

**STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION**

**In re Northern New England Telephone  
Operations, LLC — Tariff Filing to  
Implement Certain Provisions of the Order  
on Remand**

DT 12-337

**RESPONSE OF CANNE**

**Introduction**

The CLEC Association of Northern New England, Inc. (“CANNE”) submits this response to the Commission’s inquiries set out in the Secretarial Letter issued August 15, 2013. The five questions posed by the Commission each go to components of the standards established by the Federal Communications Commission (FCC) for determining those wire centers in which, if those wire centers are the end-point of a transport route, incumbent local exchange carriers (ILECs), such as FairPoint, are no longer required to provide certain dedicated transport and dark fiber transport unbundled network elements (UNEs) pursuant to section 251 of the Telecommunications Act of 1996. 47 C.F.R. §§ 51.319(e)(2), (3);<sup>1</sup> *see In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Dkt. No. 04-313, Order on Remand, FCC 04-290,

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<sup>1</sup> High-capacity (DS1 or DS3) dedicated transport and dark fiber transport are the only UNEs potentially affected by the wire center reclassifications at issue in this proceeding. The availability of these dedicated transport UNEs may also be affected by the number of business lines in a particular wire center (as an alternative test to the number of fiber-based collocators). 47 C.F.R. § 51.319(e)(2), (3). That is not an issue in this proceeding, as there is no claim or evidence that in any wire center the number of business access lines exceeds the applicable thresholds. In addition, the availability of high-capacity (DS1 and DS3) loop UNEs also may be affected in a given wire center by various combinations of the number of fiber-based collocators and the number of business lines. *Id.* § 51.319(a)(4)(i), (5)(i). Because the business-line thresholds are not exceeded in any wire center, there is no issue concerning FairPoint’s obligation to continue to provide DS1 and DS3 loop UNEs.

20 FCC Rcd. 2533 (February 4, 2005) (Triennial Review Remand Order or TRRO).<sup>2</sup> The Commission previously adjudicated these matters several years ago in DT 05-083. *In re Verizon New Hampshire — Wire Center Investigation*, DT 05-083, 06-012, Order Classifying Wire Centers and Addressing Related Matters, Order No. 24,598, at 48 (March 10, 2006) (“March 2006 Order”).<sup>3</sup>

The basis for the FCC's decision to relieve ILECs of certain unbundling obligations in some wire centers was that facilities-based competition had advanced to the point that, in some local markets, competition was sufficiently robust so that CLECs were no longer impaired without access to certain of the incumbent's network elements at mandatory TELRIC rates. TRRO ¶ 2. The FCC "weighed carefully a variety of actual competitive indicia of determining impairment" with respect to high capacity transport, *id.* ¶ 93, and determined that the presence of a sufficient number of “fiber-based collocators” would indicate the presence of competitive deployment in a given wire center, *id.* ¶ 99. Accordingly the FCC established a test involving the number of fiber-based collocators in a wire center to assess whether a CLEC was impaired without access to high capacity and dark fiber transport on a route having a particular wire center as an end point.

The FCC defined “fiber-based collocator” as follows:

*Fiber-based collocator.* A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that

- (1) Terminates at a collocation arrangement within the wire center;
- (2) Leaves the incumbent LEC wire center premises; and

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<sup>2</sup> [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-290A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.pdf)

<sup>3</sup> <http://www.puc.nh.gov/Regulatory/Orders/2006orders/24598t.pdf>

(3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.

47 C.F.R. § 51.5.

### Responses

***1. Does a CLEC, with collocation and active electrical power, using its own optronics to activate dark fiber provided by another CLEC on an indefeasible right to use (IRU) basis, qualify as a fiber-based collocator?***

CANNE addresses two issues in response to this question. First, how should the Commission evaluate whether dark fiber is provided as on an IRU basis, and, second, does obtaining dark fiber strands on an IRU basis from a carrier other than the ILEC qualify as “operating a fiber-optic cable or comparable transmission facility?”

**IRU.** The FCC has described an IRU as the conveyance of an ownership interest commensurate with the useful life to the facility, such that an IRU:

confers on the grantee substantially all of the risks and rewards of ownership for the estimated economic life of the asset. IRUs typically include the following elements: (i) payment of a substantial fee up front to enter into the IRU contract; (ii) a minimum total duration of 10 years... and (vi) no unreasonable limit on the right of the grantee to use the asset as it wishes (*e.g.*, the grantee shall be permitted to splice into the IRU fiber, though such splice points must be mutually agreed upon by grantor and the grantee of the IRU).

