Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

	)	
In the Matters of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

PETITION FOR DECLARATORY RULING
OF FAIRPOINT COMMUNICATIONS, INC.

Pursuant to Section 1.2 of the Commission's rules, FairPoint Communications, Inc., Debtor-in-Possession, and its operating subsidiaries (collectively, "FairPoint") hereby request that the Commission issue a declaratory ruling in connection with the pole attachment complaint filed against FairPoint by Biddeford Internet Corporation d/b/a Great Works Internet ("GWI") on February 19, 2010 before the Maine Public Utilities Commission ("MPUC"). Although GWI's complaint was filed more than 180 days ago, such that the MPUC no longer has jurisdiction over that complaint under Section 224(c)(3)(B)(i) of the Communications Act of 1934, as amended (the "Act") and Section 1.1414(e) of the Commission's rules, the MPUC has continued to subject FairPoint to burdensome discovery requirements, and created uncertainty as to the respective obligations of the parties. Moreover, GWI's complaint seeks to compel FairPoint to allow boxing techniques to be used on its poles, even though FairPoint does not use such techniques in the ordinary course of its operations to serve itself or any other party, but rather only uses them when a unique situation in the field dictates such use, and FairPoint would not box its own poles on the specific poles where GWI has requested boxing. The Commission has concluded that a utility is not required to authorize the use of boxing techniques by a

requesting carrier except in circumstances that are similar to those in which the utility uses such boxing techniques. Accordingly, FairPoint respectfully requests that the Commission declare that: (i) the MPUC no longer has jurisdiction over GWI's complaint, and thus is obligated under Section 224(c)(3)(B)(i) of the Act and Section 1.1414(e) of the Commission's rules to terminate its investigation of the matters raised therein; and (ii) FairPoint's decision not to allow GWI to box FairPoint's poles based on the operational standards that FairPoint would employ for itself was and is reasonable and nondiscriminatory, and thus consistent with the requirements of Section 224 of the Act.

BACKGROUND

Section 224 of the Communications Act. Section 224 of the Communications Act, as amended, defines the scope of federal and state jurisdiction with respect to the regulation of the rates, terms, and conditions for pole attachments.[1] Generally, the Commission may regulate such rates, terms, and conditions unless a state: (i) has enacted regulations in this area and certified as much to the Commission; and (ii) takes final action with respect to any given pole attachment complaint within 180 days of filing.[2]

Maine's Pole Attachment Regulations. Maine has adopted both statutory and administrative rules for pole attachments, which, among other things, permit parties to bring pole attachment complaints before the MPUC. More specifically, 35-A M.R.S. § 711(4) directs the Commission to adopt rules "governing the resolution of pole attachment rate disputes," and Me. P.U.C. Reg. 880 contains those rules. The Maine rules do not contain specific requirements regarding boxing or bracketing of poles.

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[1] 47 U.S.C. § 224. *See also* 47 C.F.R. 1.1414.

[2] 47 U.S.C. § 224(c)(3)(B)(i).

Maine's Oxford Order. On October 26, 2006, the MPUC released the *Oxford Order*, which found that several of the third-party pole attachment policies and requirements of Verizon New England Inc. ("Verizon") were unjust and unreasonable, and ordered Verizon to take remedial action.[3] Among other things, the *Oxford Order* established streamlined procedures for resolving pole attachment disputes arising under the *Oxford Order*.[4] The Commission explained that these procedures would be used in lieu of the pole attachment complaint procedures adopted pursuant to 35-A M.R.S. § 711.[5]

GWI's Pole Attachment Complaint and Subsequent MPUC Investigation. On February 19, 2010, GWI asked the MPUC staff to use its "delegated authority [under the *Oxford Order*] to determine that FairPoint has acted unreasonably in its make-ready proposals and should be required to allow pole attachments as proposed by GWI . . . ."[6] In this complaint, GWI took issue with FairPoint's conclusion that make-ready work would be necessary to serve GWI on 68 poles in Bath and West Bath, Maine. More specifically, GWI asserted that "the make-ready work for every pole could be avoided by boxing the pole,"[7] and sought to compel FairPoint to allow such boxing. GWI's complaint prompted the MPUC to request responsive filings from the parties on multiple occasions, and in these requests the MPUC repeatedly

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3 *See Oxford Networks f/k/a Oxford County Telephone; Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order, MPUC Docket No. 2005-486 (Oct. 26, 2006) (the "*Oxford Order*").

