

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 11-248

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC

Petition to Implement Municipal Property Tax Surcharge

Order Denying Rehearing

ORDER NO. 25,399

August 9, 2012

I. PROCEDURAL AND FACTUAL BACKGROUND

On November 15, 2011, Northern New England Telephone Operations, LLC (FairPoint or Company)¹ filed a tariff change seeking to implement a surcharge to cover all or a portion of new property taxes it now must pay on its utility poles and conduits. Prior to 2010, FairPoint and other telecommunications providers were exempt from certain municipal property taxes on their utility poles and conduits. That exemption was withdrawn by the New Hampshire Legislature effective July 1, 2010, and, as a result, numerous municipalities began assessing property taxes on FairPoint's poles and conduits. *See* RSA 72:8-a. In its November 15 filing, FairPoint proposed to revise its tariff to institute a surcharge of \$0.99 per month on customers' bills, on each of up to 25 lines per billing account. In its filing, FairPoint requested, pursuant to RSA 378:6, IV, that the new tariff pages be effective on December 1, 2011.

¹ As with prior orders in this docket, we note that although the petition included references only to Northern New England Telephone Operations (NNETO), at the December 14, 2011 hearing on temporary rates in this case NNETO agreed that for purposes of this matter, NNETO and FairPoint Communications-NNE (FairPoint) are one and the same. Accordingly, for purposes of consistency, the Commission shall use the trade name FairPoint in this order.

By Order No. 25,293 (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 taking of effect of the revisions pending an investigation. The Commission scheduled a hearing for December 14, 2011, for the purpose of determining whether a charge – either the proposed surcharge or some other charge – should be implemented on a temporary basis during the Commission’s investigation pursuant to RSA 378:27.

On December 28, 2011, the Commission issued Order No. 25,308 which, in relevant part, permitted FairPoint to implement its proposed surcharge of \$0.99 as a temporary tariff provision, but concluded that the charge could not be imposed until at least April 1, 2012, under the terms of the settlement agreement in Docket No. DT 07-011. The Commission also stated that by “permitting a surcharge to be imposed on a temporary basis we echo Staff’s position that this decision is not to be interpreted as a determination that a surcharge is the appropriate recovery mechanism on a permanent basis.” *Northern New England Telephone Operations, LLC*, Order No. 25,308 (Dec. 28, 2011) at 17. Following discovery by the parties, a hearing on the merits was held on May 16, 2012.

On June 27, 2012 the Commission issued Order No. 25,384, wherein the Commission concluded that the municipal property tax expense was a new expense for the Company and one for which it may seek recovery. *Northern New England Telephone Operations, LLC*, Order No. 25,384 (Jun. 27, 2012) at 9. Further, the Commission concluded that property taxes are an operating expense of the utility that should be recovered through rates, rather than as a surcharge. *Id.* at 9-10. The Commission noted that as of the time of the order FairPoint had “presented only

estimates of the expense” and that it “contended that the estimates it had provided may prove wrong because the underlying valuations are flawed and because it is possible that more municipalities may yet bill for these taxes.” *Id.* at 10. The order also noted that FairPoint was seeking abatements on nearly every assessment. *Id.*

The Commission further noted that due to the passage of Senate Bill 48 (SB 48) the Commission would not possess authority over certain of FairPoint’s retail rate setting as of the bill’s effective date, August 10, 2012. *Id.* In light of the determinations that recovery of the expense should be through rates, that the total expense was unknown at the time of the hearing, and that FairPoint would soon have flexibility in its rate setting, the Commission ordered that the temporary surcharge terminate on August 9, 2012, and that FairPoint seek any recovery of the expense through its rates on and after August 10. *Id.* at 11. In keeping with the limitations instituted by SB 48, the Commission concluded that after August 10, FairPoint could either adjust its retail rates up to a statutory cap without seeking Commission approval or adjust certain of its rates without regard to the cap, subject to Commission review and approval. *Id.* at 11. On July 26, 2012 FairPoint filed the instant motion for rehearing with regard to Order No. 25,384.

II. MOTION FOR REHEARING

In its motion, FairPoint contends that the Commission took the “unusual, if not unprecedented, step of ordering that the increase would indeed be ‘temporary,’ expiring on August 9, 2012”. FairPoint Motion for Rehearing at 2. According to FairPoint, the Commission’s decision had the “practical effect” of resetting its rates to those in effect prior to its original tariff filing in November 2011 and to subject that filing to a statute that was not in effect at that time. FairPoint Motion for Rehearing at 2-3. According to FairPoint, the

Commission's order improperly applied SB 48 "retroactively" and in such a way as to nullify a rate increase sought prior to the effective date of SB 48. FairPoint Motion for Rehearing at 3.

According to FairPoint, it is entitled to the rights it had under the law that was in effect at the time of its tariff filing and that instead of applying that law, the Commission "prospectively rescinded the temporary rate increase, and reset FairPoint's rate to its original value . . . expressly for the purpose of subjecting the rate increase to Senate Bill 48 when it becomes effective in August 2012." FairPoint Motion for Rehearing at 4. FairPoint contends that the Commission could not decide the matter based upon law that did not govern at the time of its decision.

