



November 8, 2012



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New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
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Re: **DT 12-308, COMCAST PHONE OF NEW HAMPSHIRE, LLC AND COMCAST IP PHONE II, LLC - Application of SB 48 on VoIP and IP Enabled Services**

and

DT 09-044, NEW HAMPSHIRE TELEPHONE ASSOCIATION - Petition for an Investigation into the Regulatory Status of IP Enabled Voice Telecommunications Services

Dear Ms. Howland,

This submission is made on behalf of Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE (“FairPoint”) in response to the Commission’s Order of Notice dated October 24, 2012, in the above captioned Dockets. In its Order of Notice, the Commission explained that the New Hampshire Supreme Court (the “Supreme Court”) has remanded the appeal of the Commission’s determinative orders in DT 09-044 via an order dated October 12, 2012. The Order of Notice sets forth a litany of issues to be addressed by the parties and include (but apparently are not limited to):

- (i) whether cable voice service under review in DT 09-044 falls within the statutory definition of “VoIP service” or “IP-enabled service” in RSA 362:7, I(d) and (e);
- (ii) whether, in light of the enactment of SB 48, any changes are required to be made or should be made to any of the findings and rulings in Order Nos. 25,262, 25,274 or 25,288, including the question of whether SB 48 affects the definition of “public utility” in RSA 362:2 and whether and to what extent regulatory treatment of Comcast and Time Warner as CLECs in respect to their cable voice services is still appropriate;

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- (iii) what areas of state regulation of CLECs described in such orders no longer apply as a result of the enactment of SB 48;
- (iv) whether, in light of the nature and purpose of DT 09-044, SB 48 renders the Commission's previous findings and rulings legally insignificant and practically meaningless for the State of New Hampshire or Comcast, Time Warner or other providers of VoIP service or IP enabled service; and
- (v) whether SB 48 eliminated the significance of the Commission's determination that fixed IP-enabled cable voice service is a "public utility" service under state law by removing any regulatory obligations that depend on that determination.¹

At the outset, FairPoint takes no position on any of these questions and reserves its rights to do so at a later date. However, FairPoint does object to the overall scope of the proceeding and the limitations placed upon new Interveners. Specifically, the Supreme Court's order states that Case No. 2011-0762 "is remanded...*for the limited purpose* of reconsidering Commission Order Nos. 25,262 ("VoIP Order") and 25,274 and related orders (together, the "VoIP Orders") in DT 09-044 in light of Laws of 2012, Chapter 177 (SB 48)."² The order of Notice clearly does not comply with the Supreme Court's succinct directive to reconsider the above referenced Commission orders. Nowhere does the Supreme Court direct the Commission to issue an expansive interpretation of SB 48. The issue presented by the Supreme Court is simple and to the point – reconsider the Commission's orders in light of SB 48.

In addition, the Commission clearly limited Interveners participation and abridged the parties' rights to participate in a new Docket with far-reaching implications despite the lack of any justiciable controversy. As FairPoint understands it, this inquiry 1) is restricted to the facts, parties and issues contained in the record of DT 09-044 *only* and 2) allegedly does not intrude on the Puc 400 rulemaking in Docket DRM 12-036 or other similar rulemakings engendered by SB 48. Yet the issues to be decided here clearly have the potential to affect other Dockets and the rights of all Excepted Local Exchange Carriers ("ELECs"). Such rights could be adversely affected simply because of the expansive nature of the Commission's new inquires as set forth in the Order of Notice.

Yet, the Order of Notice clearly limits Interveners' participation to the filing of briefs and participating in oral arguments. This violates the Due Process Clause of the New Hampshire Constitution. Part I, Article 15 of the State Constitution provides, in relevant part: "No subject shall be deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." "Law of the land in this article means due process of law."³ The ultimate standard for

¹ Order of Notice at 3.

² Supreme Court Order, October 12, 2012, at 1 (emphasis added).

³ State v. Veale, 158 N.H. 632, 636; cert. denied, 130 S.Ct. 748 (2009).

judging a due process claim is the notion of fundamental fairness.⁴ Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play.⁵

FairPoint's concern for this issue arises from the manner in which certain of these questions are framed. For example, question (iii) asks "what areas of state regulation of *CLECs* described in such orders no longer apply as a result of the enactment of SB 48" (emphasis supplied). While this question *might* only be directed at the cable VoIP providers that were designated as CLECs in the VoIP Order, it could also be construed as applying to all CLECs. Similarly, question (iv) asks "whether . . . SB 48 renders the Commission's previous findings and rulings legally insignificant and practically meaningless for the State of New Hampshire . . ." Again, while the question might only involve the "findings and rulings" of DT 09-044, this question could also be construed much more broadly to include *all* previous Commission rulings. Together, the particular phrasing of these questions suggests the Commission intends to issue definitive interpretations concerning SB 48 based upon a constitutionally flawed proceeding, facts limited to DT 09-044 and a Supreme Court order that never requested such issues be addressed. This is a much broader inquiry than the Commission's procedural schedule and the existing record can support.

