September 17, 2012

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Via Hand Delivery

Debra Howland
Executive Director and Secretary
State of New Hampshire
Public Utilities Commission
21 South Fruit Street
Concord, NH 03301

Re: Objection of Northern New England Telephone Operations LLC ("NNETO") and Enhanced Communications of Northern New England Inc. ("Enhanced Communications") to Public Utility Assessment and Related Invoices

Dear Ms. Howland:

I received Public Utility Assessment Invoices for each of NNETO and Enhanced Communications, each invoice being dated August 17, 2012, and each invoice being received on August 21, 2012 (each being an "assessment" and collectively the "assessments"). This will serve as an objection to the assessments contained therein pursuant to RSA 363-A:4.[1] While this statute requires the New Hampshire Public Utilities Commission (the "Commission") to hold a hearing on this objection after reasonable notice, please note that I am willing to meet with you in advance of any hearing to review and potentially resolve the issues raised herein.

By way of brief background, NNETO's assessment totals $942,999. Per the attached spreadsheet and as explained below, NNETO's assessment should be reset to an amount which does not exceed $403,229. Enhanced Communications' assessment totals $70,452. As explained below, Enhanced Communications' assessment should be reset to an amount not to exceed $5,500. Overall, these revised assessments are predicated upon two general principles: (i) neither NNETO nor Enhanced Communications should be required to fund expenses of the Office of Consumer Advocate in light of the enactment of and effectiveness of Senate Bill 48 and (ii) the Commission has no statutory authority to levy an assessment on either NNETO or Enhanced Communications' interstate revenues. Such assessments constitute an unlawful and unconstitutional taking of property.

[1] Note that NNETO and Enhanced Communications will make in a timely manner the first installment of their respective assessment.

I. For purposes of the assessments, the Commission must remove from the funding formula any and all expenses associated with the Office of Consumer Advocate as neither the Residential Ratepayers Advisory Board nor the Consumer Advocate have jurisdiction over or regarding Excepted Local Exchange Carriers ("ELECs") or services provided to any end user.

The Commission's Fiscal Year 2013 List of Utility Assessments ("2013 Utility Assessment"), page 1, specifies that the Commission calculated utility assessments by "...allocating the FY 2013 (July 1, 2012 through June 30, 2013) budget estimate of the [Commission] and [OCA] to each utility in direct proportion as the revenues relate to the total utility revenues as a whole." There is no lawful reason to include the annual expenses of the OCA in the calculation of the assessment for ELECs. Senate Bill 48 amended the OCA's enabling legislation, RSA 363:28, such that the OCA has no jurisdiction to petition, initiate, appear or intervene in matters pertaining to (among other things) rates, terms or conditions related to services provided by ELECs to end user customers. Similarly, the enabling legislation for the Residential Ratepayers Advisory Board, RSA 363:28-a, has been amended such that it has no statutory authority to advise the Consumer Advocate on matters pertaining to ELECs or their end use customers.

In light of the above, there is no legal basis to require ELECs to pay the costs and expenses of the OCA. Such expenses must be removed from the assessment calculation for ELECs. RSA 363-A:1 requires the Commission to "...ascertain the total of its expenses during such year incurred in the performance of its duties relating to public utilities as defined in RSA 362:2 and relating to the [OCA]..." The Commission's duties related to public utilities have been amended by Senate Bill 48 and ELECs have been exempted from many statutory obligations previously imposed on local exchange carriers. For example, and without limitation, incumbent telecommunication carriers that elect to become ELECs (with NNETO being an ELEC as a matter of law pursuant to RSA 362:7(I)(c)) can no longer be treated differently from a regulatory perspective than competitive local exchange carriers (*see* RSA 362:8) and the Commission can no longer investigate or regulate rates, fares, or charges for services provided by ELECs. As the Commission's duties have significantly decreased in this regard and as the OCA's enabling legislation specifically exempts ELEC matters from the OCA's jurisdiction, it necessarily follows that none of the OCA's expenses are attributable to NNETO and therefore cannot be assessed on NNETO. Furthermore, the New Hampshire Supreme Court, describing Commission assessments as "license fees," has held that"[t]o be valid charges made as license fees must bear a relation to and approximate the expense of issuing the licenses and of *inspecting and regulating* the business licensed ... such fees ... must be *incidental to regulation* and not primarily for the purpose of producing revenue." *Laconia v. Gordon*, 107 N.H. 209, 211 (1966) (emphasis added and citation omitted) (*accord Appeal of Ass'n of N.H. Utils.*, 122 N.H. 770, 773 (1982). Accordingly, the OCA expenses must be removed from the assessment calculation as applied to NNETO and any other ELEC and NNETO's assessment should be reduced accordingly.

