

**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 Wire Center Reclassification

**Order Approving Process for Future Wire Center Reclassification
Investigations and Denying Motion for Clarification**

ORDER NO. 25,631

February 21, 2014

I. PROCEDURAL HISTORY

On October 7, 2013, the Commission issued an order reclassifying six wire centers owned by Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint), and extending the transition periods applicable to such reclassifications.

Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE, Order No. 25,580 (October 7, 2013) (2013 Reclassification Order). In the 2013 Reclassification Order, the Commission directed Staff to work with interested parties to develop and propose a reasonable and appropriate process to be implemented in future wire center reclassification proceedings, and to file a report summarizing the results of this initiative within 90 days of the date of the Reclassification Order. *Id.* at 26-27.¹

On November 5, 2013, a Motion for Clarification was filed by the CLEC Association of Northern New England, Inc. (CANNE) with respect to the process for determining whether fiber optic facilities are operated by fiber-based collocators (FBCs) pursuant to indefeasible right of

¹ At Staff's request, this 90-day deadline was extended until January 14, 2014, by secretarial letter dated January 8, 2014.

use (IRU) agreements. On November 15, 2013, FairPoint filed an Objection to CANNE's Motion for Clarification.

On January 14, 2014, Staff filed a report summarizing its efforts to develop a future process, in collaboration with representatives of FairPoint and CANNE, and recommending Commission approval of the future investigation procedures developed through this collaborative process. On January 31, 2014, Staff filed a supplemental report stating that the parties had agreed to the use of an initial set of data requests, with one noted issue to be resolved by the Commission.

II. POSITIONS OF THE PARTIES AND STAFF

A. CANNE's Motion for Clarification

In its Motion for Clarification filed on November 5, 2013, CANNE requested that the Commission specify the definition and characteristics of an IRU in the context of determining whether a collocation arrangement is a "fiber based collocation" under the applicable wire center impairment criteria established by Federal Communications Commission (FCC) regulations and Commission precedent. In support of this request, CANNE asserted that Commission adoption of an IRU definition would serve to "establish regulatory certainty on this important issue and provide for application of fair and consistent criteria going forward." CANNE Motion at 3. CANNE cited several FCC orders describing IRUs and asserted that the IRU definition should specify at a minimum that, in order to be deemed an IRU, a lease agreement must meet the following criteria:

- (1) have a long term, with a duration in the range of 20 years, commensurate with the useful life of the fiber asset;
- (2) provide the lessee with indicia of ownership, such as the ability to splice fiber;

- (3) require payment of all or a substantial part of the cost of the IRU on an up-front basis; and
- (4) be treated as a capital asset for accounting purposes.

Id. at 4.

CANNE further requested that the Commission specify that procedures for future wire center reclassifications must

include scrutiny of the facts underlying claims that an arrangement is an IRU, including but not limited to examination of underlying documents purporting to be IRUs, to ensure that asserted IRUs meet the definition and characteristics.

Id. at 1. In support of this request, CANNE asserted that Staff should “investigate beneath the surface of claims that an arrangement is an IRU” by requesting, obtaining and reviewing any purported IRU documentation and accounting entries to be sure that the lease arrangement may properly be characterized as an IRU under the relevant definition. *Id.* at 5.

B. FairPoint’s Objection

In its Objection to Motion for Clarification filed on November 15, 2013, FairPoint claimed that CANNE’s request for clarification is moot because it does not seek to clarify any decision of the Commission and, “without a decision, there is nothing to clarify.” FairPoint Objection at 2. FairPoint requested that the Commission dismiss the CANNE Motion or, in the alternative, docket it separately as a petition for declaratory ruling pursuant to N.H. Code Admin. Rules Puc 207.01, “so that a true record can be developed on which to base a decision, or enter it in the current docket as unsolicited comments that can inform the Commission’s ongoing inquiry while requiring no other action from the Commission.” *Id.*

