

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

REPLY TO RESPONSE OF CANNE

NOW COMES Northern New England Telephone Operations, LLC d/b/a FairPoint Communications - NNE (“FairPoint”) and hereby replies to the Response of CANNE dated September 9, 2013 (“CANNE Response”).

A. Burden of proof

In its Response, CANNE untimely disagrees with the Commission’s May 2013 tabling of the issue of which parties carry the burden of proof, asserting that “FairPoint, as the petitioner seeking relief regarding a change to its own tariff, bears the burden of proof.” In support of this contention, CANNE has cited a considerable body of law for the proposition that the proponent of a change in the *status quo* carries the burden of proof, especially regarding a wire center reclassification, which CANNE equates to a rate increase.¹ FairPoint has already discussed its position on this issue in its Motion for Rehearing,² and has little to add at this point, other than to note that CANNE’s Response has introduced some confusion regarding two issues.

First, CANNE is confused about which party in a wire center impairment inquiry is the petitioner or “proponent.” CANNE believes that FairPoint is the proponent, because FairPoint filed the tariff revisions. In most cases (many of which CANNE has cited), this would be true.

¹ CANNE Response at 15.

² Motion for Rehearing and/or Reconsideration of Order No. 25,456 (Feb. 6, 2013) (“Motion for Rehearing”).

However, this is not that type of case. This is because within the context of the *TRRO*,³ FairPoint's revisions to the list of non-impaired wire centers are not an affirmative request for some sort of relief (*e.g.*, a rate increase), but instead act as a *defense* to a standing claim by CLECs. As FairPoint explained in its Motion for Rehearing, the *TRRO* and relevant case law are clear that in a UNE proceeding, it is the party seeking to *establish* impairment that has the burden of persuasion, not the party seeking to establish *non-impairment*.⁴ While the impetus for this proceeding may have been FairPoint's tariff filing, that filing was a response to the tacit contention by the CLECs that the subject wire centers are impaired. This impairment, or lack thereof, is the central proposition in this proceeding, and it is the CLECs who are its proponent, and thus bear the burden of persuasion.

In regard to the relative burdens, CANNE is also confused. Specifically, CANNE fails to distinguish between the burden of *persuasion* and the burden of *production*. While it may be true, as CANNE asserts in its Response, that FairPoint is in "possession of a vastly greater amount of information than the CLEC" (although FairPoint disputes how "vast" this information is; see below) and "should be required to produce all such information so as to inform the Commission's decision,"⁵ this only goes to the burden of *production*, not the burden of *persuasion*. In *Tzimas v. Coiffures by Michael*,⁶ the New Hampshire Supreme described the distinction:

It is well established that while the ultimate burden of proof never shifts, the burden of going forward may do so. In order to prove causation, the plaintiff must produce evidence to prove it is more likely than not that her injury was

³ *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*")

⁴ See Motion for Rehearing at 12 (citing *Covad Commc'ns Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir. 2006); *TRRO* para. 234.)

⁵ CANNE Response at 19.

⁶ 135 N.H. 498 (1992).

work-related. Assuming that she did this . . . the burden of production then shifted to the defendants to show that the injury probably did not occur at work. *The burden of persuasion did not shift to the defendants*; thus, at no time were the defendants ever required to prove where or how the injury occurred.⁷

As in *Tzimas*, FairPoint may be in possession of considerable information which it must produce, this does not mean that the burden of proof ever shifts to FairPoint.

B. Transition

In its Response, CANNE supplements its previous Comments⁸ and seeks to persuade the Commission that the Commission should adopt the decision of the Maine Commission that the date of an order approving reclassifications, not the date of any FairPoint accessible letter or other unilateral pronouncement, is the appropriate start of the transition period.⁹ FairPoint has discussed its position on this issue in its Comments,¹⁰ but notes that CANNE's Response requires some clarification.

CANNE asserts that the Maine decision is consistent with the Commission's previous determination that "transition periods should begin to run from the date of the Commission order approving a wire center reclassification."¹¹ However, this is not exactly what the Commission has decided. In Order No. 24,723, the Commission stated that "applicable transition periods shall begin on the effective date of *tariff revisions* approved by the Commission,"¹² not necessarily the date of the approval order. This is not the only occasion on which the

⁷ *Id.* at 500 (emphasis supplied).

⁸ CANNE's Comments Supporting Extension of the Transition Period for Reclassified Wire Centers (June 28, 2013) ("CANNE Comments").

⁹ *Id.* at 25.

¹⁰ FairPoint Brief Regarding Period for Transitioning Direct Transport Circuits in Non-Impaired Wire Centers.

¹¹ CANNE Response at 24-25.