II. For purposes of the assessments, the Commission cannot legally levy an assessment utilizing NNETO's interstate revenue or Enhanced Communications' interstate revenue.

As noted by the Supreme Court's decision in *Laconia,* the Commission's assessment must bear relation to the licensed business. As the Commission does not regulate interstate services, requiring NNETO and Enhanced Communications to pay an assessment on interstate revenue is unlawful. As demonstrated by the attached ARMIS Annual Summary Report and the 2013 Utility Assessment, the Commission assessed NNETO against its total reported revenue of $296,612,000. This figure includes revenue generated through the provision of interstate services, nearly all of which are regulated by the Federal Communication Commission and not this Commission. NNETO's interstate revenue and non-regulated revenue must be removed from the assessment calculation as the Commission does not regulate the services which generate the revenue. In addition, the imputed revenue related to directory listings in New Hampshire, which is not real in any event, must be removed from the assessment calculation as the Commission has no authority to impute such revenue against NNETO in light of the enactment of and effectiveness of Senate Bill 48.

NNETO believes that its assessment must be reduced to a figure not to exceed $403,229. The attached ARMIS Annual Summary Report includes a revised assessment calculation and that report is incorporated herein by reference. However, even that figure must be reduced to account for the removal of the OCA's estimated expenses as discussed above.

Similarly, approximately 88% of the revenues reported by Enhanced Communications relate to and derive from interstate services. The Commission's jurisdiction over Enhanced Communications arises from its registration as a competitive intraLATA toll provider ("CTP"), with Enhanced Communications' CTP Certification number being 04-001-08. Administrative Rule Puc 402.10 defines CTP as "...any carrier authorized to provide intraLATA toll service, except for an ILEC that provides toll service exclusively to its local service customers in New Hampshire." However, Enhanced Communications' interexchange (i.e., long distance) revenues and all other interstate revenues must be excluded from the assessment calculation. Therefore, the assessment must be revised downward to an amount not to exceed approximately $5,500. However, as with NNETO's assessment, even that figure must be reduced to account for the removal of the OCA's estimated expenses as discussed above.

NNETO and Enhanced Communications recognize that RSA 363-A:2 requires the Commission and OCA's expenses to "...be assessed against the public utilities...[and]...shall be calculated by using the gross utility revenue of all public utilities..." However, the Commission's assessment formula is not consistent with a plain reading of the applicable statutory scheme when taken in its entirety. The reference to "gross utility revenue" in RSA 363-A:2 must be read in conjunction with the definition of a public utility as defined within RSA 362:2. While the

entirety of RSA 362:2 covers matters such as the distribution of gas, heat, electricity and water, for purposes of a telecommunications company, RSA 362:2 defines a "public utility" as:

> ...every corporation, company, association...owning operating or managing any plant or equipment or any part of same for the *conveyance of telephone or telegraph messages*...and any other business...over which on September 1, 1951, the public utility exercised jurisdiction. (Emphasis added.)

