

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DM 12-276

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC AND ENHANCED
COMMUNICATIONS OF NORTHERN NEW ENGLAND, INC.

Objection to Public Utility Assessment

Prehearing Conference Order

ORDER NO. 25,451

January 7, 2013

APPEARANCES: Patrick C. McHugh, Esq. for Northern New England Telephone Operations LLC and Enhanced Communications of Northern New England, Inc., Susan S. Geiger, Esq., Orr & Reno, on behalf of Comcast Phone of New Hampshire, LLC, Robert A. Bersak, Esq. for Public Service Company of New Hampshire, Alexander W. Moore, Esq. for MCI Communications Services, Inc. d/b/a Verizon Business Services, Sarah B. Knowlton, Esq. for EnergyNorth Natural Gas, Inc. and Granite State Electric Company d/b/a Liberty Utilities, Darren Winslow for Freedom Ring Communications, LLC d/b/a BayRing Communications, Susan W. Chamberlin, Esq. for the Office of Consumer Advocate, and Edward N. Damon for the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

On September 17, 2012, Northern New England Telephone Operations LLC (NNETO) and Enhanced Communications of Northern New England, Inc. (Enhanced Communications) (collectively, FairPoint) filed with the New Hampshire Public Utilities Commission (Commission) an objection to public utility assessment and related invoices pursuant to RSA 363-A:4. NNETO is an incumbent local exchange carrier with operations in New Hampshire, among other northern New England states. Enhanced Communications is a competitive intraLATA¹ toll provider registered to do business in New Hampshire. The objection requested that their assessments be lowered, in NNETO's case to no more than \$403,229, a reduction of

¹ In other words, Enhanced Communications provides competitive long distance toll service between the various local calling areas within the Local Access and Transport Area (LATA) comprising the 603 area code.

\$539,770 from its annualized assessment amount of \$942,999, and in the case of Enhanced Communications to a maximum of \$5,500, a reduction of \$64,952 from its annualized assessment amount of \$70,452.²

In support of its objection, Fairpoint argues that NNETO and any other “excepted local exchange carriers” should not be required to fund expenses of the Office of Consumer Advocate (OCA) due to the enactment of Laws of 2012, Chapter 177 (SB 48) and, in addition, that the Commission has no statutory authority to levy an assessment on the interstate revenues of either NNETO or Enhanced Communications. FairPoint also argues that the assessments constitute an unlawful and unconstitutional taking of property.

On September 26, 2012, the OCA filed a notice of participation on behalf of residential ratepayers. On October 5, 2012, the Commission issued an order of notice establishing a prehearing conference, which was held at the Commission on November 6, 2012. The order noted that if the assessment of one public utility is reduced, the assessments of the remaining public utilities may increase in order to fully reimburse the Commission for its expenses.

Petitions to intervene were filed by Comcast Phone of New Hampshire, LLC (Comcast), Public Service Company of New Hampshire (PSNH), MCI Communications Services, Inc. d/b/a Verizon Business Services (Verizon), EnergyNorth Natural Gas, Inc. and Granite State Electric Company d/b/a Liberty Utilities (Liberty Utilities), and Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing). In addition, on November 2, 2012, nine incumbent local exchange carriers of the New Hampshire Telephone Association³ filed written comments

² The amounts of \$942,999 and \$70,452 contained in FairPoint’s objection are 2013 assessments. It is apparent that, as described in FairPoint’s filing, the objection relates to the current fiscal year 2013 assessments imposed by the Commission on NNETO and Enhanced Communications.

³ The nine are: Bretton Woods Telephone Company, Inc., Dixville Telephone Company, Dunbarton Telephone Company, Inc.; Granite State Communications; TDS Telecom/Hollis Telephone Company, Inc.; TDS Telecom/Kearsarge Telephone Company; TDS Telecom/Merrimack County Telephone Company; TDS Telecom/Union Telephone Company, Inc.; and TDS Telecom/Wilton Telephone Company, Inc.

expressing their joint support for FairPoint's objection. After the prehearing conference, segTEL, Inc. (segTEL) filed a petition to intervene.

On November 13, 2012, Staff filed a report of the technical session following the prehearing conference. The report stated that the participants discussed matters related to the scope of the docket and the possibility of developing a proposed procedural schedule, noting the parties' agreement that prior to establishing a procedural schedule, the Commission needs to define the scope of the docket based on the record.

