

**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 Reclassifying Certain Wire Centers and Extending Transition Period

ORDER NO. 25,580

October 7, 2013

I. PROCEDURAL HISTORY

On 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.¹ The result of the proposed tariff revision would have allowed FairPoint to discontinue offering certain unbundled network elements (UNEs)² to other telecommunications carriers, following the expiration of a seven-month transition period for digital signal level 1 (DS1) and digital signal level 3 (DS3) transport UNEs and a 13-month transition period for dark fiber transport UNEs. During the applicable transition period, the rate for any such UNE would be 115% of the normal tariffed rate.

¹ 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 regulations implementing its decision in *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2005) (the *Triennial Review Remand Order or TRRO*).

² UNEs are components of the telecommunications network owned and operated by incumbent local exchange carriers (ILECs), that the ILECs are required to offer on an unbundled basis to competitive carriers under federal law. The availability of these UNEs enables non-facilities-based telecommunications carriers to provide service without installing all of their own network infrastructure, such as copper wire, optical fiber and coaxial cable, and without having to contract for higher cost special access arrangements.

On January 17, 2013, the Commission issued Order No. 25,456, rejecting the proposed tariff revisions without prejudice and opening an investigation into the level of competition in the reclassified wire centers. FairPoint filed a motion for rehearing and/or reconsideration of this order on February 6, 2013, the CLEC Association of Northern New England, Inc. (CANNE) filed an objection to FairPoint's motion, and Commission Staff filed a memo in response to FairPoint's motion on February 13, 2013.

On May 28, 2013, the Commission issued Order No. 25,514, in which it determined that FairPoint's proposed tariff revisions must be permitted to take effect as of January 15, 2013 under state law, without any determination that the wire centers affected by the tariff revisions are unimpaired or that the revised tariff is just, reasonable, or otherwise in accordance with law. Staff was ordered to complete its investigation of the wire centers subject to FairPoint's tariff revisions and to submit a final report to the Commission no later than August 1, 2013. Noting the conflicting evidence of impairment and other factors, the Commission expressed concern that the seven-month transition period specified by FairPoint might deny CANNE's members and other affected companies adequate time to transition to alternate providers if the transition period were to end on August 15, 2013; accordingly, FairPoint and CANNE were directed to file briefs 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.³

On June 28, 2013, FairPoint filed a brief and CANNE filed comments addressing issues regarding the potential extension of the applicable transition period under the tariff. Staff filed a memorandum dated July 25, 2013 reporting on the status of its investigation and discovery submitted to potentially collocated parties; in this memorandum Staff recommended

³ These briefs originally were to be filed no later than June 14, 2013; this due date was extended until June 28, 2013 by secretarial letter dated June 13, 2013.

that the Commission extend the due date for submission of Staff's final investigation report until August 12, 2013. The due date for Staff's report was extended to August 12, 2013 by secretarial letter dated July 29, 2013.

On August 9, 2013, FairPoint filed revisions to its NH PUC Tariff No. 2 that reverted twenty of the wire centers to their prior impairment status, and provided for an additional six-month transition period for DS1 and DS3 interoffice transport between the offices remaining subject to investigation in this proceeding. FairPoint stated in its cover letter for this tariff filing that, pursuant to the changes to be made in the filing, it will not (1) charge any increased rate for the offices being removed for the period from January 15, 2013 through the effective date of the revised tariff filing, nor (2) disconnect any DS1 and DS3 UNEs for the period from August 15, 2013 through the proposed effective date of the revised tariff filing.

On August 12, 2013, Staff filed a memorandum that summarized the status of its investigation of the alleged fiber-based collocations in the seven wire centers listed for reclassification in FairPoint's revised tariff. Staff outlined certain additional factual inquiries and legal issues required to be addressed in connection with the completion of this investigation. Staff's memorandum recommended that the Commission order the parties to submit briefs regarding five specified questions of legal interpretation.

On August 15, 2013, a secretarial letter was issued that (i) acknowledged FairPoint's revised tariff filing, (ii) extended the time for Commission determination regarding the proposed tariff revisions by an additional 30 days, until October 8, 2013, pursuant to RSA 378:6, IV, (iii) ordered the submission of briefs addressing five specified questions of legal interpretation by September 4, 2013⁴, and (iv) ordered FairPoint not to (1) charge any increased rate for the offices

⁴ The due date for these briefs was extended until September 9, 2013 in response to a request filed by a representative of CANNE, by secretarial letter issued on August 23, 2013.

being removed for the period from January 15, 2013 through the effective date of the revised tariff filing, or (2) disconnect any DS1 and DS3 UNEs for the period from August 15, 2013 through the effective date of the revised tariff filing.

On September 9, 2013, FairPoint filed a brief and CANNE filed a response regarding the following questions of legal interpretation as directed by the Commission:

- (a) Does a competitive local exchange carrier (CLEC), with collocation and active electrical power, using its own optronics to activate dark fiber provided by another CLEC on an indefeasible right to use basis qualify as a fiber-based collocator?
- (b) If there is one CLEC terminating fiber in a competitive access transport terminal and three additional CLECs using the same fiber cable on an indefeasible right to use basis, should this be counted as 4 fiber-based collocators? Why or why not?
- (c) Does a CLEC, with collocation, active electrical power and fiber optic cable extending from the collocation facility to a termination point in the wire center area not owned or controlled by FairPoint (e.g., a fiber loop extending to a business) qualify as a fiber-based collocation?
- (d) Does fiber terminated at one end in the wire center (e.g., a collocation or competitive access transport terminal) extending from the collocation facility to a termination point in the wire center area that is owned or controlled by FairPoint qualify as a fiber-based collocation?
- (e) Based on the discovery responses received to date, are there other legal precedents or regulatory interpretations that should be considered by the Commission in determining the appropriate classification of the seven listed wire centers?

