

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 14-102

WILLIAM G. WHALEN

**Complaint Against Northern New England Telephone Operations LLC d/b/a
FairPoint Communications-NNE – Rate Increase Dispute**

MOTION FOR REHEARING OF ORDER NO. 25,679

Pursuant to RSA 541:3 and N.H. Admin. Rules Puc 203.33, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”), hereby moves the New Hampshire Public Utilities Commission (the “Commission”) to reconsider, in part, its Order Ruling on Complaint, No. 25,679, dated June 26, 2014 (the “Order”) and to clarify it in part. Specifically, FairPoint respectfully requests that 1) the Commission reverse its decision to deny FairPoint’s Motion for Confidential Treatment of certain documents related to FairPoint’s confidential and proprietary internal Methods and Procedures (“M&Ps”) and, 2) clarify its analysis of how the rules regarding basic service apply to customers who have presubscribed to long distance service. In support of this Motion, FairPoint states as follows:

I. INTRODUCTION AND BACKGROUND

On March 24, 2014, the Complainant filed a complaint with the Commission against FairPoint regarding rate increases reflected in bills received from FairPoint for two landline telephone services provided to his residence. The Complainant asserted that both lines qualified as “basic service” and that the rate increases exceeded the statutory cap on increases in the rate for basic service.

After a hearing on the Complaint, the Commission issued its Order on June 26, 2014, in

which, among other things, it held that FairPoint had improperly categorized the Complainant's two telephone lines and that they both qualified for a residential basic service rate. Accordingly, the Commission ordered FairPoint to provide a refund, plus interest, to the Complainant for any amounts charged to those accounts in excess of the amounts a residential basic service customer would have been charged for each telephone line. In addition, the Commission denied FairPoint's Motion for Confidential Treatment and Request for Protective Order regarding the confidential and proprietary M&Ps, which pertained to the criteria that determine a customer's eligibility to be charged the rate for basic service. Furthermore, in regard to certain other issues, the Commission expressly disclaimed that its Order decided whether presubscription to long distance service provided by FairPoint, or by any affiliate of FairPoint, renders a customer ineligible for the basic service rate classification.

II. STANDARD OF REVIEW

The standard of review for a Motion for Rehearing is well established. The governing statute states:

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.¹

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings.² To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is

¹ RSA 541:3.

² See *Dumais v. State*, 118 N.H. 309, 312 (1978). See also Office of the Consumer Advocate, 148 N.H. 134, 136 (2002) (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).

unlawful or unreasonable.³

III. DISCUSSION

A. The Commission's Denial of FairPoint's Motion for Confidential Treatment is Contrary to Law and Should be Reversed.

In the Order, the Commission indeed found “that FairPoint has a legitimate privacy interest in the two internal corporate policy documents included as attachments to Exhibit 9 [*i.e.* the M&Ps].”⁴ However, the Commission still stripped FairPoint of its exemption from disclosure under RSA 91-A:5, IV, finding that “the public has a substantial interest in disclosure of the criteria and policies *used by FairPoint* to determine customer eligibility for basic service,”⁵ justifying this decision on the basis of the alleged difficulty in navigating FairPoint’s website.⁶

However, the Commission’s decision to override FairPoint’s privacy interest is not permitted by the relevant statute. New Hampshire’s Right-to-Know Law, RSA 91-A, is solely designed to provide the public with information about the workings of *government*, not the workings of a *private party* like FairPoint. Regardless of the interests of the public, the Commission has no authority to mandate the release of FairPoint’s confidential and proprietary information if this information does not pertain to the workings of the Commission. This is particularly true when, as explained later in this Motion, the public interest can be served without violating FairPoint’s rights.

The New Hampshire Supreme Court explained this legal concept in *Union Leader Corp.*

³ See RSA 541:3; RSA 541:4; DT 07-027; Petitions for Approval of an Alternative Form of Regulation, Order No. 25,194 at 3 (Feb. 4, 2011).

⁴ Order at 15.

⁵ *Id.* (emphasis supplied).

⁶ *Id.*

v. *City of Nashua*, a key case interpreting the Right-to-Know Law.⁷ In its decision, the Court reiterated the legislature’s statement of purpose, that:

The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all **public bodies**, and their accountability to the people. In other words, the purpose is to provide the utmost information to the public about what its **government** is up to. If the general public has a legitimate, albeit abstract, interest in the requested information such that disclosure is warranted, disclosure must be made Conversely, if disclosure of the requested information does not serve the purpose of informing the citizenry **about the activities of their government**, disclosure will **not** be warranted **even though the public may nonetheless prefer**, albeit for other reasons, that the information be released.⁸

Equating the Right-to-Know Law with the federal Freedom of Information Act, the Court went on to emphasize that:

[o]fficial information that sheds light on **an agency’s performance of its statutory duties** falls squarely within th[e] purpose [of the FOIA]. That purpose, however, **is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct**. [P]resumably in the typical case in which one private citizen is seeking information about another, the requester [did] not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to [the] request would not shed any light on the conduct of any Government agency or official.⁹

As the Commission stated in its Order, the release of the M&Ps was solely to inform the public of *FairPoint’s* conduct -- not that of the Commission. This purpose, however, is contrary to the holding contained in *Union Leader Corp. v. City of Nashua*.