*In The Matter of Special Access For Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, 27 F.C.C.Rcd. 16318, 16361-62 (December 18, 2012).<sup>4</sup>

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<sup>4</sup> [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-153A1\\_Rcd.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-12-153A1_Rcd.pdf)

Elsewhere the FCC has stated that a typical IRU has a duration of at least 20 years and confers ownership rights: “An IRU is an indefeasible right to use facilities for a certain period of time that is commensurate with the remaining useful life of the asset (usually 20 years, although the parties may negotiate a different term). As a contract law matter, an IRU differs from a lease because it confers on the grantee the vestiges of ownership.” *In The Matter Of Rural Health Care Support Mechanism*, WC Dkt. No. 02-60, Report and Order, FCC 12-150, 27 F.C.C. Rcd. 16678, 16737 n.342 (December 21, 2012).<sup>5</sup>

Accordingly, when the FCC uses the term IRU, it implies that the term of an IRU and the remaining useful life of the asset are intertwined. Further, under an IRU, the grantee can treat the facilities in many respects as if the grantee owned them. Master service agreements (MSAs) or long-term lease arrangements typically do not convey such rights. In evaluating the existence of an IRU, CANNE anticipates that the Commission will request and review the underlying contracts to ensure that an IRU arrangement has been established in light of the foregoing criteria.

**Fiber-optic “Cable.”** Once the IRU basis is established, the Commission must determine whether such a facility meets the regulation’s condition that the CLEC operate “a fiber-optic cable or comparable transmission facility.” The Commission has already answered that question, stating, “[w]e find that to operate a cable, a CLEC must be able to control not only the lighting of the fiber within it, but a broader range of functions, such as the placement, capacity and configuration of the cable itself. March 2006 Order at 37. The Commission continued:

Thus, based on the plain meaning of the term and a fair interpretation of the rule, we find that only fiber-optic cables, not fiber strands or lit fiber-optic

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<sup>5</sup> [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-150A1\\_Rcd.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-12-150A1_Rcd.pdf)

facilities, should be counted toward fiber-based collocation. The rule provides for one exception: when a collocation arrangement involves dark fiber obtained by a CLEC from an incumbent LEC on an indefeasible right of use (IRU) basis. However, according to Staff's Affidavit, this situation does not exist in any of the wire centers at issue. Further, Staff's Affidavit does not indicate the existence of CLECs operating fiber-optic cable obtained under an IRU basis from another CLEC except in one limited circumstance where it is immaterial to the count of fiber-based collocators. The Parties do not assert differently. We need not address, therefore, how IRUs between the ILEC and CLECs or between CLECs are to be evaluated. As a result, we consider only those collocators that employ CLEC-operated, self-deployed fiber-optic cables in our analysis.

*Id.* at 37-38. Although the Commission's analysis at the time did not extend to fiber optic strands obtained under an IRU from the ILEC or another CLEC, the Commission did find that the plain meaning of "fiber-optic cable" did not include individual strands.

That determination was consistent with the policy rationale underlying the FCC's use of "fiber-based collocators" as a proxy measure of competition along a dedicated transport route. In the TRRO, the FCC reinterpreted the "impair" standard of section 251(d)(2) to determine which network elements must be provided to competitors on unbundled basis. The FCC reiterated the determination in its earlier Triennial Review Order that a requesting carrier is impaired "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." TRRO ¶¶ 10, 24. The FCC further clarified that the question of whether entry was uneconomic was to be assessed with reference to a "reasonably efficient competitor." *Id.* ¶ 24.

To determine an unbundling framework for interoffice transport — the only UNE at stake in this proceeding — the FCC adopted a proxy approach that looked at the number of "fiber-based collocators" in a wire center. The number of fiber-based collocators is used as a proxy to determine the level of competitive deployment in a particular geographic market. The level of competitive deployment, in turn, suggests the extent to which competitors have access to

alternative facilities and therefore no longer need to rely on the ILEC's network for economic entry into the market. The FCC stated, "[W]e utilize evidence of actual deployment to define the general characteristics of incumbent LEC wire centers where we believe there is lack of impairment — that is, where reasonably efficient competitive LECs are capable of duplicating the incumbent LEC's network." TRRO ¶ 87 (footnotes omitted).

Throughout its analysis, the FCC emphasized that its inquiry examined the extent to which competitors had duplicated or were capable of duplicating the ILEC's network. See, for example, the quote from ¶ 87 above. Similarly, in ¶ 91, the FCC described its test as focusing on whether the ILEC's network was duplicated: "[T]he test we adopt in this Order examines the feasibility of duplicating dedicated transport facilities connecting incumbent LEC wire centers." The FCC emphasized, however, that its "approach accounts for the different ways that competitive LECs deploy their own transport networks. By focusing on the competitive characteristics of a wire center and the inferences we draw from similar routes we believe we are able to capture competitive LEC deployment that does not precisely mirror the incumbent LEC's network design." *Id.* ¶ 88.

In introducing the use of fiber-based collocation as the test for impairment, the FCC states:

We use fiber-based collocation as a key factor in determining where competing carriers *already have deployed fiber transport facilities* because a sufficient degree of *such collocation indicates the duplicability of these network elements and, thus, a lack of impairment*. The Commission previously has used fiber-based collocation as a key indicator of competitive fiber deployment, and the D.C. Circuit has affirmed this use as reasonable. Fiber-based collocation in a wire center very clearly indicates the presence of competitive transport facilities in that wire center and signals that significant revenues are available from customers served by that wire center *sufficient to justify the deployment of transport facilities*.

TRRO ¶ 96 (emphasis added; footnotes omitted). Again, in paragraph 134, the FCC focuses on the ability of competitors to duplicate the ILEC's network: "Therefore, the test we adopt in this Order results in no unbundling where the record reveals that a reasonably efficient competitor has, or could, duplicate the facilities of the incumbent LEC."

