

**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 Certain Provisions of the Order on Remand**

**Order Granting Motion for Rehearing and Partially Granting Motion for Reconsideration**

**ORDER NO. 25,514**

**May 28, 2013**

**I. PROCEDURAL HISTORY**

At 4:19 p.m. on Friday, November 16, 2012, Northern New England Telephone Operations, LLC d/b/a FairPoint Communications — NNE (FairPoint) filed a revision to NH PUC Tariff No. 2. This tariff revision reclassified a number of FairPoint wire centers as “unimpaired” under federal law.<sup>1</sup> The result of the proposed tariff revision would have allowed FairPoint to discontinue offering certain unbundled network elements to other telecommunications carriers.

FairPoint’s filing was processed by Commission staff, entered into the official files of the Commission, and posted on the Commission’s website with a date stamp indicating that the filing was made between 4:15 and 4:30 on Monday, November 19, 2012. On Tuesday, November 20, 2012, the Executive Director issued a secretarial letter acknowledging receipt of

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<sup>1</sup> Section 251(d)(2) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56 (1996) authorizes the Federal Communications Commission (FCC) to require unbundled access to certain network elements when the failure to provide such access would “impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” A wire center is unimpaired for particular network elements when it meets competitive requirements set forth by the FCC in the *Triennial Review Remand Order* (TRRO) and implementing regulations.

the filing on November 19. Subsequently, FairPoint, intervening parties, staff, and the Commission proceeded as if the filing had been made on November 19.

On November 27, 2012, the CLEC Association of Northern New England (CANNE) filed a petition to intervene. CANNE also requested, among other things, a formal review of the proposed wire center reclassifications. On December 13, 2012, FairPoint issued data requests to each of the intervenor/cross petitioners that are members of CANNE. On December 14, 2012, and in response to FairPoint's desire to provide evidence supporting its proposed tariff revision, Staff requested a 30 day extension to January 18, 2013, under RSA 378:6, IV. On December 18, 2012, the Executive Director issued a secretarial letter informing FairPoint that the Staff's request for an extension had been granted.

CANNE filed responses to the data requests on December 24, 2012.<sup>2</sup> On January 8, 2013, Staff filed a memo indicating that CANNE's data responses disputed FairPoint's assertions regarding collocation by CANNE's members. Staff recommended that the Commission reject the tariff revision and open an investigation into the level of competition in the wire centers that FairPoint seeks to reclassify.

The Commission issued Order No. 25,456 on January 17, 2013, rejecting the proposed tariff revisions without prejudice and opening an investigation. FairPoint filed a motion for rehearing and/or reconsideration on February 6, 2013. CANNE filed an objection to FairPoint's motion and Commission Staff filed a memo in response to FairPoint's motion on February 13, 2013.

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<sup>2</sup> CANNE subsequently amended its data responses on January 9, 2013.

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. FairPoint**

According to FairPoint, the Commission's Order No. 25,456 contained several incorrect or unlawful determinations. First, FairPoint argues that the actual tariff filing date reported in the Order and on the Commission's website was incorrect and that FairPoint filed its proposed tariff revisions on November 16, 2012, rather than on November 19, 2012, as reflected in the Commission's records. FairPoint asserts that all deadlines and effective dates provided by law must be determined based on a filing date of November 16, 2012.

FairPoint also argues that it is unlawful for the Commission to reject the tariff filing under federal law. FairPoint cites section 252 (f) of the Communications Act of 1934, as amended (the Act) which allows a Bell operating company to prepare and file with a state commission, a statement of the terms and conditions that the company generally offers within the state to comply with the requirements of section 251 of the Act. Such a statement is often referred to as a "statement of generally available terms" or an "SGAT." FairPoint argues there is no relevant difference between its tariff revision and an SGAT, citing prior references by the Commission to the "SGAT tariff." According to FairPoint, the Act requires a state commission either to complete its review of an SGAT or permit it to take effect no later than 60 days after the date of submission. FairPoint calculates the effective date of its "SGAT" to be January 15, 2013. FairPoint also points out that the Act allows a state commission to continue to review an SGAT that has been permitted to take effect and that the Commission should therefore permit the tariff to become effective on January 15, 2013.