II. FAIRPOINT'S OBJECTION TO ASSESSMENTS

The objection is based on three primary claims. First, FairPoint argues that NNETO, and any other "excepted local exchange carrier" (ELEC) defined in RSA 362:7, I(c), should not be required to fund expenses of the OCA due to the enactment of Laws of 2012, Chapter 177 (SB 48), effective August 10, 2012 (sometimes referred to below as the SB 48 claim). FairPoint states that SB 48 amended the OCA's enabling legislation, RSA 363:28, so that the OCA has no jurisdiction to petition, initiate, appear or intervene in matters pertaining to, among other things, rates, terms or conditions related to services provided by ELECs to end user customers and also amended the enabling legislation for the Residential Ratepayers Advisory Board, RSA 363:28-a, such that the board has no statutory authority to advise the OCA on matters pertaining to ELECs or their end use customers.

FairPoint asserts that because the Commission's regulatory duties have thus been significantly reduced and the OCA's enabling legislation specifically exempts ELEC matters from the OCA's jurisdiction, it follows that none of the OCA's expenses are attributable to NNETO and therefore cannot be assessed to NNETO. FairPoint further indicates that the assessments do not measure up to the standards for valid "license fees" set forth in *Laconia v.*

Gordon, 107 N.H. 209, 211 (1966) (holding "[t]o be valid charges made as license fees must bear a relation to and approximate the expense of issuing the licenses and of inspecting and regulating the business licensed . . . such fees . . . must be incidental to regulation and not primarily for the purpose of producing revenue") and *Appeal of Ass'n of NH Utilities*, 122 N.H. 770,773 (1982).

Second, citing to the *Laconia v. Gordon* case, FairPoint argues that requiring NNETO and Enhanced Communications to pay an assessment based on their interstate revenue (and other non-regulated revenue) is unlawful because the Commission does not regulate the telephone services which generate the revenue⁴ (sometimes referred to below as the interstate revenues claim). As a matter of statutory interpretation, FairPoint asserts that the Commission has no authority under RSA 362:2 to levy an assessment on the interstate revenues of either NNETO or Enhanced Communications and concludes that only its gross revenues from providing telephone messages entirely within New Hampshire can be counted in the assessment calculation. FairPoint further asserts that NNETO's and Enhanced Communication's assessments cannot be based on its interstate services over which the FCC has jurisdiction because the Commission is preempted by Federal law from regulating interstate telephone services.

Finally, FairPoint argues that the assessments constitute an unlawful and unconstitutional taking of the property of NNETO and Enhanced Communications because they deprive them of their right to retain their non-regulated New Hampshire revenues and because they are required to pay for Commission expenses on a disproportionate basis. FairPoint also contends that NNETO's and Enhanced Communications' vested rights are abridged.

⁴ FairPoint also argues that the imputed revenue related to directory listings in New Hampshire must be removed from the assessment calculation because SB 48 eliminates the Commission's authority to impute such revenue to NNETO.

III. POSITIONS OF THE PARTIES AND STAFF

A. FairPoint

As to the scope of the proceeding, FairPoint stated that this case is solely about NNETO's and Enhanced Communications' assessments as controlled by applicable law. FairPoint suggested that the case may be appropriate for an agreed statement of facts with briefing and possible Commission questioning, and a hearing if facts are in dispute. Transcript of prehearing conference (Tr.) at 8. FairPoint stated that there should be no briefing of scoping issues. Tr. at 39.

In FairPoint's view, RSA 363-A:4 prescribes the deadline for filing objections to the State fiscal year 2012⁵ assessments but contains no restrictions as to when the company can complain about the fiscal year 2013 assessments.⁶ Tr. at 11. FairPoint specified that its objection relates to the fiscal year 2013 assessments in respect to its SB 48 claim and, because the effective date of SB 48 is August 10, 2012, that claim can be maintained. *Id.* FairPoint stated that it is not seeking reassessments related to the OCA's fiscal year 2012 expenses. Tr. at 12.

Regarding its interstate revenues claim that NNETO's and Enhanced Communications' assessments cannot be based on revenues from their interstate services over which the FCC, and not the Commission, has jurisdiction,⁷ FairPoint argued that the Commission has authority to

⁵ Fiscal year 2013 commenced on July 1, 2012 and ends on June 30, 2013.

