

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 11-061

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

**Petition for Approval of Simplified
Metrics Plan and Wholesale Performance Plan**

Order Denying Motion for Rehearing and Suspending Procedural Activity

ORDER NO. 25,560

August 5, 2013

I. PROCEDURAL HISTORY

On June 27, 2013, the Commission issued Order No. 25,538 (the Arbitration Procedure Order), granting, subject to conditions, the Joint Motion for Expedited Approval of Arbitration Procedure (the Joint Motion) filed on May 13, 2013 by Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint), Biddeford Internet Corporation d/b/a Great Works Internet, Comcast Phone of New Hampshire, LLC, CRC Communications of Maine, Inc. d/b/a OTT Communications, CTC Communications Corp., Lightship Telecom LLC, Conversent Communications of New Hampshire, Inc., all d/b/a "EarthLink Business", Freedom Ring Communications, LLC d/b/a BayRing Communications, and National Mobile Communications Corporation d/b/a Sovernet Communications (the Moving Parties). The Joint Motion sought Commission approval of specific arbitration procedures (the Arbitration Procedures) designed to address and resolve issues associated with a simplified Performance Assurance Plan to be known as the Wholesale Performance Plan (the WPP). The proposed Arbitration Procedures would involve the three states of Maine, New Hampshire, and

Vermont; therefore, the Moving Parties sought similar approval and adoption of the Arbitration Procedures by the Maine Public Utilities Commission and the Vermont Public Service Board.

In the Arbitration Procedure Order, the Commission noted the limitations on its authority to delegate adjudicative functions to a hearings examiner under RSA 363:17 and concluded that it could not legally be bound by the recommendation of a hearings examiner as to matters of either fact or law. Accordingly, the Commission granted the Joint Motion subject to the following conditions:

(1) notwithstanding anything to the contrary in the Joint Motion or the Arbitration Procedure/Process contained in Exhibit 1 to the Joint Motion, the Commission may consider any evidence, testimony, or other material relevant to the determination of the issues in this proceeding, including, but not limited to, evidence, testimony, or other material presented as exceptions or comments to a Hearings Examiner's Report, in briefs by the parties, or prior to or during the arbitration proceedings before the Arbitration Panel; and (2) the Commission is not obligated to accept any finding or conclusion of fact or law made by the Arbitration Panel during or as a result of the arbitration proceedings before the Arbitration Panel or in any Proposed Decision.¹

On July 26, 2013, FairPoint filed a Motion for Rehearing and/or Reconsideration of or, in the Alternative, to Annul and Set Aside Order No. 25,538 (FairPoint Motion). On August 2, 2013, a Response to the FairPoint Motion and Request to Suspend Procedural Activity Pending Outcome of Settlement Negotiations (Response) was filed by Biddeford Internet Corporation d/b/a Great Works Internet, Comcast Phone of New Hampshire, LLC, CRC Communications LLC d/b/a OTT Communications, CTC Communications Corp., Lightship Telecom LLC, Choice One of New Hampshire, Inc. and Conversent Communications of New Hampshire, Inc., all d/b/a "EarthLink Business", Freedom Ring Communications, LLC d/b/a BayRing Communications, and National Mobile Communications Corporation d/b/a Sovernet Communications (CLEC Parties).

¹ Arbitration Procedure Order at 7.

II. POSITIONS OF PARTIES AND STAFF

A. FairPoint

In the FairPoint Motion, FairPoint asserted that the purpose of the proposed arbitration procedures was to limit discovery, shorten testimony, narrow the issues, reduce the amount of briefing and encourage a consistent result across all three states. According to FairPoint, the conditions imposed in the Arbitration Procedure Order represent a substantial and material modification of the proposed arbitration process and the Arbitration Procedure Order and therefore

effectively acts as a denial of the Joint Motion and an order of the Commission, *sua sponte*, of an alternate procedure that amounts to the Commission's standard rules of procedure, only complicated by the layering of the arbitration procedure under the hearing examiner. This is an alternative process that FairPoint did not agree to undertake.

