

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DT 09-007

segTEL, Inc. Dark Fiber Arbitration Request

segTEL, Inc.

**MOTION FOR PARTIAL RECONSIDERATION OF
THE DETERMINATION OF THE ARBITRATOR
AND
REQUEST FOR INVESTIGATION AND HEARING**

On April 16, 2009, by Secretarial Letter, the New Hampshire Public Utilities Commission (Commission) adopted the arbitrator's findings in Docket No. DT 09-007 regarding the provision of dark fiber to segTEL, Inc. (segTEL) by FairPoint Communications (FairPoint), the Regional Bell Operating Company successor in New Hampshire. segTEL respectfully requests that, pursuant to RSA 541:3, the Commission grant reconsideration of the determination of the Arbitrator. Further, pursuant to RSA 365:4, segTEL requests that the Commission further investigate FairPoint's dark fiber practices and procedures. Specifically, segTEL requests that the Commission schedule a hearing to:

1. conduct a fact-specific inquiry into the type and amount of fiber available on certain specific routes identified in the appendices to segTEL's original complaint in this docket; and
2. investigate whether FairPoint's dark fiber procedures and policies are in compliance with its tariff and all applicable rules and laws.

In support segTEL states the following facts and law.

I. OVERVIEW

On January 21, 2009, segTEL requested fast-track arbitration regarding several requests for dark fiber that had been rejected by FairPoint Communications of New England (FairPoint). On January 26, 2009, the Commission appointed General Counsel F. Anne Ross as arbitrator. The Staff of the Commission (Staff) requested additional time to consider the arbitration on February 11, which was granted with an extension to February 27, 2009. The arbitrator filed her findings on February 27 (Initial Determination), and additional findings on March 27 (March 27 Determination).

In the March 27 Determination, the arbitrator addressed segTEL's Appendix 2, determining that no fiber was available. On April 16, 2009, the Commission adopted the Arbitrator's Report. segTEL believes that the March 27 Determination is incorrect in fact and in law and requests that the Commission conduct a hearing into the facts on the following:

Appendix 2. segTEL believes that the Arbitrator's finding on this route is in error both in fact and in law.

Appendix 8. segTEL believes that the Arbitrator's finding on this route is in error both in fact and in law

Appendix 11. The March 27 Determination does not address the status of testing and repair of the defective fiber identified therein, which segTEL believes was inadvertently overlooked. If the defective fiber on the route identified in Appendix 11 is able to be repaired, segTEL believes sufficient fiber exists on that route to meet segTEL's request.

segTEL also requests that the Commission investigate FairPoint's dark fiber ordering and provisioning processes to determine whether FairPoint is in compliance with its tariffs, with

Commission orders and rules, with FCC rules and with federal law. segTEL requests that the Commission investigate and determine whether and to what extent:

1. FairPoint responds to dark fiber availability requests in a timely manner;
2. FairPoint's responses to dark fiber availability requests are complete;
3. FairPoint considers all available fiber when responding to dark fiber availability requests;
4. FairPoint considers pending projects when responding to dark fiber availability requests.
5. FairPoint considers routine network modifications when responding to dark fiber availability requests;
6. FairPoint considers network efficiency when responding to dark fiber availability requests; and
7. FairPoint gives preference to itself over competitors when responding to dark fiber availability requests.
8. Fairpoint considers CLEC demand when deploying new fiber in the field.

II. APPLICABLE STANDARD

For the Commission to grant a motion for reconsideration pursuant to RSA 541:3, the requesting party must apply within 30 days, "...specifying in the motion all grounds for rehearing..." The purpose of reconsideration is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings (See *Dumais v. State*, 118 N.H. 309,312 (1978), and to provide an opportunity to correct any action taken, if correction is necessary, before any appeal to a court is filed. See *Appeal of the Office of the Consumer Advocate*, 148 N.H. 134, 136.

In response to a complaint regarding a utility, the utility must not only respond to the complaint itself, but, under RSA 365:3, "...cease to commit or to permit the violation..." If the

utility does not cease its unlawful acts, pursuant to RSA 365:4, the Commission shall determine if there are reasonable grounds to open an investigation, and take such action as the facts justify.