Furthermore, the Commission’s Order is unnecessary. Although RSA 378:1-a exempts ELECs like FairPoint from almost all of the provisions of Chapter 378 [“Rates and Charges”] as it pertains to end users and end user services, it does provide, in part, that “[e]xcepted local

⁷ *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996).

⁸ *Id.* at 476-77 (internal citations omitted).

⁹ *Id.* at 477 (quoting *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 773; 109 S.Ct. 1468, 1481-82 (1989)).

exchange carriers shall post the rates, fares, charges, prices, terms, and conditions of all such services of all [end user] services on its publicly available website.” To the extent that the Commission determines that customers are encountering difficulty “in ascertaining these criteria and policies from FairPoint’s bills, communications, publications, and public web site,”¹⁰ it is far more reasonable, not to mention lawful, for the Commission to direct FairPoint to clarify its publications, rather than to force FairPoint to disclose confidential and proprietary documents to the public.

Accordingly, the Commission should reverse its decision regarding production of FairPoint’s M&Ps, grant FairPoint’s Motion for Confidential Treatment, and direct FairPoint to engage in discussions with the Commission Staff to craft a sufficiently informative posting regarding FairPoint’s end user services. FairPoint has already had preliminary discussions with the Commission Staff, and Staff have indicated their assent to modification of the Order to maintain the confidentiality of Attachments 1 and 2 to Exhibit 9, without making any concession regarding the merits of FairPoint’s legal arguments in this Section A. As described in the attached letter from Staff,¹¹ this assent is contingent on FairPoint posting information on an easily navigable web page that describes its policies regarding basic service eligibility. The information posted on this page will be at least as comprehensive and detailed as the information contained in the M&Ps, and will be developed in consultation with and with the concurrence of Staff. The deadline for completing the posting will be 60 days after the date that this Motion for Rehearing is filed.

¹⁰ Order at 15.

¹¹ See Letter from D. Wiesner, Staff Counsel, NH PUC to S. Galvin, Counsel to FairPoint, July 25, 2014, attached hereto as Attachment 1.

B. The Commission Should Clarify that its Analysis Regarding the Effect of Presubscription on Basic Service is Limited to Situations in which the Customer is Presubscribed to an Unaffiliated Carrier.

In Section IV of the Order, the Commission stated “[n]or do we decide whether presubscription to long distance service provided by FairPoint, or by any affiliate of FairPoint, renders a customer ineligible for basic service rate classification.”¹² However, FairPoint notes that this disclaimer might be construed as inconsistent with certain aspects of the Commission’s analysis in Section III.2 of the Order. In that portion of the Order, the Commission noted that “FairPoint’s initial position was that, although the ability to presubscribe to a long distance carrier is a required element of basic service, any customer who took advantage of that opportunity would lose the basic service classification. . . .”¹³ After describing FairPoint’s modification of this position (specifically that prescribing to a third party, as opposed to FairPoint or a FairPoint affiliate, did not lift the basic service classification), the Commission concluded, without qualification, that “FairPoint’s now-abandoned initial position was legally incorrect.”¹⁴ However, it is not clear from that statement whether the Commission meant that FairPoint’s position was incorrect just as it related to presubscription to third party long distance service, or whether the position was incorrect as it related to *any* long distance service, including that of FairPoint or its affiliates.

FairPoint respectfully requests that the Commission clarify that the subject of its assertion in Section III.2 is restricted to situations in which the customer is presubscribed to a long distance carrier that is not affiliated with FairPoint and confirm that the Commission has indeed made no decision on whether the basic service rate classification is lifted when a customer

¹² Order at 16.

¹³ *Id.* at 13.

¹⁴ *Id.*

presubscribes to FairPoint or any FairPoint affiliate. This would be consistent with the disclaimer in Section IV of the Order.

IV. CONCLUSION

For the reasons described herein, FairPoint respectfully requests that the Commission

- i) reconsider its decision to deny FairPoint's Motion for Confidential Treatment of certain documents related to FairPoint's internal Methods and Procedures ("M&Ps") and,
- ii) clarify the reach of its conclusion about FairPoint's initial position regarding the effect of presubscription on basic service.

Respectfully submitted,

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

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

Dated: July 25, 2014

By:  _____

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