It is useful to keep this principle in mind when applying the FCC's definition to the collocations at issue in this proceeding. To eliminate an unbundling requirement — that is, to eliminate the ability of competitors to rely on use of the ILEC's transport facilities to achieve economic market entry — competitive deployment must reasonably duplicate the ILEC's network. This principle will factor into determinations such as what constitutes a "fiber-optic cable" and what constitutes leaving the wire center premises for purposes of the definition. CANNE submits that an ILEC would not construct a transport network consisting of individual dark fiber strands. Instead, it would construct outside plant consisting of fiber-optic cable — sheaths with numerous strands within.<sup>6</sup> As set forth below, applying this principle results in a determination that obtaining individual strands on an IRU basis does not satisfy the definition of fiber-based collocator.

***2. If there is one CLEC terminating fiber in a competitive access transport terminal (CATT) and three additional CLECs using the same fiber on an infeasible right to use basis, should this be counted as four fiber-based collocators? Why or why not?***

The Commission has already answered this question in the negative by virtue of its earlier determination in the March 2006 Order that fiber strands do not constitute a "cable." Another justification is the economic and policy rationale for the use of the "fiber-based collocator" test described above.

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<sup>6</sup> Also, an ILEC would not construct a transport network consisting of fiber cable that does not leave the area served by the wire center. Instead, it would construct an interoffice facility that left the geographic area and connected to another wire center, perhaps many miles away. See discussion below.

As previously noted, the FCC adopted the fiber-based collocator test as a proxy for the extent to which competitive deployment demonstrates a level of competition that would justify duplication of the ILEC's network.

We use fiber-based collocation as a key factor in determining where competing carriers already have deployed fiber transport facilities because a sufficient degree of such collocation indicates the duplicability of these network elements and, thus, a lack of impairment. . . . Fiber-based collocation in a wire center very clearly indicates the presence of competitive transport facilities in that wire center and signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities.

TRRO ¶ 96 (footnotes omitted).

Importantly, the FCC did not find that competitors are non-impaired in wire centers with *any* fiber-based collocator. Instead, the FCC required at least three fiber-based collocators on both ends of a transport route before a finding of non-impairment would apply to that route.

But, in the scenario posed by the question, only one competitor has incurred the effort and expense to deploy a fiber-optic cable. A CLEC obtaining strands of that same fiber-optic cable is simply riding on the investment of another carrier, and there is no aspect of that CLEC's collocation that indicates it has "already deployed fiber transport facilities" or that it intends to make the economic investment necessary to do so.

Put another way, potential revenues are such that only one fiber transport self-deployment is justified. Notably, the Commission found that competitors were *not* impaired by the expense of collocation but *were* impaired by the cost of fiber transport deployment. "We find that, aside from those routes for which we make non-impairment determinations, carriers are impaired in their ability to self-provision the transmission facility itself, but are not impaired by the costs of collocation and electronics necessary to activate dark fiber." TRRO ¶ 133. Likewise, "Furthermore, carriers are capable of activating dark fiber when they have aggregated

sufficient revenues from traffic to justify the deployment of extensive optronics, but even at such revenue levels, sometimes carriers have not achieved sufficient revenues to justify the high expense of fiber deployment.” *Id.* ¶ 134. Thus, CLECs do not overcome barriers to entry merely because they can install electronic equipment in a collocation space so as to light dark fiber strands from one competitively-deployed fiber transport cable. Barriers to entry are overcome only by sufficient duplication of the ILEC’s fiber transport facilities.

It also is questionable how much price discipline is exerted by one alternative transport provider.<sup>7</sup> While multiple CLECs using dark-fiber strands may provide *retail* competition, that is not the relevant inquiry. Rather, the issue is the extent to which alternative transport is or can be deployed (and economically justified) for benefit of competitive carriers such that access to the ILEC’s transport network at mandatory TELRIC rates is not needed.

CANNE is aware of the Third Circuit opinion in *Verizon Pennsylvania Inc. v. Pennsylvania Public Utilities Commission*, No. 11-2712 (3<sup>rd</sup> Cir. June 5, 2012). That case should not control the Commission’s decision here. The opinion is labeled “not precedential” and in any event the decision is not binding in the First Circuit. Further, CANNE disagrees with the decision and believes it is mistaken, because the Court did not take into account the policy rationale regarding duplicability of transport facilities described in the TRRO. Individual dark fiber strands simply do not sufficiently duplicate the ILEC’s network to satisfy that policy justification. The Commission should find, as it did in the March 2006 Order, that a CLEC that obtains dark fiber strands through a CATT, regardless of whether those strands are obtained on an IRU basis or not, is not a fiber-based collocator.

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<sup>7</sup> As former FCC Chairman Kevin Martin observed, one competitor typically does not exert pricing pressure. It takes more than one competitor before pricing demonstrates the effects of competition. Remarks of FCC Chairman Kevin J. Martin, Georgetown University McDonough School of Business’s Center for Business and Public Policy, November 30, 2006, at 5-6 ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268774A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268774A1.pdf)).