The response filed by CANNE on September 9, 2013, in addition to addressing these questions, also contained sections addressing burden of proof, transition periods and the process to be followed in future dockets concerning wire center impairment status and reclassification.

On September 24, 2013, FairPoint filed a Motion to Strike or, in the Alternative, for Leave to Reply, and Reply to Response, with respect to these additional sections of the CANNE Response. On September 30, 2013, CANNE filed an Opposition to FairPoint's Motion to Strike and Response to FairPoint's Motion to File Reply.

On October 3, 2013, Staff filed a final memorandum summarizing the results of its investigation and its recommendations regarding reclassification of the wire centers listed in FairPoint's revised tariff filing and regarding extension of the transition periods.

II. POSITIONS OF THE PARTIES AND STAFF

A. FairPoint's Brief Regarding Legal Issues

In its brief filed on September 9, 2013, FairPoint answered the four specific questions posed by the Commission in the affirmative, and did not address the open-ended fifth question. In particular, FairPoint argued that a CLEC, with collocation and active electrical power, using its own optronics to activate dark fiber provided by another CLEC on an indefeasible right to use (IRU) basis, should be counted as a fiber-based collocator, even if it leases only strands of dark fiber and not an entire dark fiber optic cable. In support of this conclusion, FairPoint cited language from the *TRRO* and an unpublished federal appellate court decision. FairPoint also argued that a finding that CLECs leasing dark fiber strands on an IRU basis do not count would "result in illogical and perverse results and encourage 'gaming' of the system," because a large number of collocators could be actively lighting CATT⁵-terminated dark fiber leased on an IRU basis from a single competitive fiber provider without being counted as fiber-based collocators for purposes of wire center impairment analysis. FairPoint Brief, at 9.

FairPoint also argued that the FCC regulatory requirement that the CLEC's fiber leave the wire center premises is met if the fiber terminates at any point within the wire center area that is outside of the central office building and immediately adjacent property, whether the termination point is owned or controlled by a party other than FairPoint (e.g., a fiber loop extending to a business) or by FairPoint itself. FairPoint relied primarily on FCC regulatory

⁵ A "CATT" or "competitive alternate transport terminal" is equipment that provides a shared alternate splice point within a telephone utility central office at which a third party competitive fiber provider can terminate its facilities for distribution to collocation arrangements within that central office.

definitions and language cited in the *TRRO* to support its arguments with respect to these issues. FairPoint argues in favor of a narrow interpretation of the term “wire center premises,” which it maintains is more consistent with the FCC’s goal of adopting objective and administrable criteria for determining the existence of fiber-based collocations than a fact-intensive inquiry into the boundaries of wire center serving areas and the extent of competitive fiber deployments in these areas.

In conclusion, FairPoint asserted it is “evident that all [seven] wire centers at issue are non-impaired to the extent that FairPoint has claimed, if not more”, expressly disagreeing with the Staff’s assessment that there were no collocators at the Durham wire center as of November 16, 2012. FairPoint Brief, at 15-16.

B. CANNE’s Response Regarding Legal Issues

In its response filed on September 9, 2013, CANNE answered the four specific questions posed by the Commission in the negative, and did not specifically answer the open-ended fifth question. CANNE argued that CLEC operation of fiber optic strands rather than cables, even if leased from the ILEC wire center owner or another CLEC on an IRU basis, should not be counted in determining the number of fiber-based collocators in a wire center.

In support of this argument, CANNE cited language from the *TRRO* suggesting that the FCC’s use of fiber-based collocator counts was intended as a proxy for the extent to which competitive deployment demonstrates a level of competition that would justify duplication of the ILEC’s network elements. These policy considerations support the conclusion that obtaining individual fiber strands on an IRU basis does not satisfy the definition of fiber-based collocator, according to CANNE. In CANNE’s view, CLECs do not overcome barriers to entry merely because they can install electronic equipment in a collocation space so as to light dark fiber

strands from one competitively-deployed fiber transport cable; rather, “[b]arriers to entry are overcome only by sufficient duplication of the ILEC’s fiber transport facilities.” CANNE Response, at 9.

With respect to questions regarding the requirement that the collocator’s fiber “leave[s] the wire center premises,” CANNE argued that the term “wire center premises” includes all ILEC-owned or ILEC-controlled central offices, wire centers or structures and the land owned or leased by the ILEC adjacent to such central offices, wire centers or structures within the area in which all customers served by the wire center are located, and encompasses the entire geographic area served by the wire center. CANNE concluded that a CLEC maintaining a fiber optic cable that leaves the central office building, but does not leave the community served by that central office, should not be considered to have fiber optic cable that leaves the ILEC wire center premises for purposes of the definition of fiber-based collocator.

