STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 11-248

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS

Petition to Implement a Municipal Tax Surcharge

Order on Interventions, Motion for Confidential Treatment and Temporary Rates

O R D E R N O. 25,308

December 28, 2011

APPEARANCES: Harry N. Malone, Esq., and Daniel Will, Esq., of Devine, Millimet and Branch, P.A. for Northern New England Telephone Operations; Cordell A. Johnston, Esq., for the New Hampshire Municipal Association; Carolyn Cole, Esq., for segTEL, Inc.; Darren Winslow for Freedom Ring Communications, LLC d/b/a BayRing Communications; Meredith A. Hatfield, Esq., of the Office of the Consumer Advocate on behalf of residential ratepayers; and Matthew J. Fossum, Esq., for the Staff of the Public Utilities Commission

I. PROCEDURAL HISTORY

On November 15, 2011, Northern New England Telephone Operations, LLC (NNETO or FairPoint)[1] filed a tariff change seeking to implement a surcharge to cover all or a portion of new property taxes it estimates will be assessed by municipalities during the April 1, 2011 through March 31, 2012 tax year. According to the petition, for many years 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 That exemption was withdrawn by the New Hampshire Legislature effective July 1, 2010 and, as a result, numerous municipalities began assessing property taxes on FairPoint's poles and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. In addition, FairPoint notes that municipalities have begun

[1] Though the petition included references only to NNETO, at the December 14, 2011 hearing on temporary rates NNETO agreed that for purposes of this matter, NNETO and FairPoint Communications-NNE (FairPoint) are one-in-the-same. Accordingly, for purposes of consistency with prior orders involving this entity, the Commission shall use the trade name FairPoint in this order.

assessing taxes on its use of the municipal rights-of-way, which they had not previously done. As of December 9, 2011, FairPoint states that it has received invoices for property taxes from 114 municipalities totaling more than $3,000,000 and that it has paid substantially all of those invoices. FairPoint also indicates that other municipalities have either sent letters indicating their intention to assess and tax FairPoint, or have requested information from FairPoint about its poles and conduits for purposes of assessment. FairPoint anticipates that approximately 230 municipalities will eventually assess and submit bills for the poles and conduits FairPoint owns in those municipalities.

To offset this tax, on November 15, 2011, FairPoint filed certain proposed revisions to its tariff to institute a surcharge on customers' bills to recover all or a substantial portion of the amount of municipal property taxes billed to it for telephone poles, conduits, and use of municipal rights-of-way. According to the explanatory memorandum accompanying FairPoint's submission, the surcharge was proposed to be applied on a per access line basis following the same methodology as the application of the E911 surcharge. According to FairPoint's filing, the surcharge would not be applied on more than 25 lines per customer billing account. The proposed rate of the surcharge is $0.99 per line, per month up to the 25 line limit. FairPoint also requested, pursuant to RSA 378:6, IV, that the new tariff pages be permitted to become effective on December 1, 2011.

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 accordingly suspended the taking of effect of the revisions pending an investigation. In that same order, the Commission noted that there is a substantial

financial impact to FairPoint from the imposition of these taxes, and that it would address the filing in as expeditious a manner as is practicable under the circumstances. The Commission also 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.

Prior to the temporary rate hearing, the Commission received petitions to intervene from George Sansoucy, P.E., segTEL, Inc. (segTEL), Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing), and the New Hampshire Municipal Association (NHMA). On December 13, 2011, FairPoint filed a response to the Commission's order suspending the tariff and an updated version of the explanatory memorandum. On December 14, 2011, FairPoint objected to the interventions of Mr. Sansoucy and NHMA. Also on December 14, 2011, the Office of Consumer Advocate (OCA) notified the Commission of its intent to participate in this docket on behalf of residential ratepayers consistent with RSA 363:28. In addition, on December 14, 2011, FairPoint filed a motion for confidential treatment relating to some of the information in the explanatory memoranda. The hearing set for December 14, 2011 was held as scheduled with the Commission addressing the requests for intervention, FairPoint's motion for confidential treatment, the parties' initial positions in the docket, and the parties' positions on temporary rates.