4 *Id.* at 20.

5 *Id.* at 2.

6 Letter from Frederick S. Samp, General Counsel, GWI to Andrew Hagler, Esq., MPUC, at 2 (Feb. 19, 2010) (appended hereto as Attachment 2 to Exhibit A).

7 *Id.*

characterized GWI's February 19 letter as a complaint.[8] Moreover, GWI itself characterized its February 19 letter as a complaint.[9] On June 30, 2010, the MPUC issued a *Notice of Investigation* regarding "[FairPoint's] administration of pole attachments that involve [GWI],"[10] and "open[ing] an investigation to resolve [the GWI-FairPoint] dispute."

The Commission's 2010 Pole Attachment Order. On May 20, 2010, the Commission adopted an *Order* in its ongoing pole attachment rulemaking proceeding.[11] In that *Order*, the Commission concluded explicitly that a pole owner is not required to permit other parties to use attachment techniques, such as boxing, where the pole owner does not use such techniques to serve itself in similar circumstances.[12] The Commission "carefully tailored" this policy "to reflect the legitimate needs of pole owners," and in particular the views of some pole

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8 *See, e.g.*, Letter from Andrew Hagler, Esq., MPUC to Frederick S. Samp, General Counsel, GWI and Michael Reed, FairPoint-Maine (Mar. 4, 2010) (appended hereto as Attachment 3 to Exhibit A) ("By letter dated February 19, 2010 . . . [GWI] *complains* that [FairPoint] is seeking to enforce certain make-ready requirements . . . .") (emphasis added); Letter from Matthew S. Kaply, Staff Attorney, MPUC to Eric Samp, GWI (Mar. 22, 2010) (appended hereto as Attachment 6 to Exhibit A). (seeking GWI's response to a letter in which FairPoint "makes its response to *complaints* by [GWI] . . . .") (emphasis added).

9 E-Mail from Eric Samp, GWI to Matthew S. Kaply, MPUC (Apr. 19, 2010) (appended hereto as Attachment 8 to Exhibit A). (asking the MPUC to initiate an investigation to "establish that the practices *complained of* continue to be unreasonable . . . .") (emphasis added).

10 *Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, Notice of Investigation, MPUC Docket No. 2010-206, at 1 (Jun. 30, 2010) (appended hereto as Exhibit B).

11 *See Implementation of Section 224 of the* Act, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245 (May 20, 2010) ("*Pole Attachment Order*").

12 *Id.* at ¶ 8.

owners that boxing "complicates pole maintenance and replacement, can compromise safety, and may not be consistent with sound engineering practices."[13]

FairPoint's Motion to Dismiss. On October 7, 2010, FairPoint filed with the MPUC a Motion to Dismiss and for Expedited Stay, seeking the dismissal of GWI's February 19 complaint and the termination of the subsequent MPUC investigation with respect to that complaint.[14] FairPoint noted that such dismissal was required under Section 224(c)(3)(B) of the Act and Section 1.1414(e) of the Commission's rules, insofar as: (i) GWI's complaint had been pending for more than 180 days and (ii) as a result, the MPUC no longer had jurisdiction with respect to that complaint. The MPUC has not ruled on FairPoint's Motion. In the interim, FairPoint filed objections to GWI's discovery requests based on, among other things, the MPUC's lack of jurisdiction over the dispute.[15] By a Procedural Order dated October 15, 2010, the MPUC overruled these objections *sua sponte*,[16] and subsequently has continued to subject FairPoint to burdensome discovery requests.[17]

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13 *Id.* at ¶ 11.

