STATE OF NEW HAMPSHIRE

BEFORE THE

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

MOTION FOR REHEARING AND/OR RECONSIDERATION OF ORDER NO. 25,456

Pursuant to RSA 541:3 and N.H. Admin. Rule 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 Order No. 25,456 dated January 17, 2013 (the ("Tariff Rejection Order"). In support of this Motion, FairPoint states as follows:

I. INTRODUCTION AND BACKGROUND

Section 251 of the Communications Act of 1934, as amended, 47 U.S.C. § 251, (the "Act") requires that incumbent local exchange carriers ("ILECs") provide a number of services such as interconnection, unbundled network elements, and collocation to third party carriers in order to foster competition for local exchange telephone services. Section 252 of the Act provides that the rates, terms and conditions for these services can be established in an interconnection agreement that has been voluntarily negotiated under Section 252(a) or arbitrated under Section 252(b), or those arrangements can be established in a statement of generally available terms ("SGAT"), filed with and approved by the Commission, pursuant to Section 252(f).

On July 11, 1997, NYNEX (the predecessor to Bell Atlantic, Verizon New England

("Verizon"), and FairPoint, in that order) filed an SGAT with the Commission pursuant to Section 252(f), which the Commission set for investigation in Order No. 22,692 dated August 25, 1997, in DE 97-013 ("SGAT Investigation Order"). On July 6, 2001, after an extensive proceeding, the Commission approved the SGAT in Order No. 23,738 in DE 97-171 ("SGAT Approval Order"), followed by certain revisions as granted in Order Nos. 23,847 dated November 21, 2001 and 23,915 dated February 4, 2002. Two years later, in accordance with the conditions for recommending the approval of Verizon's Section 271 application, the SGAT was converted to a tariff "from which competitors may directly order anything contained in the SGAT, without the need to negotiate an interconnection agreement or amend an interconnection agreement."[1] Verizon then filed revisions to its Tariff 84 incorporating the terms of the SGAT.

Since that time, there have been a few modifications to Tariff 84, now known as FairPoint's Tariff NHPUC No. 2. Some of the most significant of these involved implementing new "wire center classification" rules pursuant to the Federal Communications Commission's ("FCC") so-called *Triennial Review Remand Order* ("*TRRO*").[2] Section 251(d)(2) of the Communications Act authorizes the FCC to require unbundled access to an ILEC's network element when the failure to provide it would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." In the *TRRO*, the FCC determined that the degree of impairment – and thus Verizon's continuing obligation to provide CLECs with certain unbundled network elements ("UNEs") – would vary by wire center according to certain objective criteria. Regarding dedicated transport circuits between wire centers, the FCC defined "tiers" of wire centers, between which competitors are deemed to be

[1] DT 01-151, Verizon New Hampshire Section 271 Inquiry, Order *Nisi* No. 24,337 Approving Revisions to Tariff 84 and New Tariff (June 18, 2004).

[2] *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2005).

not impaired in certain circumstances. A "Tier 1" wire center is one that has at least 38,000 business lines *or* at least four fiber-based collocators. A "Tier 2" wire center is one that has at least 24,000 business lines *or* at least three fiber-based collocators. (All other ILEC wire centers that do not meet the criteria above are "Tier 3" wire centers.) The FCC found that competitive local exchange carriers ("CLECs") are not impaired without access to DS1, DS3 and dark fiber transport between Tier 1 wire centers, and that CLECs are not impaired without access to DS3 and dark fiber transport between Tier 2, or between Tier 2 and Tier 1, wire centers. Moreover, when requesting dedicated transport UNEs, the *TRRO* requires CLECs to self-certify, after undertaking a "reasonably diligent inquiry," that impairment still exists in a wire center that is the subject of the request.[3]

In February 2005, Verizon filed tariff revisions reflecting the *TRRO*'s wire center non-impairment rules. In its Order No. 24,598 dated March 10, 2006 in DT 05-083 ("Wire Center Order"), the Commission defined various terms relevant to a wire center non-impairment inquiry, established a process for conducting such inquiries,[4] and approved a list of non-impaired wire centers, which list was incorporated in a table in Section 21.1.1 of Tariff 84 ("Exempt Wire Centers"). This list was supplemented in January 2007.[5]

In 2008, FairPoint adopted Tariff 84 in accordance with Section 9.3 of the Staff Settlement Agreement in DT 07-011. Subsequently, on August 19, 2011, FairPoint resubmitted the tariff in its entirety, redesignating it as Northern New England Telephone Operations LLC Tariff NHPUC No. 2 ("Tariff 2").