3. *Does a CLEC, with collocation and active electrical power and fiber optic cable extending from the collocation facility to a termination point in the wire center not owned or controlled by FairPoint (e.g., a fiber loop extending to a business), qualify as a fiber-based collocator?*

At 47 CFR § 51.5, the FCC defines both *wire center* and *premises*.

*Premises.* Premises refers to an incumbent LEC's central offices and serving wire centers; all buildings or similar structures owned, leased, or otherwise controlled by an incumbent LEC that house its network facilities; all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures; and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to these central offices, wire centers, buildings, and structures.

*Wire center.* A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

Thus, the wire center premises include all FairPoint-owned or -controlled central offices, wire centers, or structures and the land owned or leased by FairPoint adjacent to such central offices, wire centers, or structures within the area in which all customers served by the wire center are located. Both terms are given meaning when the boundary of the wire center premises is the area in which all customers served by the given wire center are located.

Defining the “wire center premises” as encompassing the geographic area served by the wire center also is consistent with the policy rationale underpinning the definition of “fiber-based collocator.” As set forth above, the FCC uses the number of fiber-based collocators as a proxy to indicate the extent to which competitors have duplicated the ILEC’s network, such that competitors no longer need access to network elements from the ILEC in order to compete.

However, the dedicated transport network elements access to which is at stake in this case all involve transport between ILEC wire centers. They are not facilities that connect ILEC wire centers with CLEC facilities or end-user locations.

[I]n the *Triennial Review Order*, the Commission narrowed the definition by limiting transport to transmission facilities between incumbent LEC wire centers or switches and by removing from the definition transmission between incumbent LEC wire centers or switches and those owned by requesting telecommunications carriers.

TRRO ¶ 67. The FCC's definition is consistent with its findings regarding the operational characteristics of unbundled transport.

Competing carriers generally use unbundled interoffice transport as a means to aggregate end-user traffic. They do so by using dedicated transport to carry traffic from their end users' loops, which generally terminate at incumbent LEC wire centers, to a point of aggregation, permitting service to customers served via multiple incumbent LEC offices without requiring the competitor to deploy or otherwise obtain its own transport facilities to those offices.

*Id.* ¶ 69.

If a "fiber-based collocator" includes those CLECs with collocation facilities using a fiber cable serving a local customer premises or CLEC facility, UNE transport could become unavailable even where no competitive transport alternative exists. This would not satisfy the policy reason for the use of fiber-based collocators as a test for determining impairment. In the case of dark fiber transport, for example, the FCC has determined that three fiber-based collocators indicate a sufficient level of competitive capability that the ILEC no longer need provide dark fiber transport on an unbundled basis on a route that begins or ends at that wire center (assuming the other end of the route also is unimpaired). The existence of three fiber loops serving customer locations relatively close to the central office building says nothing about the availability of alternative *transport*.

Comparing fiber loops or entrance facilities to fiber transport simply is not an apples-to-apples comparison. The cost and operational characteristics of loops and transport are very different. Significantly, the economics of transport deployment are determined by traffic volume, distance, and location. Deployment cost increases with the length of a transport route.

On the other hand, revenues increase with the amount of traffic carried on a particular route. A competitor, therefore, will assess the costs of deployment and build facilities where there is sufficient traffic to cover those costs. TRRO ¶ 70. Further, since transport facilities are used to aggregate traffic, a competitor will look at the aggregate traffic available along the route, taking into account that some decrease in traffic (such as from the loss of a customer) could be made up by gaining traffic elsewhere, such as by adding new customers. *Id.* ¶ 72.

For loops, the economics are determined by the costs of deployment and revenue opportunities from the particular customer location served. Carriers build fiber loops to serve particular customers. But carriers only do so where it is economic. TRRO ¶ 185. Carriers may be able economically to deploy fiber loops to large enterprise customers that use them. *Id.* ¶ 183. And, given that loops generally cannot be reused if the customer is lost, loop deployment costs are mostly sunk costs. *Id.* ¶ 152. Costs vary by length of the loop. *Id.* ¶ 150. Therefore, economies of scale may be realized when carriers construct loops to locations that are geographically close to the transport network. Given the high cost of deploying loops, carriers will only construct loops within narrow geographic corridors close to transport rings. *Id.* ¶ 154. In addition, the short length of loops makes it possible to estimate costs more readily, thereby reducing economic risks, and reducing uncertainty in the carrier's assessment of the return on its investment. Transport involves greater uncertainty, in that make-ready costs and third-party issues may be much greater than for a short loop in a confined geographic area.

Therefore, the economic characteristics of transport and loops are very different. In an analysis of the economics of competitive deployment, the decision to self-deploy transport involves very different criteria than the decision to self-deploy a loop. Competitors might deploy a short loop to serve a particular customer, because costs are relatively low for a short loop and

the revenue opportunities may be sufficient to cover such costs. Carriers would not, however, deploy a much longer, much more expensive transport route to serve only one customer. The CLEC would only construct a transport route if there were sufficient aggregate traffic to warrant the much greater expense of deployment.

