IR 13-038 STAKEHOLDER REVIEW OF ASSESSMENT PRACTICES

Staff Report
March 29, 2013

I. Background

A. Statutory Framework for Current Assessment Practice

Under RSA 363-A, public utilities operating in New Hampshire are assessed a portion of their revenues to fund expenses incurred by the Public Utilities Commission (Commission) in the implementation of its regulatory duties. Expense allocations must be assessed against each public utility and rural electric cooperative in an amount equal to its proportionate share. RSA 363-A:2. To determine the applicable allocations, the Commission calculates the gross utility revenue of all public utilities plus 33 percent of the gross utility revenue of certain rural electric cooperatives, and then allocates a percentage to each utility in direct proportion to that utility's revenues as they relate to total utility revenues as a whole. For utilities that earn minimal revenues, the Commission assesses a minimum fee, in such proportion as the Commission determines to be fair and equitable, pursuant to RSA 363-A:2. Utilities that earn less than $10,000 in gross revenues during the preceding fiscal year are exempted from assessment under RSA 363-A:5.

Certain issues have been raised before the Commission regarding the current utility assessment practice in New Hampshire in light of recent legislative and industry developments. As a result, the Commission decided to launch a stakeholder review of the current practice and related issues, as discussed below.

B. FairPoint Complaint

On September 17, 2012, Northern New England Telephone Operations LLC (NNETO) and Enhanced Communications of Northern New England, Inc. (Enhanced Communications) (collectively, FairPoint) filed with the Commission an objection to the assessment billed to FairPoint under RSA 363-A:4. NNETO is an incumbent local exchange carrier in New Hampshire, Maine and Vermont and, with the enactment of Senate Bill 48 (SB 48) in 2012, operates as an excepted local exchange carrier (as described further below) in New Hampshire. Enhanced Communications is a competitive intraLATA toll provider registered to do business in New Hampshire. FairPoint's objection requested that the assessment be lowered, arguing that the Commission has no statutory authority to levy assessments on the interstate revenues of either NNETO or Enhanced Communications. FairPoint also contended that NNETO and any other "excepted local exchange carriers" should not be required to fund expenses of the Office of Consumer Advocate (OCA) due to the enactment of SB 48.

C. *Senate Bill 48*

SB 48 modified state regulation of telephone service providers. The bill defined a new category of telecommunications utilities called "excepted local exchange carriers" (Excepted LECs or ELECs), and modified certain statutes regulating rates, charges, and billing as pertain to such carriers. This category includes FairPoint, competitive local exchange carriers, competitive toll providers, payphone providers and any independent local exchange carrier who elects to be an ELEC. Under the revised statutes, regulation of ELECs is streamlined, such that ELECs no longer have to file tariffs or seek approval for special pricing, and are no longer subject to many of the State's current utility laws.

A few utility provisions continue to apply to incumbent ELECs. Incumbent ELECs, for example, cannot raise rates for basic service by more than 10% each year without Commission approval. For customers receiving a discount on their telephone bills through the federally funded Lifeline program, price increases in the rates for basic service cannot exceed 5% each year without Commission approval. Incumbent ELECs may not discontinue basic service without Commission approval and their assets may be transferred or sold only when the Commission finds the utility to which the transfer is to be made is technically, managerially and financially capable of maintaining the obligations of an incumbent LEC.

The duties of the Office of Consumer Advocate were limited under SB 48 to those duties that do not pertain to any end user of an ELEC or services provided to such end users. SB 48 also authorized the Commission to continue to regulate safety, vegetation management, emergency response, and storm restoration requirements for poles, conduits, ducts, pipes, pole attachments, wires, cables, and related plant and equipment of public utilities and other private entities located within public rights-of-way and on, over, or under state lands and water bodies.

The definition of a public utility in RSA 362:2 and the assessment statutes in RSA 363-A were unchanged.