⁶ RSA 363-A:4 provides in part: "[w]ithin 30 days of the assessment for the first quarterly payment, each public utility which has any objection to the amount assessed against it for the prior fiscal year shall file with the commission its objection in writing, setting out in detail the grounds upon which it is claimed that said assessment is excessive, erroneous, unlawful, or invalid. If such objections are filed, the commission, after reasonable notice to the objecting public utility, shall hold a hearing on such objections, and if the commission finds that said assessment or any part thereof is excessive, erroneous, unlawful, or invalid, the commission shall reassess the amount to be paid by such public utility, and shall order that an amended bill be sent to such public utility in accordance with such reassessment."

⁷ According to FairPoint, all the revenue obtained from a telephone call placed from within New Hampshire to an out of state location would be classified under Federal law as interstate in nature. Tr. at 38.

grant the reassessments because state statutes can never trump Federal preemption nor can they trump constitutional rights. Tr. at 29. As to how the Commission assessments could become preempted, FairPoint responded that it is assessed by the FCC based on interstate revenues and thus is essentially being taxed twice. Tr. at 31. FairPoint agreed that that has been the case for many years. Tr. at 32. FairPoint further argued that it was immaterial that New Hampshire-regulated facilities are part of the operations that extend to long distance services. Tr. at 32-33. FairPoint also asserted that if assessments are based on an interpretation of “gross utility revenues” that include interstate revenues, the statute would be unconstitutional. Tr. at 33.

B. Comcast

Comcast said that it shared FairPoint’s concerns about the manner in which utility assessments are calculated for ELECs and if the Commission decides that FairPoint’s fiscal year 2013 assessments should be recalculated, then all of the ELECs’ assessments should be similarly adjusted. Tr. at 12-13. Comcast stated that RSA 362:8, added by SB 48, compels such a result. Tr. at 43.

C. PSNH

PSNH stated it wants to be sure it is treated fairly in terms of how the Commission’s expenses are allocated among the utilities. Tr. at 15. PSNH said that, like FairPoint, it has substantial revenues that are regulated by the Federal government, *e.g.*, the Federal Energy Regulatory Commission (FERC). PSNH urged that if the Commission determines that revenues that are outside the Commission’s regulatory jurisdiction should be excluded from the assessment process for FairPoint, the Commission should also exclude FERC-jurisdictional revenues.

PSNH stated there are inequities in the way utilities are assessed the Commission's expenses. As an example, PSNH said that competitive electricity suppliers do not pay the assessments even though some have filed complaints with the Commission, utilizing resources in seeking relief for their problems. PSNH also said that the Commission spends time certifying REC-eligible facilities yet they do not pay an assessment.

In PSNH's view, the assessment process and the costs of the Commission should be fully investigated. PSNH said, however, that the statute is clear in requiring that gross utility revenues be the basis for assessments and that a resolution of the problem is likely to be legislative in nature. PSNH expressed concern for free riders and suggested it may be time to institute filing fees as a way of paying for the services of the Commission and the OCA.

PSNH urged that if FairPoint prevails and the Commission limits the grant of relief to FairPoint, PSNH will have to appeal in an evergreen string of proceedings. Tr. at 39-40. PSNH said it wants to obtain equal treatment with FairPoint in this proceeding, and does not want to participate merely to show the consequences to its customers of a reduction in FairPoint's assessments.

PSNH said that it did not contest its assessment this year because it was done in a consistent way where all the utilities were treated the same. Tr. at 41. PSNH said that using "gross utility revenues" is a rough justice way of allocating expenses, but in PSNH's view there is not a preemption issue. Tr. at 41-42. Finally, PSNH expressed its willingness to work with the parties and Staff to see whether a recommendation to the legislature can be crafted to change how the Commission's costs are allocated. *Id.*

D. Verizon

Verizon supported FairPoint's position. Verizon indicated that this docket should not be a generic proceeding to deal with every utility but that the final result with respect to FairPoint should be applied to other ELECs without a separate proceeding. Tr. at 13-15.

