

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

**DT 12-321
DT 12-322
DT 12-323**

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC
d/b/a FAIRPOINT COMMUNICATIONS – NNE**

**Tariff Filings to Revise NHPUC No. 3 – Access Service Tariff,
Tariff Filing to Revise NHPUC No. 4 – Resale Services Tariff
Tariff Filing to Revise NHPUC No. 2 - Revisions Consistent with Triennial Review Order
(TRO)**

Order Rejecting and Amending Tariffs

ORDER NO. 25,444

December 21, 2012

I. PROCEDURAL HISTORY

On June 11, 2012, Governor John H. Lynch signed New Hampshire Senate Bill 48 into law. This bill became effective on August 10, 2012. Senate Bill 48 restructured telephone regulation in the State. Among other things, the bill limited the Commission's jurisdiction over FairPoint's end user (retail) rates and charges. On October 23, FairPoint purported to withdraw its retail tariff, Tariff NHPUC No. 1, which sets forth rates and charges as well as terms and conditions for FairPoint's retail telephone services. On the same date, FairPoint filed revisions to three of its wholesale tariffs: Tariff NHPUC No. 3, which sets forth rates, charges, terms, and conditions for access services, Tariff NHPUC No. 4, which states the rates, charges, terms and conditions for FairPoint's resale services, and Tariff NHPUC No. 2, which governs miscellaneous network services and is commonly referred to as the unbundled network element (UNE) / Collocation tariff. In the first two filings, docketed as Docket Nos. DT 12-321 and DT

12-322, FairPoint represented that the changes to its access and resale services tariffs reflect language changes that are required as a result of FairPoint's purported withdrawal its retail tariff. With regard to revisions of its UNE / Collocation tariff, docketed as Docket No. DT 12-323, FairPoint represented that the proposed changes are required as a result of its withdrawal of its retail tariff and that the changes are consistent with federal law, specifically *In the Matter of Unbundled Access to Network Elements*, 18 F.C.C.R. 16978 (2003), commonly referred to as the *Triennial Review Order (TRO)*; *on remand* 20 F.C.C.R. 2533 (2005), commonly referred to as the *Triennial Review Remand Order ("TRRO")*; and *Verizon New England v. Maine Public Utilities Comm'n*, 509 F.3d 1 (1st Cir. 2007).

By secretarial letters dated November 8, 2012, and November 20, 2012, the Commission approved extending the time for review of these tariffs until December 21, 2012 to allow Staff sufficient time to assess the implications of the proposed changes. Also on November 20, the CLEC Association of Northern New England, Inc. (CANNE) requested that the Commission suspend the proposed tariff changes under RSA 378:6 and convene a technical session for FairPoint to describe its proposed revisions in the three tariff filings, to explain their effect, and to provide justification for each change.

On December 19, 2012, Commission Staff filed recommendations for the disposition of each of FairPoint's tariff filings in the relevant dockets. Staff's recommendations are described below.

II. POSITIONS OF THE PARTIES AND STAFF

A. FairPoint

FairPoint asserts that Senate Bill 48 deregulated end user telecommunications services as of August 12, 2012. FairPoint stated that it is withdrawing its retail tariff, NHPUC Tariff No. 1,

in response to Senate Bill 48, effective October 23, 2012, and that the changes to its access tariff NHPUC Tariff No. 3, and resale services tariff NHPUC Tariff No. 4, are required as a result of its withdrawal of Tariff No. 1. FairPoint makes this same assertion with regard to its UNE / Collocation tariff NHPUC Tariff No. 2, and also represents that the changes to this tariff are consistent with federal law as contained in decisions of the Federal Communications Commission and the United States Circuit Court of Appeals for the First Circuit.

B. CANNE

CANNE argued that the thirty or sixty days provided by RSA 378:6, IV is insufficient time for the Commission to review the extensive tariff changes made by FairPoint, especially in light of the fact that the federal decisions relied upon by FairPoint were decided some time ago and in light of the fact that these tariff filings represent the first changes to wholesale tariffs since the enactment of Senate Bill 48. CANNE requested that the Commission suspend all tariff changes and hold technical sessions.