It is not appropriate to base a reclassification decision that will affect the ability to obtain unbundled transport on the presence of what are essentially dark fiber loops in a wire center. Whether to deploy a fiber-optic cable that serves a particular customer location involves very a different economic decision than whether to deploy a fiber transport route. That a particular fiber-optic “loop” makes economic sense in a particular circumstance says nothing about traffic, cost, and revenue characteristics of the end-point of a transport route. The presence of a fiber loop in a wire center does not give rise to an inference that it is economically feasible to duplicate the ILEC’s transport network by self-deploying transport fiber. Since the rationale for the fiber-based collocator proxy is to compare the economic characteristics of competition in one wire center to the characteristics of another wire center as a predictor of competition, the comparison should involve similar characteristics. Short fiber “loops” are not comparable to long transport routes. The FCC was fully aware of these distinctions and crafted its definitions with them in mind.

In sum, if a CLEC maintains a fiber-optic cable that leaves the central office building but does not, in turn, leave the community served by that central office, that CLEC would not be considered to have fiber-optic cable that leaves the incumbent LEC wire center premises.

4. *Does a fiber terminated at one end in the wire center (e.g., a collocation or a competitive access transport terminal) extending from the collocation facility to a point in the wire center area that is owned or controlled by FairPoint qualify as a fiber-based collocater?*

See the response to question no. 3 above. If a CLEC maintains a fiber-optic cable that leaves the central office building but does not, in turn, leave any FairPoint facility that is included in the premises of the wire center, that CLEC would not be considered to have fiber-optic cable that leaves the incumbent LEC wire center premises.

5. *Based on the discovery responses received to date, are there other legal precedents or regulatory interpretations that should be considered by the Commission in determining the appropriate classification of the seven listed wire centers?*

The Commission should consider three additional matters: the burden of proof; procedure in future cases; and the transition period.

### **Burden of Proof**

The burden of proof to show that a wire center indeed is unimpaired rests upon FairPoint. More than seven years ago, the Commission ruled that a wire center reclassification is not effective until the Commission approves a proposed change to FairPoint's wholesale tariff. "Going forward, we find that, for the purposes of Tariff 84, the reclassification of any wire center shall be effective on the date the Tariff 84 revisions reflecting such reclassification are approved by this Commission." DT 05-083, March 2006 Order at 48.

FairPoint, as the petitioner seeking relief regarding a change to its own tariff, bears the burden of proof. Puc 203.25. Further, a utility seeking a rate increase bears the burden of showing the necessity of the increase. RSA 378:8; *see, e.g., Aquarion Water Company of New Hampshire, Inc. — Notice of Intent to File Rate Schedules*, DW 12-085, Order Approving

Permanent Rates, Order No. 25,539, at 15 (June 28, 2013).<sup>8</sup> There can be no question that elimination of the unbundling requirement for interoffice transport will result in higher rates for alternative special access or commercial services.

The Commission's May 28 2013 order suggested that the issue of the burden of proof might require reevaluation because of changed circumstances. CANNE respectfully disagrees; no circumstances have changed. The TRRO was issued on February 5, 2004, more than two years before the March 2006 Order. The Commission and parties (including FairPoint's predecessor, Verizon) were aware of the TRRO as they debated and determined the mechanism to effectuate wire center reclassifications. Furthermore, in the March 2006 Order, the Commission expressly stated that the procedure it was putting in place was to implement and oversee the wire center reclassification process pursuant to the TRRO. The Commission noted its objective "to verify the reasonableness of Verizon's determinations with respect to wire center classifications pursuant to the *TRRO* and FCC rules and, where feasible, to clarify the appropriate guidelines and procedures for determining any future changes in wire center impairment classifications that may arise under the terms of the *TRRO*." March 2006 Order at 34. Noting that CLECs in New Hampshire were allowed to obtain services from Verizon under the wholesale tariff without the need to enter an interconnection agreement, the Commission determined that it would review Verizon's proposed wire center reclassifications as an amendment to the wholesale tariff. *Id.*

Verizon sought clarification of a very limited aspect of the Commission's ruling that future wire center classifications would take effect only upon the approval of amendments to the wholesale tariff — the applicability of that ruling to a supplemental proposed reclassification that

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<sup>8</sup> <http://www.puc.nh.gov/Regulatory/Orders/2013orders/25539w.pdf>

Verizon had announced during the pendency of DT 05-083. *In re Verizon New Hampshire — Wire Center Investigation*, DT 05-083, Verizon New Hampshire’s Motion for Reconsideration, Rehearing and/or Clarification, and Opposition to Conversent et al. Motion for Reconsideration, at 15-16 (filed Apr. 4, 2006).<sup>9</sup> Other than with respect to those specific pending reclassifications, however, “Verizon NH does not take issue with the Commission’s determination concerning the effective date of future classifications.” *Id.* at 15.

When FairPoint took over Verizon's operations, it “agreed to assume *all* of Verizon’s wholesale obligations.” *In re Verizon New England, Inc. et al. — Petition for Authority to Transfer Assets and Franchise*, DT 07-011, Order Approving Settlement Agreement with Conditions, Order No. 24,823, at 73 (Feb. 25, 2008)<sup>10</sup> (emphasis added). This necessarily included the requirement that the wholesale tariff mechanism must be used to reclassify wire centers.

