

**STATE OF NEW HAMPSHIRE
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**

Order Modifying Order *Nisi* Granting Licenses

ORDER NO. 25,962

October 28, 2016

In this order, the Commission modifies its prior order *nisi* granting the request of Northern New England Telephone Operations, LLC (FairPoint), for licenses under RSA 371:17 to maintain existing telecommunications cable crossings over public waters and/or state-owned lands, to exclude from that order an existing crossing in Hampton that was previously licensed by the Commission. We also address the request made by a coalition of municipalities to include statutory property taxation notice language in our crossing licenses, and we decline to include such language based on the lack of statutory authority to do so.

I. PROCEDURAL BACKGROUND

On September 30, 2016, the Commission issued Order No. 25,949 granting licenses to FairPoint to maintain 53 existing crossings over public waters and/or state lands, pursuant to RSA 371:17 (Crossings Order). The Crossings Order was issued on a *nisi* basis to ensure that interested parties would receive notice of it and have an opportunity to comment or request a hearing prior to the specified effective date. On October 12, 2016, Comments were filed by the Towns of Barrington, Belmont, Holderness, Jefferson, Meredith, Sunapee, and Waterville Valley, and the City of Laconia (collectively, the Municipalities). On October 17, the Town of Hampton (Hampton) filed its Comments and Written Request for Hearing. On October 25,

FairPoint filed a reply to the Municipalities' Comments and a reply to the Hampton filing. On October 26, the Municipalities filed a response to FairPoint's reply to their Comments.

II. POSITIONS OF THE PARTIES

The Municipalities, with the exception of Holderness and Meredith, are co-defendants in property tax litigation in Merrimack County Superior Court regarding municipal assessments on FairPoint's telephone poles and conduits and its use and occupancy of municipal rights-of-way (the Tax Litigation). *See Northern New England Telephone Operations, LLC d/b/a FairPoint Communications - NNE v. Town of Acworth, et al.*, Consolidated Docket No. 2012-CV-100 (Merrimack County Sup. Ct., December 14, 2015 Order; March 1, 2016 Order Re: Reconsideration and Clarification). In the Tax Litigation, the Superior Court has found that the use and occupancy by a telephone utility of otherwise tax-exempt municipal property will be subject to property taxation only if the lease, license, or other agreement between the municipality and the utility contains the statutory tax-shifting notification language specified in RSA 72:23, I(b). *Id.* Based on this judicial determination, the Municipalities in their Comments requested that the Commission amend the Crossings Order to include language as follows:

In accordance with the requirement of RSA 72:23, I(b), this license is granted to the licensee(s) subject to the condition that the licensee(s) and any other entity using or occupying property of the state pursuant to this license shall be responsible for the payment of, and shall pay, all properly assessed real and personal property taxes no later than the due date. Furthermore, in accordance with the requirements of RSA 72:23, I(b), the licensee(s) and any other entity using and/or occupying property of the state pursuant to this license shall be obligated to pay real and personal property taxes on structures or improvements added by the licensee(s) or any other entity using or occupying the property of the licensor pursuant to this license. Failure of the licensee(s) to pay duly assessed personal and real property taxes when due shall be cause to terminate this license.

Hampton questioned whether FairPoint's existing crossing of Tide Mill Creek between manholes 44 and 45 qualifies for Commission jurisdiction, based on the location and relevant property ownership status of that crossing. Hampton requested that the Commission conduct a hearing on whether it has jurisdiction over "Tide Mill Creek" at the location of FairPoint's existing crossing. Hampton further requested that, if the Commission determines it does have jurisdiction to issue a license for that crossing under RSA 371:17, it "only should proceed to issue such licenses if they include the language of taxability under RSA 72:23."

In reply to Hampton's filing, FairPoint asserted that the existing telephone cable crossing of Tide Mill Creek between manholes 44 and 45 actually was licensed by the Commission in 1987 pursuant to Order No. 18,572 (February 11, 1987), in Docket DE 87-12. FairPoint therefore requested that the Commission amend the Crossings Order to delete the Tide Mill Creek crossing in Hampton.