Following the hearing, FairPoint, Staff and other intervenors met in a technical session. On December 15, 2011, Staff submitted a report of that session stating that the parties had agreed that certain questions on the scope of the proceeding required rulings from the Commission prior to further proceedings in this case. To that end, Staff's report stated that within the next few

weeks the parties would work to formulate agreed upon questions to be briefed by February 3, 2012. Lastly, on December 16, 2011, FairPoint filed an updated version of its explanatory memorandum comporting with discussions held at the hearing regarding confidentiality, an updated "Table of Poles and Conduit Property Tax Appraised Value and Estimated 2011 Tax" (Exhibit 4), as well as tax bills from the municipalities that had invoiced FairPoint to date.

II. MOTIONS FOR INTERVENTION

A. BayRing and segTEL

BayRing and segTEL are both competitive local exchange carriers (CLECs) in New Hampshire and, in part, rely on the use of FairPoint's facilities, including poles and conduits, to serve their customers. Both BayRing and segTEL petitioned for intervention on the ground that their services to their customers are impacted by the wholesale services FairPoint provides to CLECs including the granting of pole attachments on terms and conditions that are just and reasonable. Accordingly, they alleged that any changes to pole attachment charges or other wholesale charges resulting from FairPoint's need to account for its increased property taxes could affect their businesses. No party objected to the interventions of BayRing and segTEL. The Commission concluded at hearing, and hereby confirms, that BayRing and segTEL meet the requirements for intervention in RSA 541-A:32, I.

B. NHMA

With respect to NHMA, its petition states that 233 of New Hampshire's 234 municipalities are members. It contends that its interests in the docket are to: (1) avoid attempts by FairPoint to blame municipalities for an increase in customers' rates; (2) require FairPoint to disclose certain information to the municipalities that they have sought regarding poles and

conduits and that they have been unable to obtain from FairPoint directly; and (3) represent the interests of its member municipalities as rate paying customers of FairPoint in assuring that any charge or increase in rates accurately reflects FairPoint's tax expense.

In its December 13 objection, FairPoint contended that NHMA did not meet the standard for intervention; first, because FairPoint was not seeking to blame the municipalities for the new tax burden and that whatever positions the parties have on the issue of the propriety of the tax itself are better addressed in other forums. Second, FairPoint contended that the Commission is not the proper forum for disputes about property assessments and therefore it is not appropriate to attempt to use the Commission as an agent for compelling disclosure of information for purposes of conducting assessments. Lastly, FairPoint argued that due to the 25 line billing cap in its proposal, none of NHMA's member municipalities, assuming one account per municipality, would be subject to an increase of more than $25.75 per month. According to FairPoint, this impact did not qualify as a "substantial interest" under the statute and was insufficient to allow NHMA's intervention. No other party objected to NHMA's intervention, but at the December 14 hearing Staff sought clarification about whether the NHMA was petitioning in its own right, or on behalf of its member municipalities, to determine whether any individual municipality might seek intervention at some future point. NHMA confirmed that it is acting on behalf of its members and not in its own right.

The Commission found at hearing, and confirms here, that NHMA's intervention is in the interests of justice and does not impair the orderly and prompt conduct of the proceedings pursuant to RSA 541-A:32, II. At a minimum, it is appropriate to permit NHMA, as the representative of numerous municipalities, to intervene to assure that any charge or rate change

that may ultimately be paid by the municipalities accurately reflects the true tax expense. In addition, having a representative of the municipalities in the matter will make it more likely that accurate information about the assessments and future intentions of the municipalities will be provided.

C. George Sancoucy

With respect to the petition of Mr. Sansoucy, his petition alleges that he seeks to intervene as a representative of 35 municipalities in New Hampshire. In addition, the petition contends that Mr. Sansoucy, or his firm, has completed the valuations for much of FairPoint's facilities upon which the property tax bills are based, and he has an interest in intervening as a result of those valuations.

