 2012, the Commission issued the Order that is the subject of this Motion for Rehearing. In that Order, the Commission ostensibly granted FairPoint’s increase, although it concluded that any on-going recovery of property tax expense is properly done through FairPoint’s rates rather than as a surcharge.³ The Commission stated that:

Earlier in this docket, the Commission determined that the property tax now imposed upon FairPoint’s poles and conduits and its use of municipal rights-of-way is a new expense of the Company that is not otherwise accounted for in its rates. *Accordingly, it is appropriate for FairPoint to seek recovery of that expense.* The amount of the expense recovered and the manner of recovery, however, must be reasonable and appropriate.”⁴

However, the Commission also took the unusual, if not unprecedented, step of ordering that the increase would indeed be “temporary,” expiring on August 9, 2012, the last day before the effective date of 2012 N.H. Laws Chapter 177 (generally known as “Senate Bill 48” or “SB 48”). The Commission explained that “due to the passage of SB 48 and the lack of precise information as described above, we determine the temporary rate should be discontinued on August 9, 2012, and FairPoint should recover the expense pursuant to the terms of SB 48.”⁵ Accordingly, the Commission directed FairPoint to impose its rate increase under the rate cap provisions of Senate Bill 48 Section 12.

The practical effect of this decision is to reset FairPoint’s rates to those in effect prior to the tariff filing in November 2011 and to subject the subject tariff filing to a statute that did not

¹ State v. New England Tel. and Tel. Co., 103 N.H. 394, 395 (1961).

² Appeal of Pennichuck Water Works, 120 N.H. 562, 564 (1980) (emphasis supplied).

³ Order at 10.

⁴ *Id.* at 9. (emphasis supplied).

⁵ *Id.* at 11.

exist at the time of the filing, was not in effect at the time of the Order, and is still not yet in effect. Put another way, the Commission has applied Senate Bill 48 retroactively to this proceeding. However, Senate Bill 48 has no provision for retroactive application nor, as explained further below, is there any provision of law that would permit the Commission to do so. Furthermore, even though Senate Bill 48 is intended to extinguish the Commission's authority over rates for end user services (except for certain caps on basic service),⁶ the Order has the practical effect of prospectively controlling a post-enactment rate increase by nullifying a pre-enactment rate increase. As such, it is unlawful and unreasonable and must be reconsidered.

II. STANDARD OF REVIEW

The standard of review for this Motion is well established. The governing statute states:

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.⁷

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings.⁸ To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.⁹

⁶ Senate Bill 48, Chaps. 177:12, 177:15.

⁷ RSA 541:3.

⁸ See *Dumais v. State*, 118 N.H. 309, 312 (1978). See also *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136 (2002).

⁹ 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 at 3 (Feb. 4, 2011).

III. ARGUMENT

A. The Order is Unlawful, and Therefore Unreasonable, Because the Matter was not Decided Under Applicable Law.

The Order denies FairPoint the rights to which it is entitled under the law that was in effect at the time of the tariff filing, and which is still in effect. The proposed rate increase was filed in November 2011, and any investigation of the proposed rate was subject to the laws in effect at that time, particularly RSA 378:5, RSA 378:6, RSA 378:27 and RSA 378:29. The Commission was bound by those laws to determine a rate that was just and reasonable, and after the Commission had so determined, FairPoint was entitled to charge that rate henceforth from April 1, 2012, the effective date of the temporary rate that the Commission had established.

Instead, the Commission issued an Order that has effectively terminated the proceeding, prospectively rescinded the temporary rate increase, and reset FairPoint's rate to its original value. The Commission did this expressly for the purpose of subjecting the rate increase to Senate Bill 48 once it becomes effective in August 2012.¹⁰ However, the rate increase was requested in November 2011 in order to recover costs that FairPoint had incurred at that point and which it has continued to incur since. It was improper for the Commission to decide this inquiry in anticipation of a law that did not govern at the time – indeed, had not even been enacted.

The Commission justified this decision by explaining that “[d]ue to the passage of SB 48 and the lack of precise information as described above, we determine the temporary rate should be discontinued on August 9, 2012, and FairPoint should recover the expense pursuant to the terms of SB 48.”¹¹ However, while there may be some imprecision as to FairPoint's future tax

¹⁰ Order at 11.