II. Procedural Background - Investigative Review

In Order 25,451, issued on January 13, 2013, in Docket No. DM 12-276, the Commission directed Staff to initiate a collaborative stakeholder process to review the current utility assessment system, in light of statutory and industry changes since the assessment statute, RSA 363-A, was last amended. Staff was asked to conduct an investigative, rather than adjudicative review, to collect pertinent information through written requests and responses and technical session discussions with stakeholders.

Information requests were issued to well over 600 public utilities contacts on January 31, 2013. Responses from 10 companies and the Office of Consumer Advocate (OCA) were submitted. Copies of all responses are available on the Commission's website at: http://www.puc.nh.gov/Regulatory/Docketbk/2013/13-038.html. A technical session was held on March 12, 2013, at the Commission. Participants included representatives from FairPoint, Comcast, New England Cable & Telecommunications Association (NECTA), AT&T Corp. and

TCG New Jersey, segTEL, Tech Valley Communications (TVC), Public Service Company of New Hampshire (PSNH), Unitil, Liberty Utilities, National Grid, and the OCA. Following the technical session, NECTA and AT&T provided additional input to Staff. Staff circulated a draft of this report to all participants on March 28, 2013.

III. Comments received

A. *Telecommunications Company Stakeholders*

AT&T

AT&T posits that the current allocation method is not fair or reasonable and should be changed to reflect the modified regulatory situation resulting from the enactment of SB 48 in 2012, noting that the Commission's duties pertaining to ELECs have lessened considerably, and that OCA's jurisdiction to petition, initiate, appear or intervene in matters related to rates, terms, conditions of service provided by ELECs to end user customers has been eliminated. AT&T adds that the current allocation method creates an unfair cross-subsidization of Commission expenses between competitive telecommunications carriers that are subject to market regulation (as well as some ILECs) and gas and electric utilities subject to rate-of-return regulation. AT&T also argues that the current method is unfair to the extent that it is based on the "gross" revenue of utilities and does not take into account the uncollectible portion of revenues.

To address the inequities it perceives, AT&T suggests that RSA 363-A:2 be revised to allow removal of uncollectible revenue from the calculation of assessments, and to reduce assessments on telecommunications revenue by 2/3 as is done in the allocation methodology applied to NHEC. AT&T adds that OCA's expenses should be assessed only on utilities subject to its jurisdiction.

AT&T further comments that telecommunications network facilities may be used to provide both interstate and intrastate services, which are regulated by the Commission or the Federal Communications Commission (FCC), based on whether facilities and services are inter- or intrastate in nature. According to AT&T, the inclusion of interstate and international revenue of ELECs in assessment allocations is questionable in light of SB 48's elimination of the Commission's authority to investigate interstate rates under RSA 363:22. AT&T adds that non-public utility revenues should not be required to fund PUC expenses.

After the March 12, 2013 technical session, AT&T further recommended against changing the pool of payers covered by the utility assessment or changing the methodology used to determine the utility assessments -- for example, to flat fees for different activities -- from a revenue basis as is used today. In addition, the focus of this stakeholder review should be limited to bring the level of utility assessments into compliance with SB 48 and the consequent reduced level of Commission regulation. According to AT&T, attempting to change the methodology or pool of payers would unnecessarily complicate the process of making the required modifications to comply with SB 48 or to align utility assessments with reduced levels of Commission regulation and involvement with telecom matters.

NECTA

NECTA generally agrees with FairPoint's concerns about current method – namely, that the Commission should not include revenue from jurisdictionally "interstate" telecommunications services in the gross utility revenue calculation, as the Commission appears to lack statutory authority to do so. NECTA notes that under RSA 363-A:1, assessments are intended to underwrite the Commission's "performance of its duties relating to the public utilities…" – thus, assessments must correspond to the business activities over which the Commission has regulatory authority.