In its December 13 objection to Mr. Sansoucy's petition, FairPoint contended that Mr. Sansoucy was not entitled to intervene because it was undisputed that the municipalities had the legal right to levy the tax and that they did so. FairPoint argued that to the extent the taxes or the underlying valuations might be challenged, such challenges were not matters for the Commission and therefore Mr. Sansoucy should not be permitted to intervene here.

At the December 14 hearing, it was also disclosed that all 35 municipalities on whose behalf Mr. Sansoucy petitioned are members of the NHMA. At the hearing, Staff questioned the need for both Mr. Sansoucy and the NHMA to represent the various municipalities. In addition Staff echoed FairPoint's contention that the Commission is not the proper forum for disputes about valuations or the taxes assessed.

The Commission found at hearing and hereby confirms that Mr. Sansoucy does not meet the requirements for intervention. To the extent he is representing the interests of certain

municipalities, those interests are also represented by NHMA, and we do not find that Mr. Sansoucy's additional representation will aid in making determinations on any of the issues in this docket. Further, to the extent he represents his own interests as the person who had conducted valuations of FairPoint's property, such valuations are not matters properly determined by the Commission. Mr. Sansoucy was permitted to make a public comment during the hearing and may continue to participate as a member of the public, but is not granted the status of an intervenor because he does not meet the standards for intervention in RSA 541-A:32.

III. MOTION FOR CONFIDENTIAL TREATMENT

With its November 15 submission, FairPoint included an explanatory memorandum containing information about the amount of taxes levied on it as of that date, its estimation of its total expected tax expense, the number of retail and resold access lines to which its proposed charge would be applied, calculations of the recovery from the charge being applied to those lines and the total to be recovered by the charge. In addition, FairPoint included a table compiling the municipalities' appraisals of its property and the taxes that had been levied on it. An updated version of the memorandum (Exhibit 2) was submitted on December 13. In its motion, FairPoint contended that the information about the tax expense, its total tax liability, its access lines, the calculations and the table of assessments and taxes is competitively sensitive information and is entitled to protective treatment as confidential, commercial, and financial information under RSA 91-A:5.

At the hearing, segTEL objected to the motion alleging that much of the information was already public and is not entitled to protection. In addition, segTEL argued that FairPoint's efforts in compiling the table were insufficient to deem the table a confidential document since it

was simply a compilation of public information. The OCA agreed with segTEL's contentions and also objected to the statement in FairPoint's motion that it would only disclose information to appropriate staff of the Commission because the OCA also had a legal right to the information. The NHMA concurred in segTEL's objection. Staff took no position on the motion.

At the December 14 hearing, FairPoint reviewed the explanatory memorandum and the compiled table with the Commission. In the course of that review, FairPoint conceded that the current tax expense information, its estimation of the total expected tax expense, the total to be recovered by the charge and the compiled table did not need to be treated as confidential. FairPoint maintained, however, that retail and resold access lines and the calculations incorporating the line counts constitute competitively sensitive information and should not be disclosed. FairPoint stated that it would file updated versions of the table and the memorandum, and it did so on December 16.

Following a recess for deliberations on the motion, the Commission granted FairPoint's motion as amended at the hearing. For completeness, the Commission confirms that ruling as follows:

> In determining whether commercial or financial information should be deemed confidential, we first consider whether there is a privacy interest that would be invaded by the disclosure. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure.

EnergyNorth Natural Gas, Inc. d/b/a National Grid NH, Order No. 25,217 (Apr. 29, 2011) at 7-8 (citations omitted). Applying the above considerations we conclude that the remaining information FairPoint seeks to protect – specifically, the counts of its retail and resold access lines and the calculations incorporating the numbers of lines – are entitled to confidential treatment. Disclosure would provide information about FairPoint's competitive position in New Hampshire which might be exploited by competitors. In addition, there is no indication that disclosure of the information would illuminate the workings of the Commission. We conclude, therefore, that the interests of FairPoint in keeping this information confidential outweigh the interests of disclosure and accordingly grant the motion as amended at the December 14, 2011 hearing.