In support of this argument, CANNE cited certain language contained in the FCC’s definition of “wire center” which states that “[t]he wire center boundaries define the area in which all customers served by a given wire center are located.” CANNE also reiterated what it claims is the policy rationale underpinning the FCC’s count of fiber-based collocators as a “proxy to indicate the extent to which competitors have duplicated the ILEC’s network, such that competitors no longer need access to network elements from the ILEC in order to compete.” CANNE Response, at 10. CANNE emphasized the distinction between the dedicated transport network elements at issue in this docket, all of which involve interoffice transport between ILEC wire centers, and fiber facilities that connect ILEC wire centers with CLEC facilities or end-user locations. Comparing what are essentially “fiber loops or entrance facilities to fiber transport simply is not an apples-to-apples comparison,” in CANNE’s view. CANNE Response, at 11.

CANNE asserted that the cost and operational characteristics of loops and transport are very different, and argued it is not appropriate to base a reclassification decision that will affect the ability to obtain unbundled transport on the presence of what are essentially dark fiber loops in an ILEC wire center.

The CANNE Response also addressed three additional issues, regarding the burden of proof, transition periods and future process in subsequent wire center reclassification proceedings. CANNE argued that the burden of proof to show that a wire center is fully or partially unimpaired properly rests upon FairPoint as the proponent of a change in its wholesale tariff, as recognized by the Commission, and because FairPoint is in exclusive possession of much of the relevant and confidential information required to evaluate a reclassification proposal. CANNE maintained that, if FairPoint is found not to have produced all such evidence, or if the evidence produced is otherwise lacking, the Commission should find that FairPoint has not met its burden and should find against FairPoint on relevant issues.

Regarding the appropriate transition periods, CANNE argued that the Commission should follow prior precedent to require transition periods beginning from the date of the order approving a wire center reclassification and not before, asserting that it would be costly, burdensome, disruptive, unfair, unnecessary and anticompetitive to require CLECs to undertake transition activities if such activities prove unnecessary by virtue of a Commission decision that a wire center remains impaired and should not be reclassified. CANNE cited a recent order of the Maine Public Utilities Commission in a similar proceeding, in which the date of the order approving the reclassifications, and not the date of any FairPoint industry accessible letter (*i.e.*, notice letter to current or potential wholesale customers) or other unilateral pronouncement, was designated as the start date for the applicable transition periods. CANNE Response, at 25.

With respect to the future process to be followed in any subsequent dockets reviewing FairPoint proposals to reclassify wire centers based on their impairment status, CANNE argued that the procedures for addressing such proposals should be “reinforced.” According to CANNE, the experience of this docket and those in the other Northern New England states demonstrates that further requirements are in order to ensure an efficient process. In CANNE’s view, FairPoint as the proponent of a tariff change should be required at the time of its initial filing to fully document the facts on which it relies in claiming that any particular wire center should be reclassified, and unless and until all such information is provided, the filing should not be deemed complete. CANNE further suggests that the Commission should consider developing, in conjunction with the parties, a standard questionnaire to be sent to alleged fiber-based collocators upon receipt of a proposed reclassification. This questionnaire would cover the information useful in review of a reclassification proposal, and could be submitted by FairPoint at the time of its tariff filing as a blank form, filled in to the extent feasible with the name of the wire center and the alleged fiber-based collocator, so that the questionnaire could be sent as soon as possible after the filing.

C. FairPoint’s Motion to Strike, or in the Alternative, for Leave to Reply

On September 24, 2013, FairPoint filed a Motion to Strike or, in the Alternative, for Leave to Reply, as well as its Reply to Response, with respect to the sections of CANNE’s Response regarding burden of proof, transition periods and future process. FairPoint argued that these sections of CANNE’s Response should be stricken because they violate the scope and spirit of the inquiry into how collocation arrangements should be classified based on the discovery responses obtained by Staff, and they contain arguments that are redundant and/or immaterial to

the relevant issues in this proceeding. FairPoint requests that, if its motion to strike is denied, the Commission permit it to respond by accepting its Reply to CANNE's Response.

In its proffered Reply, FairPoint argued that the ultimate burden of proof in wire center reclassification proceedings rests upon the CLECs, and drew the distinction between the *burden of production*, which it may carry based on its access to certain information, and the *burden of persuasion* which it claims is always borne by the CLECs. With respect to the issue of transition periods, FairPoint referenced the arguments contained in its brief filed on June 28, 2013 and went on to argue that the Commission has previously found that the applicable transition periods should begin on the effective date of approved tariff revisions, and not necessarily on the date of the approval order, citing Order No. 24,723 issued on January 5, 2007. FairPoint further argued that the Commission should consider the distinction between transition periods and transition rates and that, to the extent "the Commission decides that an adjusted transition period is necessary for whatever reason, this does not necessarily mean that FairPoint is not entitled to the transition rate during the transition period, however long it may be." FairPoint Reply, at 4.