C. Staff

Staff filed a recommendation for the disposition of each tariff filing. With regard to FairPoint's access services tariff, Staff argued that, because the tariff revisions rely solely upon reference to rates and charges posted on FairPoint's website, and incorporate unspecified text that may be modified at any time without Commission review, the Commission cannot conclude that FairPoint's wholesale rates and charges are just and reasonable. Staff asserts that the Commission is required to make such a finding under RSA 374:1 and RSA 374:2. Staff recommends that the Commission reject FairPoint's revisions to Tariff NHPUC No. 3 in their entirety, notify FairPoint that its retail tariff remains in effect insofar as it is cited by FairPoint's

wholesale tariffs, and invite FairPoint to resubmit tariff revisions that include acceptable substitutes for all references to NHPUC Tariff No. 1.

With regard to FairPoint's resale services tariff, Staff identifies six sections that, in Staff's assessment, are not "just and reasonable" as required by RSA 374:2. The six sections identified by Staff include: (1) Section 1.2.1A, which refers to FairPoint's terms of service as "regulations." Staff finds this nomenclature misleading because "regulations" commonly refer to governmental actions having the force of law; (2) Section 1.3, which asserts that terms in the tariff are defined in "terms and conditions" published by the Company. Staff asserts that this practice incorporates unspecified text that is subject to unilateral modification and makes it impossible for the Commission to determine that the terms of the tariff are just and reasonable; (3) Section 2.1.1, which asserts that FairPoint is not obligated to provide services specified in the tariff unless those services are mandated by law. Staff argues that a tariff approved by the Commission should be definitive and should remain in effect until revised according to Commission rules; (4) Section 5.2.1A, which continues a previous restriction under which a reseller cannot offer a resold service to classes of customers where FairPoint itself excludes those classes of customers from receiving the service. While Staff is not opposed to this restriction in principle, Staff argues that FairPoint has not provided a transparent and documented mechanism that resellers can use to determine what class restrictions exist; (5) Section 5.3.1A, which pertains to the discount applied to wholesale services. The revision replaces a reference to rates and charges contained in FairPoint's retail tariff with a reference to "published rates and charges." Staff argues that, should a dispute develop, there is no documented process for establishing what retail rates were on any particular day, and that until there is a verifiable and transparent process for making such determinations, the Commission cannot find that the tariff

changes meet the just and reasonable standard; and (6) Section 7.1.1, pursuant to which FairPoint proposes to charge resellers separately for municipal property taxes on utility poles. Staff argues that this provision appears to be in violation of Order No. 25,384, which requires that such expenses be recovered through rates and not by imposing surcharges. In Staff's assessment, these six sections are sufficiently important to the tariff as a whole that the Commission should reject FairPoint's resale services tariff filing in its entirety rather than attempt to amend the filing.

Staff recommends that the Commission amend FairPoint's UNE / Collocation tariff revisions and then allow them to go into effect. Staff proposes amendment of only five of the revisions, all of which fall into either of two categories: reference to FairPoint's website where the tariff previously referred to language in FairPoint's retail tariff and changes that eliminate wholesale obligations for which Staff has been unable to find support in FCC or court rulings. These five amendments proposed by staff include: (1) requiring FairPoint to incorporate the Tariff NHPUC No.1 text defining Local Calling Areas directly into Section A.1.3.2 of the UNE / Collocation tariff, (2) requiring FairPoint to delete its revisions to Sections B.7.2 and B.7.3, which, if left intact, would eliminate wholesale access to FairPoint's line information data base, (3) requiring FairPoint to delete its revisions to Sections B.11.1.A and B.11.1.C because number portability and number parity commitments are required by both Section 251 of the Telecommunications Act of 1996 (the Telecom Act) and under state law, (4) requiring FairPoint to delete its revisions to B.12.2.1.A and B.13.2.1.B disclaiming that services listed in the tariff are not available if the services are no longer mandated by federal law, and (5) requiring FairPoint to replace the word "regulations with "terms and conditions" in Section E.2.2.9A.