FairPoint Motion at 3. Based on this rationale, FairPoint requested that the Commission reconsider the Arbitration Procedure Order and either grant the Joint Motion without conditions or deny the Joint Motion.

If the Commission on reconsideration were to decline to eliminate these conditions or to deny the Joint Motion, then FairPoint requested in the alternative that the Commission annul and set aside the Arbitration Procedure Order. According to FairPoint, the conditions imposed by the Commission in the Arbitration Procedure Order (and the similar conditions imposed by the Maine Public Utilities Commission) "amount to a complete frustration of the original purpose of the Joint Motion (as FairPoint understood it) to streamline the process in this proceeding."

FairPoint Motion at 4. In FairPoint's view, the original intent of the parties would be better served by simply conforming to the Commission's standard rules of procedure, "perhaps adapted to the special characteristics of this tri-state matter in the event a mutual agreed-upon procedure can be adopted." *Id.*

B. CLEC Parties

In their Response, the CLEC Parties argued that FairPoint has provided no basis for rehearing, reconsideration, or annulment of the Arbitration Procedure Order and the FairPoint Motion therefore should be denied. The CLEC Parties explained, however, that recent negotiations between the parties have resulted in significant progress towards a comprehensive settlement of outstanding issues, potentially negating the need for the process established by the Arbitration Procedure Order. Given these positive developments, and in the interest of the efficient allocation of resources to focus on settlement rather than litigation, the CLEC Parties requested that the Commission “suspend procedural activity in this docket” pursuant to the Arbitration Procedure Order. Response at 2.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were “overlooked or mistakenly conceived” by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14.

FairPoint does not argue that the Commission erred in deciding that the arbitration procedures proposed in the Joint Motion could not be approved as submitted due to the statutory restrictions on the Commission’s delegation authority under RSA 363:17. In fact, FairPoint

makes no legal argument at all, but merely states that it did not receive the approval it sought and does not wish to accept the conditions imposed on approval in the Arbitration Procedure Order pursuant to RSA 363:17. These are not good reasons for us to rehear or reconsider our decision and, accordingly, we will deny the FairPoint Motion.

We believe, however, that FairPoint may misunderstand the effect of the Arbitration Procedure Order. We did not order FairPoint or the other Moving Parties to participate in the proposed arbitration process subject to the stated conditions. We did not appoint a hearings examiner to serve as the New Hampshire representative on the arbitration panel, nor did we direct Staff to participate in the proposed arbitration process. The effect of the Arbitration Procedure Order was merely to approve a motion voluntarily filed by parties in this docket proposing a specific set of arbitration procedures, subject to conditions compelled by the restrictions on our delegation authority contained in state law. We believe the Moving Parties are free to withdraw their Joint Motion and proceed with litigation and adjudication consistent with state law and procedures in New Hampshire and the other two states, if they do not wish to proceed with arbitration subject to the conditions stated in the Arbitration Procedure Order.

We do, however, wish to see the outstanding issues among the parties resolved in the most efficient and expeditious manner and we encourage the parties to continue active settlement negotiations to further that goal. We will therefore suspend procedural activity in this docket for the next sixty days, until October 4, 2013, prior to which date FairPoint and the CLEC Parties, either jointly or separately, must file a written report regarding the status of their negotiations, the issues that remain to be resolved, and the anticipated timing for completion of their negotiation and settlement process.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's Motion for Rehearing and/or Reconsideration of or, in the Alternative, to Annul and Set Aside Order No. 25,538 is hereby DENIED; and it is


FURTHER ORDERED, that procedural activity in this docket shall be suspended for a period of sixty days from the date of this Order, until October 4, 2013; and it is

FURTHER ORDERED, that, on or before October 4, 2013, FairPoint and the CLEC Parties, either jointly or separately, shall file with the Commission a written report regarding the status of their negotiations, the issues that remain to be resolved, and the anticipated timing for completion of their negotiation and settlement process.

By order of the Public Utilities Commission of New Hampshire this fifth day of August, 2013.




Michael D. Harrington
Commissioner



Robert R. Scott (RWS)
Commissioner

Attested by:



Debra A. Howland
Executive Director