III. ARGUMENT

A. MOTION FOR RECONSIDERATION – APPENDIX 2.

segTEL believes that the arbitrator overlooked or misconceived the facts laid out by the Parties, and did not provide segTEL with an opportunity to review and contest facts that were relied on in making the March 27 Determination. segTEL believes that it is FairPoint’s burden to prove that dark fiber facilities are necessary to meet certain short-term needs, and that FairPoint cannot meet this burden.

segTEL believes that neither the tariff nor the applicable law would allow FairPoint to reserve fiber under the circumstances that have unfolded in the past several weeks. Therefore, segTEL believes that the arbitrator’s award to FairPoint does not follow the terms of the tariff or the requirements of the law.

1. The Tariff language cited by the arbitrator requires that denial of fiber for FairPoint’s short term service needs is “demonstrably necessary”.

The determination relies on FairPoint’s NHPUC Tariff No 84 (Tariff 84), Section E, Dark Fiber 17.4.1.A, and states, “Tariff 17.4.1 A. allows for FairPoint’s reservation of dark fiber ‘for growth or survivability in a particular part of its network as demonstrably necessary to meet its individual short-term service needs, ...’ In those cases FairPoint is not required to make its dark fiber available for lease to requesting carriers.”

All parties agree that the fiber listed in the inventory section of FairPoint’s response in Appendix 2 was neither reserved by FairPoint at the time of the initial rejection, nor reserved by FairPoint at the time of the request for arbitration. The reservation of the fiber occurred *only*

after segTEL's request for arbitration and presentation of its case. Essentially, FairPoint only discovered its compelling need for this fiber when it appeared it would be awarded to segTEL.

During the investigation, FairPoint claimed that segTEL's contention that defective fibers could be repaired and entered into service was indeed correct. However, FairPoint desired the newly repaired fibers for their own use, claiming that "all 4 fibers" (the two former defective strands and two maintenance strands) were now necessary for FairPoint's *broadband* deployment. The arbitrator was apparently satisfied with FairPoint's claim that it requires all 4 fibers for its deployment of its advanced network, even though segTEL challenged that claim.

The arbitrator's finding did not refer to the unrefuted contrary information that segTEL provided demonstrating that in Maine, FairPoint told Maine Commission Staff that its network requires no more than two fibers on any route. segTEL requests reconsideration because FairPoint's unsupported assertions were taken as fact despite segTEL's refutation of those assertions.

2. When evaluating whether dark fiber may be refused to CLECs, short-term service needs must be related to the provision of regulated services, and to FairPoint's role as provider of last resort.

segTEL believes that when demonstrating the necessity of "short-term service needs" as outlined in the NH PUC tariff (see item 1), it is reasonable that those needs are related to FairPoint's role as the incumbent service provider. Indeed, the FCC supports this view, holding in its Verizon Arbitration Order that Verizon might be allowed to deny a request for dark fiber "because filling the request would, for example, impair Verizon's ability to serve as carrier of last resort." In that same order, the FCC placed the burden of proving that impairment squarely on the ILEC denying the access. See *In re WorldCom, Inc.*, 17 F.C.C.R. 27039, CC Docket No. 00-218, paragraph 467, July 12, 2002 (Verizon Arbitration Order). segTEL believes that the tariff

requires the same of FairPoint. FairPoint has the burden to show both that the request would impair its ability to carry out its duties as provider of last resort. In the instant arbitration, FairPoint did not, in segTEL's view, meet that burden.

segTEL does not believe that FairPoint's ability to serve as carrier of last resort is affected by the deployment of the advanced network capability cited by the arbitrator, particularly since it is FairPoint's stated intention to use that network to deploy advanced Internet capabilities. Internet services are neither regulated services nor intrastate services, and, as such, cannot possibly be part of FairPoint's carrier of last resort obligations in New Hampshire.

3. The Tariff must be interpreted in light of the governing Federal Law and Federal Communications Commission's interpretations thereof:

The determination fails to take into account that Tariff 84 Part E, section 17.1.1.A. states that dark fiber will be provided to the extent proscribed by "47 C.F.R. § 51.319(e)(Z)(iv)(A), as in effect on and after March 11, 2005." 47 C.F.R. § 51.319(e), states, in pertinent part, "An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act..."¹

In *AT&T Corp. v. FCC*, 220 F.3d 607, 626 (D.C. Cir. 2000) the Court wrote that "nondiscriminatory" means that "With respect to functions or services which have a retail analogue, the FCC requires that the ILEC provide access at a level that is equal to that which the ILEC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. For functions or services without a retail analogue, the FCC looks to see whether the ILEC's performance offers an efficient competitor a meaningful opportunity to compete."

