NECTA

New England Cable & Telecommunications Association, Inc.

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February 15, 2013

Via Hand Delivery and Electronic Mail
Ms. Debra A. Howland, Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: IR 13-038 – Stakeholder Review of New Hampshire's Utility Assessment System

Dear Ms. Howland:

The New England Cable and Telecommunications Association ("NECTA"), on behalf of its members, submits this letter in response to Staff's first set of information requests, issued on January 31, 2013 in the above captioned proceeding.

The issues under review in this proceeding are important and deserve close attention. As a result, NECTA plans to be an active participant. However, the specific questions asked by Staff raise complex questions of law, fact, and policy that NECTA is not currently prepared to answer. In the meantime, NECTA respectfully requests that the Commission and Staff accept the comments below in lieu of specific responses to Staff's individual information requests. NECTA believes that this approach is in keeping with your letter accompanying the requests, which states that "[t]he intent of these requests is to identify issues and generate further discussion of the of the Commission's current assessment procedures in light of recent developments, as raised in initially in Docket No. DM 12-276," and characterizes the responses being sought as "preliminary position statements to facilitate stakeholder discussion, rather than formal, adjudicative positions." In addition, NECTA has been advised by Staff that responses to the information requests are voluntary. NECTA hopes to be able to provide additional information in the near future.

While at this time NECTA's members take no specific position on whether the Office of Consumer Advocate's expenses should be assessed against Excepted Local Exchange Carriers, NECTA generally agrees with FairPoint's concerns about the way that utility assessments are calculated under RSA 363-A. In particular, NECTA agrees that the Commission should not include revenue from jurisdictionally "interstate" telecommunications services in the "gross utility revenue" calculation called for by RSA 363-A:2. NECTA takes this position for several reasons.

First, the Commission appears to lack the statutory authority to do so. RSA 363-A:1 states that the assessments are intended to underwrite the Commission's "performance of its duties relating to the public utilities ..." under its jurisdiction. Thus, the assessments on "gross utility revenue" authorized by RSA 363-A must correspond to the business activities over which the Commission has regulatory authority. The Commission does not have authority, and therefore no "duties," over the interstate services of the telecommunications carriers subject to its jurisdiction. *See, e.g., Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("questions concerning ... interstate communications services are governed solely by federal law and ... the states are precluded from acting in this area"). Because jurisdictionally interstate communications fall outside the Commission's jurisdiction, revenue derived from those services cannot be assessed under RSA 363-A.

Second, and for similar reasons, we are persuaded by FairPoint's argument that the New Hampshire Supreme Court's ruling in *Laconia v. Gordon*, 107 N.H. 209 (1966) (and its progeny) precludes the Commission from assessing interstate revenues to fund its role in regulating intrastate business activity. As *Laconia* explains, licensing fees are charges that "bear a relation to and approximate the expense of issuing the licenses and of inspecting and regulating the business licensed." *Id. at* 211. RSA 363-A assessments are clearly licensing fees under this standard.

The law places clear limits on license fee assessments. Unlike a tax, they "must be incidental to the implementation of a regulatory program ...." *American Automobile Assn. v.* State, 136 N.H. 579, 585 (1992). Thus, the validity of a licensing fee is measured "by the necessary expenses of issuing the license, and of such inspection, regulation and supervision as may be necessary." *Opinion of the Justices*, 112 N.H. 166, 170 (1972). This requirement precludes the Commission from including interstate telecommunications service revenues in its RSA 363-A assessments because it has no authority over those activities.

Third, the assessment on interstate revenues appears to run afoul at least two distinct constitutional principles. Under the Supremacy Clause of the Constitution, states are preempted from regulating in areas in which federal law occupies the field. Under the Communications Act, the Federal Communications Commission (FCC) is responsible for licensing and regulating telecommunications carriers providing interstate and international telecommunications services, and its operations are funded by fees very similar to the RSA 363-A assessment. *See* 47 U.S.C. § 159. The federal assessment on interstate services and revenues reflects the FCC's exclusive role regulating such services. Permitting states to impose assessments on the same revenue would, thus, constitute an impermissible intrusion on the FCC's authority over interstate communications services. In keeping with this principle, the federal district court in Oregon invalidated the Oregon Public Utilities Commission's policy of including interstate service revenues in its assessment for the state universal service surcharge. *AT&T Communications, Inc. v. Eachus, et al.*, 174 F.Supp.2d 1119 (D. Or. 2001). The court found that only revenues derived from intrastate services could be assessed. Likewise, the FCC may not assess intrastate revenues to fund the federal universal

service program. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 446-47 (5th Cir. 1999).

The assessment also entails a threat of multiple taxation of the sort prohibited by the Commerce Clause of the U.S. Constitution. The negative, or "dormant," aspect of the Commerce Clause forbids states from imposing a law that taxes, or places a similar fee, on more than "its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). An imposition on interstate business activities that has no allocation or apportionment mechanism inherently threatens a multiple-tax burden on the interstate actor and is therefore invalid. *See Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939) (invalidating Washington gross receipts tax on unapportioned "gross income of the business").