As the Commission indicated in the Order of Notice "[r]econsideration as ordered by the Court involves the Commission's review and determination of legal issues without further fact-finding."⁶ This statement necessarily means that the inquiry is restricted to the specific circumstances of DT 09-044, and this apparently accounts for the unusually compressed schedule, in which briefing and oral argument occur within less than four weeks of the Order of Notice. However, to the extent that the Commission expects to draw generally applicable conclusions that go beyond DT 09-044, FairPoint further submits that to do so in this proceeding would constitute a rulemaking in violation of the state Administrative Procedure Act.⁷ SB 48 is a far reaching law that involves many issues other than VoIP and IP enabled services, and affects many other parties than providers of those services. Few, if any, of these parties have been heard in DT 09-044 (if they had any interest at all) and it must be assumed that, concerning SB 48, they have proceeded in the expectation that their positions and concerns would enjoy a full hearing and examination in DRM 12-036 and any other legal proceeding which potentially affects the parties' rights. To do otherwise would abrogate their due process rights under the Administrative Procedure Act and the New Hampshire constitution.

⁴ *Id.*, 158 N.H. at 637; *see* State v. Haley, 141 N.H. 541, 544 (1997) ("due process under our constitutional republic has, as a primary consideration, the notion that no matter how rich or how poor, all of our citizens are entitled to fundamental fairness when the government seeks to take action which will deprive them of their property or liberty interests") (quotation and brackets omitted)).

⁵ Veale, 158 N.H. at 637. *See also* State v. Mwangi, Case No. 2010-0277, April 12, 2011.

⁶ Order of Notice at 2.

⁷ RSA Chapter 541-A.

State law distinguishes between declaratory rulings and rules. A declaratory ruling is “an agency ruling as to the *specific* applicability of any statutory provision or of any rule or order of the agency.”⁸ A rule, on the other hand is a “regulation, standard, form . . . or other statement of *general* applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency”⁹ Thus, if this inquiry is specific to DT 09-044 and the parties thereto, then the Commission’s determination can be considered a declaratory ruling, for which there are no distinct statutorily required procedures. However, if the Commission expects its determination to apply generally, then the proper rulemaking procedures must be followed.¹⁰ These include:

- filing a notice of the proposed rule under RSA 541-A:6, including a fiscal impact statement and a statement that the proposed rule does not violate the New Hampshire constitution, part I, article 28-a;
- providing notice to occupational licensees or those who have made timely requests for notice as required by RSA 541-A:6, III;
- filing the text of a proposed rule under RSA 541-A:10;
- holding a public hearing and receiving comments under RSA 541-A:11;
- filing a final proposal under RSA 541-A:12;
- responding to the committee when required under RSA 541-A:13; and

⁸ RSA 541-A:1, V (emphasis supplied). For example, in *Appeal of Nationwide Insurance Co.*, 120 N.H. 90, 92-93 (1980), the Supreme Court of New Hampshire held that the state insurance commissioner’s denial of a rate increase amounted to a declaratory ruling, rather than promulgation of a rule, because the ruling was simply a denial of Nationwide’s specific request for a rate increase, based on an applicable statute, and not a general policy. *See also* *Police Com’n of City of Rochester*, 149 N.H. 528, 533 (2003), holding that a PELRB’s decision regarding the applicability of provisions in a specific collective bargaining agreement did not amount to rulemaking, as the decision was specifically tailored to the dispute between the parties, and did not have general applicability to other agreements. *Id.*, 149 N.H. at 533.

⁹ RSA 541-A:1, XV (emphasis supplied). For example, the Court in *Nationwide* further distinguished a declaratory ruling from a “rule” under RSA 541-A, stating that it would consider a “uniform policy” that conditioned all insurance rates upon the adoption of flat rate surcharge plans as a “rule” that required compliance with proper rulemaking procedure. *See* *Nationwide*, 120 N.H. at 92-93.

¹⁰ “An agency decree, pronouncement, statement, etc. only becomes a rule when it has formally met all the requisites of RSA 541-A:3, including filing with the director of legislative services.” *Appeal of Marmac*, 130 N.H. 53, 57 (1987) (decided under prior law.) “The rigidity in the rule-making procedure is an important positive aspect of rule-making, because regulated parties know exactly which agency directives are rules, and what they must do in order to comply with them.” *Id.*, 130 N.H. at 58.

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- adopting and filing a final rule under RSA 541-A:14.¹¹

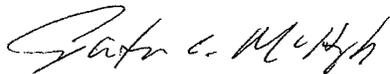
None of these procedures has been adopted in these Dockets.

SB 48 deregulates ELECs from old, out-of-date regulations that applied to a monopolistic telecommunications industry. SB 48 also levels the regulatory playing field such that FairPoint, as an incumbent local exchange carrier, must be treated from a regulatory perspective the same as CLECs (subject to a few exceptions). Any interpretation of SB 48 and the potential abridgement of ELECs' rights thereunder require considerable deliberation by the Commission and the affected telecommunications companies, conducted under proper rulemaking procedures. For this reason, the Commission should avoid using these Dockets to determine *what* regulations apply to VoIP and IP enabled services or other ELECs. This is a much broader question that must be determined in DRM 12-036, in accordance with the Administrative Procedure Act.

Lastly, FairPoint hereby advises the Commission and parties that it reserves its rights to present oral argument scheduled for Friday, November 16, 2012. Such argument may encompass legal positions not referenced herein and certainly may be in response to arguments presented by other Interveners as well as the parties to Docket DT 09-044.

An original and six (6) copies of this letter are being filed in each of the above captioned dockets, along with an electronic copy on CD.

Very truly yours,



Patrick C. McHugh

Electronic cc: Service List DT 09-044
Service List DT 12-308

¹¹ RSA 541-A:3.