E. Liberty Utilities

Liberty Utilities said that it is not clear from the face of SB 48 that the OCA is precluded from participating in Commission dockets involving FairPoint and thus it is not apparent that none of OCA's expenses should be allocated to FairPoint as a matter of law. Liberty Utilities echoed PSNH's concerns about the inequities of how expenses are allocated, but expressed doubt about the practicality of engaging in a more detailed parsing of Commission expenses as related to particular industry divisions. Tr. at 18-20.

F. BayRing

BayRing stated it did not take a position on any of FairPoint's detailed assertions but said it shared Comcast's and Verizon's concerns that if a different assessment procedure is applied to FairPoint, it be applied to all similar ELECs. Tr. at 20.

G. Office of Consumer Advocate

The OCA urged that if the question of a more accurate way of allocating expenses is opened up, the proceeding should be a generic one in which all assessments are reviewed. The OCA argued, however, that there should be a threshold determination of whether SB 48 applies to utility assessments at all, referring to RSA 362:7, III(b) which states that the prohibitions of SB 48 do not apply to the assessment of taxes or other fees of general applicability. The OCA expressed its willingness to work with all parties in a comprehensive review of the assessment

process and the actual facts and indicated it could support denial of FairPoint's objection with a new proceeding to look at all the questions in totality. Tr. at 20-23.

H. Staff

Staff supported FairPoint's position on the limited scope of the docket, suggesting that there would need to be a solid legal basis, which is not found in RSA 363-A:4, for expanding the docket to provide relief for utilities other than FairPoint. Staff argued that the statute was clear on its face in specifying that the objection must relate to the "prior fiscal year," which in this case is fiscal year 2012. Staff further argued that since the 30 day period for filing an objection pursuant to RSA 363-A:4 has passed, it is too late for other utilities to challenge the fiscal year 2012 assessments.

Regarding FairPoint's SB 48 claim, Staff said that because SB 48 only became effective on August 10, 2012 during the current fiscal year, the claim is premature and cannot be maintained in this docket. Staff also indicated that, apart from the SB 48 claim, FairPoint could challenge the interstate revenues aspect of the calculation based on last year's assessments. On the merits, Staff said that the assessment reports filed by FairPoint pursuant to the Commission's rules are based on "revenues derived from New Hampshire operations," a very different standard than one such as "revenues derived from New Hampshire regulated operations." Tr. at 23-28.

IV. INTERVENTIONS

At the prehearing conference, the Commission found the pending petitions to intervene met the requirements for intervention and granted them. Consistent with that ruling, the Commission will also grant the late-filed petition for intervention filed by segTEL.

V. COMMISSION ANALYSIS

Before addressing the parties' request that we define the scope of the docket before a procedural schedule is developed, we must decide if, as a matter of law, the issues raised are properly before us. RSA 363-A:4 authorizes the Commission to reassess the amount to be paid by a public utility if, based on the utility's objection, the Commission finds that the assessment or any part thereof is "excessive, erroneous, unlawful, or invalid." NNETO and Enhanced Communications are public utilities as defined in RSA 362:2 and therefore are subject to the provisions of RSA 363-A. RSA 363-A:4 requires that the objection be filed within 30 days of the assessment for the first quarterly payment imposed during the current State fiscal year, and it also specifies that the objection must relate to the amount assessed against the public utility for the prior fiscal year.

This was not always so. Before 1995, the statute provided that the objection was to the current fiscal year's assessment. Revised Laws 286-A:4, inserted by Laws of 1955, Chapter 203; *see also Granite State Gas Transmission, Inc.*, Order No. 17,788 in DF 84-262, 70 NHPUC 693 (August 2, 1985). In 1995, however, the statute was amended to provide that the objection relates to the prior fiscal year. Laws of 1995, chapter 29, section 2.

FairPoint's written objection to the assessments on NNETO and Enhanced Communications states that it was filed pursuant to RSA 363-A:4 and at the prehearing conference, FairPoint affirmed that it filed its objection within the 30 day time period set forth in RSA 363-A:4. Tr. at 11, lines 2-7. We assume, without deciding, that FairPoint timely filed the objection. It is plain that FairPoint is seeking relief from the *current* fiscal year's assessments. Thus, FairPoint's objection on its face does not satisfy the statutory requirement that it be to the prior fiscal year's assessments and the objection to the current fiscal year's assessments is not

ripe for adjudication pursuant to RSA 363-A:4. Accordingly, though it is useful to know that FairPoint intends to challenge the fiscal year 2013 assessment, by statute it cannot be considered at this time. A tribunal such as the Commission that exercises limited, statutory jurisdiction lacks jurisdiction to act unless it does so under the precise circumstances and in the manner prescribed by the enabling legislation. *In re Campaign for Ratepayers' Rights*, 162 NH 245, 250 (2011) (citation omitted).