On November 16, 2012, FairPoint filed, via hand delivery, revisions to Tariff 2 that

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[3] *TRRO* para. 234.

[4] But see note 23, *infra*, for a discussion of problems with this process.

[5] Order No. 24,723.

implemented certain aspects of the *TRRO*, effective December 16, 2012. Specifically, the revisions added 24 wire centers to the list of non-impaired wire centers in Section 21.1.1, and added terms for transitioning UNE dedicated transport facilities that CLECs had ordered from these Exempt Wire Centers to other types of wholesale arrangements. In accordance with the process established by the Commission in the Wire Center Order, FairPoint submitted a list of CLECs that it deemed to be fiber-based collocators in each wire center.[6] On January 17, 2013 (having once extended the review period by Secretarial Letter dated December 18, 2012), the Commission issued the Tariff Rejection Order. In that order, the Commission rejected the tariff filing without prejudice and opening an investigation into FairPoint's designation of the new Exempt Wire Centers.

The Tariff Rejection Order covered a wide array of subjects. In that Order, the Commission:

- reported that the tariff revisions were filed on November 19, 2012;[7]
- asserted that the tariff revisions would relieve FairPoint of its obligation to provide DS1 or DS3 loop service in any of these wire centers or to provide dark fiber, DS1, or DS3 transport services at any of these wire centers;[8]
- held that the time limitations imposed by RSA 378:6, IV gave the Commission no option but to reject FairPoint's tariff filing;[9]
- admonished that the proper procedure is for FairPoint to petition for an investigation, followed by filing a tariff that conforms to the findings of the investigation;[10]
- held that FairPoint has the burden of proof in this matter;[11] and
- granted CANNE's motion to open an investigation to review FairPoint's wire center classifications.[12]

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[6] *See* Wire Center Order at 48.

[7] Tariff Rejection Order at 1.

[8] *Id.*

[9] *Id.* at 5.

[10] *Id.* at 6.

[11] *Id.* at 6, 7.

With the exception of granting a review of the wire center classifications, each of the Commission's determinations as listed above is either incorrect or unlawful and must be reconsidered.

II. STANDARD OF REVIEW

The standard of review for this Motion 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.[13]

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.[14] To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.[15]

III. MOTION FOR REHEARING AND OR RECONSIDERATION OF THE TARIFF REJECTION ORDER

A. The Commission Must Correct the Actual Tariff Filing Date.

The subject tariff filing was delivered to the Commission on November 16, 2012, *not* November 19th, as reported in the Tariff Rejection Order and posted on the Commission's

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[12] Tariff Rejection Order at 1, 6, 8. The Tariff Rejection Order also established a procedure for the treatment of confidential information provided by the parties during the investigation. FairPoint does not object to this procedure, and it is not addressed in this Motion.

[13] RSA 541:3.

[14] *See Dumais v. State*, 118 N.H. 309, 312 (1978). *See also Appeal of the 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).

[15] See RSA 541:3; RSA 541:4; *See also* Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co., Order No. 25,194 at 3 (Feb. 4, 2011).

website.[16] Accordingly, and as discussed further below, all deadlines and effective dates as provided by law must be determined based on this date. FairPoint respectfully requests that the Commission reconsider the order and correct the record to reflect the proper date. In addition, as explained in the next section, the Commission should reverse its decision in light of the fact that the Tariff Rejection Order was not issued within the timeframes established by New Hampshire law and the federal Act.

B. It is Unlawful for the Commission to Reject the Tariff Filing.

As its heading indicates, Section 252 of the Communications Act describes "procedures for negotiation, arbitration, and approval of agreements" for services required under Section 251 of the Act. Regarding SGATs in particular, Sub-section 252(f) provides, in pertinent part, as follows:

> (1) In general
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> A Bell operating company[17] may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.
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> . . .
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> (3) Schedule for review
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> The State commission to which a statement is submitted shall, *not later than 60 days after the date of such submission*—
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> > (A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or
> >
> > (B) *permit such statement to take effect.*

[16] *See* date-stamped receipt copy of transmittal letter, attached as Exhibit 1.