¹ 47 C.F.R. § 51.319(e) no longer contains a section "Z".

Further, the tariff requires that dark fiber, and, in fact, all network elements for which a shortage exists, will be provided on a first-come, first-served basis. Tariff 84 A.1.6.4 states, “where a shortage of facilities or equipment exists at any time, either for temporary or protracted periods, the services offered herein will be provided to CLECs on a first-come, first- served basis.” Dark fiber itself has a similar requirement in Tariff 84 E.17.1.1.H, which states, “Dark fiber is provided subject to the availability of facilities on a first-come, first-served basis.”

There is no dispute among the parties that on this route segTEL was the “first” requestor of the fiber. FairPoint made no attempt to reserve fiber or repair defective strands and was apparently content to let the fiber go unused until it entered it appeared the fiber would be awarded to segTEL. The concept of “first-come, first-served” is rendered meaningless if FairPoint’s claims are always considered to be “first” no matter when FairPoint makes those claims.

4. The Arbitrator overlooked FairPoint’s burden to provide proof that there was insufficient fiber.

As segTEL pointed out in its request for arbitration, FairPoint has the burden of proving that its denial is reasonable. 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 equipment to respond to such 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.)

Indeed, FairPoint did not claim that providing segTEL with the two repaired fibers would result in adverse network reliability because it could not make that claim. Rather, it determined that it could save the cost of future construction by using the fibers it had tested and repaired at Staff’s request instead of providing them to segTEL. Since there is, by FairPoint’s own admission, the possibility of expanding the available fiber, and, under FCC rules, economic concerns are not to be a consideration when providing interconnection, segTEL believes that the arbitrator did not consider federal law nor FairPoint’s burden of proof when making the March 27 Determination.

5. FairPoint had ample time to test, repair and reserve the fiber for itself if it wished to do so.

As early as February 8, 2008, FairPoint representatives met with Verizon representatives to plan FairPoint’s MPLS network and to determine what fiber it would need to complete the project. FairPoint did not test the defective fibers nor set aside fibers on this route at that time, despite make substantial reservations of fiber assets throughout the territories pending acquisition.

FairPoint took over the network on April 1, 2008. According to public documents, FairPoint immediately began planning its MPLS deployment and determined where it would make network modifications. Yet, during its planning, FairPoint did not test the defective fibers nor set aside fibers on this route.

segTEL requested fiber on this route in last quarter of 2008 and requested that the defective fiber be investigated. FairPoint did not test the defective fibers nor set aside fibers on this route at that time.

When segTEL requested that FairPoint test defective fiber on various routes in New Hampshire, the response was unequivocal: “We do not test or repair defective fibers.” And, indeed, FairPoint did not test the defective fibers nor set aside fibers on this route at that time.

In fact, FairPoint refused to repair or test defective fibers until specifically told to do so by the Staff of the Commission. For FairPoint to now both test AND repair defective fibers and for the arbitrator to then allow FairPoint to keep those fibers for its own benefit is not only discriminatory but outrageous.

In Maine, an exact parallel to this situation was decided in the opposite manner.

The Maine Commission made a determination that Verizon’s maintenance spare policy was anti-competitive, and ordered Verizon to maintain only two maintenance spares on routes with 24 fibers. Great Works Internet requested two fibers on a particular route. The Maine Commission stated, “On April 4, 2006, GWI submitted a new dark fiber inquiry for the [proprietary] route. On April 25, 2006, Verizon assigned 2 of the 4 maintenance spares on the route to itself for a second SONET construction project. One day later, on April 26, 2006, Verizon responded to GWI’s request and stated that there was no fiber available on the route.”

The Maine Commission found such an action to be discriminatory, saying, “By 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 that 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.”

Based on the foregoing, segTEL respectfully requests that the Commission review the reports of the arbitrator in this matter, and reconsider the arbitrator’s determinations regarding Appendices 2. segTEL requests that the Commission determine that FairPoint must award segTEL the now working fibers that were tested and repaired as a result of segTEL’s request for arbitration.

