

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 19-137

CLEAR RATE COMMUNICATIONS, INC.

Petition for Waiver of Expenses Assessed Pursuant to Chapter 363-A

Order Denying Waiver Request

ORDER NO. 26,302

October 25, 2019

In this order the Commission denies a request by Clear Rate Communications for a waiver of payment of the Commission's minimum annual assessment.

I. PROCEDURAL HISTORY

On August 21, 2019, Clear Rate Communications, Inc. (Clear Rate or the Company) requested a waiver of expenses in the amount of the minimum annual Commission assessment of \$1,000 under RSA 363-A. On September 3, 2019, Commission Staff filed a memorandum recommending that the Commission deny Clear Rate's waiver request. On October 21, 2019, the Company filed a letter waiving its right to a hearing in this matter. The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are available on the Commission's website at <http://puc.nh.gov/Regulatory/Docketbk/2019/19-137.html>.

II. POSITIONS OF CLEAR RATE AND STAFF

A. Clear Rate

Clear Rate requested a waiver of expenses assessed by the Commission pursuant to RSA 363-A, based on its assertion that the minimum annual assessment of \$1,000 is excessive in light of the Company's minimal business in New Hampshire. Clear Rate claimed that the

minimum annual assessment is unlawful and represents a barrier to competition and market entry under RSA 362:7, II. *See* Clear Rate Request for Waiver of Expenses (August 21, 2019) at 1. In support of those positions Clear Rate stated that it serves only one customer in New Hampshire and its annual revenue attributable to that customer is less than \$2,000, which the Company believes is *de minimus*. According to Clear Rate, an assessment amounting to roughly 50 percent of its gross state revenue is excessive. *Id.* Clear Rate argued that an excessive fee is prohibited under RSA 362:7, II, because it is unduly burdensome, having the effect of a “force regulating market entry.” *Id.*

B. Staff

Staff noted that Clear Rate is a provider of Voice over Internet Protocol (VoIP) services that has not voluntarily registered as a telecommunications carrier, and, as such, is subject to assessment under RSA 363-A:2, I(d). *See* Staff Recommendation at 1. Under RSA 363-A:2, I(d) and RSA 363-A:2, VI, Clear Rate’s assessment is determined based on 33% of its gross intrastate revenue, with a minimum annual assessment amount of \$1,000. *Id.*

Staff maintained that the Commission has no authority to waive the minimum assessment, because the law setting the assessment is explicit and unambiguous. *Id.* at 2. In support of that position, Staff cited RSA 363-A:2, VI (setting minimum assessment applicable to telecommunications carriers), RSA 363-A:2, I (c) and (d) (defining telecommunications carriers subject to assessment), and RSA 363-A:5 (excepting telecommunications providers from the minimum revenue threshold exemption from assessment). *Id.* Staff highlighted that RSA 363-A:2, I(d), which expressly provides the assessment rates for VoIP providers, and the corresponding amendment to the minimum assessment amount provision of RSA 363-A:2, VI, were enacted in 2014, after the enactment in 2012 of RSA 362:7, which contains the provisions

on which Clear Rate's arguments rely, with the second half of paragraph II of that section, clarifying that VoIP services are not public utility services, added in 2013. *Id.*

III. COMMISSION ANALYSIS

RSA 363-A:4 permits assessed entities such as Clear Rate to object to an assessment and set out in writing the grounds on which it believes the assessment is "excessive, erroneous, unlawful, or invalid." The Commission is authorized to adjust the assessment if, after a hearing, it finds that the assessment or any part thereof is excessive, erroneous, unlawful, or invalid.

Clear Rate, in requesting a waiver of payment of its annual assessment, argued that the assessment is excessive and unlawful. The Company waived its right to a hearing, and we see no need for a hearing as the relevant issues involve only legal interpretation of statutory provisions.

The Commission is bound to follow applicable state statutory requirements. 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." *Northern New England Telephone Operations, L.L.C.*, Order No. 25,451 at 11 (January 7, 2013) (citing *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011)). The Commission is a "creature of statute" and must act only within the scope of its authority under the relevant statutes. *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (the Commission "is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute"). We therefore "cannot substitute our judgment for that of the legislature expressed in a duly-enacted statute." *Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 26,208 at 17 (January 11, 2019).

Clear Rate is an “assessed entity” under RSA 363-A:2, I(d), and therefore is subject to the provisions of RSA 363-A. As an assessed entity, Clear Rate, like other VoIP providers and telecommunications carriers, is subject to an assessment determined on a smaller portion of its gross intrastate revenue than fully-regulated utilities; however, it is required to pay a minimum statutory assessment amount. The minimum assessment amount is set forth in RSA 363-A:2,VI:

A minimum amount shall be assessed to utilities and other assessed entities described in paragraph I having minimal revenues in such proportion as the public utilities commission shall determine to be fair and equitable, provided that the minimum amount assessed to any entity to which subparagraphs I(c) or (d) applies shall not be less than \$1,000.

Clear Rate is a VoIP provider under subparagraph I(d); therefore, the Commission, as a matter of law, cannot assess Clear Rate an amount less than the minimum assessment of \$1,000. We therefore do not reach the question whether the minimum assessment, as applied to Clear Rate, may be considered excessive.

Turning to the argument that the assessment is unlawful under RSA 362:7, II, we do not find Clear Rate’s interpretation of that statute persuasive. RSA 362:7, III states “prohibitions of paragraph II shall not be construed to ... prohibit the assessment of taxes or nondiscriminatory 911 fees, telecommunications relay service fees, or other fees of general applicability.”

Moreover, as noted by Staff, the statutory amendment confirming that VoIP providers are subject to the minimum assessment amount under RSA 363-A:2,VI was enacted *after* the more general restriction under RSA 362-A:7, II on Commission action that “has the effect of regulating the market entry, market exit, transfer of control, rates, terms, or conditions of any VoIP service or IP enabled service or any provider of VoIP service or IP-enabled service.” We therefore find that Clear Rate is properly subject to the minimum assessment requirement imposed by state statute.

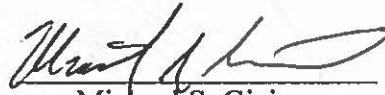
Based upon the foregoing, it is hereby

ORDERED, that Clear Rate's Petition for Waiver of Expenses Assessed Pursuant to Chapter 363-A is DENIED; and it is

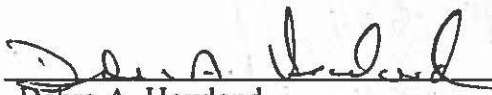
FURTHER ORDERED, that Clear Rate's objection is therefore resolved, and the amount due and owed is affirmed and payment of any assessment amount currently due shall be remitted within 30 days of this order.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of October, 2019.


Kathryn M. Bailey
Commissioner


Michael S. Giaimo
Commissioner

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