FairPoint offered a reply to CANNE’s Motion for Clarification in the event that the Commission considered the substantive issues raised in the Motion. In its reply, FairPoint criticized CANNE’s citations of FCC IRU descriptions as incomplete and inconsistent, and

characterized the FCC's use of varying definitions of IRU as "fluid and situational." *Id.* at 5. FairPoint cautioned against "importing the definition of an IRU from other FCC proceedings, particularly when the IRU is being used as a proxy for something else." *Id.* at 3. FairPoint maintained that CANNE's proposed IRU definition "is too expansive, does not conform to the spirit of the impairment inquiry, and invites gaming." *Id.* While it refrained from proposing its own definition of IRU, FairPoint suggested that the term of an IRU should not have to exceed five years and that the definition should not depend on the payment terms of the lease agreement. *Id.* at 7.

C. Staff's Reports and Recommendations

On January 14, 2014, Staff filed a report letter summarizing its efforts to develop a future process for wire center reclassification investigations in collaboration with representatives of FairPoint and CANNE. Staff reported that these participants had reached agreement as to a process to evaluate future FairPoint filings to reclassify wire centers within the statutory deadlines of RSA 378:6, IV. The proposed process, which was described in a document attached to Staff's January 14th report, establishes procedures for filing and notice by FairPoint and for discovery and investigation by Staff. Staff expressed its belief that the proposed process represents a reasonable and balanced approach that should significantly reduce the time necessary to investigate and resolve future FairPoint tariff filings to reclassify its wire centers. Staff recommended that the Commission approve the proposed process outline. Staff noted that the proposed process contemplates Staff issuance of a set of initial data requests to alleged FBCs in the relevant FairPoint wire centers and that the parties had not yet reached agreement on the questions to be included in these data requests regarding IRU agreements involving alleged FBCs.

On January 31, 2014, Staff filed a supplemental report letter stating that the parties had agreed to use of an initial set of data requests, including a subset of questions regarding IRU agreements with alleged FBCs, and noted one unresolved issue regarding the scope of questions as to fiber splicing rights and restrictions under IRUs. Staff recommended that the Commission resolve this issue and approve use of the initial set of data requests in connection with the stipulated process for future FairPoint wire center reclassification investigations. With respect to CANNE's Motion for Clarification and FairPoint's Objection, Staff recommended that the Commission decline to adopt an IRU definition at this time, deferring any such determination until a more extensive factual and legal record has been developed in the context of a contested proceeding.

III. COMMISSION ANALYSIS

We have reviewed the proposed process for future wire center reclassification investigations and the initial set of data requests, as developed through the collaborative stakeholder process, and we have concluded that these process and discovery proposals are reasonable and appropriate and should be approved. We commend the parties for their diligent efforts to develop these process improvements, which we believe will greatly increase the likelihood that future wire center reclassification proceedings can be resolved within the statutory time periods under RSA 378:6, IV. We note the ten-day period for alleged FBCs to respond to Staff's initial set of data requests in any such proceedings, and we urge all carriers to respond to these discovery questions as quickly as possible, in order to accelerate the investigation, review and determination process.

With respect to the two questions in data request 4.f to which FairPoint objects, we believe it is appropriate to include these questions in the initial data request set in the interest of

developing a more complete record upon which a determination may be made whether an alleged FBC is party to an IRU agreement. We note that CANNE, an organization that includes parties that may be called upon to respond to the data requests, has not objected that these questions are irrelevant, unnecessary or burdensome. In rejecting the objection to these questions, we do not prejudge the relevance of any information obtained in response, nor the manner in which such information may affect any IRU determination in a future contested proceeding.

