

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 09-007

segTEL, Inc.

Request for Arbitration Regarding Dark Fiber

Order Denying Motion for Rehearing

ORDER NO. 24,986

July 16, 2009

I. PROCEDURAL HISTORY

On January 22, 2009, segTEL, Inc. (segTEL) filed a dark fiber arbitration request for dark fiber on 14 routes involving 19 segments in the New Hampshire service territory of Northern New England Telephone Operations, LLC d/b/a FairPoint Communications – NNE (FairPoint). segTEL also requested confidential treatment of its dark fiber request. By secretarial letter on January 26, 2009, the Commission appointed F. Anne Ross, General Counsel, to act as arbitrator and directed her to report her findings by February 11, 2009. At the Arbitrator's request, the Commission extended that deadline to February 27, 2009.

Following two visits to the FairPoint facilities in Manchester, New Hampshire, to review inter-office fiber records and local exchange cable plat records, the Arbitrator issued findings on February 27, 2009, and supplemental findings on March 27, 2009. On April 16, 2009, by Secretarial Letter the Commission adopted the arbitrator's findings and directed FairPoint to make fiber available to segTEL on 9 of the 14 routes requested.

On May 18, 2009, segTEL filed a motion requesting reconsideration of the arbitrator's determination on 3 of the 5 routes where the arbitrator found no fiber available. On June 25,

2009, the Arbitrator reported on an additional review of the 3 routes included in segTEL's motion.

II. MOTION FOR REHEARING

segTEL argues that the arbitrator's findings regarding dark fiber availability on the routes described in segTEL's appendices 2, 8 and 11 were "incorrect in fact and in law." segTEL motion at 2.

A. Appendix 2

segTEL asserts that the arbitrator overlooked or misconceived the facts laid out by the parties and did not allow segTEL an opportunity to review and contest facts relied upon by the arbitrator in the March 27, 2009, Supplemental Report and Recommendations. According to segTEL, neither the tariff nor applicable law would allow FairPoint to reserve fiber in the manner it has used on this route.

First, segTEL observes that NHPUC Tariff No. 84 (Tariff 84), Section E Dark Fiber 17.4.1.A allows FairPoint to reserve fiber for growth or survivability, but only as demonstrably necessary to meet individual short-term service needs. segTEL claims that FairPoint failed to reserve the 2 maintenance and 2 defective fibers for its broadband deployment until after segTEL requested arbitration. segTEL also argues that FairPoint has told staff of the Maine Public Utilities Commission that it only requires 2 fiber strands for its next generation network. According to segTEL, under Tariff 84 short-term service needs may only relate to FairPoint's role as the incumbent provider of last resort. segTEL asserts that provider of last resort obligations include only telephone service and not broadband or information services.

On this route segTEL claims that FairPoint determined that it could save the cost of future construction by using the 2 repaired fibers rather than providing them to segTEL. segTEL

asserts that under Federal Communications Commission (FCC) rules economic concerns are not to be a consideration when providing interconnection, and therefore posits that “the arbitrator did not consider federal law nor FairPoint’s burden of proof when making the March 27 Determination.” segTEL motion at 8.

segTEL argues that FairPoint had ample time to repair and reserve the fiber for itself after it took over the Verizon network on April 1, 2008. segTEL claims that FairPoint refused its request to test and repair the 2 defective fibers and only did so after being told to by Commission staff. segTEL references a 2006 proceeding before the Maine Commission in which segTEL claims the Maine Commission ordered FairPoint’s predecessor, Verizon, to keep only two maintenance spares on a 24 fiber cable. segTEL quotes the Maine Commission as holding that “[b]y assigning two maintenance spares to itself while a CLEC has a pending request for the exact same number of fibers on the same route, Verizon violates both principles of fundamental fairness as well as the federal non-discrimination requirements. It is difficult to understand how Verizon could ever show the quality of access it provided to GWI is equal to that it provided itself or offers an efficient competitor a meaningful opportunity to compete.” segTEL asks the Commission to find that FairPoint must now award segTEL the 2 fibers that were tested and repaired as a result of segTEL’s request for arbitration.

B. Appendix 8

segTEL argues that the fiber count of only 8 fibers on this route is extremely small by any standard and is substantially below the traditionally deployed fiber counts for the period in which this route was constructed. segTEL questions whether all fiber was correctly counted and placed into inventory and whether routine network modifications, such as splicing, might meet segTEL’s needs on this route. Finally, segTEL asserts that it was not allowed the opportunity to refute the fiber count presented by FairPoint to the arbitrator.