FairPoint further argues that section 252 of the Act provides only two vehicles for complying with the requirements of section 251 of the Act (an interconnection agreement or an

SGAT). If this tariff is not an SGAT, according to FairPoint, the Commission has no jurisdiction over this matter. FairPoint submits that the Commission erred in rejecting the tariff pursuant to state law because it was compelled to accept the filing pursuant to federal law. In a footnote, FairPoint avers that even under state law, the tariff would have gone into effect on January 15, 2013, because “[e]ven with the 30 day extension permitted by RSA 378:6, IV, the statutory review period expired on January 15, 2013, on which date the tariff filing went into effect by operation of law.”

FairPoint contends the Order incorrectly asserts that the result of the tariff filing would be that FairPoint would no longer be required to offer DS1 or DS3 loop service in any of these wire centers. According to FairPoint, the Commission misread the proposed tariff which displays a “NO” under the column headings of “DS1 LOOP” and “DS3 LOOP” and that the tariff filing maintains DS1 and DS3 loop service availability.

Finally, FairPoint claims it is unlawful for the Commission to place on FairPoint the burden of proof as to whether wire centers are impaired. According to FairPoint, this is not the rule for impairment investigations and the party seeking to establish impairment has the burden of proof. FairPoint argues federal law is clear that the burden lies with any party that contests FairPoint’s designation of non-impaired wire centers and that the Commission should reconsider the order and hold that the CLECs must bear the burden of proof.

## **B. CANNE**

CANNE objects to FairPoint’s motion for rehearing and/or reconsideration. CANNE argues that FairPoint’s attempt to reclassify certain wire centers was appropriately dismissed by the Commission.

CANNE asserts that it is well established in New Hampshire that wire center classifications are included in a wholesale tariff. CANNE points out that Verizon agreed to convert its SGAT to a tariff in Docket No. DT 01-151 and that FairPoint agreed to assume all of Verizon's wholesale obligations in Docket No. DT 07-011. CANNE cites to prior Commission review and approval of modifications to wire center classifications in Verizon's wholesale tariff. CANNE argues that this demonstrates that wire center reclassifications are considered and reviewed as amendments to the wholesale tariff.

CANNE argues that because FairPoint is proposing a tariff revision, FairPoint must justify the relief it seeks. According to CANNE, such justification must include information "sufficient to enable the commission to properly evaluate the proposed change in tariff," pursuant to NH Code Admin. Rules Puc 1605.02(c). CANNE avers the Commission was correct in rejecting the tariff because the information provided by FairPoint to justify the proposed revision was insufficient.

CANNE asserts the Commission must rely on the date stamp of November 19, 2012. CANNE argues that November 19, 2012 is the filing date that appears in the public record, and that November 19, 2012 was the only date known to the public from which regulatory deadlines run. According to CANNE the filing should not go into effect automatically because the balance of prejudices strongly disfavors FairPoint, given the substantial doubt that discovery has cast on FairPoint's claim regarding the number of fiber based collocators in each wire center. CANNE concludes it would be more efficient to reject the filing and conduct an appropriate investigation to determine the validity of FairPoint's proposed reclassifications than to allow an erroneous filing to take effect and undo errors later.

### **C. Staff**

Staff's response to FairPoint's motion points out that FairPoint is not required to maintain an SGAT. According to Staff, the purpose of an SGAT was to allow a Bell operating company to seek FCC authority to enter the interLATA (Local Access and Transport Area) market before the Bell operating company had one or more binding interconnection agreements in effect. Staff recounts that Verizon filed its SGAT in August 1997, that Verizon's SGAT was allowed to go into effect 60 days later, and that the Commission continued its review of the SGAT until shortly before Verizon sought FCC authority to enter the interLATA market. In seeking FCC authority, according to Staff, Verizon agreed with this Commission to convert its SGAT into a tariff and to thereby make the terms and conditions available to CLECs without the need for each CLEC to enter an interconnection agreement. Staff argues that when Verizon converted its SGAT into a tariff, it became an obligation under state law, and the SGAT ceased to exist.

With respect to the dispute over the filing date, Staff argues that FairPoint had many opportunities to bring the discrepancy to light and that the Commission must rely on the date stamped on the letter that was available to the public in order to avoid prejudice to other parties. Staff agrees with FairPoint that the procedural history in Order No. 25,456 should be corrected to eliminate reference to DS 1 and DS3 loops. Staff contends that FairPoint has the burden of proof to show that access is no longer impaired in these wire centers because impairment was established in Order No. 24,598 (March 10, 2006), and FairPoint is seeking to undo that determination.

