

**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.

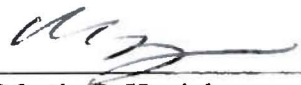
By order of the Public Utilities Commission of New Hampshire this twenty-first day of
February, 2014.



Amy L. Ignatius
Chairman

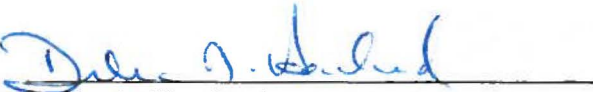


Robert R. Scott
Commissioner



Martin P. Honigberg
Commissioner

Attested by:



Debra A. Howland
Executive Director