C. Appendix 11

segTEL notes that there was one defective fiber that does not appear to have been tested. As a result, segTEL requests that the Commission require FairPoint to test and, if possible, repair the defective fiber to make fiber available to segTEL on this route.

III. STAFF MEMORANDUM

The Director of Telecommunication, Kate Bailey, re-examined the type and amount of fiber available on the three routes identified by segTel in its motion for reconsideration. The arbitrator filed a memorandum with the Commission on June 25, 2009, setting forth the results of Ms. Bailey's review.

A. Appendix 2

With regard to segTEL Appendix 2 on the disputed segment the arbitrator initially found that there were 24 fibers: 20 in use, 2 maintenance spares and 2 defective. The arbitrator reported that FairPoint agreed to test the defective fibers to determine whether the 2 defective fibers could be repaired and made available to segTEL. The arbitrator recommended that the Commission find no fiber available to lease to segTEL on the disputed segment. The arbitrator noted that FairPoint had internal requests to fund construction to increase fiber capacity on the disputed segment.

Following testing and repair of the 2 defective fibers, FairPoint reported that the fibers were usable and reserved them, as well as the 2 maintenance spares, for its next generation network plan (NGN). As a result, FairPoint determined not to construct additional capacity on this disputed segment. FairPoint indicated that when the NGN was deployed over the 4 reserved fibers on this segment it would free up 2 other fibers currently in use to serve as maintenance spares. The arbitrator found that although segTEL's request for fiber may have accelerated

FairPoint's testing and repair of the 2 defective fibers, FairPoint's reservation of the 2 additional fibers for its own use was reasonable. The arbitrator recommended that the Commission find that the 2 newly repaired fibers were not available for lease by segTEL. The additional examination of this segment by Staff on June 11, 2009, confirmed the earlier findings regarding this disputed segment.

B. Appendix 8

The arbitrator found that only 8 fibers existed on the disputed segment of segTEL Appendix 8 and that all fibers were in use. Although the arbitrator found no fiber available to lease to segTEL, the arbitrator noted that FairPoint plans construction to increase capacity on this segment. FairPoint represents that, following construction, sufficient spare capacity will exist to meet anticipated competitive local exchange carrier (CLEC) demand. The additional examination of this segment by Staff on June 11, 2009, confirmed the earlier findings regarding this disputed segment.

C. Appendix 11

segTEL Appendix 11 involved two disputed segments. On the first segment the arbitrator found 16 fibers, 12 in use, 3 reserved for maintenance and 1 defective. On the second disputed segment the arbitrator found 8 fibers with all 8 in use. The arbitrator recommended that the Commission find no fiber available to lease to segTEL on both disputed segments. On June 25, 2009, following testing of the defective fiber on the first disputed segment, the arbitrator reported that, according to FairPoint, the defective fiber was not repairable. The arbitrator noted that FairPoint planned to construct additional capacity on both segments. FairPoint represents that, following construction, sufficient spare capacity will exist to meet anticipated CLEC demand on these two segments.

IV. COMMISSION ANALYSIS

At the outset, we note that RSA 541:3 establishes the right of any person directly affected by a commission order to “apply for a rehearing” with respect to such an order. Pursuant to RSA 541:4, a motion for rehearing must “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” Pursuant to RSA 541:3, the Commission may grant a rehearing when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either “overlooked or mistakenly conceived” by the deciding tribunal. *See Dumais V. State*, 118, N.H. 309, 311 (1978). In this case we consider each of segTEL’s arguments to determine whether our prior decisions on segTEL’s Appendices 2, 8 and 11 are either unlawful or unreasonable.

A. Appendix 2

segTEL asserts that FairPoint’s reservation of 4 fibers for its own use on this route is not consistent with the tariff or applicable law. Reservation of dark fiber by New Hampshire’s dominant incumbent local exchange carrier (ILEC) has been the subject of prior Commission orders. In *Bell Atlantic Arbitration Regarding Request for Recognition of Dark Fiber as an Unbundled Network Element*, 83 NH PUC 316, (May 19, 1998), Order No. 22,942 the Commission recognized two methods for determining how much fiber Bell Atlantic (the dominant ILEC in New Hampshire at that time) could reserve: (1) the amount projected as adequate for three years; or (2) 8 spare fiber strands in a local loop and 24 spare fiber strands in interoffice (IO) cable sections. *Id.* at 18. Having considered those two approaches, the Commission chose to determine the dark fiber reservation policy on a case-by-case basis in the context of a dark fiber arbitration process. The Commission retained the right to establish more

specific reservation criteria in the future after it had conducted a number of dark fiber arbitrations. *Id.* at 18-19.

