

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 11-248

**FairPoint Communications, Inc.
Municipal Property Tax Surcharge**

**RESPONSE TO ORDER SUSPENDING TARIFF AND
PRELIMINARY STATEMENT OF POSITION**

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and, in advance of the temporary rate hearing on this matter, responds to the Commission’s Order No. 25,293 Suspending Tariff dated November 28, 2011 (“Suspension Order”) and also provides a preliminary statement of its position. As set forth further below, FairPoint believes that initial characterization of the subject tariff filing as a “surcharge” is in accordance with applicable law and Commission precedent and the Commission should permit it to become effective as requested by FairPoint. If, in the alternative, the Commission still maintains that the tariff filing is a new “rate” as defined in its rules,¹ then it is just and reasonable for the Commission to approve a temporary charge of \$.99 per line as proposed in the tariff filing, effective and retroactive to December 1, 2011.

I. Background

On November 15, 2011, FairPoint filed a tariff revision seeking to implement a surcharge to cover all or a portion of property taxes that it anticipates will be assessed by New Hampshire municipalities for the April 1, 2011 through March 31, 2012 tax year. This filing was necessary

¹ Rule Puc 1602.03 defines a “rate” as “any charge or price, and all related service provisions for services regulated and tarified by the commission, including, but not limited to, availability,

as a consequence of the July 1, 2010 expiration of the statutory pole and conduit property tax exemption, which now exposes FairPoint to municipal property taxes on its extensive network of poles and conduits. FairPoint's filing asserted that at the time of the filing it had received invoices from 44 municipalities and that an additional 45 had indicated that they would likely soon bill FairPoint. Attached to this Response is an update to the explanatory memorandum that accompanied the tariff filing, which establishes that FairPoint has now received 114 invoices. Furthermore, FairPoint's original projection that approximately 230 municipalities ultimately will assess property taxes appears to have been validated by the December 8, 2011 Petition to Intervene of the New Hampshire Municipal Association on behalf of its 233 member cities and towns.

On November 28, 2011, the Commission issued the Suspension Order, in which it suspended the tariff filing and scheduled a hearing to address the propriety of temporary rates, pursuant to RSA 378:27, and to take preliminary statements on any of the issues of note, which included the amount of municipal taxes to which FairPoint is subject, the appropriateness of the proposed surcharge, the treatment of future taxes, the propriety of capping the application of the surcharge at 25 lines, and whether the tax expense has been allocated properly.

The Commission also noted its disagreement with FairPoint's characterization of the tariff filing as a surcharge subject to RSA 378:6, IV, and instead determined that it is more appropriately addressed under RSA 378:6, I(a), which pertains to "a general increase in rates." FairPoint respectfully disagrees with this characterization.

II. The Tariff Filing is Appropriately Regarded as a Surcharge, not a General Rate Increase.

The Commission arrived at the determination that the tariff filing was a general increase in rates by consulting the *Websters Dictionary* and parsing the meaning of the individual words “representing” and “general.”² Based on these references, the Commission determined that because the surcharge is not for any particular service, but rather is the equivalent of a rate increase affecting all or a majority of the telephone utility’s retail customers, then it was a “general” increase as contemplated by RSA 378:6, I(a). However, FairPoint submits that notwithstanding the standard dictionary definition, the phrase “general increase in rates” has long carried a particular meaning in Commission law and connotes more than the creation of a singular charge as represented in the tariff filing. Rather, this term is associated with a “full rate case” as defined in the Commission’s rules, *i.e.* “a proceeding in which a revenue requirement is established for a utility and rates set to meet that revenue requirement.”³ Historically, this is a process that is not routinely invoked. Two examples from across the years include the New England Telephone filing in 1971, conducted under RSA 378:6, I, in which a general rate increase was granted to NET to replace one granted 14 years before, using 1957 as the test year,⁴ and the Northern Utilities inquiry in 2000, conducted 8 years after the last general rate case.⁵ Furthermore, this process involves an inquiry that is considerably more complicated than the one at issue in the current tariff filing, as typified in a more recent filing by Granite State Telephone involving a general rate increase, which included a full audit of the company, a finding on cost of

² Suspension Order at n.2.

³ Rule Puc 1602.01.

⁴ See *New England Tel. & Tel. Co. v. State* 113 N.H. 92, 97 (1973).

⁵ *Northern Utilities*, DG 00-046, Order No. 23,674 at 18-19 (2001).

equity and weighted average cost of capital, and establishment of an allowed rate of return.⁶

Accordingly, FairPoint suggests that it is the comprehensiveness of the inquiry that is the distinguishing feature of a “general increase in rates,” and not simply the fact of an additional charge, and that this in fact is the reason that the statute allows up to twelve months for the Commission to investigate a qualifying filing, rather than the considerably shorter period provided by RSA 378:6, IV.

Viewed in this light, it is clear that the current tariff filing exhibits none of the features of a “general rate increase” that would invoke the provisions of RSA 378:6, I(a). The tariff filing is accurately characterized as a surcharge, *i.e.* “an additional tax or cost onto an existing tax, cost or charge.”⁷ It is also important to emphasize that it is designed not to increase current revenues or profits, but simply to defray a newly imposed exogenous cost, and only to the extent that this cost continues to accrue. The Pennsylvania commission has described this situation aptly. “The surcharge allows the add-on of expenses and changes to those expenses, without including any profit or other recovery; this add-on is known as ‘dollar for dollar’ recovery.”⁸ The Pennsylvania commission further explained that “the surcharge is quite different from a base rate [which] for public utilities [is] set using what is known as the test year concept, which requires taking a snapshot of the utility’s revenues, expenses and capital costs during a one-year period.”⁹

The Commission has approved the recovery by surcharge of several types of cost increases which, if uncompensated, would deprive the utility of a reasonable and just rate. These

⁶ See Granite State Telephone, DT 05-133, Order 24,621 at 2-3.