Finally, with respect to process in future wire center reclassification proceedings, FairPoint argued that the Commission should not make a decision on process at this point, maintaining that the record in this proceeding is incomplete and the issue of future process should be one for reflection and consultation among the parties and Staff. FairPoint recognized potential merit in CANNE's suggestion that a questionnaire might be developed by the Commission in conjunction with parties for submission to alleged fiber-based collocators upon receipt of a reclassification proposal. FairPoint further suggested that the Commission may wish to take a fresh look at the Commission's "standing determination that wire center impairment filings can only be considered under the compressed timeframe of RSA 378:6, IV, rather than the

more relaxed procedure in RSA 378:6, 1(b).” FairPoint Reply, at 6. In conclusion, FairPoint argued that, to the extent the Commission determines that adjustments are required in the wire center impairment review process, this decision should not be made at this time, but only after there has been an opportunity for a deeper exchange of views among the affected parties.

D. CANNE’s Opposition to FairPoint’s Motion to Strike and Response to FairPoint’s Motion to File Reply

On September 30, 2013, CANNE filed an Opposition to FairPoint’s Motion to Strike and Response to FairPoint’s Motion to File Reply. In this filing, CANNE argued that it was not improper to include the three additional issues in its September 9, 2013 Response, because these are legal issues germane to the classification of the wire centers at issue in this proceeding. CANNE stated its belief that the discussions in its Response would be helpful to the Commission in determining the status of “the subject wire centers and by extension, wire center reclassifications generally.” CANNE Opposition, at 2. CANNE further stated that it has no objection to the Commission’s consideration of FairPoint’s Reply if the Commission believes it would be helpful to do so.

E. FairPoint’s Brief Regarding Transition Period Extension

In its brief filed on June 28, 2013, FairPoint argued that the Commission is not authorized to extend the applicable transition periods based on the “filed rate doctrine”, maintaining that tariffs have the force and effect of law and are binding on both utilities and their customers. According to FairPoint’s brief, reviewing and adjusting rates charged for services already rendered under an existing tariff would be unlawful as retroactive ratemaking and the Commission only has authority to adjust rates prospectively. FairPoint also asserted that it is not inequitable to retain the current transition periods because willful inaction of any wholesale customer to make alternative transport arrangements during the transition period would be

unreasonable and should not be rewarded. According to FairPoint, wholesale customers should have known these wire centers would not be impaired indefinitely and had an obligation to exercise reasonable diligence to determine their current competitive status. FairPoint maintained that wholesale customers were on notice as to the reclassification of the wire centers at least since the issuance of FairPoint's industry accessible letter (*i.e.*, customer notice letter) on November 8, 2012 and its subsequent tariff filing on November 16, 2012, and the customers should have taken action based on this notice. According to FairPoint, because wholesale customers 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 the applicable transition periods to be extended beyond the dates prescribed in the revised tariff filing.

F. CANNE's Comments Regarding Transition Period Extension

In its comments regarding transition period extension, filed on July 1, 2013, CANNE supported extension of the applicable transition periods under FairPoint's tariff, noting that, in practical effect, CANNE's members and other wholesale customers would be faced with greatly abbreviated transition periods for both DS1 and DS3 transport UNEs and dark fiber interoffice transport UNEs, rather than the seven-month and 13-month transition periods established under Commission precedent. CANNE expressed concern that shortened transition periods would require its members to transition to other, non-UNE services or incur discontinuance of their existing UNEs, raising the prospect of service interruptions to customers and undue expenditures of time, effort and money. CANNE argued that the Commission has authority under RSA 365:28 to modify its orders and this authority should be liberally construed, and CANNE stated its belief that an appropriate resolution would be to apply the full seven-month and 13-month

periods beginning from the date of a Commission order approving reclassification of any FairPoint wire centers.

G. Staff's Investigation Report Memorandum

Staff's memorandum filed on October 3, 2013 summarized the discovery conducted on all potential fiber-based collocators identified by FairPoint and named as parties in this proceeding, described the results of its investigation both textually and through charts depicting the fiber-based collocation arrangements in each wire center, and stated its conclusions regarding the competitive status of the wire centers listed in FairPoint's revised tariff filing. Staff noted that none of the CLECs FairPoint claimed to be collocated in Durham, confirmed fiber-based collocation as of November 16, 2012, and that based on a discussion between Staff and FairPoint on September 25, 2013, FairPoint had reported the Durham wire center raises special issues regarding the status of collocators and had agreed to reclassify that wire center to its previous status as fully impaired in this docket. Eliminating Durham from consideration, the number of wire centers proposed to be reclassified by FairPoint for which Staff provided an analysis, totals six: Dover, Hanover, Keene, Nashua, Portsmouth and Salem. Staff's memorandum also includes recommendations regarding Commission approval of FairPoint's proposed wire center reclassifications, extension of the applicable transitions periods, and the development of processes for future wire center reclassification proceedings.

In conducting its factual investigation, Staff issued two rounds of data requests specifying that answers should be provided by a responsible individual under oath, and received detailed responses from the potentially collocated companies identified by FairPoint. Staff worked with the potential fiber-based collocators to review and clarify these discovery responses, then prepared a set of diagrams illustrating the reported fiber-based collocations at each of the six

wire centers now proposed for reclassification. Staff then confirmed with each potential fiber-based collocator that these diagrams accurately depict its facilities in the relevant wire centers.

