

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 11-061

**FairPoint Communications, Inc. Petition for
Approval of Simplified Metrics Plan and Wholesale Performance Plan**

MOTION FOR REHEARING AND/OR RECONSIDERATION OF
OR, IN THE ALTERNATIVE,
TO ANNUL AND SET ASIDE ORDER NO. 25,538

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. 25,538 dated June 27, 2013 (the "Arbitration Procedure Order") or, in the alternative, to annul and set aside the Arbitration Procedure Order pursuant to RSA 365:28. In support of this Motion, FairPoint states as follows:

I. INTRODUCTION AND BACKGROUND

On May 13, 2013, FairPoint and certain competitive local exchange carriers ("CLECs") filed a Joint Motion for Expedited Approval of Arbitration Procedure ("Joint Motion"). The Motion requested that the Commission approve and adopt, without modification, a three-state arbitration procedure to address and resolve the remaining issues relating to the establishment of the Simplified PAP. In the Arbitration Procedure Order, the Commission found that the arbitration procedure described in the Joint Motion represented "an efficient and expeditious means of resolving many of the issues that remain outstanding" to reaching the goal of

developing a Simplified PAP.¹ However, citing the scope of its authority under RSA 363:17 to accept the evidence and recommendations provided by an appointed hearing examiner, the Commission then substantially revised the proposal by imposing certain conditions on the proposed process. Specifically, the Commission ordered that:

(1) notwithstanding anything to the contrary in the Joint Motion or the Arbitration Procedure/Process as described, the Commission may consider any evidence, testimony, or other material relevant to the determination of the issues in this proceeding, including, but not limited to, evidence, testimony, or other material presented as exceptions or comments to a Hearings Examiner's Report, in briefs by the parties, or prior to or during the arbitration proceedings before the Arbitration Panel; and

(2) the Commission is not obligated to accept any finding or conclusion of fact or law made by the Arbitration Panel during or as a result of the arbitration proceedings before the Arbitration Panel or in any Proposed Decision.²

These conditions do not reflect FairPoint's intent or understanding in advancing the arbitration proposal, and likely will lead to further process and delays which essentially undermine the purpose of the arbitration.

II. STANDARD OF REVIEW

The standard of review for a Motion for Rehearing 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.³

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of

¹ Arbitration Procedure Order at 5.

² *Id.* at 7.

³ RSA 541:3.

matters either overlooked or mistakenly conceived in the underlying proceedings.⁴ To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.⁵

Regarding the alternative Motion to Set Aside, RSA 365:28 provides that:

At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it.

This statute should be "liberally construed"⁶ and the Commission's authority under this statute is limited only in that the modification must satisfy the requirements of due process and be legally correct.⁷

III. DISCUSSION

The purpose of the proposed arbitration procedure was to limit discovery, shorten testimony, narrow the issues, reduce the amount of briefing and, most importantly, encourage a consistent result across all three states. However, the conditions in the Arbitration Procedure Order are a substantial and material modification of the proposed arbitration process. Consequently, the Arbitration Procedure Order effectively acts as a denial of the original Joint Motion and an order of the Commission, *sua sponte*, of an alternate procedure that amounts to the Commission's standard rules of procedure, only complicated by the layering of the arbitration procedure under the hearing examiner. This is an alternative process that FairPoint did not agree to undertake. For this reason, FairPoint requests that the Commission reconsider

⁴ 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) (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).

⁵ 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).

⁶ *Meserve v. State*, 119 N.H. 149 (1979).

⁷ *Appeal of Office of Consumer Advocate*, 134 N.H. 651 (1991).

the Arbitration Procedure Order and eliminate the conditions, so that it is truly a grant of the Joint Motion. Or, it should deny the Joint Motion in actual fact, and not only in effect.

To the extent that the Commission continues to feel bound by its decision, then FairPoint requests that the Commission annul and set aside the Arbitration Procedure Order. The conditions, and similar conditions imposed by the Maine commission,⁸ amount to a complete frustration of the original purpose of the Joint Motion (as FairPoint understood it) to streamline the process in this proceeding. As the Commission itself stated, while it does not expect “to conduct a full de novo review unless requested by a party in the proceeding, *we do not believe we have the authority to accept limitations on our ability to do so.*”⁹ Accordingly, it reserved the right to “consider *any* evidence, testimony, or other material relevant to the determination of the issues in this proceeding” and to reject “*any* finding or conclusion of fact or law made by the Arbitration Panel.”¹⁰ In other words, the proceeding remains open ended, at the Commission’s sole discretion.

In fact, FairPoint would not have participated in any request that sought the result imposed through the Commission’s Arbitration Procedure Order and, indeed, would have affirmatively opposed such a request. FairPoint submits that the original intent of the parties would be better served by simply conforming to standard rules of procedure, perhaps adapted to the special characteristics of this tri-state matter in the event a mutual agreed-upon procedure can be adopted. For that reason, FairPoint respectfully requests that if the Commission does not reconsider the Arbitration Procedure Order as requested above, then that it simply annul and set the Order aside.

⁸ Order Approving Motion, Maine PUC Docket No. 2009-334 (June 13, 2013).

⁹ Arbitration Procedure Order at 6 (emphasis supplied).

¹⁰ *Id.* at 7 (emphasis supplied).

IV. CONCLUSION

For the reasons described herein, FairPoint respectfully requests that the Commission reconsider its Order No. 25,538 to approve the Joint Motion without conditions or, in the alternative, annul and set it aside.

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, 2013

By: 

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


Patrick C. McHugh
State President – New Hampshire
& Assistant General Counsel
FairPoint Communications, Inc.
770 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, 2013

By: _____



Harry N. Malone