As a point of further clarification, because the only information now subject to confidential treatment are access line counts, which would be of interest to competitors, the confidential treatment extends only to FairPoint's competitors in this case, namely segTEL and BayRing. The NHMA, however, is entitled to obtain the confidential versions of this information with the condition that it is not permitted to share or disclose the information to other parties and is not to use the information for any purposes beyond this case.

IV. TEMPORARY RATES

A. POSITIONS OF THE PARTIES AND STAFF

i. FairPoint

In its written response to the Commission's suspension order, FairPoint initially disagreed with the Commission's determination to treat this matter under the terms of RSA 378:6, I(a) and contended that it properly fell within RSA 378:6, IV. At the hearing, however,

FairPoint stated that in the interest of moving forward expeditiously, it would not further contest the Commission's determination.

On the issue of temporary rates more specifically, FairPoint contended that it was entitled to temporary rates under RSA 378:27 because it had made the requisite showing required by the statute. In particular, FairPoint contended that the report it had filed with the Commission demonstrated that: it has been billed by municipalities and that although it may dispute the assessments underlying the bills, the municipalities had the legal right to issue them; it was likely that FairPoint would receive bills from approximately 230 municipalities and that the bills would likely total in the millions; the costs of paying those bills are not included in FairPoint's current rates and that even when the expected tax costs are allocated appropriately, the per line cost exceeds the $0.99 charge it seeks to impose; and the proposed charge represents a pass-through of costs and does not return a profit to FairPoint.

At the hearing, FairPoint presented Kevin O'Quinn, its director of financial reporting for Northern New England and to the Federal Communications Commission (FCC), as a witness. Mr. O'Quinn confirmed that as of the close of business on December 9, 2011, FairPoint had received invoices from 114 municipalities and that it had paid approximately $3.1 million on those invoices. Mr. O'Quinn testified that he thought the 114 municipalities represented approximately half of those that would eventually assess tax on FairPoint. In addition, he stated that in the bills of the municipalities that had already invoiced FairPoint, it was not always clear which portions of the bill applied to the tax on poles and conduits and the municipal rights-of-way. He stated that this lack of clarity regarding what property is being assessed may be one basis upon which FairPoint would eventually challenge the assessments or bills.

Mr. O'Quinn also testified about the derivation of the proposed charge. According to Mr. O'Quinn, based on the average amount of the tax bills received to date, the expected total tax expense is approximately $6.6 million. Mr. O'Quinn then testified that using traditional allocation methods prescribed by the FCC, approximately $330,000 of the expected total would be allocated to non-regulated services, which includes voicemail and similar services, and an additional $132,500 would be allocated to pole attachments. The remaining approximately $6.2 million would then be allocated between interstate and intrastate services with interstate services, including DSL service, being allocated approximately $2.1 million. The remaining $4.1 million in estimated tax expense would be allocated to intrastate services. Of this $4.1 million, Mr. O'Quinn testified that approximately $3.1 million would be recovered through FairPoint's proposed charge of $0.99 per line. This allocation is contained in a spreadsheet prepared by Mr. O'Quinn and submitted as Exhibit 3 at the December 14 hearing.

He stated that because raising rates is not an attractive option for FairPoint, the proposed charge of $0.99 was established at least in part as a marketing choice rather than as a direct recovery of the entire expected expense. Mr. O'Quinn reiterated that FairPoint has already paid more than $3 million and stated that in seeking this recovery it was not attempting to recover the total expected tax burden at the expense of its residential and business customers. In response to questions from the Commissioners, Mr. O'Quinn stated that FairPoint's most recent filings with the Commission showed that its earnings in New Hampshire were negative and that this requested increase would only offset part of an increased expense and would not result in FairPoint over-earning.

ii. NHMA

In questioning Mr. O'Quinn, NHMA sought information about FairPoint's expected tax payments and, more specifically, whether FairPoint expected to pay on a tax liability that may not be accrued by the end of the year. Mr. O'Quinn reiterated that based on the information FairPoint had available to it, he expected FairPoint to accrue the tax liability of approximately $6.6 million by the fiscal year's end (March 31, 2012). In addition, NHMA questioned Mr. O'Quinn about the cost estimates and allocations and the manner of recovery through FairPoint's other operations.

