

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 TO STRIKE OR, IN THE ALTERNATIVE,
FOR LEAVE TO REPLY**

NOW COMES Northern New England Telephone Operations, LLC d/b/a FairPoint Communications - NNE (“FairPoint”) and hereby moves to partially strike the September 9, 2013 Response of CANNE (“CANNE Response”) in this proceeding. In support of this motion, the FairPoint states as follows:

On November 16, 2012, FairPoint filed revisions to its Tariff NH PUC No. 2 (“Tariff 2”) which implemented certain aspects of the Federal Communications Commission’s *Triennial Review Remand Order* (“TRRO”).¹ Specifically, the revisions added 24 wire centers to the list of wire centers in Section B.21.1.1 of Tariff 2 that are non-impaired to some extent (for a total of 28) and added terms for transitioning UNE dedicated transport facilities that wholesale customers had ordered from these non-impaired wire centers to other types of wholesale arrangements.

On August 9, 2013, following a period of discovery among the parties and the Commission Staff, FairPoint filed further revisions to Tariff 2 that reduced the number of unimpaired wire centers from 28 to 9, based on the number of fiber-based collocators (“FBCs”), and modified the transition periods. Of the 9 wire centers, 7 were newly classified as non-

¹ *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2005) (“TRRO”).

impaired or reclassified to a higher level of non-impairment (*i.e.* Tier 2 to Tier 1).

Beginning in July 2013, the Commission Staff conducted two rounds of discovery on CLECs believed to be collocated in FairPoint wire centers in the state. In a report of its analysis of the discovery responses, issued on August 12, 2013 (the “Staff Report”), the Staff was equivocal as to whether FairPoint had properly classified these 7 offices. The Staff advised that the ultimate determinations hinged on the legal interpretation of the FBC definition in regard to ownership of the fiber facility and the end point of the facility outside the wire center in question. Staff recommended that “the Commission request briefing . . . *to resolve whether certain types of arrangements should be counted as qualifying fiber based collocator.*”² Accordingly, Staff recommended a list of five questions of legal interpretation to be briefed by the parties. By Secretarial Letter issued on August 15, 2013, the Commission requested briefing on the five questions of law suggested by the Staff, which the Commission transcribed verbatim. Four of the questions involved specific fact patterns. The fifth question was slightly more open-ended:

*Based on the discovery responses received to date, are there other legal precedents or regulatory interpretations that should be considered by the Commission in determining the appropriate classification of the seven listed wire centers?*³

As indicated by the statements of Staff and the Commission, then, this particular inquiry was expressly restricted to the narrow question of how collocation arrangements should be classified based on the discovery responses obtained from the Staff. However, rather than respond accordingly, CANNE exploited this opening to devote fully one half of its brief to three extraneous issues unrelated to the inquiry at hand. These issues involve:

- 1) the burden of proof, which FairPoint raised in its Motion for Rehearing of Order No.

² Report of Staff Investigation of Fiber Based Collocators in DT 12-337 (Aug. 12, 2013) (emphasis supplied) (“Staff Report”).

³ Secretarial Letter at 2.

25,456,⁴ which CANNE ignored completely in its Objection to that Motion,⁵ and which the Commission tabled pending the Staff's investigation;⁶

- 2) the transition period, on which both parties briefed the Commission in briefs filed June 28, 2013, and for which CANNE admittedly seeks to supplement its previous filing with new authority (not discovery);⁷ and
- 3) "future process," in which CANNE seeks to impose new, single-party procedural requirements in future wire center impairment proceedings.

It is clear, then, that pages 14 through 25 of CANNE's Response are, for all practical purposes, an unconsented-to Reply to FairPoint's previous briefs (*i.e.*, burden of proof), an unconsented-to Supplement to its previous Comments (*i.e.*, transition period), and an untimely Petition for Rulemaking (*i.e.*, future procedure). This portion of CANNE's Response violates the scope and spirit of the inquiry of how collocation arrangements should be classified based on the discovery responses. It contains arguments that are redundant and/or immaterial to the issue at hand, and FairPoint respectfully requests that it be struck from the record.⁸

In the alternative, to the extent that the Commission denies FairPoint's Motion to Strike, then FairPoint respectfully requests that it be accorded, with Commission permission, the opportunity to present its own Reply on these matters, which Reply is being filed

⁴ Motion for Rehearing and/or Reconsideration of Order No. 25,456 at 11-13 (Feb. 6, 2013) ("Motion for Rehearing").

⁵ CANNE's Objection to FairPoint's Motion for Rehearing and/or Reconsideration of Order No. 25,456 (Feb. 12, 2013).

⁶ Order No. 25,514 Granting Motion for Rehearing and Partially Granting Motion for Reconsideration at 9 (May 28, 2013)..

⁷ See CANNE's Comments Supporting Extension of the Transition Period for Reclassified Wire Centers at 25 (June 28, 2013) ("CANNE Comments").

⁸ See, e.g. Wright, Miller, *et al.*, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.) "A motion to strike under Federal Rule 12(f) is the appropriate remedy for the elimination of redundant, immaterial, impertinent, or scandalous matter in any pleading"

contemporaneously with this Motion. Commission Rule Puc 203.32(c) provides that:

The commission shall establish a briefing schedule that allows one or more parties to submit briefs in rebuttal or reply to the brief or briefs of one or more other parties when such a sequential schedule is necessary to assure due process, fairness or full discussion of the issues presented.

FairPoint submits that permitting FairPoint to reply to the CANNE Response will assure due process, fairness and full discussion of the issues presented.

In light of the nature of the relief requested herein, FairPoint has not sought the assent of the other parties before filing this motion.

WHEREFORE, FairPoint respectfully requests that the Commission

- a) Strike all portions of CANNE's Response on pages 14 through 25 under the headings "Burden of Proof," "Future Proceedings," and "Transition Period," or, in the alternative,
- b) Grant FairPoint leave to reply to these portions of CANNE's Response.

Respectfully submitted,

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

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