With respect to the request by the Municipalities and Hampton to add to the Crossings Order specific tax-shifting notification language based on RSA 72:23, I(b), FairPoint asserted that "[t]he Municipalities lack standing to request language concerning property taxation in licenses concerning state lands and the cables and wires that cross them." FairPoint maintained that the Crossings Order is "not aimed at taxation" but instead focuses on the functional use and safety of the proposed crossings "and not the origination and termination licenses of FairPoint." FairPoint noted that the Crossings Order expressly stated that FairPoint remains responsible for obtaining any and all other permits to operate and maintain its existing crossings from any "local authorities having jurisdiction." FairPoint urged the Commission not to "accede to the Municipalities' efforts to turn it into a legislative body," nor to "the Municipalities' efforts to

re-litigate issues already decided in the [Tax Litigation].” Finally, FairPoint objected to the Municipalities’ proposed tax-shifting notification language as “overly broad and flawed,” and requested that, if the Commission were to consider including any such language, FairPoint should be provided the opportunity to address the terms and conditions of the proposed new crossings license provision.

In response to FairPoint’s reply, the Municipalities affirmed that they are not asking the Commission to decide whether any of FairPoint’s property located on, over, or under state-owned land or public waters located within their communities is taxable. The Municipalities stated that they want the proposed language to be included only “so that FairPoint’s taxable property does not escape taxation.” The Municipalities further clarified their position that failure to include the statutory taxing language in the Commission’s crossing licenses “would allow FairPoint to claim in future tax abatement cases that the municipalities could not assess its use of the state-owned lands and water[s] because those licenses do not contain the taxing language.” With respect to FairPoint’s objection to their proposed notification language, the Municipalities asserted that the objection lacks merit because the “cited language is the language which is required under RSA 72:23, I.”

III. COMMISSION ANALYSIS

As we summarized in the Crossings Order, RSA 371:17 requires that utilities obtain a license from the Commission to “construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state,” when such facilities are necessary “to meet the reasonable requirements of service to the public.” RSA 371:20 authorizes the

Commission to grant a crossing license if it “may be exercised without substantially affecting the public rights in said waters or lands.” RSA 371:17 defines public waters to include “all ponds of more than 10 acres, tidewater bodies, and such streams or portions thereof as the Commission may prescribe,” and the Department of Environmental Services prepares, maintains, and publishes an official list of all public waters in the state. The Commission’s scope of review and investigation generally applicable to proposed utility crossings under RSA 371:17 “focus[es] on the functional use and safety of the proposed crossings.” Crossings Order at 6 (citing *Northern Pass Transmission LLC, et al.*, Order No. 25,910 (June 28, 2016) at 11).

Unlike the Municipalities, the Commission is not a taxing jurisdiction. Nor is RSA 371:17 a taxation statute. Our authority to issue crossing licenses under RSA 371:17-23 does not address or involve state or local taxation, and our review and investigation of proposed utility infrastructure crossings under that statute generally are limited to the functional use and safety of the crossings. In the absence of clear statutory authority to include tax-shifting notification language based on RSA 72:23, I(b) in our crossing license orders, we decline to modify the Crossings Order to include the language proposed by the Municipalities.

With respect to FairPoint’s existing crossing of Tide Mill Creek between manholes 44 and 45 in Hampton, it appears that crossing was previously licensed by the Commission pursuant to Order No. 18,572 (February 11, 1987). We therefore grant FairPoint’s request to modify the Crossings Order to delete from that order the Tide Mill Creek crossing in Hampton, pursuant to our authority under RSA 365:28.

Based upon the foregoing, it is hereby

ORDERED, that Order No. 25,949 is modified to remove therefrom the FairPoint crossing appearing on the list as number 17, across Tide Mill Creek in the Town of Hampton between manholes 44 and 45; and it is

FURTHER ORDERED, that Order No. 25,949 as so modified shall be effective on October 30, 2016; and it is

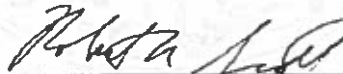
FURTHER ORDERED, that the Town of Hampton's written request for hearing is DENIED; and it is

FURTHER ORDERED, that the request by the Municipalities and the Town of Hampton to modify Order No. 25,949 to include tax-shifting notification language based on RSA 72:23, I(b) is DENIED.


By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of October, 2016.



Martin P. Honigberg
Chairman




Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director