In its statements to the Commission, NHMA contended that FairPoint was potentially overstating its total tax expense because it was possible, and even probable, that not all municipalities would bill at the average as anticipated by FairPoint. NHMA stated that it expected the actual total expense to be closer to $3 million and, therefore, any amount sought by FairPoint should be based on a total tax of $3 million and not the $6.6 million FairPoint was estimating. Further, NHMA agreed that FairPoint should be permitted to recover its tax expenses, but contended that it should do so through rates and not as a surcharge. NHMA, therefore, argued that this matter should be a rate case before the Commission.

iii. segTEL

segTEL questioned Mr. O'Quinn about whether the "half" of the municipalities he was referring to when discussing the 114 bills received to date was half of all municipalities in the state, or half of those in which FairPoint has a presence. Mr. O'Quinn confirmed that it was those in which FairPoint has a presence. segTEL also asked whether FairPoint had already

disputed or intended to dispute the bills and Mr. O'Quinn responded that FairPoint had not yet challenged any assessments, but intended to at some point.

In its statements on the issues, segTEL noted that through its pole attachments it uses the facilities of various incumbents, including FairPoint, to deliver its services. It stated that it understood that some percentage of the cost, including the tax, of those poles would be borne by those attached to the poles, such as segTEL. To that end, while segTEL generally supported FairPoint's recovery of costs, it sought to ensure that potential abuses were avoided. In particular, segTEL pointed to concerns such as avoiding double recovery of tax expense by FairPoint, *i.e.*, recovery of the same expense both from attached entities and other ratepayers, and avoiding double recovery by municipalities through payments of the tax expense both by FairPoint and the attached entities. In addition, segTEL expressed concern about this case amounting to single-issue ratemaking.

iv. BayRing

BayRing did not offer statements to the Commission but did seek information from Mr. O'Quinn about how many of the tax bills he believed FairPoint may dispute. Mr. O'Quinn did not offer an estimate.

v. OCA

The OCA questioned Mr. O'Quinn about his familiarity with the Commission's rules at Puc 1600. Mr. O'Quinn stated that he was not specifically familiar with the rules. He answered similarly when questioned about his knowledge of the requirements for cases under RSA 378:6, I. The OCA also questioned Mr. O'Quinn about his familiarity with the settlement agreement in Commission Docket No. DT 07-011, and specifically about the terms of section 8 of that

agreement concerning FairPoint's ability to raise its rates. Mr. O'Quinn stated that he knew of the agreement but was not familiar with its terms. Mr. O'Quinn also confirmed for the OCA that no audit had been conducted of FairPoint in conjunction with the filing.

In its statements to the Commission, the OCA stated that this case represented single-issue ratemaking. In addition, the OCA stated that because the Commission's order of notice in this docket referred to a general increase in rates, the filing was required to comply with the Puc 1600 rules and that this filing did not. The OCA also stated that FairPoint's request raised questions about rate increases under the settlement agreement in Docket No. DT 07-011 and whether anything in that agreement was changed by the events in Docket No. DT 10-025. In its closing, the OCA objected to a rate increase for FairPoint at this time.

vi. Staff

In its questions to Mr. O'Quinn, Staff sought clarification about the various services contained in the categories referenced on Exhibit 3. In addition, Staff questioned Mr. O'Quinn about FairPoint's intentions with regard to the approximately $2 million of tax expense allocated to interstate services. Mr. O'Quinn stated that FairPoint was currently reviewing how to handle that portion of the expense, but that in any event it could not begin any recovery of that expense, should it seek to, unless and until it made certain filings with the FCC in or around July 2012.