⁷ Black’s Law Dictionary 1441 (6th ed.).

⁸ Popowsky v. Pennsylvania Public Utility Commission, 869 A.2d 1144, 1152 (2005).

⁹ *Id.*

include a water utility's capital investments in infrastructure,¹⁰ as well as emergency capital repairs by a separate water utility.¹¹ In addition to capital repairs, the Commission has allowed a surcharge by a water utility in receivership for repayment of a debt to the temporary operator.¹² Finally, the Commission has approved an environmental remediation surcharge requested by a gas utility.¹³ Clearly, the Commission has distinguished between charges that comprise general rate increases and those that should be treated as surcharges separate from general rates. FairPoint submits that the proposed Municipal Property Tax Surcharge falls clearly on the latter side of the line, and respectfully requests that the Commission recategorize it accordingly and address it pursuant to RSA 378:6, IV, as FairPoint originally requested.

III. FairPoint is Entitled to Charge the Proposed Rate on a Temporary Basis, Effective December 1, 2011.

Even if the Commission ultimately regards the tariff filing as a general rate increase rather than a surcharge, FairPoint is entitled to the proposed charge on a temporary basis. RSA 378:27 provides that:

[i]n any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine, and prescribe for the duration of said proceeding reasonable temporary rates

This statute was “designed to protect utilities against confiscatory rates and to permit recoupment of any deficiency in return suffered under a temporary order.”¹⁴ The temporary rate standard “is less stringent than the standard for permanent rates, in that temporary rates shall be determined

¹⁰ See Aquarion Water Company of New Hampshire, Inc., DW 08-098, Order No. 25,186 (December 22, 2010), in which the Commission dealt with *both* a general rate increase and various surcharges.

¹¹ See Rolling Ridge Water System, DW 01-196, Order No. 24,178 (May 23, 2003).

¹² See Daniels Lake Water Works, Inc., DW 00-247, Order No. 24,604 (March 24, 2006).

¹³ See EnergyNorth Natural Gas, Inc., DG 03-160, Order No. 24,270 (January 30, 2004).

¹⁴ State v. New England Tel. & Tel. Co., 103 N.H. 394, 395 (1961).

expeditiously, without such investigation as might be deemed necessary to a determination of permanent rates.”¹⁵ “The burden of proof required by the temporary rate statute can be satisfied by the filing of reports with the commission unless there appears to be reasonable grounds to question the figures in such reports.”¹⁶

With its tariff filing, FairPoint filed an explanatory memorandum and exhibits, updated with this Response, that comprise a report that firmly establishes that FairPoint is entitled to temporarily charge at least \$.99 for the duration of this proceeding. This report demonstrates the following:

- it is undisputed that FairPoint has received tax bills from municipalities;
- while FairPoint reserves the right to dispute the assessments on which those bills are based, it is clear that the municipalities currently have the lawful right to issue these bills;
- it is highly likely, bordering on certain, that FairPoint will receive tax bills from approximately 230 municipalities, and that these bills will total millions of dollars as indicated in the report;
- these costs are not reflected in FairPoint’s current rates;
- based on current estimates, even when these costs are allocated among unregulated services, interstate services and pole attachments, the per line allocated cost exceeds \$.99 per line;
- a surcharge of \$.99 per line, capped at 25 lines per customer billing account, is a partial pass-through of these costs and does not represent a return of profit to FairPoint.

Accordingly, the record will show that FairPoint is entitled to immediate relief based on RSA 378:27. Furthermore, to the extent that the Commission agrees that the tariff filing is subject to RSA 378:6, IV, good cause exists for the Commission to exercise its discretion to

¹⁵ Appeal of Office of Consumer Advocate, 134 N.H. 651, 660 (1991) (quotations omitted).

¹⁶ Public Service Company of New Hampshire, 66 N.H. PUC 178 (May 1, 1981) (citing “estimated data” as the type of reports that Commission would question).

permit these temporary rates to become effective retroactive to December 1, 2011 on less than 30 days notice, in accordance with FairPoint's request in the tariff filing.

IV. Conclusion

In conclusion, FairPoint respectfully requests that the Commission treat the tariff filing as a surcharge under RSA 378:6, IV and that it permit the proposed surcharge to be retroactive to December 1, 2011. In the alternative, should the Commission maintain that the tariff filing is a rate rather than a surcharge, then it should permit it to be imposed temporarily, retroactive to December 1, 2011.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC, D/B/A
FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: December 13, 2011

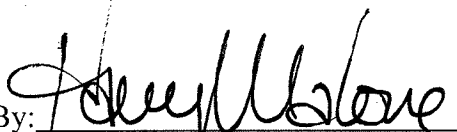
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CERTIFICATE OF SERVICE

I hereby certify that a PDF copy of the foregoing Response was forwarded this day to the parties by electronic mail.

Dated: December 13, 2011

By: 
Harry N. Malone, Esq.