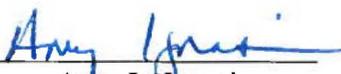
With respect to CANNE's Motion for Clarification, we agree with Staff and FairPoint that it would be premature to adopt an IRU definition in the absence of a fully-developed factual and legal record. With respect to CANNE's request that we require Staff to obtain and review any purported IRU documentation and related accounting entries in the course of its investigation, we believe this request effectively has been rendered moot by CANNE's agreement to the investigation procedures and initial data requests we adopt today, which do not require that such documentation and accounting entries be obtained and reviewed. We note, however, that Staff is not foreclosed from requesting additional documents or information through subsequent data requests if circumstances warrant. Therefore, we will deny CANNE's Motion for Clarification without prejudice.

Based upon the foregoing, it is hereby

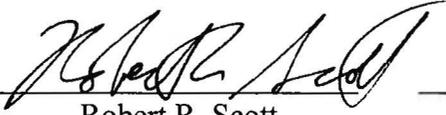
ORDERED, that the future process outline and initial data requests template, as set forth in Appendix A and Appendix B, respectively, appended to this Order, are approved for use in future FairPoint wire center reclassification proceedings; and it is

FURTHER ORDERED, that CANNE's Motion for Clarification is denied without prejudice.

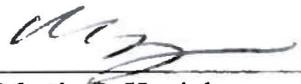
By order of the Public Utilities Commission of New Hampshire this twenty-first day of
February, 2014.



Amy L. Ignatius
Chairman



Robert R. Scott
Commissioner



Martin P. Honigberg
Commissioner

Attested by:



Debra A. Howland
Executive Director

APPENDIX A

Process for FairPoint Filings to Reclassify Wire Centers

1. FairPoint will make a tariff filing with the Commission proposing a reclassification of any wire center or wire centers. The filing must include a cover letter specifying the wire centers proposed to be reclassified and each network element that would be affected by such reclassification, together with back-up documentation reasonably sufficient to show that each wire center contains no less than the minimum number of “fiber-based collocators” (FBCs), as defined in 47 C.F.R. §51.5, or business lines, or both, as interpreted by the New Hampshire Public Utilities Commission (the FP Supporting Documentation).² FairPoint will include in its filing the most current contact information in its records for the appropriate representative of each such alleged FBC, including name, address, telephone number, and e-mail address.
2. No later than the date of the tariff filing, FairPoint will provide a redacted copy of its tariff filing to each alleged FBC, including only the FP Supporting Documentation specific to that alleged FBC. FairPoint also will issue an accessible letter notifying all CLECs that a tariff filing has been made to reclassify the specified wire center(s), and specifying the proposed reclassification. The FairPoint filing must include a copy of this accessible letter, as well as a representation that the required notice has been provided to each alleged FBC.
3. If Staff does not believe that the FP Supporting Documentation is reasonably sufficient to show that no less than the minimum number of alleged FBCs is collocated in each specified wire center with fiber optic cable and related equipment as of the date of the FairPoint tariff filing, then Staff will recommend that the tariff filing be rejected.
4. If Staff believes that FairPoint has provided FP Supporting Documentation meeting this standard, then Staff will issue data requests to the alleged FBC contacts identified by FairPoint. The alleged FBCs issued these data requests will have 10 days to respond, per Puc 203.09(f). Staff also may issue data requests to any party, including FairPoint, or utilize other investigatory means Staff deems appropriate to gather relevant information, at any stage of the proceeding.
5. If such data request responses and other information obtained by Staff through its investigation support the undisputed factual and legal conclusion that a wire center contains at least the minimum number of FBCs, business lines, or both, as of the date of FairPoint’s tariff filing, then Staff will recommend that the relevant wire center be reclassified as fully or partially unimpaired as set forth in FairPoint’s tariff filing.

² FP Supporting Documentation considered adequate to meet this standard includes, but is not limited to, copies of FairPoint records showing that a fiber pull was completed from manhole zero to the CLEC collocation.