In its statements to the Commission, Staff first noted the unique circumstances of this case, in that although FairPoint had not characterized its filing as a general increase in rates, the Commission is treating it as such. Staff then stated that it supported FairPoint's request for temporary rates here because it has already incurred a substantial cost in paying these taxes. Regarding the method of recovery, Staff stated that in its estimation a surcharge for temporary

rates was appropriate because the amounts recovered would be easier to track for purposes of a later reconciliation. Staff, however, stated that it wanted to be clear that in agreeing with the surcharge for temporary rates, it was not agreeing that the surcharge was the appropriate recovery method on a permanent basis. Lastly, Staff stated that based on the information available it did not oppose the $0.99 rate proposed by FairPoint as a temporary rate.

B. COMMISSION ANALYSIS

As an initial matter, the Commission will briefly address FairPoint's contention that this case is more appropriately addressed under the provisions in RSA 378:6, IV. For the same reasons as those stated in Order No. 25,293 (November 28, 2011), which suspended FairPoint's proposed tariff changes, the Commission finds that the proposed changes are more appropriately addressed under RSA 378:6, I(a). This conclusion, however, does not mean that the Commission has determined a full rate case is required in this instance. Puc 1602.01 defines a "[f]ull rate case" as "a proceeding in which a revenue requirement is established for a utility and rates [are] set to meet that revenue requirement." The requirements for a full rate case filing are set forth in Puc 1604. Under Puc 1605, however, the Commission permits changes to rates, fares, charges, prices or terms or conditions in situations where a full rate case is not required. Puc 1605.01(a) provides examples of such situations including, but not limited to: fuel or commodity adjustments, purchased power adjustments, line or main extensions, and new services. Though not specifically enumerated in the rule, the Commission finds, in this case, that the change sought by FairPoint may be addressed under Puc 1605 rather than Puc 1604. FairPoint has made a limited proposal to make a limited adjustment to account for a portion of a specific and defined new expense and is not proposing rate changes to meet a general revenue requirement as would

be determined in a full rate case. Furthermore, there is no evidence or suggestion thus far in this case that the proposed surcharge has the potential of putting FairPoint into an over-earnings situation with regard to its New Hampshire regulated service operations and assets. Under the circumstances, we find this case to be sufficiently similar to the types of cases enumerated in Puc 1605.01 that it may be dealt with in a similar fashion and a full rate case is not required.

The filing requirements of Puc 1605.02 appear to have been satisfied by Exhibit 1 (the initial filing) as supplemented and updated by Exhibits 2-5. The Staff Report of Technical Session filed on December 15, 2011 indicates that the parties and Staff agreed that the question of whether the tariff changes proposed by FairPoint "could be addressed through something other than a 'full' rate case" is a threshold issue that needed to be resolved before the balance of a procedural schedule could be developed. As the Commission herein decides that issue we direct the parties to reconvene in technical session to discuss and propose a procedural schedule for the balance of this proceeding and report back to the Commission no later than January 20, 2012.

As to the issue of temporary rates, for the reasons stated below we conclude that FairPoint may institute a surcharge in the manner and amount proposed, but may not do so prior to April 1, 2012. Pursuant to RSA 378:27 the Commission may fix, determine, and prescribe reasonable temporary rates to be observed during the duration of the proceeding. The standard for temporary rates is "less stringent than the standard for permanent rates, in that temporary rates shall be determined expeditiously, without such investigation as might be deemed necessary to a determination of permanent rates." *Appeal of the Office of Consumer Advocate*, 134 N.H. 651, 660 (citation and quotations omitted).