FairPoint nonetheless argues that although RSA 363-A:4 prescribes the deadline for filing objections to the fiscal year 2012 assessments, it contains no restrictions as to when the company can complain about the fiscal year 2013 assessments. This argument does not overcome the fundamental infirmities inherent in FairPoint's objection, however. The remedy provided under RSA 363-A:4 is the sole remedy provided by the legislature when a public utility seeks a reduction in its public utility assessment. The statute is clear and under current law, the Commission is not free to provide FairPoint with another remedy, including the right to challenge the current fiscal year's assessments as it seeks to do in this case. We conclude that because this remedy is specifically provided by the legislature, we may not create a different remedy. *In re Campaign for Ratepayers' Rights, supra* at 251 (expression of one thing in a statute implies the exclusion of another); *State v. Simone*, 151 NH 328, 330 (2004). Our conclusion applies to FairPoint's objection as a whole, including its claims based on statutory interpretation and the constitution. Under these circumstances, FairPoint is not entitled to a hearing on its objection and we will therefore dismiss it without prejudice to renew at the appropriate time.

This is not the first time a utility has challenged our assessment provisions. *See Granite State Gas Transmission, Inc.*, Order No. 17,788, *supra* and *Granite State Gas Transmission, Inc.*,

Order No. 16,165 in docket DF 82-273, 68 N.H.P.U.C 28. In Order No. 16,165 the Commission found that assessing Granite State Gas Transmission, Inc.'s total revenues, including interstate revenues for which the Federal Energy Regulatory Commission (FERC) set rates, was reasonable and not duplicative. The Commission observed that it was empowered to, and did in fact, intervene in FERC dockets concerning the utility. The Commission found that such intervention could result in "substantial advantages," and that the assessment against Granite State Gas Transmission, Inc. bore a reasonable relation to the regulation provided. *Id.* at 29. That finding was affirmed in Order No. 17,788. *Supra.* The Commission continued to administer RSA 363-A using "gross utility revenues" (RSA 363-A:2), including revenues derived from activities of both an intrastate and interstate nature, as the basis for the assessments. The extent to which these cases are applicable to the issues raised by FairPoint will of course be considered in a FairPoint request to change its assessment for fiscal year 2013, should it make such a filing.

Although our ruling means that this docket will end at this point, we are mindful that a number of parties expressed concerns at the prehearing conference about the fairness of the assessment system given the changes in the utility business and in utility regulation since RSA 363-A was last amended. A number of parties expressed interest in participating in a generic proceeding to review the assessment system. We believe that an inquiry into the problems, if any, and possible solutions is worthwhile. Accordingly, we will direct Staff to convene a collaborative stakeholder process to review these matters. In particular, Staff is requested to gather pertinent information, including sending information requests to the parties by January 31, 2013 with responses requested by February 15, 2013, and holding a technical session on or about

February 27, 2013 at 1:00 p.m., and to submit a written report regarding the results to us by March 15, 2013.

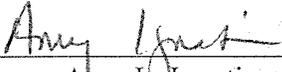
Based upon the foregoing, it is hereby

ORDERED, that all the pending petitions to intervene are granted; and it is

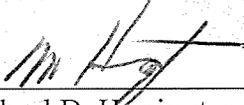
FURTHER ORDERED, that FairPoint's objection is dismissed; and it is

FURTHER ORDERED, that Staff convene a stakeholder process as set forth above.

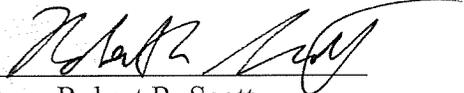
By order of the Public Utilities Commission of New Hampshire this seventh day of January, 2013.



Amy L. Ignatius
Chairman

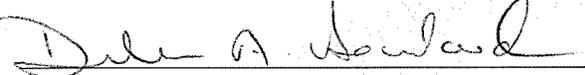


Michael D. Harrington
Commissioner



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director

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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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