¹² DT 06-020, Supplemental Wire Centers Qualifying for Relief from Certain Unbundled Services, Order No. 24,723 Classifying Wire Centers and Establishing Transition Periods at 15 (Jan. 5, 2007) (emphasis supplied).

Commission has distinguished between the effective date of an approval order and the effective date of the subject tariff. In Order 24,598, the Commission found that “the reclassification of any wire center shall be effective on the date the Tariff 84 revisions reflecting such reclassification are approved by this Commission.”¹³ However, it went on to state that “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.” Furthermore, the Commission ordered that the list of certain reclassified wire centers be filed with an effective date retroactive to the date requested by Verizon.¹⁴

This implies that the Commission distinguishes between the effective date of wire center *classification*, and the effective date of *tariffed rates* involving those wire centers. They need not be the same. The formal classification is essentially the acknowledgement of the fact that non-impairment exists, and may have existed for some time.

Furthermore, the Commission should consider that there is a distinction between transition *period* and transition *rates*. To the extent that the Commission decides that an adjusted transition period is necessary for whatever reason, this does not necessarily mean that FairPoint is not entitled to the transition rate during the transition period, however long it may be.

C. Future Process

In its Response, CANNE claims hardship as a result of the proceeding, and suggests that “the Commission should reinforce existing requirements and impose additional requirements on any reclassification proposal filed by FairPoint.”¹⁵ CANNE further asserts that “[a]s the proponent of a tariff change, FairPoint should be required at the time of its initial filing to fully

¹³ DT 05-083, Verizon New Hampshire Wire Center Investigation, Order No. 24,598 Classifying Wire Centers and Addressing Related Matters at 48 (Mar. 10, 2006).

¹⁴ Order 24,598 at 47-48.

¹⁵ CANNE Response at 22.

document the facts on which it relies in making its claim.”¹⁶

As discussed above, FairPoint disputes CANNE’s contention that FairPoint is the “proponent” in this matter. Aside from that, FairPoint observes that CANNE is unclear on the relief that it is seeking here. CANNE proposes that FairPoint “fully document” its tariff filing in a “full and complete” initial filing,¹⁷ but does not describe what constitutes such a filing. CANNE refers to the FCC’s “complete as filed” rule in forbearance proceedings as an example, but again is not specific as to how this process would translate to the matter at hand. As it is, FairPoint’s initial filing conformed to the procedure that the Commission has previously prescribed for wire center impairment proceedings.¹⁸

FairPoint does not disagree with CANNE that “in both the New Hampshire and federal jurisdictions, both sides have a burden to sustain.”¹⁹ The question is what that burden is and how it is distributed. The fact is that, contrary to CANNE’s insinuations regarding FairPoint’s “exclusive possession” of vast amounts of information, no party’s command of the facts is complete, and the parties must rely on information from the each other, combined with the disinterested evaluation of the Commission’s Staff, to construct a full and complete case.

FairPoint respectfully cautions the Commission against making a decision on process at this point. The record in this proceeding is far from complete, and the issue of future process is one for reflection and consultation among the parties and Staff. For example, CANNE has

¹⁶ CANNE Response at 22.

¹⁷ *Id.* at 23.

¹⁸ “In support of any future proposed revisions to Tariff 84 which seek to change wire center classifications, Verizon shall provide this Commission with a list of CLECs it deems to be fiber-based collocators in accordance with our determinations herein and/or with a copy of the ARMIS data supporting the number of asserted business lines, including information demonstrating that the business lines are used for switched services, whichever is relevant to the wire center’s classification.” Order 24,598 at 48.

¹⁹ CANNE Response at 19.

suggested that the Commission produce *in conjunction with the parties*, a standard questionnaire to be sent to alleged fiber-based collocators upon receipt of a proposed reclassification. This suggestion has merit. Furthermore, FairPoint suggests that the Commission may wish to take a fresh look, outside the heat of a contended proceeding, at the Commission's standing determination that wire center impairment filings can only be considered under the compressed timeframe of RSA 378:6, IV, rather than the more relaxed procedure in RSA 378:6, I(b). The reclassification of a wire center is not clearly a "new service" as contemplated by RSA 378:6, IV, but certainly falls short of a full rate case contemplated by RSA 378:6, I(a). RSA 378:6, I(b) may be the best fit for this type of inquiry.

In any event, to the extent that the Commission determines that adjustments are required in the wire center impairment process, FairPoint believes that this decision should not be made at this time, but only after there has been an opportunity for a deeper exchange of views.

Respectfully submitted,

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

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: September 24, 2013

By:  _____

Harry N. Malone
111 Amherst Street
Manchester, NH 03101
(603) 695-8532
hmalone@devinemillimet.com