¹¹ *Id.*

liability, there is little or no evidence regarding the certainty of the justness and reasonableness of the proposed charge. FairPoint not only provided clear evidence that the rate increase did not come close to recovering the full amount of the new costs it had already incurred and was continuing to incur,¹² but it also established that overwhelming success in the various tax abatement proceedings would be necessary for the proposed charge to ever ensure complete recovery.¹³ Furthermore, in the same Order, the Commission advised that such uncertainty, particularly fluctuations in tax rates and valuations, is normal in the course of business and can be attended to as it arises. “That the final amount is not known, however, is no basis for continuing this unique treatment of an operating expense. Tax rates and valuations fluctuate and it is up to a utility to manage these variable costs, including by seeking rate relief where appropriate.”¹⁴ So on the one hand, in support of its own argument, the Commission said that a lack of precision justifies a departure from the *status quo*. On the other hand, to rebut FairPoint’s argument, it said that the same lack of precision does not justify such a departure. The Commission cannot have it both ways.

FairPoint has produced evidence that the increase is just and reasonable, and the Commission has not disagreed. There is no provision of existing law that authorizes the Commission to deny FairPoint the rate increase or to terminate it at an arbitrary date. Therefore, the Order is unlawful and unreasonable and must be reconsidered.

B. The Order is Unlawful, and Therefore Unreasonable, Because it Applies a Law Retrospectively.

The Order is also unlawful because it is based on the retrospective application of a statute

¹² *Id.* at 6 (citing Tr. at 41-42).

¹³ Tr. at 61. (“Q. [T]he Company would have to have a combination of no tax bills and abatements that would amount to 30 percent of what you've estimated before it came close to a dollar-for-dollar recovery of those costs? A. That’s correct.”)

¹⁴ Order at 10.

that is not yet in effect. NH Const. Article 23 states that “[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.” The New Hampshire Supreme Court has interpreted this to mean that “every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.”¹⁵ “A retrospective law, for the decision of a civil cause, is a law prescribing the rules by which an existing cause shall be decided upon facts existing previous to the making of the law.”¹⁶

The Order presents an interesting twist on this situation. Instead of retrospectively applying a current statute to past facts, it prospectively applies current facts to a future statute. The ultimate result, however, is the same as that which Article 23 prohibits: “[t]he underlying policy of this prohibition is to prevent the legislature from interfering with the expectations of persons as to the legal significance of their actions *taken prior to enactment of a law*.”¹⁷ FairPoint submitted its rate increase well before Senate Bill 48 was enacted – in fact, two months before this legislation even was introduced in January 2012.¹⁸ FairPoint had every right to have this submittal considered and approved under existing law, and has expressed its justifiable expectation of this.¹⁹ FairPoint has produced evidence that the increase is just and reasonable, and the Commission has not disagreed. There is no provision of existing law or Senate Bill 48 that authorizes the Commission to deny FairPoint the rate increase or to terminate it at an

¹⁵ *Woart v. Winnick*, 3 N.H. 473, 479 (1826) (quoting *Society v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)).

¹⁶ *Id.*

¹⁷ *State v. Vashaw*, 113 N.H. 636, 637-38 (1973) (emphasis supplied).

¹⁸ 2012 Senate Journal 3 at 33.

¹⁹ Order at 7 (citing Tr. at 63-64).

arbitrary date. Therefore, the Order is unlawful and unreasonable and must be reconsidered.

IV. CONCLUSION

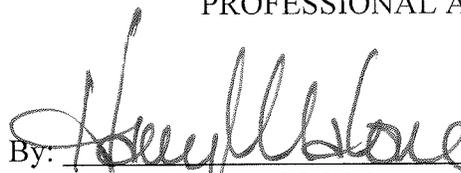
For the reasons described herein, the Commission has done more than just mistakenly conceive certain facts and interpretations of applicable law; it has applied *inapplicable* law in a twisted manner so that a law that is not even in effect has been held to govern and control a situation FairPoint raised in November 2011. As a result, the Order is unlawful and unreasonable. FairPoint respectfully requests that the Commission reconsider its Order No. 25,384 and approve FairPoint's rate increase on a permanent basis as of April 1, 2012.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC, D/B/A
FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: July 26, 2012

By:  _____

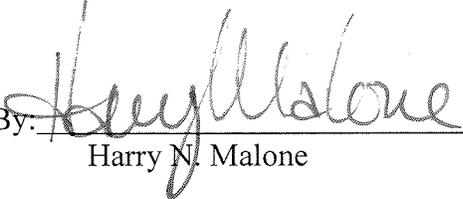
Harry N. Malone
11 Amherst Street
Manchester, NH 03101
(603) 695-8532
hmalone@devinemillimet.com

Patrick C. McHugh
State President – New Hampshire
& Assistant General Counsel, NNE
FairPoint Communications, Inc.
900 Elm Street
Manchester, NH 03101
(603) 656-1633
pmchugh@fairpoint.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: July 26, 2012

By: 

Harry N. Malone