

ORIGINAL
N.H.P.U.C. Case No. <u>DT 07-011</u>
Exhibit No. <u>RR 1</u>
Witness: <u>Steve Freeman</u>
DO NOT REMOVE FROM FILE

DT 07-011
Responses to Record Requests
Issued at March 19, 2012 Hearing
April 2, 2012
PUBLIC

1. Does the Commission have the legal authority to allow FairPoint to utilize SQI penalty funds for broadband expansion (i) under the Commission's current legislative mandate and (ii) under the Commission's current legislative mandate as revised/limited by Senate Bill 48 (the NH deregulation legislation)?

Response:

(i) under the Commission's current legislative mandate;

Yes. The SQI penalties do not derive from any express legislative mandate regarding service quality, but rather under the Commission's legislative mandate to regulate in the "public interest." In that vein, the SQI penalties arise from the Staff Settlement Agreement with the Commission staff in DT 07-011, the proceeding in which FairPoint acquired Verizon's northern New England assets.¹ Citing its public interest mandate,² the Commission approved the Staff Settlement Agreement, and conditioned the asset transfer on adherence to the agreement. "In this order, we determine after extensive hearings and based on a voluminous evidentiary record that the transaction *as conditioned by the pending settlement agreement*, and with the addition of a limited number of additional conditions, meets the 'public good' standards of RSA 374."³

It is not uncommon for the Commission to resolve cases based on a settlement agreement with Staff, as state statutes and the Commission's rules permit disposition of Commission proceedings by settlement. RSA 541- A:31, V(a) provides that "[u]nless precluded by law, informal disposition may be made of any contested case, at any time prior to the entry of a final decision

¹ DT 07-011; Settlement Agreement Among the Joint Petitioners and the Commission Staff § 10.3 (Jan. 23, 2008). Section 10.3 of the Staff Settlement Agreement provides that "FairPoint will be subject to the Quality of Service Requirements as set forth in Exhibit 3, attached hereto and made a part hereof. FairPoint will be subject to the penalties specified in Exhibit 3 in accordance with the required Transition Increments set forth therein." Exhibit 3 is a four page document attached to the Staff Settlement. Section 4 of that Exhibit states that "FairPoint shall apply the Maine service quality penalty structure to the criteria set forth herein (\$7,500 per percentage point missed subject to an overall annual limit of \$12.5 million) and subject to the Transition Increments."

² "Specifically, RSA 374:26 precludes the commencement of service as a public utility in this state unless, 'after due hearing,' the Commission finds 'that such engaging in business, construction or exercise of right, privilege or franchise would be for the *public good* . . . and [the Commission] may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the *public interest*.' RSA 374:28 provides that the Commission may authorize a public utility to discontinue providing service on a permanent basis 'whenever it appears that the *public good* does not require the further continuance of such service.' Finally, RSA 374:30 authorizes a utility to 'transfer . . . its franchise, works or system . . . exercised or located in this state . . . when the commission shall find that it will be for the *public good* and shall make an order assenting thereto, but not otherwise.'" DT 07-011, Order No. 24,823 at 37-38 (Feb. 25, 2008) ("Merger Order").

³ Merger Order at 2 (emphasis supplied).

or order, by *stipulation, agreed settlement*, consent order or default.” (emphasis supplied). The Commission’s Rule Puc 203.20 (b) provides that the Commission shall approve disposition of any contested case by settlement “if it determines that the result is just and reasonable and serves the public interest.”

As to modifying the terms of such a settlement, state statutes permit the Commission to alter any of its order at any time. RSA 364:28 provides, in part, that “[a]t any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it.” To the extent that any order is incorporated the terms of a settlement agreement with the Commission itself, this would imply that those terms could be altered as well. Indeed, the Commission has already modified the SQI penalty provisions. In DT 10-025, the FairPoint restructuring proceeding, the Commission approved a Post Filing Regulatory Settlement with the Commission Staff that, among other things, modified the terms of the SQI plan.⁴ Noting the revisions to the Quality of Service commitment (among other things), the Commission determined that “[o]n the basis of the foregoing, we find the Regulatory Settlement to serve the public interest and will approve it.”⁵

In conclusion, the current SQI penalties are the result of a settlement with the Commission that it was empowered to make in the public interest. The Commission is also empowered to alter the terms of this settlement and has done so once already. To the extent that the Commission determines that the public interest is better served by repurposing SQI penalties to broadband expansion, it also has the authority and the legislative mandate under current law to do so.

(ii) under the Commission’s current legislative mandate as revised/limited by Senate Bill 48 (the NH deregulation legislation).

No. The Commission would not have authority under the existing version of Senate Bill 48 (if enacted) to enforce any SQI requirements or penalties, whenever established, or any order after February 2011 that relates to FairPoint’s broadband expansion requirements. Nonetheless, the Commission should not consider this factor fatal to the request presently before the Commission. FairPoint believes sufficient time exists prior to any enactment of Senate Bill 48 to resolve the jurisdictional issue. For example, FairPoint is willing to work with the Commission and the New Hampshire Office of the Attorney General to develop an acceptable legal framework to ensure FairPoint’s compliance with any broadband expansion plan as submitted to date. This could include a contractual arrangement with the State of New Hampshire, whereby the Commission could act as a finder of fact with respect to compliance matters and the Commission’s findings thereafter could be filed by the Attorney General’s Office under a stipulation of judgment with

⁴ DT 10-025, Order No. 25,129 Order Approving Regulatory Settlement Agreement and other Transactions Related to Bankruptcy Reorganization; Regulatory Settlement at 2.1 – 2.3.

⁵ *Id.* at 66.

DT 07-011
Responses to Record Requests
Issued at March 19, 2012 Hearing
April 2, 2012
PUBLIC

the Merrimack County Superior Court and enforced by that Court. This is but one example of such a contractual arrangement, and FairPoint is willing to discuss other ideas advanced by the Commission, its Staff or the Attorney General's Office.