In its May 28 Order, the Commission noted FairPoint’s claim that it is unlawful for the Commission to place on FairPoint the burden of proof as to whether wire centers are impaired and that federal law is clear that the burden of proof lies with any party that contests FairPoint’s designation of non-impaired wire centers. FairPoint is not correct.

Nothing in the TRRO imposes a burden of proof upon the CLEC. To the contrary, according to the TRRO, it is the ILEC, not the CLEC, that must seek relief from the Commission in the context of a wire center reclassification. The TRRO unambiguously requires that upon receipt of a request for a dedicated transport or high-capacity loop UNE, the ILEC must provision the request and, if it seeks to challenge that request on the ground that the wire center

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<sup>9</sup> <http://www.puc.nh.gov/Regulatory/CaseFile/2005/05-083/MOTIONS/Verizon%20Motion%20for%20Reconsideration%20Rehearing%20and-or%20Clarification%20of%20Order%2024,598%2004-04-06.pdf>.

<sup>10</sup> <http://www.puc.nh.gov/Regulatory/Orders/2008orders/24823t.pdf>

is unimpaired, *the ILEC* must bring the challenge before the Commission. Specifically, the FCC said:

Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.

TRRO ¶ 234.

Thus, the TRRO actually *invokes* state procedure by requiring that the ILEC bring a dispute before the state commission. Under the TRRO, the ILEC, not the CLEC, is the petitioner. Far from being inconsistent with federal law, requiring FairPoint to show that its wire center reclassifications are justified *complies* with the FCC directive. As the petitioner under such a proceeding as described in ¶ 234, FairPoint is subject to the requirement in Puc 203.25 that it prove the factual basis for its claim.

In addition, the legal principles underlying the burden of proof issue are substantially the same in both jurisdictions. As the Commission has explained, in the administrative law context, the “burden of proof” typically means the burden of going forward. *In re Hollis Telephone, Inc. et al. — Joint Petition for Authority to Block the Termination of Traffic from Global NAPs Inc.*, DT 08-028, Order Addressing Petition for Authority to Block the Termination of Traffic from Global NAPs Inc., Order No. 25,043 at 20 (Nov. 10, 2009)<sup>11</sup> (citing Davis & Pierce, *Administrative Law Treatise* (1994), at § 10.7 (noting that the term 'burden of proof' as set forth in the Administrative Procedures Act means the burden of going forward)). While the petitioner generally bears the burden of establishing a prima facie case, the burden may shift to the

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<sup>11</sup> <http://www.puc.nh.gov/Regulatory/Orders/2009orders/25043t.pdf>

respondent where it is uniquely in control of data or information essential to resolving the issues raised. *Id.* The Commission also cited its earlier order in *Comcast Phone of New Hampshire — Application for Authority to Serve Customers in the TDS Service Territories*, DT 08-013, Order Granting Authority, Order No. 24,938, at 18 (February 6, 2009)<sup>12</sup>, noting that the petitioner bears the burden of producing evidence reasonably available to it, while the respondent bears burden of producing evidence in its exclusive control. *In re Hollis Tel.*, Order No. 25,043 at 20-21.

In a subsequent order denying Global NAPS' motion for reconsideration, the Commission again noted its "established policy of shifting the burden to the party with unique access to relevant evidence, particularly with respect to the operation of public utilities. *Id.*, Order Denying Motion for Stay, Rehearing or Reconsideration, Order No. 25,088 at 17 (April 2, 2010).<sup>13</sup>

The Commission also cited *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977). That case contains an extended explanation of burden of proof under the federal Administrative Procedure Act, which provides in relevant part, "Except as otherwise provided by statute, the proponent of a rule or order shall have the burden of proof." 5 U.S.C. § 556(d). *Id.* at 1004. In that opinion, the D.C. Circuit held: "As to the APA, our opinion holds that the 'burden of proof' it casts upon the 'proponent' is the burden of coming forward with proof, and not the ultimate burden of persuasion." *Id.* at 1013.

The Court cited the legislative history of the Act (both the Senate and House Committee reports) to explain that under federal administrative procedure, each side had a burden.

That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with

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<sup>12</sup> <http://www.puc.nh.gov/Regulatory/Orders/2009orders/24938t.pdf>

<sup>13</sup> <http://www.puc.nh.gov/Regulatory/Orders/2010orders/25088t.pdf>

a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.

*Id.* at 1014 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), *reprinted* in S. Doc. 248 at 208). “[T]his section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor . . . .” *Id.* (quoting H.R. Rep. 1980, 79th Cong., 2d Sess. 34 (1946), *reprinted* in S. Doc. 248 at 270) (emphasis removed).

Thus, in both the New Hampshire and federal jurisdictions, both sides have a burden to sustain. And in this case, a substantial burden rests on FairPoint, for either of two reasons. First, either as the petitioner for a tariff change or the complaining party challenging a CLEC order for a UNE at a wire center that FairPoint believes unimpaired, FairPoint bears the burden of proof.

