

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 12-337

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC d/b/a
FAIRPOINT COMMUNICATIONS – NNE**

**Tariff Filing to Implement Certain Provisions of the Order on Remand
Order Rejecting Reclassification of Wire Centers and Opening Investigation**

ORDER NO. 25,456

January 17, 2013

I. PROCEDURAL HISTORY

On November 19, 2012, Northern New England Telephone Operations, LLC d/b/a FairPoint Communications — NNE (FairPoint) filed a revision to NH PUC Tariff No. 2 that reclassified a number of FairPoint wire centers as “unimpaired” under federal law.¹ The result of the tariff change would be that FairPoint would no longer be required to offer as unbundled network elements: (1) DS1 or DS3 loop service in any of these wire centers; or (2) a full set of dark fiber, DS 1, or DS3 transport services at any of these wire centers.

On November 27, 2012, the CLEC Association of Northern New England (CANNE) filed a petition to intervene. CANNE also requested, among other things, a formal review of the proposed wire center reclassifications. On December 14, 2012, Staff requested a 30 day extension to provide sufficient time for parties and Staff to gather additional facts and to allow Staff the opportunity to complete its review. In a secretarial letter issued on December 18, 2012,

¹ Section 251(d)(2) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56 (1996) authorizes the Federal Communications Commission (FCC) to require unbundled access to certain network elements when the failure to provide such access would “impair the ability of the telecommunications carrier seeing access to provide the services that it seeks to offer.” A wire center is unimpaired for particular network elements when it meets competitive requirements set forth by the FCC in the *Triennial Review Remand Order* (TRRO) and implementing regulations.

the Commission granted CANNE's petition to intervene and, pursuant to RSA 378:6, IV, extended the time for decision until January 18, 2013.

Also on December 18, 2012, Staff recommended that the status of each wire center be independently verified, and that Staff be permitted to propound discovery on the collocating companies identified in FairPoint's filing. Staff requested that information associating a particular collocating company with a particular wire center be deemed confidential and treated accordingly by all parties.

On January 9, 2013, and based upon the state of discovery, Staff recommended that the Commission reject the tariff and open an investigation into the level of competition in the wire centers that FairPoint seeks to reclassify.

Consequently, the issues before the Commission are whether to accept, modify, or reject FairPoint's tariff filing and/or open an investigation, whether Staff should independently verify the level of competition in each wire center, and whether to protect certain information from public disclosure.

II. POSITIONS OF THE PARTIES AND STAFF

A. CANNE

CANNE asserted that in Dockets DT 05-083 and DT 06-012, the Commission (1) prescribed the procedure to be followed and the information to be submitted to the Commission to commence the reclassification of wire centers, (2) interpreted Federal Communication Commission (FCC) criteria for reclassifying wire centers, and (3) made determinations regarding how those criteria were to be applied in the State. *See generally, Verizon New Hampshire, Order No. 24, 598 (March 10, 2006).* CANNE also asserted that the Commission has already determined that transition periods shall begin on the effective date of the tariff revisions

approved by the Commission. *See Verizon New Hampshire*, Order No. 24,723, at 15 (January 5, 2007). CANNE complained that FairPoint's filing is supported by proprietary information and that the tariff change seeks to impose rates retroactively in violation of the Commission precedent CANNE has cited. CANNE asserted that the Commission's assistance is required to properly reclassify wire centers, particularly given FairPoint's claims of confidentiality for the information supporting the petition. CANNE asked the Commission to commence an investigation.

B. FairPoint

FairPoint asserted that the changes to its tariff merely implement provisions of a February 4, 2005 order of the FCC² by designating certain wire centers as unimpaired for Unbundled Network Elements (UNE) dark fiber, DS1 and DS3 Interoffice Transport. FairPoint provided a confidential list of central offices and the collocators that FairPoint claims satisfy the relevant criteria for reclassifying each wire center.

C. Staff

Staff has filed three recommendations in this docket. In the first of these recommendations, Staff recommended extending the 30 day period for ruling on FairPoint's tariff filing for an additional 30 days, arguing that because the legal status of earlier FCC and Commission rulings would have to be examined, and because the various parties intended to introduce additional material, it would not be practical for Staff to complete a review of the tariff within 30 days.

In its second recommendation, Staff stated its belief, based on prior experience with reclassification dockets, that it would be important to independently verify the accuracy of

² This order is formally entitled *In the Matter of Unbundled Access to Network Elements*, 20 F.C.C.R. 2533 (Feb. 4, 2005), and is commonly referred to as the TRRO.

FairPoint's designations by conducting discovery on all of the collocators listed by FairPoint in its filing. Staff noted, however, that not all collocators were parties, and that most collocators would consider collocation information to be competitively sensitive. Staff asked the Commission to permit discovery on the non-party collocators and to determine that discovery (by whomever served and by whomever answered) that tied a collocator to a specific wire center be deemed confidential. Lastly, the Staff recommended a procedure for addressing confidential information submitted in this docket which included a request that the Commission waive its rule requiring that motions for confidential treatment be filed by FairPoint and every collocating company involved.

In its third recommendation, Staff informed the Commission that CANNE's members had responded to data requests issued by FairPoint. Staff represented that, in some cases, CANNE's members disputed FairPoint's assertion of collocation and in other cases reported that their investigation had not yet been completed. According to Staff, the discovery responses leave the question of wire center impairment levels unresolved. Staff asserted that, in the absence of a consensus among parties, an investigation would be required that is beyond the normal scope and timeframe of tariff filings. Until such an investigation is conducted, Staff argued, the Commission cannot have a basis on which to find that the proposed revisions are just and reasonable as required under New Hampshire RSA 374:1 and 374:2. Staff recommended that the Commission reject FairPoint's tariff filing pursuant to RSA 378:6, IV and open an investigation under RSA 365:5 into wire center impairment status at the central offices identified by FairPoint's filing.