[17] The FCC has determined that FairPoint is considered a "Bell operating company." *See Applications for Transfer from Verizon Communications Inc. to FairPoint Communications, Inc.*, WC Docket No. 07-22, Memorandum Opinion and Order, 23 FCC Rcd 514 para. 33 (2007).

(4) Authority to continue review

> Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2)["State commission review"].[18]

Section 252(f) thus requires the Commission to either complete its review of the SGAT within 60 days or *permit the SGAT to take effect*, pending any further review that the Commission may or may not decide to undertake.

In the Tariff Rejection Order, the Commission did not find that FairPoint's tariff filing was deficient, *per se*, but only that there was insufficient time to complete its review of the SGAT and the objections of the intervenors. "[T]he 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."[19] "The Commission finds that, under the circumstances of this case, an investigation under RSA 365:5 is appropriate and necessary to secure and implement [FairPoint's] rights."[20] Consequently, "[g]iven 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."[21]

However, the Commission erred when it rejected the tariff outright. In accordance with federal law (and in the absence of an agreement with FairPoint otherwise), the Commission was compelled to accept the filing, permit it to take effect, and then initiate any further review that it felt was necessary. Indeed, this is the course that the Commission has taken in the past. In the original 1997 SGAT proceeding, the Commission accepted NYNEX's SGAT filing at the 60 day

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[18] 47 U.S.C. § 252(f) (emphasis supplied).

[19] Tariff Rejection Order at 5.

[20] *Id.* at 6.

[21] *Id.* at 5.

deadline and scheduled it for further investigation. As it explained in the SGAT Investigation Order:

> [W]e find that we cannot adequately complete our review of the Petition for Approval of SGAT in Docket DE 97-171 within the period mandated by §252(f)(3). Therefore, as we will not be in a position to approve or deny the SGAT, the SGAT will automatically take effect at the expiration of the time period for review, pursuant to §252(f)(3)(B). We understand and approve the intent of Congress to allow an SGAT to go into effect while state review continues. Pursuant to §252(f)(4), we intend to continue our review beyond the time period and to exercise our authority to approve or disapprove the SGAT when our review is complete. We consider the rates of an SGAT which goes into effect automatically pursuant to §252(f)(3)(B) to be the equivalent of temporary rates under RSA 378:27. We consequently suspend the remainder of the procedural schedule as set out in our Order No. 22,661 and schedule a prehearing conference to establish an appropriate procedural schedule for completing our review, including a hearing on temporary rates. Thus, our review of the SGAT will not be delayed, but rather enhanced. As Congress intended, neither will NYNEX's introduction of an SGAT be delayed.[22]

The SGAT Investigation Order established a procedure that was largely in conformance with federal law,[23] as contrasted to the instant Tariff Rejection Order, in which the Commission

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[22] DE 97-013, New England Telephone and Telegraph Company dba NYNEX, Order No. 22,692 82 NH PUC 618, 619 (1997). Note that a hearing on temporary rates was never held. *See* DE 97-171, Bell Atlantic Petition for Approval of Statement of Generally Available Terms, Order No. 23,738 Granting in Part and Denying in Part, at 9 (July 6, 2001) ("SGAT Approval Order").

[23] FairPoint uses the qualifier "largely" because the SGAT Investigation Order was erroneous to the extent that it purported to establish temporary rates under RSA 378:27. RSA 378:27 presumes that there will be a "true-up" under RSA 378:29 or RSA 378:30 once the permanent rate is determined. *See State v. New England Tel. & Tel. Co.*, 102 N.H. 394 (1961). However, Section 252(f) provides for no "true-up." Rather, until such time as the Commission has reviewed the SGAT and approved or rejected it, the SGAT shall "take effect" pursuant to Section 252(f)(3)(B). The Commission perpetuated this error in the Wire Center Order as well. In the Wire Center Order, the Commission stated that

> [g]oing forward, ... the reclassification of any wire center shall be effective on the date the Tariff 84 revisions reflecting such reclassification are approved by this Commission. Verizon may file its tariff revisions concurrently with its notices to the CLEC industry of changes to wire center classifications, and may true-up rate changes to the effective date of such future tariff revisions.