Staff stated its determination that each of the six wire centers has a number of potential fiber-based collocators sufficient to warrant reclassification as proposed by FairPoint, depending on the Commission's determination of the legal issues outlined in the August 15, 2013 secretarial letter and addressed by parties in their September 9, 2013 filings. Staff expressed its belief that each of the six wire centers should be reclassified as proposed by FairPoint in its August 9, 2013 revised tariff filing.

Staff also recommended that, in view of the particular circumstances of this proceeding and the amount of time that has elapsed since FairPoint's initial filing in November 2012, the Commission accept the revised transition period end date of February 8, 2014 for DS1 and DS3 transport UNEs, as proposed in FairPoint's August 9th tariff filing, but extend the transition period for dark fiber transport UNEs for an additional six months, until August 15, 2014.

Finally, Staff addressed the issue of revised process to be followed in any future wire center reclassification dockets. Staff expressed agreement with some commenters that the process for wire center reclassification is unnecessarily burdensome on many, and perhaps all, parties, and the view that many potential approaches may offer improvements in this process. Staff did not recommend any specific new or revised process, but indicated its willingness to conduct an investigation into procedural alternatives. Accordingly, Staff recommended that the Commission require interested parties to work with Staff to develop and propose an appropriate process to be implemented in future wire center reclassification proceedings.

III. COMMISSION ANALYSIS

Based on the results of Staff's investigation and our interpretation of the applicable legal standards for impairment, including our determinations set forth below, we have concluded that the FairPoint wire centers located in Dover, Hanover, Keene, Nashua, Portsmouth and Salem have been shown to be fully or partially unimpaired, warranting their reclassification as proposed in FairPoint's revised tariff filing on August 9, 2013. We commend Staff for its diligent and thorough efforts to conduct the factual investigation necessary to support findings by the Commission regarding the competitive status of the 27 wire centers originally reclassified by FairPoint as fully or partially unimpaired in its November 16, 2012 tariff filing, and we acknowledge the cooperation of the potentially collocated companies named as parties in this docket in responding to Staff's discovery requests. After review of Staff's considerable efforts to confirm FairPoint's representations regarding fiber-based collocators present in the 27 wire centers, we will require that any future reclassification filings be more detailed. We anticipate that the level of detail required will be addressed by the parties and Staff in the future process investigation we order today.

We accept Staff's investigation reports dated October 3, 2013 and August 12, 2013 and address below the legal issues regarding the six wire centers remaining subject to FairPoint's revised tariff filing. We then address the applicable transition periods for the wire centers found to have been properly reclassified, as well as CANNE's request for the Commission to specify procedures for future wire center reclassification proceedings.

Before reaching these substantive issues, however, we first address two procedural matters. We find that CANNE's discussion of the burden of proof, transition periods, and future process in its September 9, 2013 Response is informative and helpful in resolving issues

germane to this proceeding, and we therefore deny FairPoint's Motion to Strike these sections of CANNE's Response. We find that FairPoint's Reply filed on September 14, 2013 also is informative and helpful in understanding these issues, and we therefore grant FairPoint's Motion for Leave to Reply and accept its Reply.

With respect to burden of proof, we are unconvinced by FairPoint's arguments that it does not bear the burden of persuasion in wire center reclassification proceedings. As a practical matter, however, the question which party bears the burden of proof does not require resolution, because we find that the factual record developed through Staff's investigation establishes by a preponderance of the evidence the factual basis for our determinations regarding reclassification in this order, in view of the legal interpretations we adopt below. We therefore decline to address burden of proof issues at this time. We anticipate that interested parties will continue to raise these issues during the course of the future process investigation we order today.

A. Legal Interpretation Issues

Under the *TRRO* and FCC regulations, an ILEC wire center will be classified as "Tier 1", or fully unimpaired, if there are at least four fiber-based collocators in the wire center. 47 C.F.R. §51.319(d)(3)(i). An ILEC wire center will be classified as "Tier 2", or partially unimpaired, if there are at least three fiber-based collocators in the wire center. 47 C.F.R. §51.319(d)(3)(ii).

A "fiber-based collocator" is defined in 47 C.F.R. §51.5 as

any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that

- (1) Terminates at a collocation arrangement within the wire center;
- (2) Leaves the incumbent LEC wire center premises; and
- (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC

on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.

Based on our review of Staff's memorandum and the results of its investigation, we believe there are essentially three questions of legal interpretation that must be resolved by the Commission in order to determine the impairment status and proposed reclassification of the six FairPoint wire centers at issue in this docket:

1. Does a CLEC count as a fiber-based collocator if it leases dark fiber on an indefeasible right to use basis from another CLEC (rather than the ILEC), activates the dark fiber using its own optronics, and meets all other criteria under the FCC rule?
2. If the answer to question 1 is affirmative, does the CLEC count as a fiber-based collocator if the dark fiber it leases consists of strands of fiber rather than an entire fiber optic cable?
3. Does a CLEC count as a fiber-based collocator if it operates a fiber optic cable or comparable transmission facility extending from its collocation facility to a termination point located within the wire center area that is not owned or controlled by the ILEC (e.g., a fiber loop extending to a business), and meets all other criteria under the FCC rule?

If each of these three legal questions⁶ is answered in the affirmative, then Staff's investigation and recommendation support a determination by the Commission that all six of the remaining wire centers should be reclassified as proposed by FairPoint.

