

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 14-102

WILLIAM G. WHALEN

Complaint Against FairPoint Communications, Inc. Rate Increase Dispute

Submitted by:

New Hampshire Legal Assistance (NHLA)

May 7, 2014

Introduction:

The following ELEC-ILEC practices which seek to narrow the universe of customers potentially afforded basic service price caps are simply not supported by state law: 1.) The practice of ELEC-ILECs of *de facto* applying only one basic service price cap per household and/or physical residence, and 2.) The practice of ELEC-ILECs removing the price cap if the basic service customer purchases a service from another company, including long-distance service.

The Legislature in adopting Senate Bill 48, Chapter Law 177 (2012) expressly included the following price cap statute:

Rates for basic service of incumbent local exchange carriers which qualify as excepted local exchange carriers may not increase by more than 5 percent for Lifeline Telephone Assistance customers and by more than 10 percent for all other basic service customers in each of the 8 years after the effective date of this paragraph or the effective date of an existing alternative plan of regulation, except for additional rate adjustments, with public utilities commission review and approval, to reflect changes in federal, state, or local government taxes, mandates, rules, regulations, or statutes.

RSA 374:22-p, VIII(b); *see also* Puc 410.03(d). In doing so, the Legislature implemented a form of price cap regulation of ELEC-ILEC for a period of eight (8) years, including a different price cap for low-income Lifeline Telephone Assistance customers. This legislatively required price cap cannot simply be ignored, as the Legislature "... is presumed not to use words that are superfluous or redundant." *Frost v. Commissioner, New Hampshire Banking Dept.*, 163 N.H. 365, 384 (2012)(citation omitted).

A. The Plain Language of the Price Cap Statute Does Not Limit the Applicability of the Price Caps to Only One Per Household or Physical Residence.

Mr. Whalen's complaint raises the issue of the applicability of the price caps for basic service where more than one customer line goes into a household.

More than one low-income person or families sometimes live in the same household. In recent years, for economic reasons, NHLA has seen an increase in the number of low-income families who "double-up" and sometimes "triple-up" in the same household. In some cases homes have been subdivided into duplexes or triplexes. NHLA also works with clients who live in rooming houses with multiple other low-income persons. In these cases low-income persons and families sometimes make separate arrangements, including for phone service. The price cap statute does not contemplate customers losing their price cap protection for basic service simply because more than one customer line goes into the structure.

The plain language RSA 347:22-p, VIII(b) provides:

Rates for basic service of incumbent local exchange carriers which qualify as excepted local exchange carriers may not increase by more than 5 percent for Lifeline Telephone Assistance customers and by more than 10 percent for all other basic service customers in each of the 8 years after the effective date of this paragraph...

(Emphasis added). The focus is on the customer, not the household. The Legislature could have limited the applicability of the price caps by household or by physical residence, but it did not, and we simply cannot "...add words which the lawmakers did not see fit to include." *In re Garrison Place Real Estate Inv. Trust*, 159 N.H. 539, 542 (2009). The Legislature requires all "customers" to be afforded the price cap. As a consequence, every customer line must be evaluated for the applicability of the price cap, even in cases where there are more than one customer line going into a household or at a physical residence.

Following the passage of the Telecommunications Act of 1996, which created a new section to the Communications Act of 1934 entitled "Universal Service" (*see* 47 USC § 254), it has been recognized and accepted that it is the responsibility of both the state and federal governments to preserve and advance universal service. *See e.g. Bell Atlantic Mobile, Inc. v. Department of Public Utility Control*, 253 Conn. 453, 465 (2000). That includes, *inter alia*, the requirement that: "The Commission [FCC] and the States should ensure that universal service is available at rates that are just, reasonable, and affordable." 47 USC § 254 (i)(emphasis added); *see also* 47 USC § 254 (b)("Universal Service Principles").

With Senate Bill 48, the Legislature did not erase this state responsibility to preserve and advance universal service. To the contrary, the legislature expressly cited and left unrefined the Commission's responsibility and jurisdiction to preserve and advance universal. It did so by enacting RSA 363:8, I, which provides for broad, unlimited Commission authority over: "Such obligations that arise pursuant to the commission's authority under the Communications Act of 1934, as amended." Indeed, the New Hampshire Telephone Association (representing FairPoint and others) has argued that:

There are a number of areas, assessments, pole attachments, universal service, intercarrier relationships, where the Commission still has jurisdiction in many respects.

See DT 12-308, Transcript of Hearing on Nov. 16, 2012, p. 62, ll. 14-17. And:

SB 48 does not allow any carrier, including a VoIP provider, to escape any obligations it may have to preserve universal service.

See Brief of Rural Carriers of the New Hampshire Telephone Association in DT 12-308, p. 5. It would be contrary to the obligation to preserve universal service if all low-income persons and families living in the same household lose their price cap protection simply by virtue of living together.