B. REQUEST FOR RECONSIDERATION – APPENDIX 8.

segTEL believes that the arbitrator overlooked or misconceived the facts laid out by the Parties, and did not provide segTEL with an opportunity to refute facts that were relied on in making the March 27 Determination. The fiber count on the route in question is extremely small by any standards, and substantially below the traditionally deployed fiber counts for the period in which this route was constructed. segTEL questioned whether all available fiber was counted, whether unterminated fiber existed that was not placed into inventory, and whether routine network modifications such as splicing could be performed to meet segTEL’s needs. There is no evidence that any of these requests were evaluated or adjudicated, and segTEL was not presented with the opportunity to refute the fiber count presented to the arbitrator.

C. REQUEST FOR RECONSIDERATION – APPENDIX 11.

On this route there was one defective fiber. segTEL believes this route was inadvertently overlooked when the arbitrator had FairPoint test defective fibers to determine if they could be

repaired. segTEL requests that the Commission have FairPoint test and, if possible, repair the one defective fiber on this route, thus allowing the award of two fibers to segTEL.

D. REQUEST FOR INVESTIGATION

segTEL also requests that the Commission investigate FairPoint's dark fiber ordering and provisioning processes to determine whether FairPoint is providing dark fiber pre-ordering services within the terms of its tariff and all applicable rules and law.

1. FairPoint does not respond to dark fiber availability requests in a timely manner.

The procedure for ordering dark fiber requires a CLEC to first request a record review to determine dark fiber availability prior to placing an order. By Commission order and under the terms of the tariff, responses to dark fiber availability requests are to be completed within 15 days (Tariff 84, B.17.1.2.A). Currently FairPoint is working extended intervals which would increase the fifteen-day interval to between 16 and 20 days. While segTEL receives a yes or no response in that time frame, the "no" responses are not complete, useful or in compliance with Tariff 84, and so cannot be considered a timely response under the terms of the tariff.

2. FairPoint's responses to dark fiber availability requests are incomplete.

Pursuant to the terms of Tariff 84, B.17.1.2.A.2., FairPoint responses to dark fiber inquiries that no fiber is available must include:

- a. The specific reason the request cannot be granted
- b. A simple schematic depicting the direct and any reasonable alternate indirect routes that were investigated
- c. The total number of fiber sheaths and strands between points on the requested routes
- d. The number of strands currently in use
- e. The transmission speed on each strand (e.g., OC3)
- f. The number of strands in use by other carriers
- g. The number of strands lit in each of the three preceding years
- h. The number of strands reserved for the Telephone Company's use

- i. The estimated completion date of any construction jobs planned for the next two years or currently underway
- j. An offer of any alternate route with available dark fiber
- k. In addition, for fibers currently in use, the Telephone Company shall specify if the fiber is being used to provide non-revenue producing services such as emergency service restoration, maintenance, and/or repair

Several recent requests of segTEL have been denied, with none of the information above included. The interval (see part D.1., above) for responses is as long as it is in order to give FairPoint time to gather the information set out by the tariff. Instead, segTEL must escalate and wait additional days to get the information FairPoint is required to provide in its response.

3. FairPoint does not consider all available fiber when responding to dark fiber availability requests.

Based on the information provided to the arbitrator in response to segTEL's request for arbitration, it appears that FairPoint does not consider all available fiber when responding to dark fiber requests. Specifically, FairPoint may fail to include all sheaths of fiber, unterminated fiber, pending installations, and/or fiber that could be made available using either routine network modifications or by efficient use of what fiber is available.

4. FairPoint does not consider pending projects when responding to dark fiber availability requests.

Based on the information provided to the arbitrator in response to segTEL's request for arbitration, it appears that FairPoint is not providing accurate information on pending projects. For example, on at least one route current construction is underway to install conduit and fiber. When asked about this job, FairPoint indicated that, while fiber is planned on that route within a year, the budget has not been approved, so, therefore, it does not have to report that job on its dark fiber response. Further, during the course of the arbitration, some of the routes were identified for the first time as having jobs pending or currently underway.

In a more egregious example, segTEL's original dark fiber rejection for the Appendix 2 route stated that there were "no construction jobs planned" in the future for that route. In the arbitrator's report segTEL discovered that there was indeed a new fiber build planned for the route. Adding insult to injury, FairPoint, by reserving the fibers that segTEL had requested after the fact, apparently sought and received permission to then *cancel* its new fiber optic build that would have provided new fiber supply on this route for FairPoint, segTEL and presumably other requesting CLECs as well.

segTEL requests that the Commission clarify for FairPoint what jobs it must report on its dark fiber responses, and order FairPoint to comply.