1. Dark Fiber Leased from Another CLEC

In an earlier wire center investigation in Docket No. DT 05-083, the Commission expressly reserved judgment on the first two questions listed above. After finding that in general

⁶ Note that the fourth question briefed by the parties, regarding a fiber optic cable terminating at a point within the wire center area that is owned or controlled by FairPoint, is not at issue in the instant proceeding because there is no wire center with respect to which these factual circumstances exist.

only fiber-optic cables, and not fiber strands or lit fiber-optic facilities, should be counted toward fiber-based collocation, the Commission continued as follows:

The rule provides for one exception: *when a collocation arrangement involves dark fiber obtained by a CLEC from an incumbent LEC on an indefeasible right of use (IRU) basis.* However, according to Staff's Affidavit, this situation does not exist in any of the wire centers at issue. Further, Staff's Affidavit does not indicate the existence of CLECs operating fiber-optic cable obtained under an IRU basis from another CLEC except in one limited circumstance where it is immaterial to the count of fiber-based collocators. The Parties do not assert differently. *We need not address, therefore, how IRUs between the ILEC and CLECs or between CLECs are to be evaluated.* As a result, we consider only those collocators that employ CLEC-operated, self-deployed fiber-optic cables in our analysis.⁷

The FCC definition of “fiber-based collocator” expressly provides that “[d]ark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable.” 47 C.F.R. §51.5(3). In the *TRRO*, the FCC stated that

when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis from *another carrier*, including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities.⁸

The FCC has recently reiterated this view in its amicus brief filed in an appeal decided by the United States Court of Appeals for the Third Circuit.⁹ The FCC’s brief in this case maintained that a CLEC is a fiber-based collocator if it obtains dark fiber on an IRU basis from a competitive fiber provider and supplies its own collocated optronics equipment to activate the dark fiber and transmit communications into and out of the wire center. *Id.*, at 738. The Court of Appeals adopted this position and decided the appeal accordingly. *Id.*, at 741-742.

⁷ *Verizon New Hampshire*, Order No. 24, 598 (March 10, 2006), at 37-38 (footnotes omitted and emphasis supplied).

⁸ *TRRO*, ¶102, n. 292 (emphasis supplied).

⁹ See *Verizon Pennsylvania, Inc. v. Pennsylvania Public Utilities Commission*, 484 Fed. Appx. 735, 2012 WL 1995025 (3d. Cir. 2012) (decision designated as “not precedential”).

A similar conclusion was reached by the Maine Public Utilities Commission in a 2007 order regarding ILEC wire center impairment.¹⁰ The Maine Commission determined it would count as a fiber-based collocator “any CLEC which, in addition to meeting all the other requirements, leases dark fiber . . . on an IRU basis from Verizon *or another CLEC.*” *Id.*, at 11 (emphasis supplied).

Based on the quoted language in the *TRRO*, the FCC guidance, and the Maine regulatory precedent, we find that a CLEC leasing dark fiber from another CLEC on an IRU basis, activating that dark fiber using its own collocated optronics equipment, and meeting all other criteria under the FCC definition, should be counted as a fiber-based collocator for purposes of wire center impairment evaluation.

2. Lease of Dark Fiber Strands Rather Than Full Cable

As noted above, the Commission previously found that in general only fiber-optic cables, and not fiber strands, should count toward fiber-based collocation, but expressly noted the exception in the rule for a collocation arrangement involving dark fiber obtained by a CLEC on an IRU basis.¹¹ It is unclear from the language of either the FCC rule or the *TRRO* whether an IRU lease of dark fiber strands, rather than an entire fiber optic cable, should be included in the fiber-based collocation count.

We note that the rule refers to “dark fiber” and not “dark fiber optic cable.” *See* 47 C.F.R. §51.5(3). This more open-ended reference suggests that the term is not limited to a full sheath of fiber strands but may include individual strands contained within the sheath. In *Verizon Pennsylvania*, the Third Circuit Court of Appeals adopted the FCC’s interpretation of

¹⁰ *Re Verizon-Maine*, Docket No. 2002-682 (April 19, 2007).

¹¹ *Verizon New Hampshire*, Order No. 24, 598 (March 10, 2006), at 37-38.

the phrase “fiber-optic cable or comparable transmission facility” as used in the definition to cover dark fiber strands leased on an IRU basis from a competitive fiber provider through an ILEC competitive access transport terminal, and found that the CLEC leasing such strands could qualify as a fiber-based collocator, provided that it had installed optronics equipment in the wire center that controls whether and when the dark fiber strands are activated for transmission of telecommunications traffic.¹²

The Maine Commission reached a similar conclusion in its 2007 order, stating that

The FCC does not directly address the question of whether individual strands qualify. However, dark fiber is traditionally provided to CLECs in pairs of strands and not in full fiber-optic cables. The FCC’s repeated references to dark fiber indicates to us that its use of the term cable was not limited to whole cables but also included individual fiber strands. Thus, we will count as a fiber-based collocator any CLEC which, in addition to meeting all the other requirements, leases dark fiber strands on an IRU basis from Verizon or another CLEC.¹³

Based on the language used in the FCC definition and its subsequent guidance and this Maine regulatory precedent, we find that a CLEC leasing dark fiber strands from another CLEC on an IRU basis, activating that dark fiber using its own collocated optronics equipment, and meeting all other criteria under the definition, should be counted as a fiber-based collocator for purposes of wire center impairment evaluation. Having reached this conclusion based upon the regulatory language and FCC guidance, it is not necessary to address the policy-based arguments advanced by CANNE, and we therefore decline to do so.

