

**CONFIDENTIAL
MATERIAL
IN COMM FILE**

January 21, 2009



Debra Howland, Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, N.H. 03301-2429

Re: Dark Fiber Arbitration Request and Request for Confidential Treatment

segTEL, Inc. ("segTEL") is a duly authorized CLEC in the state of New Hampshire. segTEL purchases unbundled network elements from FairPoint New Hampshire ("FairPoint") out of FairPoint's NH Tariff No. 84. The tariff offers unbundled dark fiber under terms and conditions that include a requirement that segTEL request a record review to determine dark fiber availability prior to placing an order.

segTEL has placed several requests for records review. Several recent requests of segTEL have been denied, although it is segTEL's opinion that sufficient spare fiber may be available to meet segTEL's request. Pursuant to orders of the New Hampshire Public Utilities Commission (Commission) regarding dark fiber, in particular the final order in Docket No. DE 97-229, Order No. 22,942, in such circumstances segTEL may request that the Commission appoint an arbitrator and conduct a fast-track arbitration.

segTEL placed these orders, and when denied, escalated them. On January 8, 2009, segTEL provided FairPoint with a list of dark fiber issues, requesting further escalation. In response to segTEL's correspondence and despite the arbitrator's recommendations from Docket #08-111, FairPoint instructed segTEL on January 15th to address these in the appropriate regulatory venue using the fast track arbitration process.

segTEL believes that its dark fiber requests should be provisioned for the following reasons:

- 1) Excessive Maintenance Reservation. The amount of dark fiber reserved for maintenance and FairPoint use is excessive and has the effect of denying segTEL fiber that segTEL is entitled to under Federal regulations, section 251(c)(3) of the Act, NH PUC Tariff #84, as well as by NH PUC rules and orders;
- 2) DWDM Deployment. Verizon's previous DWDM deployment and conversion of legacy transport arrangement on these routes provides sufficient capacity for current projects and maintenance over the pre-existing lit fibers;

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3) Inventory Errors. The actual inventory of fiber on these routes may be substantially in excess of what is recorded on the dark fiber inquiry (DFI) response;

4) Testing of Defective Fibers. On those routes where dark fiber is listed as defective, testing would reveal what routine network modifications could be done to restore the fiber to working order. Tariff 84, Part B, Section 17.1,5 states that a CLEC “may request initial or subsequent testing of dark fiber to determine actual transmission requirements”; and

5) Availability Due to Construction. Dark fiber responses include notices of future construction. When that construction has been completed, fibers should be available for use.

The first issue of maintenance spare reservation should be sufficient for the Commission to conclude that adequate fiber resources exist to honor segTEL’s requests. While the Commission has not set an absolute standard, it has determined that the number must be “reasonable”. The Maine Commission has found it is reasonable that maintenance pairs be limited to one pair or 5% of the total strand count, whichever is greater (*See* Docket No. 2002-243, ME PUC, March 31, 2006). Massachusetts determined that a minimum of 2 fibers (one pair) for maintenance was sufficient (*See* Decision P.U./D.T.E. 96-73/74, 96-75, Decision P.U./D.T.E. 96-80/81, Decision P.U./D.T.E. 96-83, 96-94-Phase 4-N, Massachusetts DTE, December 13, 1999.)

FairPoint has agreed. In a Maine rapid response proceeding and in conversations with segTEL, FairPoint Vice President Michelle Hymson has indicated that the Maine standard would be followed in New Hampshire, and did release fiber to segTEL last summer based on that premise. In each prior case, however, achieving the release of additional pairs has required time-consuming escalation directly to Ms. Hymson. segTEL believes that it is justifiably concerned that in this instance rather than utilizing the informal opportunity to provide the identical remedy as previously provided, it has been forced to engage the Commission’s resources.

Under Federal Law, dark fiber, because it is a UNE, must be provided to the extent it is technically feasible to do so. 47 C.F.R. § 51.5 defines technically feasible, stating:

“[i]nterconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is *no possibility of expanding the space available*. The fact that an incumbent LEC must modify its facilities or request is technically feasible. *An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.*” (Emphasis added.)

Despite prior assertions by Verizon that maintenance spares are required on every route, three of the fourteen routes at issue in this arbitration request have 100% of the fibers in use, with no provision for maintenance at all. This contradicts prior statements from the incumbent that a minimum amount of maintenance spares are necessary and inviolate. The evidence also shows that this use of fiber is not just the result of a snapshot in time, as the spare fiber was put in use several months ago, leaving routes without maintenance spares for two years and possibly longer. As far back as *Iowa I* and reaffirmed in the *Triennial Review Order* the FCC has stated that an incumbent must provide service to its competitors that is not inferior to the service it provides to itself. Therefore, if the incumbent can exhaust *all* maintenance spares for its own purposes, and for purposes unrelated to short-term maintenance of service, then it is discriminatory for it to reject CLEC requests for fiber that was use the remaining pair of fiber.

segTEL believes that most of the routes included in this request have adequate fiber to accommodate segTEL's request without a survey, and requests that the Commission order FairPoint to immediately provision segTEL's order for fiber on the fourteen routes specified in the attachments.

It was not segTEL's preference to bring these fourteen rejected routes in an arbitration request to the Commission. However, availability of dark fiber has changed dramatically in the past five months. Since (the date of segTEL's previous dark fiber arbitration request) there has been no newly requested dark fiber installed, except for the route that was the subject of the arbitration. Dark fiber requests, which are required to be done in no more than 15 days under the terms of Tariff 84 were most commonly responded to within 13 calendar days prior to August, and now most commonly take 27 days. Further, the number of rejections has increased substantially: fully two-thirds of segTEL's requests are rejected, despite the reasonable belief that the orders could be fulfilled as a result of the existence of excessive maintenance spares, requests for testing of defective fibers, repeated escalations and other reasons enumerated herein.

Attached are Appendices 1 through 14, documenting each route for which segTEL is requesting arbitration, including the end points, intermediate serving wire centers, availability and blockage information, the basis for segTEL's request for arbitration, and segTEL's request for relief for each route. In submitting this for filing, segTEL includes seven copies of this letter and its appendices.

segTEL requests confidential treatment of Appendices 1-14 pursuant to RSA 378:43. Specifically, the information contained in the Appendices is not general public knowledge or published elsewhere; segTEL has taken measures to prevent the dissemination of the information during the ordinary course of business; and the information pertains to the provision of competitive services and/or sets forth confidential engineering and commercial information.

Furthermore, the information enclosed also contains material that FairPoint Communications believes is confidential and proprietary, is not general public knowledge or published elsewhere, and which FairPoint has taken measures to prevent the dissemination of during the ordinary course of business.

For the foregoing reasons, segTEL requests:

- (1) fast-track arbitration on these requests pursuant to Order No. 22,942.
- (2) that the Appendices to this request be granted confidential treatment.

The confidential version of this document has been provided to FairPoint Regulatory.

Sincerely,

A handwritten signature in black ink, appearing to read "Kath Mullholand". The signature is fluid and cursive, with a large loop at the end.

Kath Mullholand
Director of Operations

cc: Kevin Shea, FairPoint Communications

Attachments: Appendices 1-14 REDACTED