5. FairPoint fails to consider routine network modifications when responding to dark fiber availability requests.

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 (assuming that the fiber is in fact defective). Tariff 84 E.17.1,5 states that a CLEC "may request initial or subsequent testing of dark fiber to determine actual transmission requirements". FairPoint routinely denies such requests, and has only complied when the arbitrator specifically identified routes she wanted FairPoint to test. Subsequent requests by segTEL have been denied, and escalations have been unavailing.

In addition, FairPoint does not investigate, and refuses to do so when asked, whether and to what extent there is unterminated fiber on interoffice routes that simply requires jumpers in order to be put into inventory.

6. FairPoint does not consider network efficiency when responding to dark fiber availability requests.

Verizon's previous DWDM deployment and conversion of legacy transport arrangement on these routes provides sufficient capacity for current projects and maintenance. On some routes, FairPoint fiber is in use at speeds that are levels of magnitude below the capacity of the fiber. When segTEL has asked about the possibility of "rolling" services, and combining services onto smaller numbers of fibers in order to free up available fiber, FairPoint has responded that it does not do such things. Yet, in the course of the arbitration, on the route in Appendix 2, FairPoint indicated that it planned to do exactly that to free up fiber for itself rather than construct additional fiber.

To the extent that FairPoint does such modifications to meet its own needs, under 47 C.F.R. § 51.319 (e)(4), FairPoint must do such modifications on behalf of CLECS as well.²

7. FairPoint gives preference to itself over competitors when responding to dark fiber availability requests.

Despite prior assertions by Verizon and now FairPoint that maintenance spares are required on every route, three of the fourteen routes at issue in the arbitration request have 100% of the fibers in use, with no provision for maintenance at all. Even while claiming that Fairpoint inherited this activity from Verizon and does not condone or engage in it anymore, that is precisely what it did on the Appendix 2 route when the maintenance spares were all put into use for FairPoint's own purposes. 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

² (i) An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers where the requested dedicated transport facilities have already been constructed. An incumbent LEC shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of *any carrier*. [Emphasis added.]

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.

8. FairPoint does not have any mechanism for taking CLEC demand into account when deploying new interoffice fiber.

In Order No. 23,948 the Commission expressed its concern about availability of dark fiber and stated that, “In part to that this situation is not one that is capable of repetition yet evading review, we expect Verizon to consider future wholesale demand for fiber at the time it is sizing a build-out of its facilities for its retail customers.” The Commission acknowledged that there is no requirement that the incumbent construct fiber where none currently exists, the continued, “However, in its planning, Verizon must prudently take into consideration its wholesale customers’ expected needs for Dark Fiber along routes where Verizon has deployed or plans to deploy fiber for its own network needs. Without such a requirement, the current unsatisfactory condition is likely to persist, i.e., CLECs will have a theoretical right to access Dark Fiber where Verizon has deployed it for itself, but no realistic chance of access to such facilities, thus depriving New Hampshire customers of quality telecommunications services.

FairPoint acquired all of the rights and obligations of Verizon on April 1, 2008. At present, segTEL is unaware of any process that FairPoint has implemented to meet the Commission’s requirement to take CLEC demand into account. Given the substantial interest in dark fiber transport demonstrated by segTEL and, presumably, other CLECs that operate in New Hampshire, and taking into account FairPoint’s recent construction activities in this area, segTEL

requests that the Commission investigate whether and to what extent FairPoint is complying with the Commission order to take CLEC demand into account in these deployments.

IV. CONCLUSION

For all the foregoing reasons set forth herein, segTEL requests that this Commission:

1. Approve segTEL's request for partial reconsideration regarding Appendix 2;
2. Approve segTEL's request for partial reconsideration regarding Appendix 8, scheduling a hearing to conduct a fact-specific inquiry into the type and amount of fiber available on that route;
3. Approve segTEL's request for partial reconsideration regarding Appendix 11; and
4. Open an investigation into whether FairPoint's dark fiber procedures and policies are in compliance with its tariff and all applicable rules and laws.

Respectfully submitted,

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