Wire Center Order at 48 (emphasis supplied). Again, Section 252(f) provides for no true up, and

has suggested that FairPoint should have done the opposite. In the Tariff Rejection Order, the Commission admonished FairPoint for filing the tariff when it did, advising that "FairPoint could instead have petitioned for an investigation, followed by filing a tariff that conforms to the findings of the investigation"[24] or that "FairPoint could prevail upon Staff to help organize stakeholder meetings to develop consensus regarding tariff changes before complicated or controversial tariff filings are made."[25] However, both these suggestions are contrary to federal law, and Commission precedent as established in the SGAT Investigation Order.

It is also important to note that it is immaterial that the filing is characterized as a "tariff" rather than an "SGAT," since this is a distinction without a difference. In the Act and FCC rules, a "statement of generally available terms" is self-defined; it is "a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section."[26] It is clear that Tariff 2, however it is labeled, is an SGAT as contemplated by the Act. Furthermore, the Commission has never suggested otherwise. On its website, the Commission has affirmed that "[i]n New Hampshire, Verizon's Statement of Generally Available Terms and Conditions (SGAT) is a wholesale tariff."[27] Moreover, as far back as 2001, the Commission used the terms together, referring five times in the SGAT Approval Order to the "SGAT tariff."[28]

Thus there can be no doubt that Tariff 2 is an SGAT for purposes of Section 252(f) of the Act, and that the tariff filing should be treated accordingly. In fact, if there is any conceivable

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the process described in the Wire Center Order is invalid.

[24] Tariff Rejection Order at 6

[25] *Id.* n. 3.

[26] 47 U.S.C. § 252(f)(1).

[27] *See* "NH PUC CLEC Information," available at www.puc.state.nh.us/Telecom/clecs.htm, visited Jan. 28, 2013, attached as Exhibit 2.

[28] *See* SGAT Approval Order at 19, 30, 81, and 115.

way that Tariff 2 can be found *not* to be an SGAT, then this entire proceeding is moot because the Commission has no jurisdiction over this matter. Section 252 of the Act provides two (and only two) vehicles for complying with the requirements of Section 251: interconnection agreements under sub-sections 252(a) and (b), or an SGAT under Section 252(f). Section 252 of the Act delegates to the Commission the authority to approve such agreements or statements, but it grants no other independent authority to the Commission to fashion a process that is outside of that prescribed in Section 252.[29] If Tariff 2 is not an SGAT, then it has no validity at all.

The Tariff Rejection Order is unlawful to the extent that it rejects the tariff revisions and does not permit them to become effective as of January 15, 2013, the 60th day following the filing date.[30] FairPoint respectfully requests that the Commission reconsider the order and permit the tariff revisions at issue to be effective as of January 15, 2013.

C. The Commission should Correct the Order and Hold that the Tariff Filing does not Affect Loop Availability.

In the Tariff Rejection Order, the Commission asserts that "[t]he result of the tariff

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[29] *See, e.g.* Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n, 359 F.3d 493 (7th Cir. 2004) (holding that IURC could not establish interconnection process independent of Section 252). In fact, some federal circuit courts have held that any tariff, like Tariff 2, that obviates the need for a negotiated interconnection agreement is unlawful. *See, e.g.*, Verizon North, Inc. v. Strand, 309 F.3d 935 (6th Cir. 2002) (finding that UNE tariff is preempted, as it completely bypasses and ignores the detailed process negotiation and arbitration process set out by Congress aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review). *Accord,* Wisconsin Bell v. Bie, 340 F.3d 441 (7th Cir. 2003). *But see* Michigan Bell Tel. v. MCIMetro Access Transmission, 323 F.3d 348 (6th Cir. 2003) (holding that UNE tariff is not preempted if it exists *in conjunction with* a negotiated or arbitrated interconnection agreement that references the tariff).

[30] *See* Section III.A, above. It should also be noted that, in addition to its defects under federal law, the Tariff Rejection Order is invalid under New Hampshire law as well. RSA 378:6, IV, under which the Commission evaluated the tariff, provides that any tariff under that section "*shall* become effective as filed 30 days after filing" unless the commission amends or rejects the filing within the 30-day period. The tariff was filed on November 16, 2012. Even with the 30 day extension permitted by RSA 378:6, IV, the statutory review period expired on January 15, 2013, on which date the tariff filing went into effect by operation of law.