No party disputes that property taxes on regulated assets are a legitimate expense for which a utility may seek recovery. FairPoint has demonstrated, and no party disputes, that being required to pay these newly imposed property taxes creates a new expense for FairPoint that is not otherwise accounted for in its rates. FairPoint has also demonstrated that beginning to collect against that expense would not result in the Company over earning. According to the estimates presented by FairPoint, the recovery it projects will merely offset some of the expense chargeable to intrastate services, rather than return a profit to the company. In fact, based on the records on file with the Commission, FairPoint is under-earning on its New Hampshire operations. Mr. O'Quinn testified that as of the date of FairPoint's most recent filing with the Commission for the period ended September 30, 2011, FairPoint's earnings in New Hampshire are approximately $60 million in the negative. Therefore, we conclude that FairPoint is entitled to impose temporary rates and that it may do so in the amount proposed in its filing. We find the amount of the proposed charge reasonable under the circumstances, bearing in mind that any recovery on a temporary basis will be reconciled when a permanent rate is established. Furthermore, while it is not the practice of the Commission generally to implement temporary rates as a surcharge, we do so in this case because it will allow the company and our Staff to track the money more readily. Also, we conclude that because the proposed surcharge follows the same billing scheme as that used for E911, FairPoint will likely be able to institute the charge with minimal disruptions in customer billing. In 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.

At the hearing the OCA questioned whether the settlement agreement in Docket No. DT 07-011 limits the ability of FairPoint to obtain a rate increase such as proposed in this case. Following our review of that settlement, we agree. Section 8.1 of the settlement agreement, filed with the Commission on January 23, 2008, states, in relevant part, that FairPoint will:

> continue to offer to residential retail customers a local exchange, stand-alone basic service product that includes the services listed in Puc 412.01. [FairPoint] will not seek Commission approval for an increase in New Hampshire basic exchange retail rates (above those in effect for Verizon in New Hampshire as of the Closing Date) to take effect during the five-year period following the Closing Date. The Commission will not require a decrease of any basic exchange retail rates of Telco to be effective within the five-year period following the Closing Date. These restrictions shall not prevent a revenue neutral rebalancing of access and retail basic exchange rates if otherwise approved by the Commission. Notwithstanding the foregoing, FairPoint shall have the right to petition the Commission to allow a retail rate case filing, and the Commission shall have the right to initiate a retail rate investigation, in the event of exigent circumstances (excessively low earnings claimed by FairPoint or a Commission concern of excessively high earnings) as long as the change in rates resulting from such rate proceeding does not take effect before the fourth anniversary of the Closing Date.

Under this provision, even under exigent circumstances such as excessively low earnings, no change in basic exchange retail rates may take effect prior to the fourth anniversary of the closing date. The closing date is defined as the effective date of the transaction, which was March 31, 2008. Thus, although FairPoint appears to have excessively low earnings, under this provision no change in basic exchange retail rates may take effect before March 31, 2012. Although the universe of access lines that FairPoint seeks to surcharge in this tariff amendment may well be larger than the universe of those that may be characterized as subject to basic exchange rates, it is certainly clear that the proposed tariff change, applicable to all retail access lines, includes those lines that are paying basic exchange retail rates, and therefore the surcharge will constitute an additional charge or rate, and thus an increase in rates for basic exchange

service. Accordingly, because the tariff as proposed by FairPoint in this case would result in an increase to basic exchange retail rates as contemplated under the settlement agreement, it may not take effect until after March 31, 2012. We conclude, therefore, that temporary rates as described above may be charged beginning April 1, 2012.

Based upon the foregoing, it is hereby

ORDERED, that the motions to intervene of segTEL, BayRing and the New Hampshire Municipal Association are GRANTED and the motion to intervene of George Sansoucy is DENIED; and it is

FURTHER ORDERED, that FairPoint's motion for confidential treatment, as amended, is GRANTED and the access line counts in FairPoint's explanatory memoranda are entitled to confidential treatment and will be withheld from the public and from FairPoint's competitors as described above; and it is

FURTHER ORDERED, that FairPoint may institute a surcharge of $0.99 per access line, per month, up to 25 lines in accordance with the proposed tariff pages it has submitted in this docket, but that the surcharge shall not be imposed prior to April 1, 2012 as described above; and it is

FURTHER ORDERED, that FairPoint, Staff, and interested parties shall convene in technical session to develop and recommend a procedural schedule for the balance of this proceeding and report to the Commission no later than January 20, 2012.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of December, 2011.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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