The Commission's own rules addressing the issue narrowly tailor the definition of a "utility" to "...any 'public utility' owning, operating, or managing any plant or equipment, or any part of the same for the *conveyance of telephone messages* for the public, pursuant to RSA 362:2." *See* Puc 402.60 (emphasis added). Thus the phrase "gross utility revenue" must be calculated by counting the revenue based upon the statutory definition of a public utility. As applicable to NNETO and Enhanced Communications, utility revenues must be limited to revenue from providing (i) "telephone or telegraph messages" within New Hampshire and (ii) "any other business...over which on September 1, 1951, the public utility exercised jurisdiction."[2]

In addition, it is clear that the Communications Act of 1934, as amended, vests the Federal Communications Commission ("FCC") with jurisdiction over "*all* interstate and foreign communications by wire or radio." 47 U.S.C. 152(a) (1988) (emphasis added). As the D.C. Circuit Court of Appeals observed in *NARUC II*, regulatory authority over interstate communications is "totally entrusted to the FCC." *NARUC II*, 746 F.2d 1492, 1501 (D.C. Cir. 1984). Moreover, the FCC's plenary authority plainly precludes a state from enforcing a regulation that, on its face, purports to regulate interstate communications. *See In re Operator Servs. Providers of America, Memorandum Opinion and Order*, 6 FCC Rcd. 4475 (1991) (preempting a Tennessee statute expressly regulating interstate communications services offered by operated service providers on the grounds that the statute infringed on the FCC's plenary jurisdiction over interstate communications services); *see also AT&T v. Public Serv. Comm'n of Wyoming*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate communication is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC."). Therefore, as a matter of Federal law, the Commission cannot exercise jurisdiction over interstate services and applicable New Hampshire statutes cannot be interpreted as allowing any form of regulation over such services.

Consequently, a plain reading of these statutes requires the Commission's assessment to be based upon the revenues of services over which the Commission and OCA exercise their respective

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[2] Attached to this submission is an AT&T Profile and Historic Information paper reflecting how telephone service evolved. Of note, in 1951 AT&T Bell Labs developed technology needed to support direct distance dialing.

jurisdiction. Based upon the above, NNETO and Enhanced Communications respectfully request their assessments to be revised.

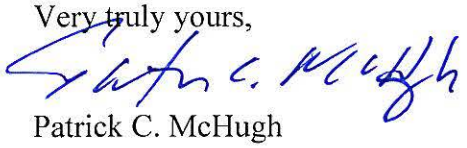
III. Requiring NNETO and Enhanced Communications to pay an assessment for the expenses of the Office of Consumer Advocate and to pay an assessment based upon interstate revenues constitutes an unconstitutional taking of NNETO and Enhanced Communications' property.

The right to property is "natural, essential, and inherent," N.H. CONST. pt. I, art. 2, and is constitutionally protected against encroachment by Par I, Article 12 of the State Constitution. Accordingly, the State may effectuate a taking through the police power only if just compensation is paid and the property is put to a public use. *See Merrill v. City of Manchester*, 127 N.H. 234, 237 (1985); *Soucy v. State*, 127 N.H. 451, 454 (1985); 14 P. Loughlin, New Hampshire Practice, Local Government Law § 825 (1995). In addition, "...[i]t is well settled that a State cannot take private property without affording the owner the constitutional protection of due process." *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 975 (1982). By depriving NNETO and Enhanced Communications of their right to retain their non-New Hampshire regulated revenues and by requiring NNETO and Enhanced Communications to pay for the expenses of an agency on a disproportionate basis, the assessments constitute an inverse condemnation. *See Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1071 (1982).

NNETO and Enhanced Communications are entitled to relief for an abridgement of vested rights. *See Appeal of Public Service Co.*, 122 N.H. at 1071. "Generally the term vested right expresses the concept of a present fixed interest, which in right and reason should be protected against arbitrary state action. A vested right cannot be contingent nor a mere expectance of a future benefit." *Gilman v. County of Cheshire*, 126 N.H. 445, 448-49 (1985). The proper remedy in this case is to (i) recalculate the assessments as reflected herein and (ii) abate both NNETO's assessment and Enhanced Communications' assessment via a reduction in the assessments owed for the Commission's fiscal quarters 2 through 4 of fiscal year 2013.

Thank you for your consideration of these matters.

Very truly yours,



Patrick C. McHugh

Cc: Office of Consumer Advocate