Four years later, in *Verizon New Hampshire*, 87 NH PUC 225 (April 12, 2002), Order No. 23,948 the Commission adopted the facilitator's finding that: "...Verizon's proposed reservation terms, which mirrors its policies in other Verizon states (except for Massachusetts) is in compliance with the Commission's orders." *Id.* at 9. In his report filed in that docket the facilitator described Verizon's existing dark fiber reservation policy in New Hampshire:

"...in interoffice facilities, 4 fibers as fiber maintenance spares in cables containing up to 24 fibers, 6 fibers in cables containing from 25 to 48 fibers, 8 fibers in cables containing from 49 to 96 fibers, 10 fibers in cables containing from 97 to 144 fibers and 12 fibers in cables above 144 fibers." Report of Facilitator, January 3, 2002, at 53.

The facilitator did not recommend any change in Verizon's reservation policy, finding it consistent with prior Commission orders. *Id.* at 54. *See also*, Modified Report of Facilitator, January 16, 2002, at 7, in which the facilitator recommended continuing Verizon's current dark fiber reservation policy. The Commission has not required a change in this fiber reservation policy since the 2002 order.

The Commission's approval of FairPoint's acquisition of Verizon's New Hampshire network was conditioned on FairPoint's assumption of all of Verizon's wholesale obligations. *See Verizon New England, Inc. Petition for Authority to Transfer Assets and Franchise*, Order No. 24,823, (February 25, 2008) at 73. As a result, we find that FairPoint is entitled to continue Verizon's dark fiber reservation policy. As applied to the fiber on the route described in segTEL's Appendix 2, the former Verizon policy would allow FairPoint to reserve for its own use 4 of the 24 fibers in this section of IO cable.

segTEL also claims that since there are instances where FairPoint does not reserve all 4 fibers on a 24 fiber IO cable, it should be required to make all reserved fibers available on a first come first, served basis to competitive carriers. This argument misapplies the federal non-discriminatory standard. In order for fibers to be offered to competitive carriers on a non-discriminatory first come, first served basis the fibers must be available, that is, not reserved for FairPoint's own use. The Verizon, now FairPoint, reservation policy in New Hampshire has allowed reservation of up to 4 fibers on a 24 fiber IO cable. The purpose of this reservation policy is to allow the incumbent carrier to maintain some excess capacity on its network for reliability, for maintenance, and for growth to meet its own needs. The network is a dynamic system requiring constant maintenance, repair and construction. As a result, the reservation policy sets an upper limit for how much excess capacity the incumbent may maintain without making it available to competitive carriers. In order to accommodate the incumbent's maintenance and growth needs, we must allow the incumbent some flexibility in the number of excess fibers it reserves on any given route. We find that allowing the incumbent to reserve up to 4 fibers on a 24 fiber IO cable allows such flexibility and we continue to approve that reservation policy for FairPoint.

segTEL also complains that in its response to its dark fiber request FairPoint designated 2 fibers as reserved for maintenance and the other 2 as defective, and only tested and repaired the 2 defective fibers when asked to do so by Commission Staff. According to segTEL it is unfair to allow FairPoint to now reserve the 2 additional newly repaired fibers for its own use. We must consider segTEL's complaint in light of the timing of segTEL's request. On January 22, 2009, when segTEL requested dark fiber arbitration for 14 different routes on the FairPoint network, FairPoint had acquired the network less than a year earlier and was in the midst of cutting over

from legacy Verizon software to a newly developed FairPoint back office system. Under these circumstances, it is understandable that FairPoint had not fully investigated and documented the condition and reservation status of all of its recently acquired dark fiber plant. Since FairPoint was entitled to reserve up to 4 of the 24 IO fibers described in segTEL's Appendix 2 for its own use, we do not believe its delay in testing, repairing and reserving those 2 additional fibers should prevent it from reserving them.