### III. COMMISSION ANALYSIS

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were “overlooked or mistakenly conceived” by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977) and *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14.

FairPoint argues that the tariff filing date of November 19, 2012 is incorrect. Based on Exhibit 1 to FairPoint’s Motion, FairPoint filed its tariff revision on Friday, November 16, 2012 at 4:19 p.m. FairPoint argues under both federal and state law, particularly RSA 378:6, IV, that the filing became effective on January 15, 2013, 60 days after FairPoint’s claimed filing date. We find that FairPoint’s argument that the Commission was mistaken regarding the filing date combined with the time constraints imposed by RSA 378:6, IV provide good reason for the Commission to reconsider its rejection of FairPoint’s tariff.

Under N.H. Code Admin. Rules Puc 203.02(b), “Upon request of a person submitting a document and upon receipt of an extra copy of the document with the filing, the commission shall date stamp and return the copy as confirmation of the filing.” FairPoint provided a date stamped copy of its tariff revision as confirmation of a Friday, November 16, 2012 filing date. We have examined Exhibit 1 to FairPoint’s Motion for Rehearing and have conducted an internal investigation. We have determined that FairPoint did file its petition at 4:19 on Friday, November 16, 2012, and that the November 19, 2012 date stamp on the copy contained in the Commission’s official records is

incorrect. We note that this is the only time within the institutional knowledge of the Commission that date stamps have differed on the same filing. Nonetheless, it is the Commission's duty to maintain sound records of its docketed proceedings, and the Commission has since taken steps to ensure that this same clerical error will not be repeated.

FairPoint argues that, pursuant to RSA 378:6, IV, its tariff went into effect by operation of law on January 15, 2013, 60 days after FairPoint filed the tariff revision in the absence of an order rejecting the tariff by that date. We agree. RSA 378:6, IV (West 2009). We stress, however, that we have not determined that the wire centers affected by the tariff are unimpaired or that the revised tariff is just, reasonable, or otherwise in accordance with the law. 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. Accordingly, we direct FairPoint and CANNE to file briefs, no longer than 10 pages in length, concerning whether it would be appropriate for the Commission to order a transition period that extends beyond August 15, 2013, the date called for in the tariff. These briefs are to be filed no later than June 14, 2013. Staff, and those companies that have been identified by FairPoint as having collocated facilities in the affected wire centers, may also file briefs at their election. In the meantime, we also direct Staff to complete its investigation of the affected wire centers with all due haste. Towards that end, we have scheduled a technical session for all affected parties for June 5, 2013, commencing at 9:00 a.m.

Additionally, upon further review of the proposed tariff, we agree with FairPoint that the procedural history contained in Order No. 25,456 incorrectly states that DS1 and DS3 loops



would be affected by the proposed revisions. We clarify here that the proposed revisions were not intended to have an impact on the availability of DS1 or DS3 loops.

As to FairPoint's request for determination regarding the burden of proof, we find that circumstances have superseded our prior order. We will address burden of proof issues anew if, following the investigative phase, any party contests the designations made by FairPoint in its tariff.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the record be corrected to reflect that FairPoint filed its proposed revisions to NH PUC Tariff No. 2 on Friday, November 16, 2012; and it is

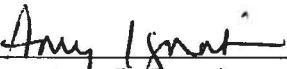
**FURTHER ORDERED**, that FairPoint's proposed revisions to NH PUC Tariff No. 2 are permitted to go into effect as of January 15, 2013, as clarified above, without any determination that the wire centers described in the tariff revision are unimpaired; and it is


**FURTHER ORDERED**, that FairPoint and CANNE shall file briefs, and any other party may file briefs no longer than 10 pages in length, and no later than June 14, 2013, concerning whether it would be appropriate for the Commission to extend the transition period stated in FairPoint's filing from August 15, 2013 to some later date; and it is

**FURTHER ORDERED**, that Commission Staff shall conduct the investigation ordered in Order No. 25,456 and file a report with the Commission no later than August 1, 2013; and it is

**FURTHER ORDERED**, that the Executive Director notify collocating companies identified in FairPoint's filing of their necessary party status and set a technical session for June 5, 2013, beginning at 9:00 am.


By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of  
May, 2013.

  
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Amy L. Ignatius  
Chairman

  
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Michael D. Harrington  
Commissioner

  
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Robert R. Scott  
Commissioner

Attested by:

  
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Debra A. Howland  
Executive Director