Second, even if the CLEC had the burden of establishing a prima facie case, FairPoint is in exclusive possession of a vastly greater amount of information than the CLEC. Accordingly, it should be required to produce all such information so as to inform the Commission’s decision.

There can be no question that there is a wide gap in the information available to FairPoint and to CLECs regarding the configuration, equipment, and facilities in the collocations in FairPoint’s wire centers. One need only look at the volume of confidential information produced in this docket to see that the information is decidedly imbalanced on FairPoint’s side. The identities of the alleged fiber-based collocators have been masked. Typically, a CLEC has information only about its own equipment and facilities. FairPoint, however, is uniquely in possession of critical information, such as whether a fiber pull has occurred or whether a collocator is using FairPoint UNE transport or lit services.

The FCC recognized the extent to which ILECs possess information relevant to the fiber-based collocator inquiry.

Many incumbent LECs have been reviewing and maintaining this data for years in order to demonstrate eligibility for special access pricing flexibility. ... Moreover, because most competitive LECs purchase some facilities or services from incumbent LECs, such as interconnection, collocation, loops, and so forth, an incumbent LEC typically possesses significant aggregated information about competitors in its markets. Information regarding fiber-based collocation is readily identifiable by incumbent LECs, via review of billing records or physical inspection of central office premises.

TRRO ¶ 100.

Further, FairPoint does not share that information with other competitors. It is appropriate that FairPoint protect the confidential or competitively-sensitive business information of its wholesale customers. However, FairPoint may not use that confidentiality as a shield against scrutiny and Commission review of its reclassification proposals.

The information imbalance is not alleviated by information available outside the records produced in this docket, such as by inspection or observation of the collocation arrangements at issue. In any given wire center, FairPoint controls the vast majority of space within its central office buildings. While CLECs have access to a limited amount of collocation space set aside for their use, FairPoint prohibits CLECs from access to large areas of the central office which are relevant to this inquiry, for example, the CATT, cable vault, and riser space. The mere presence of a collocator in the space visible to other CLECs does not prove the existence of a "fiber-based collocator" for purposes of this inquiry.

The Commission is aware of the information disparity between CLECs and ILECs in competitive disputes. The Commission has previously recognized that ILECs are uniquely in control of information concerning how competition affects them, and has put the burden on the ILECs to produce that kind of information:

We note that certain company specific information concerning the potential impact of a competitive market on ILECs is known only by the ILECs. [The competitive entrant]

bears the burden of producing evidence reasonably available to it and the [ILECs] bear the burden of producing evidence which is in their exclusive control.

*Comcast Phone of New Hampshire — Application for Authority to Serve Customers in the TDS Service Territories*, DT 08-013, Order Granting Authority, Order No. 24,938, at 18 (February 6, 2009).

The same principle should apply here. The Commission has said that the failure to produce information uniquely in a party's control is a "dispositive circumstance." *In re Hollis Tel.*, Order No. 25,088, at 17. To the extent that FairPoint has information that is relevant to a wire center classification in its exclusive possession or control (including but not limited to confidential information concerning the configuration and facilities of a collocation arrangement), it bears the burden of producing such evidence to the Commission. If FairPoint does not produce all such evidence, or the evidence is otherwise lacking, the Commission should find that FairPoint did not meet its burden and should find against FairPoint on relevant issues.

### **Future Proceedings**

The Commission also should reinforce its procedures for addressing wire center reclassification proposals. Although the Commission has previously determined that wire center reclassification proposals are to be addressed as proposed amendments to the wholesale tariff, the experience of this docket and those in the other Northern New England states demonstrates that further requirements are in order to ensure an efficient process.

FairPoint's initial proposal, as set forth in its November 16, 2012 Accessible Letter, involved the reclassification of 28 wire centers. CANNE challenged that proposal, on the ground, among others, that it was overbroad and overinclusive. As the result of CANNE's challenge and the Commission Staff's investigation, FairPoint's proposal has been reduced to seven wire centers, some 25% of the original list (and that number is not conclusive, but remains subject to

further reduction in this proceeding). A similar experience occurred in the contemporaneous Maine proceeding. FairPoint's initial proposal was to reclassify 16 wire centers. After CANNE questioned that proposal and the Maine Commission Staff investigated, the end result was reclassification of three wire centers (less than 20% of the original list). *In re CLEC Association of Northern New England — Request for Review of FairPoint's Proposed Wire Center Reclassifications*, Dkt. No. 2012-00570, Order (Aug. 16, 2013).<sup>14</sup>

Correcting FairPoint's overbroad initial proposals have required substantial expenditures of time, money, and effort on the part of the Commission and parties. To reduce such wasteful expenditures in the future, the Commission should reinforce existing requirements and impose additional requirements on any reclassification proposal filed by FairPoint. As the proponent of a tariff change, FairPoint should be required at the time of its initial filing to fully document the facts on which it relies in making its claim.

FairPoint, like other utilities that file tariff amendments, already is required to provide "information . . . sufficient to enable the commission to properly evaluate the proposed change in tariff." Puc 1605.02(c). Unless and until all such information is provided, the filing is not deemed complete. *Id.* § 1605.02(e). Further, the initial filing should show how each alleged fiber-based collocation satisfies the criteria in the § 51.5 definition.