6. If contested legal issues are identified, but facts are undisputed, then Staff will recommend a briefing schedule to be concluded in time for the Commission to issue a decision within no more than 60 days from the tariff filing date, if possible.
7. If facts are in dispute based on the FP Supporting Documentation, the responses provided by alleged FBCs to Staff data requests, and any other information obtained by Staff through its investigation, then Staff will conduct a conference call or calls with or between FairPoint and each specific alleged FBC to attempt resolution of the disputed factual issues.
8. If the facts in dispute cannot be resolved, then Staff will recommend that the FairPoint tariff filing be rejected and the disputed facts be investigated and possibly adjudicated through an evidentiary hearing. Once the investigation and any such evidentiary hearing have been completed, and if the Commission has issued an order approving reclassification of the specified wire center(s), then FairPoint will be permitted to make the tariff effective as of the date of submission of its compliance filing.
9. In the event that an alleged FBC does not respond to Staff data requests notwithstanding reasonable efforts by Staff to compel such response, and the status of the alleged FBC in a wire center is material to the proposed reclassification of such wire center, then Staff will conduct a site visit to such wire center with FairPoint (and other parties subject to confidentiality restrictions), and attempt to make a determination whether the alleged FBC meets the requirements to be counted as an FBC with respect to that wire center. If such a determination can be made based on the site visit, then the process will continue and Staff will recommend that the alleged FBC be found to be an actual FBC with respect to that wire center. If such a determination cannot be made following the site visit, then Staff will recommend that the tariff filing be rejected with respect to that wire center.
10. If the tariff review period is extended by an additional 30 days, and a decision ultimately is made within the 60-day period approving FairPoint's tariff filing, then transition rates will go into effect as of the originally proposed tariff effective date, but the applicable transition periods for discontinuation or conversion of facilities will begin as of the date the Commission approves the reclassification or allows it to take effect.
11. Confidentiality restrictions and procedures will apply as in the investigation conducted in Docket DT 12-337, in order to protect any information that associates a particular alleged collocator with a particular wire center.
12. If circumstances arise which are not covered by the procedures above, Staff will expeditiously convene a status conference to determine how to resolve the issues, in connection with which conference all parties will be expected to work in good faith to establish an expedited procedural schedule for the resolution of such issues.

APPENDIX B

DATA REQUESTS OF N.H. PUBLIC UTILITIES COMMISSION STAFF

INSTRUCTIONS

1. Please furnish data responses within ten (10) days pursuant to N.H. Admin. Rule Puc 203.09(f).
2. For the purposes of these requests, “document” is defined as any writing of every kind in the possession, custody or control of the Company, including but not limited to letters, facsimiles, minutes and records of meetings, memoranda, reports, notes, plans and maps, recordings, transcripts, records of telephone or other communications, vouchers and other accounting records, lists, engineering studies, rate studies, economic studies, and computer files.
3. For each response, please identify the individual who will be available for cross-examination concerning that response.
4. If the Company has no document which is responsive in any way to any portion of a data request, please so state. In addition, please identify the person who determined that no such document exists.
5. If requested data is duplicative of that furnished in response to another data request, please identify the response in which the information is contained.
6. If you find a request to be unclear or imprecise, please request clarification, by telephone, to the Staff member who forwarded these requests as soon as possible.

Data Requests from Commission Staff: Form Instructions

Please complete the form below with reference to the following specific instructions:

- A. In Section 1, list the parties that own more than 10% of your company. *(Fictional example responses are provided in shaded italics.)*
- B. Please fill out the table in Section 2 with one line for each fiber (meaning fiber optic cable or strand) that you had in operation at each listed wire center during any period from **[the first date shown in FairPoint's back-up documentation]** through the date of your response.
- C. As guidance, the first three shaded lines provide an example using a fictional respondent with two fiber collocations of some type in the Grovers Corners wire center and one in the Leah wire center.
- D. Please add extra lines where needed for a given wire center (as in example line 2).
- E. Please use the following definitions and directions in completing the table:
 1. **Leaves the wire center premises:** a fiber is considered to leave the wire center premises when it leaves the FairPoint central office(s) building itself, together with associated vaults, structures, equipment and facilities, and adjacent land, all being owned, leased or otherwise controlled by FairPoint.
 1. **Operate:** Control or direct the functioning of. In the case of a fiber-optic cable, "operate" includes controlling the placement, capacity and configuration of the cable itself.
 2. **Powered:** The fiber is attached to electrically powered and active equipment in the collocation facility.
 3. **Service Start Date:** The date by which the fiber was powered and was operated by you. You may report this as "By [the first date shown in FairPoint's back-up documentation]" if that is accurate.
 4. **Service End Date:** The date by which the fiber was no longer powered or no longer operated by you. If the fiber is still powered and operated by you, enter CURRENT. Include multiple lines in the table for fibers that have transitioned in and out of service.
 5. **Fiber Ownership:** Mark this column:
 - **Own:** where you own a fiber cable outright (do not use 'Own' for strands)
 - **FRP:** where you lease the fiber from FairPoint on an IRU basis
 - **CFP:** Where you lease the fiber on an IRU basis from a competitive fiber provider. *(List each such CFP in Section 2).*
 - **N/A:** None of the other responses (Own, FRP, or CFP) apply
- F. For each fiber listed as leased from FairPoint or a CFP on an IRU basis, complete the questions under Section 4.

Data Requests from Commission Staff: Form

1. Ownership of Your Company

List the name of each individual, corporation, company, other business organization, trust or other entity that has or had a 10% or greater share of your company's equity at any time between the earliest service start date and the latest service end date listed below and state the period during which such equity interest was owned or controlled:

Name: **Period of Ownership:**

<i>Wayne Ventures</i>	<i>June 2010-Current</i>
<i>Anthony Stark Capital</i>	<i>March 2011-Dec. 2012</i>

2. Wire Center Fibers

Wire Center	CLLI	Fiber Ownership	Powered?	Leaves Wire Center Premises?	Service Start	Service End
<i>Grovers Corners</i>	<i>GRCRNHAM</i>	<i>OWN</i>	<i>N</i>	<i>Y</i>	<i>By 3/1/2010</i>	<i>Current</i>
<i>Grovers Corners</i>	<i>GRCRNHAM</i>	<i>CFP</i>	<i>Y</i>	<i>Y</i>	<i>6/15/2011</i>	<i>Current</i>
<i>Leah</i>	<i>LEAHNHBR</i>	<i>CFP</i>	<i>-</i>	<i>N</i>	<i>-</i>	<i>-</i>

3. Competitive Fiber Providers

*In Grovers Corners we lease fiber from XYZ Fiber.
In Leah we lease fiber from Second City Fibronics.*

- 4. Additional Questions for Each Fiber Leased on an IRU Basis (add sheets as necessary to provide answers for each such fiber)**
- a. Party from which the fiber is leased:
 - b. Start date and duration of the lease:
 - c. Describe the circumstances, if any, under which the lease may be terminated before the end of the stated term.
 - d. Are there any restrictions on the uses to which you may put the fiber, or the services you may provide over the fiber? If so, describe.
 - e. Are there any restrictions on resale, assignment, or re-leasing of the fiber? If so, describe.
 - f. Do you have the ability to splice the leased fiber strands? If so, at what points and under what circumstances? Please describe any restrictions on your ability to splice the fiber.
 - g. Please describe the payment arrangements for the fiber. Please specify, in particular, whether an up-front payment was required, and if so, what up-front payments were required.
 - h. Please specify who has the obligation to maintain and/or repair the fiber strands that are subject to the lease. If you contract with another party (for example, the fiber provider) for maintenance and/or repair of the fiber, please describe the arrangement, including the fees involved and the party to which the fees are paid.
 - i. Please describe how you treat the lease as an accounting and tax matter (for example, as an asset, a lease, or an operating expense).