

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 12-337

Northern New England Telephone Operations LLC d/b/a FairPoint Communications - NNE
Tariff Filing to Implement Certain Provisions of the Order on Remand

**BRIEF REGARDING PERIOD FOR TRANSITIONING
DIRECT TRANSPORT CIRCUITS IN NON-IMPAIRED WIRE CENTERS**

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications - NNE (“FairPoint”) and hereby submits the following Brief in connection with the investigation of its tariff filing regarding the impairment status of certain of its wire centers.

I. BACKGROUND AND INTRODUCTON

On November 16, 2012, FairPoint filed revisions to its Tariff NH PUC No. 2 (“Tariff 2”) which implemented certain aspects of the Federal Communications Commission’s *Triennial Review Remand Order* (“TRRO”)¹. Specifically, the revisions added 24 wire centers to the list of non-impaired wire centers in Section B.21.1.1, and added terms for transitioning UNE dedicated transport facilities that wholesale customers had ordered from these non-impaired wire centers to other types of wholesale arrangements. In accordance with the process established by the Commission in its 2006 *Wire Center Order*,² FairPoint submitted a list of collocators that it deemed to be fiber-based collocators in each wire center. On May 28, 2013, in its Order on Rehearing, the Commission held that the revisions to Tariff 2 became effective as a matter of law on January 15, 2013, subject to further investigation of the validity of FairPoint’s designation of

¹ *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2005).

² DT 05-083, Order No. 24,598 Classifying Wire Centers and Addressing Related Matters (March 10, 2006) (“*Wire Center Order*”).

the non-impaired wire centers.

However, citing the confusion as to the exact filing date of the tariff revisions and conflicting information derived from its investigation so far, the Commission raised the question as to whether the 7 month transition period specified in Tariff 2 was adequate time for FairPoint's wholesale customers to make alternative transport arrangements. Accordingly, the Commission solicited briefs concerning whether it would be appropriate for the Commission to order a transition period that extends beyond August 15, 2013, the date derived from the terms of the tariff. For the reasons explained further below, the Commission should not extend this transition date and, indeed, cannot extend this date.

II. THE FILED RATE DOCTRINE DICTATES THAT THE ONLY LAWFUL TRANSITION PERIOD IS THAT SPECIFIED IN THE CURRENTLY EFFECTIVE TARIFF.

Attendant to the designation of the 24 additional wire centers, Tariff 2 also contains a provision establishing a transition period of 7 months for any dedicated transport element "leased prior to the effective date of this tariff," during which time the rate for that element would be 115% of the normal tariffed rate, and after which the element would no longer be available pursuant to Tariff 2.³ This transition period is 13 months for dark fiber.⁴ The effective date of Tariff 2 was January 15, 2013, and thus these transition periods comprise, in part, the lawful rate for these dedicated transport elements and, in accordance with the filed rate doctrine, may not be deviated from.

The filed rate doctrine dictates that tariffs "do not simply define the terms of the contractual relationship between a utility and its customers. They have the force and effect of

³ See Tariff 2 §§ B.2.1.1.C.b; B2.1.1.B.b.

⁴ See Tariff 2 § B.17.1.1.C.b.

law and bind both the utility and its customers.”⁵ Describing this doctrine in the federal area, the New Hampshire Supreme Court has explained that “common carriers, such as the defendants, are prohibited from charging rates or from providing related services other than as set forth in the applicable tariff.”⁶ For this reason, reviewing and adjusting the rates charged for services already rendered under an existing tariff on a retroactive basis would be unlawful under this doctrine.

Furthermore, it would amount to unlawful retroactive ratemaking. The power of the Commission to fix or adjust rates is *prospective* in nature. RSA 378:7 provides (with emphasis added):

Whenever the commission shall be of the opinion . . . that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, . . . the commission shall determine the just and reasonable or lawful rates, fares and charges to be *thereafter observed and enforced*.

The Supreme Court clearly stated that:

If the PUC were to allow a rate increase to take effect applicable to services rendered at any time prior to the date the petition for the rate increase was filed, it would be retroactively altering the law and the established contractual agreement between the parties. In essence, such action would be creating a new obligation in respect to a past transaction, in violation of Part 1, Article 23 of our State Constitution and, due to the retroactive application, would also raise serious questions under the Contract Clause of the Federal Constitution, U.S. Const. Art. I, 10, Cl. 1.⁷

These principles apply with equal force to tariff provisions as applied to service furnished in the past where the Commission determines subsequently that those tariff provisions are not just and reasonable. Any challenge by a customer or action by the Commission on its own motion must address the issue through proceedings that are prospective in effect only. “[I]t is a basic legal principle that a rate is made to operate in the future and cannot be made to apply

⁵ Appeal of Pennichuck Water Works, 120 N.H. 562, 566 (1980).

⁶ Guglielmo v. Worldcom, 148 N.H. 309, 313 (2002).