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 . . . ."[31] This is incorrect. A review of the amended table for Section 21.1.1 of the tariff displays the entry "NO" under the column headings "DS1 LOOP" and "DS3 LOOP" for each wire centers. This indicates that FairPoint does not claim at this time that those wire centers are non-impaired regarding the provision of loops.[32] FairPoint claims only that these wire centers are non-impaired regarding the provision of dedicated transport, as indicated by the "YES" entries under the corresponding column headings. FairPoint respectfully requests that the Commission alter the order and otherwise correct the record to reflect this distinction.

D. It is Unlawful for the Commission to Place the Burden of Proof on FairPoint.

In the Tariff Rejection Order, the Commission held that "the burden of demonstrating that any tariff filing reclassifying one or more wire centers is appropriate rests with FairPoint"[33] and that discovery would be conducted so as to provide FairPoint the tools required to make its "necessary showing."[34] The Commission is incorrect in this instance, as this is not the rule for impairment investigations. In *Covad v. F.C.C.*,[35] the D.C. Circuit Court of Appeals explained

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[31] Tariff Rejection Order at 1.

[32] Pursuant to the *TRRO* and FCC rules, 47 CFR § 51.319, DS1 and DS3 loop impairment requires a showing regarding *both* the number of fiber based collocators *and* the number of business lines. On the other hand, showings of dedicated transport impairment are only concerned with the number of business lines *or* the number of fiber based collocators – the number of business lines is irrelevant if a sufficient number of fiber based collocators is present. Although FairPoint does not concede that the subject wire centers are impaired regarding UNE loops, the supporting information accompanying FairPoint's tariff filing does not include any statistics concerning business lines and thus supports no claims regarding loop impairment.

[33] Tariff Rejection Order at 7.

[34] *Id.* at 6.

[35] Covad Commc'ns Co. v. F.C.C., 450 F.3d 528 (D.C. Cir. 2006).

that as early as 2002, in *USTA I*,[36] it held that in a UNE proceeding, it is the party seeking to establish impairment that has the burden of proof. The court explained that:

> *USTA I* and *USTA II* make clear that the burden of persuasion rests on the shoulders of the party that urges the Commission to find impairment. And the rationale for our conclusion is simple: The plain text of § 251(d)(2) permits unbundling only where the Commission receives evidence that UNEs are ''necessary'' to prevent ''impair[ment]'' of the CLECs' competitive aspirations. Thus, the 1996 Act does not obligate the ILECs to prove non-impairment—*it forces the CLECs to prove impairment.*[37]

The FCC appeared to recognize this when, in the TRRO, it required that a CLEC looking for UNE transport must self-certify that the wire center is impaired:

> We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).[38]

Under the FCC's rules, the requesting CLEC must make an affirmative statement regarding a question of fact. It therefore stands to reason that the burden of proof is on the CLEC that made the assertions.[39]

The Tariff Rejection Order is unlawful to the extent that it places the burden of proof in this proceeding on FairPoint. Federal law is clear that the burden lies with any party that contests FairPoint's designation of non-impaired wire centers. FairPoint respectfully requests that the Commission reconsider the order and hold that the CLECs must bear the burden of proof

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[36] United States Telecomm. Ass'n v. F.C.C., 290 F.3d 415 (D.C. Cir. 2002).

[37] Covad, 450 F.3d at 548 (emphasis supplied).

[38] *TRRO* para. 234.

[39] Note that the FCC rules nonetheless balance the interests of the respective parties, requiring FairPoint to provision any UNE while the CLEC makes its case, provided that the request is made after a "reasonably diligent inquiry." *See id.*

consistent with the D.C. Circuit Court of Appeals' decision in *Covad.*

IV. CONCLUSION

For the reasons described herein, the Commission overlooked or mistakenly conceived certain facts and interpretations of applicable law. As a result, it has issued an Order that is unlawful and unreasonable. FairPoint respectfully requests that the Commission reconsider Order No. 25,456 to:

- correct the factual findings regarding
  1) the filing date of the tariff and
  2) its effect on UNE loop availability;
- to hold that the tariff revisions are effective no later than January 15, 2013; and
- to hold that the burden of proof does not lie with FairPoint to establish that the designated wire centers are non-impaired.

Respectfully submitted,

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

By Its Attorneys,
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Dated: February 6, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: February 6, 2013

By: _____
Harry N. Malone