Further, FairPoint contends that, while there may be some imprecision as to FairPoint's future tax liability, there was clear evidence that the rate increase did not recover all of FairPoint's anticipated new costs. FairPoint Motion for Rehearing at 4-5. In addition, FairPoint contends that the Commission concluded that a lack of precision about the amount of the tax expense both justified termination of the temporary surcharge, which FairPoint describes as a departure from the *status quo*, and, at the same time, "does not justify such a departure." FairPoint adds that the Commission "cannot have it both ways." *Id.* at 4. FairPoint also contends that 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." *Id.* at 5.

FairPoint further argues that the Commission erred because it retroactively applied the law as contained in SB 48. According to FairPoint, it submitted its proposed increase before the introduction of SB 48 and was entitled to have its submission considered under the law that existed at the time the submission was made. FairPoint contends that there is nothing in SB 48 that authorizes the Commission to deny FairPoint its rate increase or to terminate the rate change.

Accordingly, FairPoint contends that the Order is unlawful and unreasonable and must be reconsidered.

III. 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. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. 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 *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14.

Pursuant to RSA 378:27, the Commission may, after notice and a hearing, set temporary rates for the duration of a proceeding provided that the temporary rates are “sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.” Further, under RSA 378:29, temporary rates “shall be effective until the final determination of the rate proceeding, *unless terminated sooner by the commission.*” (emphasis added). Both statutes were in effect at the time of FairPoint’s filing and are cited by FairPoint in its motion as applicable to its filing. According to the plain language of the statutes, the Commission may set temporary rates that remain in effect for the duration of the proceeding,

unless the Commission terminates them sooner. Thus, existing law permitted the Commission to terminate FairPoint's temporary rate change either at the close of the proceeding or at some prior date.

We disagree with FairPoint's reading of our decision with respect to the lack of precise information to support continuation of the temporary surcharge. In Order 25,384, we found that where "the final amount [of the tax expense] is not known... [there] is no basis for continuing" the surcharge to recover that expense and that, as a result, the temporary surcharge "should be discontinued." *Order 25,384* at 10-11. In other words, the lack of precise information to support the indefinite continuation of such a charge justified its termination.

In addition, in Order No. 25,384 the Commission concluded that the tax expense now borne by FairPoint should be correctly recovered through its rates, and not as a surcharge levied separate from its other rates. FairPoint has not challenged this conclusion. FairPoint does, however, contend that the Commission erred in terminating the temporary surcharge because there was evidence that the charge was just and reasonable. While we found in Order No. 25,308 that a temporary surcharge was a reasonable means to address FairPoint's concerns regarding the recovery of property tax expenses, the amount of such a charge is only part of the analysis. In the same order, we noted that the decision to implement a temporary surcharge "is not to be interpreted as a determination that a surcharge is the appropriate recovery mechanism on a permanent basis." *Order No. 25,308* (Dec. 28, 2011) at 17. In Order No. 25,384, we further found that "any on-going recovery of this expense is properly done through FairPoint's rates rather than as a surcharge." *Northern New England Telephone Operations, LLC*, Order No. 25,384 (Jun. 27, 2012) at 10. FairPoint, despite the Commission's statements in those orders,

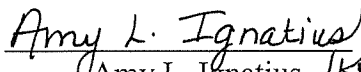
took no steps to determine how or in what way this cost should be accounted for in its rates. *See* Transcript of May 16, 2012 Hearing at 32-33. In that the Commission concluded that there should not be a separate charge, the Commission was within its authority to terminate the charge as proposed by FairPoint. Had SB 48 not existed at all, the Commission could still have terminated the surcharge pending the submission of a proposal by FairPoint to recover this cost through an increase in its permanent rates. It should be noted however, that Fairpoint never submitted a proposal for recovery through permanent rates for the Commission to consider. Therefore, the only course of action open to the Commission was to determine the appropriate length of time for the temporary rates to remain in effect.


To the extent SB 48 has any bearing on the instant matter, it is to establish the date after which FairPoint may adjust its rates with greater flexibility than it has had in the past, and after which FairPoint is, in large part, no longer subject to the Commission's general rate-setting practices. It is in light of this change in the rate setting process that the Commission determined the date upon which the surcharge should end. Following the effective date of SB 48, FairPoint may seek recovery of the tax expense through its rates; in Order No. 25,384, the Commission delineated the options available to FairPoint to achieve that recovery. SB 48 was not "retroactively" applied to a requested rate increase, but was used as a guidepost for determining a reasonable date upon which the surcharge should end and, presumably, new permanent rates would be established using the flexibility afforded by SB 48. FairPoint has the tools it needs to be made whole and the Commission's treatment of the surcharge did not render the Company unable to recover amounts that have been found to be legitimately collected from ratepayers. Accordingly, for the above reasons we find no basis to grant rehearing of Order No. 25,384.

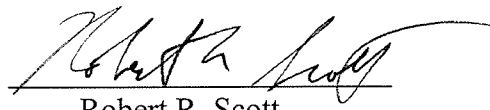
Based upon the foregoing, it is hereby

ORDERED, that FairPoint's Motion for Rehearing of Order No. 25,384 is DENIED.

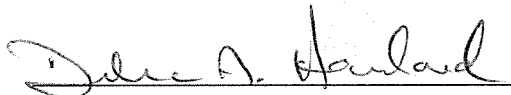
By order of the Public Utilities Commission of New Hampshire this ninth day of August,
2012.


Amy L. Ignatius (KWS)
Chairman


Michael D. Harrington
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director

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