Finally, in addition to RSA 363:8, I, and notwithstanding the legislatively required price caps for basic service, "[t]he commission shall seek to ensure that affordable basic telephone

services are available to consumers throughout all areas of the state at reasonably comparable rates.” (Emphasis added). RSA 374:22-p, III. The Legislature kept this requirement. While this provision may not be applicable in this particular case, NHLA asks the Commission to refrain from a ruling that indicates the price cap provisions of RSA 374:22-p, VIII(b) are the only method for Commission oversight of prices for basic telephone services. Had the Legislature intended to rely only on the price cap regulation in RSA 374:22-p, VIII(b), it would have erased RSA 374:22-p, III. Moreover, RSA 374:22-p, VIII(b) deals with “basic service” and RSA 374:22-p, III deals with “basic telephone services” (plural). The Commission should refrain from a ruling that prematurely circumvents its requirement to ensure affordable basic telephone services in possible future cases.

B. A Basic Service Customer of an ELEC-ILEC Does Not Lose His or Her Price Cap Protection for Basic Service Simply Because the Customer May Get a Service with Another Company, Like Long Distance Service.

Mr. Whalen’s complaint raises the issue of the applicability of the price caps for basic service where the customer has only basic service with the ELEC-ILEC but has another service with a different company, like long distance.

RSA 374:22-p, I(b)(defining “basic service”) and RSA 374:22-p, I(c)(defining “nonbasic service”) must be read in conjunction with the price cap provision of RSA 374:22-p, VIII(b). Statutes should be construed together so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Professional Firefighters of Wolfeboro v. Town of Wolfeboro*, 164 NH 18, 22 (2012); *Grand China v. United Nat’l Ins. Co.*, 156 NH 429, 431 (2007);

RSA 374:22-p, I(c) provides that: “Any combination of basic service along with any other service or feature offered by the telecommunications service provider is nonbasic service...” (Emphasis added). With the words in the underlines clause of “the” and “provider,” which is singular, the Legislature focused this language on one single provider. The price caps in RSA 374:22-p, VIII(b) focuses on “customers.” Had the Legislature intended customers to lose price cap protection for basic service based on getting long-distance service from a different provider it would not have used the word “the” and it would have added an “s” to the end of the word “provider” to make the word plural. The price cap analysis is clearly limited to services the customer gets from the ELEC-ILEC provider itself.

In terms of long distance, part of the definition of “basic service” includes “[t]he ability to complete calls to any other telephone line, which is capable of receiving calls, in the state” (RSA 374:22-p, I(b)(3)). (Emphasis added). New Hampshire residents who work or have health related needs and appointments in Massachusetts, or even at the White River Junction VA hospital, need to make out-of-state (or long distance) calls. It is simply not reasonable for the many ELEC-ILEC customers who need to place calls out-of-state to automatically risk losing their basic service price cap protection, simply because they get long-distance service from another company, get a calling card, or get a cell phone/track phone enabling them to make calls out-of-state.

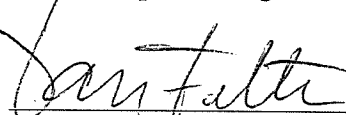
Moreover, Senate Bill 48 promotes customer choice and competition. It runs counter to this underlying purpose of Senate Bill 48 for an ELEC-ILEC to force a customer to discontinue contracting for service with another company in order to get the price cap for basic service from an ELEC-ILEC. Such interference may implicate the customer's right to contract with others. Additionally, rate increases on basic service customers in these situations may actually coerce the customers into purchasing additional services through the ELEC-ILEC, and result in an anti-competitive effect. Since the statutory analysis for the price caps focuses on what a customer gets from the ELEC-ILEC provider, it should be none of the ELEC-ILEC provider's business what a person does with other companies.

WHEREFORE, NHLA respectfully requests the following orders from the Commission:

- 1.) ELEC-ILECs be prohibited from limiting the applicability of the price caps in RSA 374:22-p, VIII(b) to only one per household and/or physical location/addresses without considering the facts and circumstances of each customer line;
- 2.) FairPoint review basic service price increases it has imposed since August 10, 2012 on households and/or physical locations/addresses with more than one customer line, and retroactively credit customers who should have otherwise been afforded the price caps in RSA 374:22-p, VIII(b);
- 3.) ELEC-ILECs be prohibited from limiting the applicability of the price caps in RSA 374:22-p, VIII(b) to customers who have only basic service from the ELEC-ILEC, but who contract for another service from a different company, like long distance;
- 4.) FairPoint review basic service price increases it has imposed since August 10, 2012 on any customer with only basic service with the ELEC-ILEC but who had a service from another company, like long distance, and retroactively credit customers who should have otherwise been afforded the price caps in RSA 374:22-p, VIII(b);
- 5.) ELEC-ILECs be prohibited from interfering with a customer's right to contract with other companies by communicating the customer will lose price cap protection if the customer does so; and
- 6.) Grant such other relief as may be just.

Respectfully submitted,

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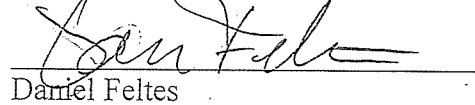
Email: dfeltes@nhla.org

Date: 5/7/14

Certification of Service

I certify that on May 7, 2014 copies of this filing were hand delivered to the Commission and the parties present.

New Hampshire Legal Assistance

A handwritten signature in cursive script, appearing to read "Dan Feltes", is written over a horizontal line.

Daniel Feltes