According to Staff, the remaining revisions, either eliminate unbundled network element offerings that are no longer required to be provided by FairPoint under federal law, or eliminate services that may be mandated by Section 271 of the Telecom Act, but the state enforcement of which is preempted. Staff does not propose changes to revisions that fall into either of these two categories

III. COMMISSION ANALYSIS

The three filings made by FairPoint propose over 170 changes to three of its wholesale tariffs. The Commission reviews filings such as these under the time frames specified in RSA 378 and must within the thirty or sixty day time period, if extended, either amend or reject the filings. Here, the Commission rejects FairPoint's revisions to Tariff NHPUC No. 3 governing access service offerings and Tariff NHPUC No. 4 governing resale service offerings in their entirety. The Commission's rejection of the revisions to Tariff NHPUC No. 3 and No. 4 are without prejudice. The Commission will allow FairPoint's revisions to Tariff No. 2 relating to miscellaneous network services (UNE / Collocation) with the five amendments proposed by Staff. Because there are issues common to all three filings, the Commission will discuss its analysis on an issue-by-issue basis, rather than on a tariff-by-tariff basis.

A. References to FairPoint's Website

FairPoint's drafting technique of referring to and relying upon definitions, policies, rates, terms and conditions posted only on its website makes it difficult if not impossible for the Commission to determine that a service offered or rate charged in a tariff is just and reasonable under RSA 374:1 and RSA 374:2. Further, a reference in a tariff to FairPoint's website does not conform to the tariff filing requirement in RSA 378:1. Not only does this technique require the Commission form an understanding of language currently posted on FairPoint's website, the

Commission must keep in mind that what is posted on FairPoint's website today may be different tomorrow. If the Commission were to approve a reference to FairPoint's website when approving a tariff filed at the Commission, then language that the Commission has not had the opportunity to review would be viewed by many as carrying the Commission's imprimatur. The Commission cannot sanction language that it has not reviewed. This drafting technique permeates FairPoint's revisions to its access services tariff. Therefore, we reject the proposed revisions to NHPUC Tariff No. 3 filed in Docket No. DT 12-321, without prejudice. FairPoint also uses this technique in Section 1.3 of its resale services tariff and in Section A.1.3.2 of FairPoint's UNE / Collocation tariff. As noted above, the Commission rejects all of the revisions to NHPUC Tariff No. 4 filed in Docket No. DT 12-322, because the rejected revisions appear to be interrelated with the remainder of the tariff. We believe that it is best to give FairPoint the first opportunity to amend, prior to further Commission review. However, in Docket DT 12-323, the Commission finds that the definition of local calling areas is discreet enough to accept FairPoint's UNE / Collocation tariff with an amendment to Section A.1.3.2 that directly incorporates the Tariff NHPUC No. 1 definition of local calling areas.

B. Class of Customer Restrictions and Wholesale Discount Basis

Staff has identified two instances where the lack of a retail tariff and reference to FairPoint's website poses special problems. These include class of customer restrictions in proposed Section 5.2.1.A and wholesale discount under Section 5.3.1.A of FairPoint's resale tariff filed in Docket No. DT 12-322. The Commission is persuaded that FairPoint must propose a mechanism that will allow resellers and the Commission to determine what restrictions exist at any particular time, and must likewise propose a record keeping process that will conform to RSA 378:1 and will permit resellers and the Commission to document rates and charges at any

point in time so that disputes over wholesale discounts are both minimized and easily reviewed by the Commission. The importance of these provisions to the whole of Tariff No. 4 leads us to reject, without prejudice, the revisions to Tariff NHPUC No. 4 filed in Docket DT 12-322 in their entirety.

C. Use of the Term “Regulations”

With regard to Section 1.2.1.A of FairPoint’s resale tariff and Section E.2.2.9A of its UNE / Collocation tariff, the Commission finds that the use of the term “regulations” is misleading. The Commission is concerned that the use of this term implies governmental action or approval, or even the force of law. In future, FairPoint should not refer to its terms of service, whether in the form of policies, service offerings, rates, terms, or other conditions as “rules” or “regulations.”

D. Use of Disclaimers

FairPoint’s use of disclaimers to deny services that are listed in its tariffs, but which subsequently become voluntary services under federal law is an inappropriate use of a tariff. Our statutes and rules require the submission of a tariff revision and Commission review before a tariffed service may be altered or withdrawn. *See e.g.* RSA 378:1, :5 and :6. Commission review of state wholesale tariffs is necessary given the complexities of federal law that inform them and the consequent likelihood of disagreement over interpretations of that law. Under New Hampshire law, specifically RSA 378:6, IV, the Commission will review such revisions expeditiously. Accordingly, when FairPoint files its amendments to its UNE / Collocation tariff, it must remove its disclaimer in Section 2.1.1, and FairPoint may not include such a disclaimer if it decides to file further revisions to its resale tariff.