NECTA adds that the N.H. Supreme Court ruling in *Laconia v. Gordon*, 107 N.H. 209 (1966) precludes the Commission from assessing interstate revenues to fund its role in regulating intrastate business activity. NECTA further posits that RSA 363-A assessments are licensing fees subject to clear limits under the law and as such must be measured "by the necessary expenses of issuing the license, and of such inspection, regulation and supervision as may be necessary," citing *Opinion of the Justices*, 112 NH 166, 170 (1972).

NECTA comments further that the current assessment practice appears to run afoul of at least two constitutional principles under the Supremacy and Commerce Clauses of the U.S. Constitution. Under the Supremacy Clause, for example, states are preempted from regulating in areas in which federal law occupies the field. Here, according to NECTA, the FCC is responsible for licensing and regulating telecommunications carriers that provide interstate and international telecom services, and its operations are funded by fees similar to the RSA 363-A assessment (47 U.S.C. sec. 159). Thus, according to NECTA, state assessments on the same revenue would constitute an impermissible intrusion on the FCC's authority over interstate communications services (*AT&T Communications, Inc. v. Eachus, et al.*, 174 F.Supp.2d 1119 (D.Or. 2001).

NECTA also notes that under the Commerce Clause, state assessments should not impose multiple taxation on interstate revenues (*Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989)); and, further, 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 (*Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 713, 715 (1972)). NECTA comments that New Hampshire's utility assessment practice does not provide for any linkage between the revenue and service to the State's residents or any credit in the event another state imposes an assessment on the same revenue.

NECTA concluded that its members do not seek to avoid paying their fair share to support the Commission's activities, but suggests that the Commission consider revising the assessment methodology to make it more equitable and in keeping with cost-causation principles to reflect the Commission's actual workload and activities, perhaps through weighted assessments to reflect Commission's actual workload by industry while apportioning general administrative, overhead or other indirect costs equally among each industry that the Commission regulates. Finally, NECTA posits that the Commission does not have authority to assess non-public utilities or unregulated entities to fund Commission activities related to the regulation of public utilities.

After the technical session, NECTA commented that, for purposes of the utility assessment imposed under RSA 363-A, the term "gross utility revenue" used in that statute should not include revenue from interstate telecommunications services. For purposes of the utility assessment imposed under RSA 363-A, NECTA argues that the term "gross utility revenue" should not include revenue that a company collects on behalf of and pays to a third party.

segTEL

As a CLEC operating in New Hampshire, segTEL files annual reports and pays utility assessments. segTEL noted that NECTA's written remarks offer an astute analysis of the current legal status of the Commission's assessment practices, and that segTEL would be happy to provide information and analysis pertaining to its regulated vs. nonregulated, intrastate vs. interstate (except for retail toll), and direct vs. pass-through revenue – but that the compilation of such information would take time, as it has never been requested before.

TVC

TVC registered as a CLEC in 2012 and, as such, will file annual reports and pay utility assessments. TVC is currently in the process of establishing its plans for investment in infrastructure in New Hampshire and development of products and, since this review process could result in substantially increased costs of operating in the State, TVC elected to participate in order to assess the climate for future investment in infrastructure and offerings.

FairPoint

FairPoint believes that the current allocation method as applied in practice is not fair or reasonable and that the Commission needs to analyze and report on the amount of time it spends attending to matters or issues raised by persons or entities that pay no assessment. According to FairPoint, entities that utilize the Commission's regulatory processes should be required to fund Commission expenses in some manner – for example, through service-based fees tied to the amount of work involved or hours spent by the Commission and staff resolving issues, although consumers who seek to resolve complaints should not be subject to filing fees.

FairPoint comments that the fact that the Commission requires utilities to report revenues of an interstate nature does not mean that assessments on such revenue are lawful, adding that the Commission is preempted from taking any 'regulatory action' on interstate revenues and deregulated services that FairPoint records as interstate special access revenues. FairPoint further adds that the ability of the Commission to file comments in an FCC proceeding does not rise to the level of regulatory action or thereby grant authority to recover costs for such participation.