⁷ Pennichuck, 120 N.H. at 566.

retroactively. . . .”⁸

Ultimately, a utility is entitled to rely on a final rate order until a new rate is fixed by the governing regulatory commission.⁹ “Consequently, the revenues collected under the lawfully imposed rates become the property of the utility and cannot rightfully be made the subject of a refund.”¹⁰ The Commission can effect that change only on a *prospective* basis for any *newly* designated wire centers. Thus, FairPoint should be permitted to impose the currently effective transition period on any currently designated wire centers.

III. WHOLESALE CUSTOMERS HAVE HAD AMPLE TIME TO TRANSITION THEIR FACILITIES.

In suggesting the extension of the transition period, the Commission explained that:

The evidence of impairment is conflicting. We are concerned that, given the seven month transition period specified by FairPoint, and due to FairPoint remaining silent on the issue of the incorrect filing date until after the Commission’s order rejecting the tariff, CANNE’s members and other affected companies will be denied an adequate time to transition to other providers if the transition period ends on August 15, 2013.¹¹

However, the logic of this statement is based on an invalid presumption. The Commission’s inquiry presumes that FairPoint’s wholesale customer did little or nothing to prepare for the transitions (wagering instead that the tariff would be rejected) *and that it was reasonable to adopt this strategy*. Accordingly, the Commission suggests that allowances should be made to accommodate these customers. However, FairPoint submits that, under the

⁸ Pennichuck, 120 N.H. at 566.

⁹ See, e.g., *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 389 (1932).

¹⁰ *So. Central Bell Telephone Co. v. Louisiana Pub. Serv. Comm’n*, 594 So.2d 357, 359 (La. 1992).

¹¹ Rehearing Order at 8. Several points also need to be clarified. First, the transition period “specified by FairPoint” is in exact conformance with that dictated by the Commission in Order No. 24,723 at 12-13, in DT 06-020 (Jan. 5, 2007). Second, in the case of unbundled DS3 and DS1 transport, the “transition” need be nothing more than acceptance of a higher charge for the service. Third, while the transition from dark fiber does involve actual termination of the offering, that transition period is 13 months, until February 15, 2014.

circumstances, this willful inaction was *not* reasonable, nor is it reasonable to subsequently reward such procrastination with an extension. FairPoint's wholesale customers might have hoped that the tariff filing would be rejected, but with no way of knowing for certain that the tariff would be rejected, these customers should have been reasonably diligent to prepare for transition.

For a period of over seven years, from March 2005 until the November 2012 tariff filing, only four FairPoint wire centers in all of New Hampshire had been designated as non-impaired. Any reasonably diligent wholesale customer must have anticipated that this situation would not continue indefinitely. Indeed, in establishing the currently tariffed transition periods, the Commission explained that:

we agree that there is a certain burden imposed on the CLECs to be aware of the current state of competition in the areas in which they choose to operate. . . . CLECs should expect to take some responsibility for keeping abreast of the competitive status of the market in which they undertake operations, and the fact that the TRRO, in effect, gave notice in March of 2005 to competitive carriers that they should anticipate and consider alternative arrangements.¹²

In addition to this general notice (in effect for over eight years now), FairPoint's wholesale customers were issued an Accessible Letter on November 8, 2012 advising them specifically of the latest non-impairment designations.¹³ This was followed by the tariff filing itself on November 16, 2012. After the tariff was rejected on January 17, 2013, FairPoint moved swiftly to seek rehearing, filing its petition for rehearing a full 10 days before the statutory deadline and effectively putting all parties on notice that it would expeditiously seek to validate its tariff filing and the transition period. In the *TRRO*, the FCC explained that "incumbent LEC counts of fiber-based collocations can be verified by competitive LECs, which will also be able

¹² Order 24,723 at 13.

¹³ A revised Letter was issued November 16th, clarifying the applicable transition periods.

to challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes.” However, in the more than seven months since FairPoint designated the newly non-impaired wire centers, the wholesale carriers have not issued any data requests to FairPoint or otherwise taken steps to prepare a challenge, content instead to rely on the Commission Staff to conduct this investigation in their stead.

Wholesale carriers have had ample time to prepare for the transition of any circuits affected by the new wire center designations. It would be unjust, unreasonable and unlawful for this transition period to be extended beyond the date prescribed in FairPoint’s tariff.

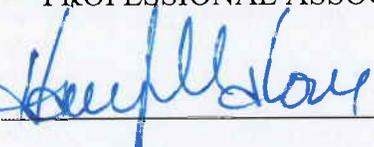
WHEREFORE, FairPoint requests that the Commission make no revisions to the transition periods described in its Tariff 2.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC D/B/A
FAIRPOINT COMMUNICATIONS-NNE

By Its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: June 28, 2013

By:  _____

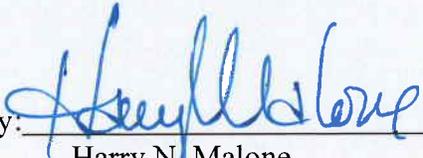
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: June 28, 2013

By: 
Harry N. Malone