Requiring FairPoint to make a full and complete initial filing is particularly appropriate given that, as discussed above, FairPoint bears the burden of coming forward with all information uniquely in its control to support its claim. If FairPoint does not produce all such information at the time of filing, the proposal should be summarily dismissed with an opportunity to cure.

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<sup>14</sup> <https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/ViewDoc.aspx?DocRefId={8488522B-8175-4278-ADA2-71C8F19B529C}&DocExt=pdf>. FairPoint's accessible letter listed seventeen wire centers, but one of those was Portland, whose status did not change.

On this issue, the Commission may wish to look for guidance to the FCC's "complete as filed" rule applicable to forbearance petitions under §10 of the Act. 47 CFR §1.54. The FCC enacted the rule in light of its experience in a number of forbearance petitions, where the petitioners had withheld essential information supporting their claims until the later stages of the proceeding, making it unfairly difficult to challenge such petitions and for the FCC staff to address in timely manner within the statutory deadlines for review. *See In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56, ¶¶ 6, 12 (June 29, 2009).<sup>15</sup>

The complete as filed rule specifies that the initial petition must contain information sufficient to make out a prima facie case on each element of the criteria for granting forbearance; requires that the petitioner notify any third parties if the petitioner intends to rely on information in the possession of those third parties; and imposes other requirements. 47 C.F.R. § 1.54(b), (e). Importantly, the rule prohibits a petitioner from supplementing the record, except in response to statements or fact introduced by commenters or opponents, or by permission. *Id.* § 1.54(f).

Requiring FairPoint to make a complete filing up front will reduce the amount of time, effort, and expense that the Commission and parties must expend extracting and verifying information in FairPoint's control. To be sure, such a requirement will not eliminate all work required of other parties and the Staff. Those parties will still be required to provide information in their possession, and the Staff may be required to undertake an investigation, particularly of third parties, as it did in DT 05-083 and in this case. However, by having FairPoint submit its case up front, that amount of effort will be reduced. It also is hoped that requiring FairPoint to

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<sup>15</sup> <http://apps.fcc.gov/ecfs/document/view?id=7020038358>

assemble its complete case before filing will result in greater internal scrutiny of its claims and will reduce the prospect of overly broad, unsupported claims in the future.

The Commission also should consider developing, in conjunction with the parties, a standard questionnaire to be sent to alleged fiber-based collocators upon receipt of a proposed reclassification. Based on the experience in this docket and in DT 05-083, the Staff and parties are familiar with the information that would be useful in review of a reclassification proposal. FairPoint should submit a blank form, filled in to the extent feasible (*e.g.*, name of FBC, identification of wire center, etc.) along with its filing, so that the questionnaire may be sent as soon as possible after filing.

CANNE is mindful of the Commission's wide range of duties and does not wish unnecessarily to add to the Staff's workload. However, due to the confidentiality concerns inherent in a reclassification proceeding, some involvement by the Staff is inevitable if a proposal is to receive a proper level of review. It is unlikely that future proposals will involve as many wire centers or collocation arrangements as in this proceeding. Therefore, CANNE hopes and expects that the amount of time that the Staff is required to devote will be appropriate. Requiring a full and complete filing up front would help alleviate any undue demands on the Staff's time and resources.

### **Transition Period**

The issue of when the transition period for reclassified wire centers should begin remains open. CANNE believes that, as the Commission previously has determined, transition periods should begin to run from the date of the Commission order approving a wire center

reclassification. These issues have been briefed, and rather than repeat its arguments, CANNE respectfully refers the Commission to its June 28, 2013 filing.<sup>16</sup>

CANNE would, however, like to make two additional points. First, addressing the identical issue, the Maine Commission recently determined that the date of its order approving reclassifications, not the date of any FairPoint accessible letter or other unilateral pronouncement, was the appropriate start of the transition period. *In re CLEC Association of Northern New England — Request for Review of FairPoint’s Proposed Wire Center Reclassifications*, Dkt. No. 2012-00570, Order at 5 (Aug. 16. 2013).

Second, CANNE reemphasizes the disruptive effect of uncertainty over wire center classifications and the availability (or nonavailability) of UNEs at affected wire centers. The status of seven wire centers remains unsettled. Transition off UNEs and onto alternative arrangements involves planning, implementation, time, and expense. It is unfair, unnecessary, and anticompetitive to require CLECs to undertake transition activities if such activities prove unnecessary by virtue of a Commission decision that a wire center remains impaired. As the Maine Commission found, beginning the transition period on the date of a reclassification order “will help to avoid the unnecessary expenditure of time and resources by the CLECs.” *Id.* This Commission should adopt the same principle and reiterate its previous holding that transition periods begin from the date of a Commission order reclassifying a wire center, and not before then.

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<sup>16</sup> <http://www.puc.nh.gov/Regulatory/Docketbk/2012/12-337/LETTERS-MEMOS-TARIFFS/12-337%202013-07-01%20CANNE%20COMMENTS.PDF>

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Respectfully Submitted,

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