FairPoint notes that its interstate services and operations generally use the same network facilities that provide services historically regulated by the Commission – i.e., intrastate operations, but that fact is irrelevant to the analysis of what constitutes a fair, reasonable and lawful utility assessment. According to FairPoint, Commission jurisdiction over telecommunications infrastructure within the state used to provide both intra and interstate services does not justify an assessment that includes interstate revenue. FairPoint adds that the cost of network facilities is allocated to (i) non-regulated, (ii) interstate and (iii) intrastate operations in accordance with FCC rules.

According to FairPoint, the Commission's assessment should be based on regulated intrastate revenues and nothing further, adding that SB 48 significantly deregulated the retail telecommunications market and the Commission now has little jurisdiction over retail operations of ELECs. In conclusion, FairPoint suggests that a fair assessment would reflect the lessened regulation, including ELEC assessments at dramatically reduced levels from the current level.

Verizon Business Services/Verizon Access Transmission Services, Teleconnect, TTI National

Verizon commented that RSA 363-A:2 does not specify whether "gross utility revenue" includes interstate revenues, so the statute itself is not unfair or unreasonable on its face, but the allocation method is not fair or reasonable in practice and may be constitutionally infirm, because it is not authorized by state statute and it imposes on exclusive federal jurisdiction over interstate services with respect to telephone service.

Verizon adds that the Commission does not have regulatory authority over interstate services offered by telephone companies and that it is not fair or reasonable to assess a tax or license fee on services that are beyond its regulatory authority. According to Verizon, the assessment allocation method should be applied only to gross intrastate revenue and that RSA 363-A:2 should be revised to clarify that gross utility revenue includes only revenue derived from intrastate service.

Verizon does not believe that non-public utilities should be required to fund Commission expenses.

Verizon further notes that its interstate operations rely on intrastate facilities and/or services of unaffiliated entities – for example, interstate calls are routinely handed off to a local service provider for termination to end users (including transmission, switching, common line functions), and that such local service providers are subject to some degree of regulation by the Commission.

B. ***Electric Company Stakeholders***

PSNH

PSNH argued that the current assessment method is unfair, unreasonable, unlawful, and unconstitutional. According to PSNH, the current assessment method is under-inclusive because it does not include certain market participants – that is, competitive electric energy suppliers and interstate gas pipelines. PSNH believes that entities that benefit from frequent use of Commission proceedings and services should participate equally in the payment of Commission expenses to ensure level competitive footing. PSNH notes that trade and commerce subject to the jurisdiction of the Commission is exempt from the consumer protection law and, therefore, to the extent RSA 374-F:7 exempts competitive suppliers from consumer protection laws applicable to other businesses, the Commission has heightened responsibility to monitor such entities. Thus, such entities should be subject to Commission assessment. Further, PSNH notes that while the Commission has concluded that it is appropriate to include federally regulated revenues in New Hampshire assessments, the current assessment for fiscal year 2013 does not appear to assess all federally regulated entities with a presence in New Hampshire, such as interstate gas pipelines. PSNH also argues that the current assessment method is over-inclusive to the extent that it includes PSNH transmission service revenue, which comes under FERC jurisdiction, and therefore should not be included in the State assessment.

PSNH recommends two options: 1) that the current method of assessment be modified to include competitive suppliers as well as all companies and revenues over which the Commission asserts jurisdiction, including interstate gas pipelines; and 2) if the Commission decides that competitive suppliers should not be included in the assessment process, then it should exclude from utility assessments those revenues attributable to the provision of default energy service. Similarly, PSNH suggests that if the Commission excludes revenues subject to the jurisdiction of the FCC for telecommunications companies or if it fails to include all federally-regulated sources in its assessments, then revenues regulated by the FERC for the state's electric utilities should similarly be excluded.

