

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
CRS 16-219

Northern New England Telephone Operations LLC

**Petition for Licenses to Maintain Utility Cables Over and Across Public Lands and Waters
of the State of New Hampshire**

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC'S (d/b/a FAIRPOINT
COMMUNICATIONS - NNE) REPLY TO THE COMMENTS OF
BARRINGTON, BELMONT, HOLDERNESS, JEFFERSON, MEREDITH,
MERRIMACK, SUNAPEE, WATERVILLE VALLEY, AND THE CITY OF LACONIA
(THE "MUNCIPALITIES")
(ORDER NO. 25,949)**

In response to the comments from the Municipalities, Northern New England Telephone Operations LLC ("FairPoint" herein) states as follows:

1. FairPoint owns and maintains telephone poles and conduits within municipal rights-of-way throughout the state of New Hampshire. In New Hampshire, municipalities may tax, among other things, telephone poles, conduits and the use or occupancy of municipal rights-of-way, as real property. *See* RSA 72:8-a; RSA 72:23. RSA 72:8-a, which authorizes the taxation of telephone poles and conduits as real property, makes abundantly clear that cables and wires – among other property – “shall not be taxable as real estate.” Therefore, under no circumstances may municipalities tax crossings of state-owned lands or waters or the associated wires and cables, the subject of this docket. *See* RSA 72:8-a. Yet, the Municipalities seek to include property tax language in FairPoint’s crossing licenses.

2. For background, FairPoint and the Municipalities have been engaged in property tax litigation in Merrimack County Superior Court regarding municipal assessments on

FairPoint’s telephone poles, conduits and use or occupancy of municipal rights-of-way. *See Northern New England Telephone Operations, LLC d/b/a FairPoint Communications – NNE v. Town of Acworth*, Notice of Decision No. 220-2012-CV-100 (Merrimack County Sup. Ct., December 14, 2015; March 1, 2016, Order Re: Reconsideration and Clarification). As a general rule, municipal property is exempt from taxation, unless occupied by another pursuant to a license or agreement that provides for the payment of property taxes by the occupant. *See* RSA 72:23, I (a). In the parties’ litigation, the Merrimack County Superior Court held that municipal licenses lacking express terms requiring FairPoint to pay property taxes could not serve as the basis for municipal taxation of FairPoint’s use or occupancy of municipal rights-of-way.¹ As a result, the Court held, those taxes were issued without authority and are *ultra vires*. (*Id.*, Order at pp. 14-15, December 14, 2015).

3. Overlapping the litigation process, the Municipalities, FairPoint and several other stakeholders, have recently undergone an exhaustive legislative process concerning municipal taxation of telephone poles and conduits. That process began in the New Hampshire Assessing Standards Board (“ASB”), proceeded through the legislature and culminated in HB 1198, which the Governor signed into law. Through a series of hearings and information gathering, the ASB collected detailed input from all stakeholders, including the Municipalities, deliberated on that input and made a recommendation to the legislature. The legislature went through this thorough process before passing HB 1198.

4. The legislature, and the process that led to HB 1198, rather than the PUC in this narrow docket, provided the appropriate forum for the Municipalities to accomplish what they now seek. The legislature is the only body in New Hampshire empowered to authorize taxation.

¹ The Court further held that Municipalities are not barred from assessing taxes based on the value of FairPoint’s poles and conduits.

And, for the relief requested by the Municipalities, state statute must expressly authorize the tax. *See In re Reid*, 143 N.H. 246, 252 (1998) (quoting *Indian Head Nat'l Bank v. Portsmouth*, 117 N.H. 954, 955 (1966) (cited for the proposition that in New Hampshire a tax must be authorized by statute). The PUC should not accede to the Municipalities' efforts to turn it into a legislative body. Nor should the PUC accede to the Municipalities' efforts to re-litigate issues already decided in the litigation in the Merrimack County Superior Court.

5. To be clear: FairPoint's petition and the PUC's order in this docket concern licenses, pursuant to RSA 371, for cable and wire crossings over or under public lands and waters owned by the state. This docket does not concern FairPoint's licenses with the Municipalities, FairPoint's use or occupancy of municipal property, municipal property taxation, or the Municipalities at all. The Municipalities lack standing to request language concerning property taxation in licenses concerning state lands and the cables and wires that cross them. *See* RSA 72:8-a. And, the Order *Nisi* is not aimed at taxation but instead "focus[es] on the functional use and safety of the proposed crossings" and not the origination and termination licenses of FairPoint (Order *Nisi* at p. 6.) (citing *Northern Pass Transmission LLC, et al.*, Order No. 25,910 (June 28, 2016) at 11). To underscore this last point, the PUC's Order *Nisi* in this docket emphasizes that "FairPoint is responsible for obtaining any and all other permits for the operation and maintenance of the existing crossings from any . . . local authorities having jurisdiction." (Order *Nisi* at p. 6.)

6. Lastly, FairPoint does not address the actual terms and conditions of the provision proposed by the Municipalities because the request to include this language in the licenses should be denied in its entirety. That said the Municipalities' provision is overly broad and flawed. To the extent the Commission disagrees with FairPoint's arguments and the weight of

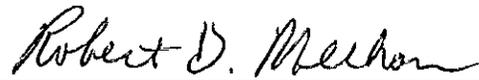
authority that militates against the Municipalities position, FairPoint respectfully requests ample opportunity to address the provision's terms and conditions if required.

For the foregoing reasons, FairPoint respectfully requests the Commission not include the proposed tax language in the licenses granted through the Order *Nisi*.

Respectfully Submitted,

Northern New England Telephone
Operations LLC d/b/a FairPoint
Communications – NNE

Dated: October 24, 2016



Robert D. Meehan
Director – NH Regulatory
770 Elm Street
Manchester, NH 03101
603.656.8116
robert.meehan@fairpoint.com

Certificate of Service

I hereby certify that an original and two copies of the above reply comments have this day been hand delivered to the Public Utilities Commission Executive Director and that copies of same have been sent electronically to the service list.