segTEL next argues that FairPoint's intended use of the 4 spare fibers for its next generation network is beyond the scope of FairPoint's obligations as carrier of last resort and cannot form the basis of a reservation for its own use. While we recognize that broadband facilities provide both telecommunications and information services to FairPoint customers, we do not find that such mixed use removes the network element from serving as a facility of last resort. The tariff language requires the telephone company to identify the number of fiber strands reserved for its own use and does not limit "use" to regulated telephone service. *See*, NHPUC Tariff No. 84 Part B Section 17.1.2 A. 2. h. The Commission has not restricted the incumbent's use of reserved fiber to telephone services and to do so now would be inconsistent with the settled interpretation of reservation under the tariff. Likewise the Commission has not required CLEC's requesting use of dark fiber to restrict their use of the fiber to telephone service. In light of our recent requirement that FairPoint deploy broadband to 95 percent of its telephone customers within five years of its acquisition of the Verizon network, we find it inappropriate to limit FairPoint's reservation of fiber to use for regulated telephone services. *See Verizon New England, Inc. Petition for Authority to Transfer Assets and Franchise*, Order No. 24,823, (February 25, 2008) at 78-79.

We are not bound by decisions of the Maine Public Utilities Commission, nor are we persuaded by segTEL's summary of commitments that FairPoint may have made to the staff of the Maine Public Utilities Commission regarding dark fiber. As a result, we do not address these arguments.

B. Appendix 8

In response to segTEL's concerns that all fiber was not counted, or that unterminated fiber existed which was not in inventory, we instructed Staff to recheck all fiber records on this route. Staff undertook that additional investigation and found no fiber available, even assuming routine network modifications including splicing.

segTEL also requests the opportunity to refute the fiber count presented by FairPoint to the arbitrator. Since segTEL chose to avail itself of the streamlined arbitration process designed for dark fiber requests, it may not now ask for a full adjudication of evidence presented by FairPoint as part of this arbitration. We appointed an arbitrator to conduct an investigation and to determine facts. We adopt those facts as a basis of our decision in this arbitration. Furthermore, we adopt the arbitrator's finding in her additional report of June 25, 2009, that no fiber is available on this route.

C. Appendix 11

As a result of segTEL's concern that FairPoint had not tested the one defective fiber on this route, we directed the arbitrator to determine the status of FairPoint's testing. The arbitrator reported in her June 25, 2009 report that FairPoint tested the defective fiber and found that it is not repairable. We adopt the arbitrator's finding on this point.

Based upon the foregoing, it is hereby

ORDERED, that segTEL's LLC Motion for Rehearing is hereby DENIED.

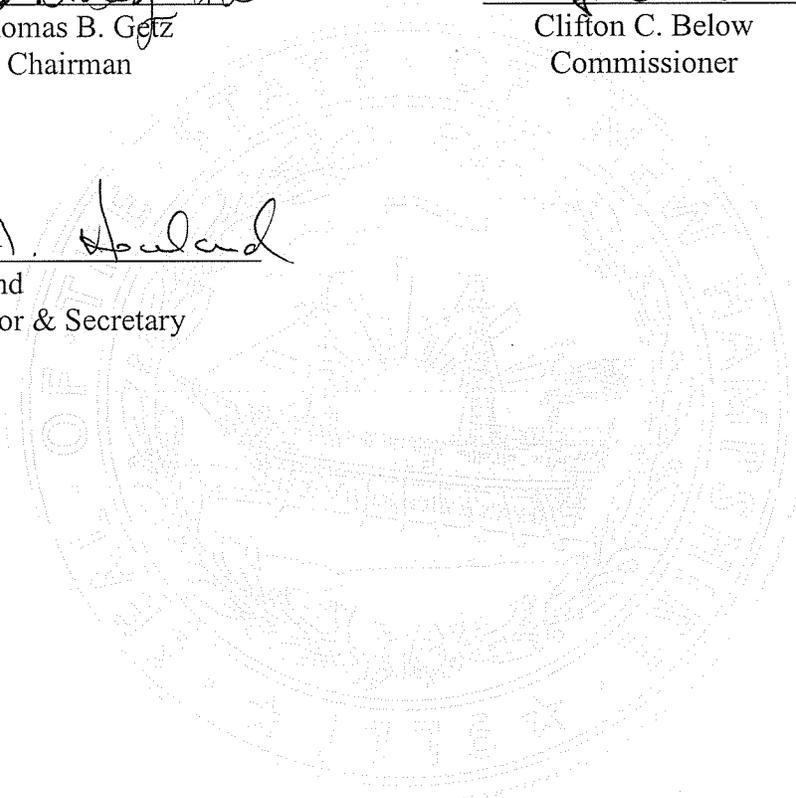
By order of the Public Utilities Commission of New Hampshire this sixteenth day of July, 2009.


Thomas B. Getz
Chairman


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Commissioner

Attested by:


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