PSNH further notes that most competitive companies do not file a FERC Form-1; however, the Commission's rules utilize "gross receipts" of competitive electric suppliers to assess the financial security required by Puc 2003.01(d)(4). PSNH also notes that approximately 15.5% of its reported revenue pertains to revenue collected on behalf of, and paid to, another entity.

NHEC

The New Hampshire Electric Cooperative (NHEC) favors an assessment methodology that links cost recovery to entities that cause the costs incurred by the Commission. NHEC does not raise objections to the fairness or reasonableness of RSA 363-A; nor has it undertaken a systematic review of alternative approaches to the current assessment process. It notes that it will respond to new facts or positions raised by this investigative review.

Unitil

Unitil noted that neither Unitil Energy Systems, Inc. nor Northern Utilities, Inc. generates revenue associated with interstate operations.

Liberty Utilities

Liberty Utilities took no position at this time as to the fairness or reasonableness of the current assessment allocation method, or whether non-public utilities should be assessed. Liberty Utilities also reported that neither Granite State Electric Company d/b/a Liberty Utilities nor EnergyNorth Natural Gas, Inc. d/b/a Liberty Utilities generates interstate revenue, such that all revenue from each company is regulated by the NHPUC, and that Granite State gas Transmission, Inc., an interstate gas transmission pipeline company regulated by the FERC, provides tariffed firm and interruptible gas transmission services to Northern Utilities, among others.

C. *Office of Consumer Advocate*

OCA noted that, without a thorough analysis, it cannot determine at this time if the methodology should be changed, adding that the unevenness of any methodology that attempts to link cost recovery with cost causers is due to the fact that costs incurred by the Commission can vary greatly in any given year. The OCA further states that the current allocation method is legal and constitutional. (*Petition of Southern New Hampshire Medical Center, 2011-754* Supreme Court of New Hampshire (October 30, 2012) ("...[W]e will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution.")). The OCA further notes that every public utility benefits from or is affected by regulatory authority, whether or not an individual company falls under scrutiny in a particular calendar year. Commission decisions create precedent for all utilities to follow and the Puc rules apply to all utilities, even if they are not involved in a current proceeding before the Commission. Therefore, by casting a wide net and assessing the gross revenues of all public utilities, the current methodology equitably allocates the regulatory financial burden.

At the March 12, 2013 technical session, OCA questioned the appropriateness of the 33% factor used to calculate NHEC revenues in the existing methodology under the current statute.

IV. Technical Session Discussion

Participants in the March 12, 2013 technical session generally agreed that modifications to the current utility assessment practice are needed to reflect recent industry and regulatory developments. There was general consensus that entities that are not public utilities but avail themselves of Commission services, including registrations and certifications, should be assessed an amount that reflects reasonable costs incurred by the Commission. Participants suggested that different methodologies could be applied to different industries, while similar entities within industries should be treated in a similar manner. Several participants reiterated their concern that uncollectible revenues are included in assessment calculations, and proposed that uncollectible revenues be excluded from assessment. Certain participants proposed reconsideration of the 33 percent statutory assessment on NHEC while a similar discounted assessment rate could be applied to entities that are subject to similarly reduced levels of regulation. It was also noted that the Maine PUC recently adjusted its assessment process in light of recent legislative changes pertaining to the telecommunications industry.

V. Conclusion/Recommendation

Staff agrees with participating stakeholders that there are certain assumptions and calculations in the current utility assessment system that should be examined in light of legislative and industry developments during the past several years. Staff proposes that stakeholder discussions continue through further exchange of information and one or more additional technical sessions to examine more closely the issues raised thus far, and to enable Staff to provide a more fully developed recommendation for potential Commission action. Other areas to explore through a continued stakeholder process could include a survey of how other state commissions and state regulatory agencies are funded and how to address the assessment of OCA expenses.

Staff thus believes there is further work to be done and proposes to convene another technical session in late May to flesh out these ideas with the parties. Toward that end, Staff will develop a straw proposal for consideration by parties at that technical session.