The *Goldberg* case illustrates the principle. There, the Court recognized that an Illinois assessment on all interstate telecommunications services could violate the Commerce Clause because "some interstate telephone calls could be subject to multiple taxation." *Id.* at 263. The assessment at issue in *Goldberg* was upheld only because it required a link to Illinois for both the telephone call and the billing or charging address *and* it "provide[d] a credit to any taxpayer upon proof that the taxpayer has paid a tax in another [jurisdiction] … on the same telephone call which triggered the Illinois tax." *Id.* at 256. The tax thereby "avoid[ed] actual multiple taxation." *Id.* at 264. RSA 363-A contains neither the necessary linkage nor the required credit.

Moreover, in the area of regulatory fees, a state imposition on interstate commerce is valid only if it is based on some fair approximation of the use of the regulated services or facilities and is not excessive in relation to the property or services provided by the public body. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 713, 715 (1972); *see also Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.,* 567 F.3d 79 (2d Cir. 2009) (striking down passenger fee that funded local public projects not used by interstate travelers). These principles parallel the state-law rules exemplified by the *Laconia* decision.

The RSA 363-A assessment "is calculated by using the gross utility revenue of all public utilities." RSA 363-A:2. Unlike the situation in *Goldberg*, the New Hampshire assessment does *not* provide for any linkage between the revenue and service to New Hampshire residents or any credit in the event that another state imposes an assessment on the same revenue. Instead, the New Hampshire assessment – as it is applied by the Commission – attaches to "gross utility revenue" without any limiting allocation or apportionment principle, like the invalid tax in *Gwin, White & Prince.* Therefore, even if federal statutory law permitted the Commission to place a surcharge on interstate calls for the purpose of funding its work regulating intrastate activities (which it does not), the Commission's Order would still subject carriers in New Hampshire that provide interstate services to an impermissible threat of duplicate fees. This violates the dormant Commerce Clause.

Despite its belief in the need for reforming the RSA 363-A assessment methodology, NECTA wants to be clear about its motives in this proceeding. NECTA's members are *not* seeking to avoid paying their fair share to support the Commission's activities. This is illustrated by, for example, the method by which one of its members, Comcast Phone of New Hampshire, LLC ("Comcast Phone") calculates the revenue base currently subject to assessment under RSA 363-A. Comcast Phone has, for many years, imputed *all* of the retail revenues collected by its affiliate that provides interconnected voice over Internet protocol ("VoIP") service for purposes of calculating Comcast Phone's contribution obligations under RSA 363-A. Similarly situated Comcast affiliates in other states do the same thing for similar state assessments. While Comcast Phone could reasonably argue that VoIP revenues should be excluded because VoIP is not subject to regulation by the Commission, it has not done so. Thus, Comcast has demonstrated its willingness to pay *more* than its fair share in certain circumstances. At least one other NECTA member, Time Warner Cable, also pays the assessment on a similar basis.

That said, NECTA does believe that the Commission (or the Legislature, if necessary) should consider revising the assessment methodology to make it more equitable. In keeping with the cost-causation principles articulated by the Court in *Laconia*, NECTA believes that the Commission should consider seeking a revision to the RSA 363-A assessment methodology to reflect the Commission's *actual* workload/activities. Under the current assessment formula, all public utilities in the state are assessed the same proportionate share based on their respective revenues, without regard to the Commission's expenses associated with different industry segments. In the extreme, this means that even if the Commission devoted no resources to regulating the New Hampshire telephone industry in a given fiscal year, telephone utilities would nonetheless be required to fund the Commission's budget at the same rate as other industries that actually occupy the Commission's time. The inequity of this approach is obvious. NECTA believes that the Commission should consider weighting assessments to reflect the Commission's actual workload by industry. General administrative, overhead or other indirect costs could be apportioned equally among each industry that the Commission regulates.

In addition, the information requests also ask whether entities that are not public utilities under RSA 362:2 should be required to fund the Commission's expenses. As discussed at length above, the Commission has the authority to assess the surcharge solely for the purpose of underwriting the Commission's performance of its duties relating to the public utilities under its jurisdiction. The Commission cannot therefore extend the assessment to non-public utilities or unregulated entities to fund activities by the Commission relating to regulating public utilities.

Finally, NECTA notes that most, if not all, of the financial information the Commission seeks can be found in the Annual Reports that all public utilities file with the Commission.

NECTA wishes to thank the Commission for inviting it to participate in this proceeding and for accepting this letter in lieu of formal responses to each of Staff's individual questions.

Respectfully submitted,

Paul R. Cianelli (ssg)

Paul R. Cianelli, President

cc: Service List (electronic mail only)
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