3. Termination Point Within the Wire Center Area

The FCC definition of “fiber-based collocator” requires that the fiber-optic cable or comparable transmission facility operated by the collocated carrier must “leave[s] the incumbent

¹² See *Verizon Pennsylvania*, 484 Fed. Appx. at 739-742.

¹³ *Re Verizon-Maine*, at 11.

LEC wire center premises.” 47 C.F.R. §51.5(2). The term “wire center premises” is not defined in the FCC rules; however, the terms “wire center” and “premises” are defined in 47 C.F.R. §51.5 as follows:

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter.¹⁴ The wire center boundaries define the area in which all customers served by a given wire center are located.

Premises. Premises refers to an incumbent LEC's central offices and serving wire centers; all buildings or similar structures owned, leased, or otherwise controlled by an incumbent LEC that house its network facilities; all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures; and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to these central offices, wire centers, buildings, and structures.

CANNE argues that the inclusion of the second sentence in the definition of “wire center” quoted above, as well as policy-based considerations regarding the use of fiber-based collocation deployments as a proxy for competitive alternatives to use of the ILEC’s UNEs, support the conclusion that the definition of “wire center premises” must encompass the entire geographic area served by the wire center. CANNE Response, at 10. In CANNE’s view, the term “wire center premises” includes all ILEC-owned or -controlled central offices, wire centers or structures and the land owned or leased by the ILEC adjacent to such central offices, wire centers or structures “within the area in which all customers served by the wire center are located.” *Id.* CANNE therefore concludes that a CLEC maintaining a fiber optic cable that leaves the central office building, but does not leave the community served by that central office, should not be considered to have fiber optic cable that leaves the ILEC wire center premises for purposes of the definition of fiber-based collocator. CANNE Response, at 13.

¹⁴ In the Appendix to Part 36 of the FCC’s rules, “central office” is defined as a “switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.”

In contrast, FairPoint highlights the plain meaning and common understanding of the language used in the FCC definitions, as well as references in the *TRRO* to variations of the term “wire center service area” when describing the broader geographic area served by an ILEC wire center, to argue that the term “wire center premises” is more limited in scope and includes only the building containing the central office equipment and the immediate environs of such building. FairPoint Brief, at 10-13.

We are aware of no precedent or guidance addressing this issue in decisions of the FCC, the federal courts, or any state utility regulatory authorities. FairPoint’s arguments for a more limited and discrete reading of the relevant FCC definitional language, however, appear to be stronger than the policy-based arguments promoted by CANNE, and the narrower interpretation has the additional virtues of greater clarity and simpler application. We therefore find that the term “wire center premises” should be given a narrow definition as the ILEC central office(s) building itself, together with associated vaults, structures, equipment and facilities, and adjacent land, all being owned, leased or otherwise controlled by the ILEC. Having reached this conclusion, it is not necessary to address the policy arguments advanced by CANNE, and we therefore decline to do so.

Based on this interpretation of the FCC definitional language, we find that a CLEC should be counted as a fiber-based collocator if it operates a fiber optic cable or comparable transmission facility extending from its collocation facility within the wire center to a termination point located within the wire center area that is not owned or controlled by FairPoint (e.g., a fiber loop extending to a business), and meets all other criteria under the FCC definition.

B. Wire Centers Reclassified

Staff determined through its investigation that the six FairPoint wire centers located in Dover, Hanover, Keene, Nashua, Portsmouth and Salem had been demonstrated to be fully or partially unimpaired, as reclassified in FairPoint's August 9, 2013 tariff filing, dependent on the Commission's determination of the legal interpretation questions addressed above. Having resolved these questions of legal interpretation, we find that the record created through Staff's investigation supports the conclusion that all six of these wire centers are fully or partially unimpaired to the extent claimed by FairPoint. We therefore accept FairPoint's reclassification of the wire centers located in Dover, Hanover, Keene, Nashua, Portsmouth and Salem, as set forth in its August 9, 2013 tariff filing. Nashua, Portsmouth and Salem will be reclassified as Tier 1 wire centers, and Dover, Hanover and Keene will be reclassified as Tier 2 wire centers.

With respect to the Durham wire center, Staff's memorandum indicates that FairPoint has acknowledged special issues warranting removal of this facility from further consideration in this docket, and Staff's investigation has not confirmed the presence of any fiber-based collocators in Durham as of November 16, 2012. We are convinced by the evidence adduced through Staff's investigation that the Durham wire center should not be reclassified based on its impairment status as of such date, and we therefore will order FairPoint to remove the Durham wire center from its revised tariff, without prejudice to FairPoint's filing a proposal for reclassification of this wire center based on its impairment status as of a later date.