III. COMMISSION ANALYSIS

Based upon Staff's characterization of discovery produced so far, there is disagreement between FairPoint and other parties over reclassification of at least some of the wire centers. It is not possible to verify FairPoint's reclassification through the conduct of discovery within a 60 day period. This is especially so, because of the number of wire centers identified, the potentially confidential nature of collocation information, and the fact that FairPoint conducted discovery on only a subset of collocating companies; those companies intervening in this docket. With this in mind, the Commission addresses the four issues before it.

1. The Commission finds that it cannot accept or modify FairPoint's tariff change without a better showing by FairPoint that the relevant collocated facilities meet the criteria set forth by the FCC and previous orders of this Commission. According to Staff, several of the collocating companies that responded to FairPoint's discovery deny that their facilities meet the relevant criteria, and it is not possible for the Commission to sort out the parties' disagreements in the short time provided for review of tariff filings under RSA 378:6, IV. Additionally, the disagreement over the facilities of intervening collocating companies suggests further investigation of FairPoint's determinations regarding the facilities of other non-intervening collocating companies is warranted. Because non-intervening parties' identities have been kept confidential, those parties may not know that representations regarding their collocations have been made. Given the contested information before us and the time limitations imposed by RSA 378:6, IV, we have no choice but to reject FairPoint's tariff filing.

2. The thirty to sixty-day timeframe for adjudicating telecommunications tariff filings set forth in RSA 378:6, IV should not operate as an obstacle to the approval of wholesale tariffs. Some tariff filings, however, are simply not amenable to approval or modification on

such an abbreviated schedule. Filing a tariff change under 378:6, IV is only one method of seeking Commission review of a tariff. FairPoint could instead have petitioned for an investigation, followed by filing a tariff that conforms to the findings of the investigation.³ This approach would have allowed the Commission to designate companies with the confidential information required to complete the record, as necessary parties. FairPoint could then have conducted discovery on all companies collocated in its wire centers, rather than relying upon a Staff investigation to meet FairPoint's burden of proof.

3. FairPoint has a right under federal law to reclassify its wire centers and under state law to sell its wholesale services through the use of filed tariffs. The Commission finds that, under the circumstances of this case, an investigation under RSA 365:5, is appropriate and necessary to secure and implement those rights. Accordingly, the Commission will open an investigation, and will require all collocating companies identified by FairPoint in its tariff filing to participate. To ensure that the time expended and efforts made in this docket are not lost, the Commission will use this docket for its investigation and will require parties upon whom discovery has been served in this docket to respond fully. All such discovery shall be treated as if made during the investigation. To provide FairPoint the tools required to make its necessary showing, and for Staff to conduct the level of verification it believes advisable, the Commission will permit the parties to conduct discovery limited to (1) whether the collocated facilities identified in FairPoint's tariff filing meet the relevant criteria for reclassifying each wire center and (2) whether the collocating entities are independent of each other.

³ Alternatively, FairPoint could prevail upon Staff to help organize stakeholder meetings to develop consensus regarding tariff changes before complicated or controversial tariff filings are made.

4. The remaining issue is whether information that associates a particular collocator with a particular wire center should be treated as confidential. Staff asserts that the information is of the type currently considered confidential commercial information, and that any person providing this information is likely to file a motion for confidential treatment. FairPoint has treated such information as confidential from the outset. In DT 05-083 and DT 06-102, the Commission treated such information as confidential. The Commission deems such information to be confidential, pursuant to RSA 91-A:5, IV, and it shall be treated accordingly in this docket. All other information requested or provided, such as non-identifying information regarding the nature of the facilities located at each wire center, will be treated as publicly available information. Further, the Commission determines that extending to all parties the process recommended by Staff of utilizing redacted and confidential data requests and responses will avoid the filing of multiple, duplicative motions for confidential treatment and thereby will aid in the efficient processing of the required information. Accordingly, pursuant to Puc 201.04 and 201.05, the Commission waives its requirement that parties submit motions for confidential treatment for information that would associate a particular collocator with a particular wire center in this docket. This decision regarding confidentiality, while extended herein to all parties, is applicable only in this docket and shall not be used as a basis for confidential treatment of information in any future filing by any company.

Finally, though the Commission is opening this investigation, the burden of demonstrating that any tariff filing reclassifying one or more wire centers is appropriate rests with FairPoint.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's proposed revisions to NH PUC Tariff No. 2 are REJECTED without prejudice, and it is

FURTHER ORDERED, that CANNE's request that the Commission conduct an investigation is GRANTED; and it is

FURTHER ORDERED, that those companies identified by FairPoint as having facilities collocated at the wire centers now under investigation are made necessary parties to this docket, and the Executive Director shall provide those companies with letter notice of this proceeding; and it is

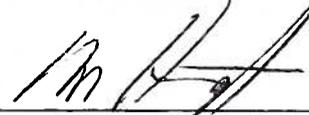
FURTHER ORDERED, that parties upon whom discovery has been served in this docket respond fully and continue to supplement their responses; and it is

FURTHER ORDERED, that information requested or produced that associates a particular collocating company with a particular wire center shall be treated as confidential.

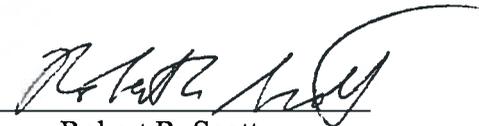
By order of the Public Utilities Commission of New Hampshire this seventeenth day of January, 2013.



Amy L. Ignatius
Chairman



Michael D. Harrington
Commissioner



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director