E. Changes Not Supported By Law

The Commission will consider arguments that FairPoint's proposed revisions to B.7.2 and B.7.3 (both relating to access to FairPoint's line information data base) and B.11.1.A and B.11.1.C (relating to number portability and number parity) of its UNE / Collocation tariff are supported by law. Likewise, the Commission will consider an argument that FairPoint's proposed change to Section 7.1.1 (relating to recovering municipal property taxes) is not contrary to Order 25,384. FairPoint's filings, to date, lack specific legal support for these changes. Staff was not able to find such support, and the Commission will not search for it in the relatively short time allowed for review of telecommunications tariff filings. If FairPoint decides to make another filing revising its resale tariff, it should adequately explain its legal basis for any collection of property taxes that is inconsistent with Order No. 25,384.

In the meantime, the Commission will allow FairPoint's UNE / Collocation tariff to go into effect so long as FairPoint files an amended tariff removing Sections B.7.2, B.7.3, B.11.1.A, and B.11.1.C.

F. Withdrawal of Tariff NHPUC No. 1

Under Senate Bill 48, FairPoint is required to post all of its retail rates, fares, charges, prices, terms and conditions of service on its website, and is no longer required to maintain a retail tariff at the Commission. See also RSA 378:1-a (West Supp. 2012). However, FairPoint's wholesale tariffs have historically referred to FairPoint's retail NHPUC Tariff No. 1. Unless and until the Commission approves changes to FairPoint's wholesale tariffs that eliminate references to NHPUC Tariff No. 1, the Commission will retain that NHPUC Tariff No. 1 on file, and will utilize that tariff for the limited purpose of resolving disputes regarding wholesale services.

G. Conclusion

The three filings under consideration represent FairPoint's and the Commission's first attempts at revising FairPoint's wholesale tariffs following the New Hampshire General Court's restructuring of retail telephone regulation. This process will prove more efficient if FairPoint works with its wholesale customers and Staff to assist them in understanding proposed wholesale tariff revisions in advance of any tariff filing, rather than relying solely upon the Commission to review tariff filings within the time frames established under RSA 378:6, IV. If FairPoint had followed such a course, rejection of its access services and resale tariffs could likely have been avoided. In light of CANNE's interest in a technical session, the Commission recommends that FairPoint meet with representatives of the companies that obtain wholesale services under tariff and Staff prior to submitting new revisions. The Commission will make its Staff available for consultation and its offices available for meetings to facilitate FairPoint's adjustment to its new regulatory environment.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's proposed revisions to Tariff NHPUC No. 3 filed in Docket No. DT 12-321 are REJECTED without prejudice; and it is

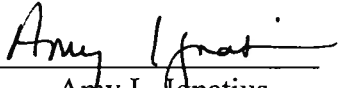


FURTHER ORDERED, that FairPoint's proposed revisions to Tariff NHPUC No 4 filed in Docket No. DT 12-322 are REJECTED without prejudice; and it is

FURTHER ORDERED, that FairPoint's proposed revisions to Tariff NHPUC No. 2 filed in Docket No. DT 12-323 are ACCEPTED in part and REJECTED in part, as discussed herein, and it is

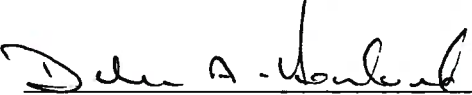
FURTHER ORDERED, that FairPoint, if it decides to accept the Commission's findings with regard to Tariff NHPUC No. 2, shall file a revised tariff in compliance with this

Order by January 21, 2013; otherwise, FairPoint's proposed revisions to Tariff NHPUC No. 2 shall be REJECTED without prejudice in their entirety.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of December, 2012.

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|  _____ Amy L. Ignatius Chairman |  _____ Michael D. Harrington Commissioner |  _____ Robert R. Scott Commissioner |
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Attested by:



Debra A. Howland
Executive Director