C. Transition Period Extension

We now turn to the question whether the transition periods proposed in FairPoint's revised tariff filing of August 9, 2013 are just and reasonable under the circumstances or whether these periods should be extended to provide wholesale customers with a longer period of time

during which to make alternative transport or access arrangements. FairPoint has proposed that the transition period for DS1 and DS3 transport UNEs be extended through February 8, 2014 and terminate as of that date, while leaving in place the February 15, 2014 transition period end date for dark fiber transport UNEs. We note that the period from the date of this order through these February 2014 dates is shorter than the seven-month transition period for DS1 and DS3 transport UNEs and the 13-month transition period for dark fiber interoffice transport UNEs we have required in previous wire center reclassification dockets.¹⁵

CANNE argues that these standard transition periods should be implemented from the date of this order, as described above. Staff recommends that the revised transition period for DS1 and DS3 transport UNEs be accepted, but the transition period for dark fiber transport UNEs be extended for an additional six months, until August 15, 2014, under the particular circumstances of this proceeding. We believe Staff's recommendation represents an appropriate and equitable resolution of this issue.

The Commission has the general authority to "amend, suspend, annul, set aside, or otherwise modify" its prior orders under RSA 365:28, and the authority granted under this provision is to be "liberally construed." *Appeal of the Office of the Consumer Advocate*, 134 N.H.651, 657 (1991); *Meserve v. State*, 119 N.H. 149, 152 (1979). We are not persuaded by FairPoint's arguments that the extension of applicable transition periods, an action which is *prospective* in effect, would violate either the "filed rate doctrine"¹⁶ or the restrictions on retroactive ratemaking set forth in RSA 378:7.

¹⁵ See, e.g., *Verizon New Hampshire*, Order No. 24,723 (January 5, 2007), at 12-16.

¹⁶ See *Guglielmo v. Worldcom*, 148 N.H. 309, 312-314 (2002); *Appeal of Northern Utilities, Inc.*, 136 N.H. 449, 453-454 (1992) ; *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980).

In the particular and unique circumstances of this docket, we believe that permitting the transition period for DS1 and DS3 transport UNEs to expire on February 8, 2014, as proposed in FairPoint's latest tariff revision, is reasonable and appropriate, but such an abbreviated transition period for dark fiber transport UNEs may create an unreasonable hardship for FairPoint's wholesale customers and result in potentially anti-competitive effects. We believe that an additional period of six months should be afforded with respect to dark fiber transport in order to lessen the adverse impacts on these wholesale customers. We emphasize, however, that these findings are based on the peculiar circumstances of this proceeding, in which tariff revisions proposed by FairPoint went into effect by operation of law without the Commission's approval. These specific findings should not be considered precedential for any future wire center reclassification proceedings.

We therefore will accept the proposed transition period for the six wire centers which we have found to have been properly reclassified, located in Dover, Hanover, Keene, Nashua, Portsmouth and Salem, with respect to DS1 and DS3 transport UNEs, but reject the proposed transition period with respect to dark fiber interoffice transport UNEs and require that this transition period be extended for an additional six months, until August 15, 2014.

D. Future Process for Wire Center Reclassification Proceedings

Finally, we address the issue of a revised process to be followed in future wire center reclassification dockets. CANNE argues and Staff concurs that the current process for wire center reclassification may be unnecessarily time-consuming, costly, and burdensome for many if not all involved parties, and that alternative approaches to this process may represent significant improvements in efficiency and speed of resolution. We note that CANNE proposed, and FairPoint endorsed, the potential use of a standard questionnaire form, and we also believe

this concept may have merit and should be considered. Staff did not recommend any specific new or revised procedures to be followed, but expressed its willingness to conduct an investigation into new or revised procedural alternatives. Accordingly, we will order Staff to work with interested parties to develop and propose an appropriate process to be implemented in any future wire center reclassification proceedings, and to file a report summarizing the results of this initiative and the proposed process revisions, within 90 days.

Based upon the foregoing, it is hereby

ORDERED, that FairPoint's Motion to Strike or, in the Alternative, for Leave to Reply, is denied as to the motion to strike and is granted as to the motion for leave to reply; and it is

FURTHER ORDERED, that FairPoint shall remove from the NH PUC Tariff No. 2 list of exempt wire centers the wire center located in Durham; and it is

FURTHER ORDERED, that FairPoint shall extend the transition period for dark fiber interoffice transport UNEs under NHPUC Tariff No. 2 for the wire centers located in Dover, Hanover, Keene, Nashua, Portsmouth and Salem for a period of six months, terminating on August 15, 2014; and it is

FURTHER ORDERED, that, subject to the modifications ordered in the preceding two ordering paragraphs, FairPoint's revisions to NH PUC Tariff No. 2 are hereby accepted, effective as of the date of this Order; and it is

FURTHER ORDERED, that FairPoint shall file a compliance tariff with the Commission in accordance with N.H. Code Admin. Rules Puc 1603 no later than 30 days from the date of this Order; and it is

FURTHER ORDERED, that Staff shall conduct an investigation together with interested parties in order to develop and propose a reasonable and appropriate process to be

implemented in future wire center reclassification proceedings, and Staff shall file a report summarizing the results of this initiative and the proposed process revisions, within 90 days.

By order of the Public Utilities Commission of New Hampshire this seventh day of October, 2013.

Amy Ignatius

Amy L. Ignatius
Chairman

M.D.H.

Michael D. Harrington
Commissioner

Robert R. Scott

Robert R. Scott
Commissioner

Attested by:

Debra A. Howland

Debra A. Howland
Executive Director