14 *Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, FairPoint Communications-NNE's Motion to Dismiss and for Expedited Stay, MPUC Docket No. 2010-206 (Oct. 7, 2010) (appended hereto as Exhibit C).

15 *Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, FairPoint Communications-NNE's Objections to GWI's First Set of Data Requests, MPUC Docket No. 2010-206 (Oct. 12, 2010) (appended hereto as Exhibit D).

16 *Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation*, Procedural Order, MPUC Docket No. 2010-206 (Oct. 15, 2010) (appended hereto as Exhibit E) ("Observing that FairPoint has interposed objections as to each of [GWI's discovery] requests on the grounds that there is presently before the Commission a Motion to Dismiss for lack of subject matter jurisdiction, those objections are hereby overruled.").

17 By letter filed with the MPUC that same day, FairPoint requested clarification of the basis for the MPUC's ruling with respect to these objections. *Commission Investigation*

DISCUSSION

Maine has adopted regulations governing the rates, terms, and conditions upon which pole attachments must be provided. While the MPUC therefore has jurisdiction to resolve pole attachment complaints, under Section 224(c)(3)(B)(i) it lacks such jurisdiction over any individual matter with respect to which the MPUC has failed to take final action "within 180 days after the complaint is filed with the State[.]"[18] As noted above, GWI submitted a pole attachment complaint to the MPUC on February 19, 2010, such that the MPUC had jurisdiction over GWI's complaint only to the extent that final action with respect to that complaint was taken by August 17, 2010. As no such action was taken, jurisdiction has reverted to the Commission under Section 224(c)(3)(B)(i) of the Act and Section 1.1414(e) of the Commission's rules.[19] However, the MPUC has failed to recognize as much by granting FairPoint's Motion to Dismiss, and in fact has denied FairPoint's jurisdictional objections to discovery and continued to subject FairPoint to burdensome discovery requirements, notwithstanding the MPUC's lack of authority to do so. In order to eliminate uncertainty and clarify the scope of the MPUC's authority, the Commission should declare that the MPUC no longer has jurisdiction over GWI's complaint, and thus is obligated under Section

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into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation, Letter from William Hewitt, Counsel to FairPoint, to Matthew S. Kaply, MPUC Hearing Examiner, MPUC Docket No. 2010-206 (Oct. 15, 2010) (appended hereto as Exhibit F). As of the filing of this Petition, the MPUC has not provided such clarification.

18 *See* 47 U.S.C. § 224(c)(3)(B)(i). Maine law does not specify any applicable period for the processing of pole attachment complaints not involving cable system facilities.

19 47 U.S.C. § 224(c)(3)(B)(i); 47 C.F.R. § 1.1414(e).

224(c)(3)(B)(i) of the Act and Section 1.1414(e) of the Commission's rules to terminate its investigation of the matters raised therein.[20]

Further, the Commission should address the substantive issue raised in GWI's complaint. Because the Commission now has exclusive jurisdiction over the dispute between GWI and FairPoint, federal law governs the disposition of GWI's complaint and the issues raised thereunder.[21] As noted above, GWI's complaint contends that "the make-ready work for every [disputed] pole could be avoided by boxing the pole," and seeks to compel FairPoint to allow GWI to perform such boxing. Notably, though, the Commission has concluded that Section 224 does not entitle a carrier to avail itself of pole attachment techniques not used by the owner of the relevant pole. In particular, where a pole owner does not utilize boxing techniques, it cannot be compelled to make those techniques available to requesting carriers.[22] In fact, the *Pole*

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[20] In an attempt to escape this result, GWI has asserted before the MPUC that its February 19, 2010 letter was not a complaint. Letter from Frederick S. Samp, General Counsel, GWI to Karen Geraghty, Administrative Director, MPUC, at 3 (Oct. 14, 2010) (appended hereto as Exhibit A). Simply put, this argument does not pass the straight-face test. As noted above: (i) both the MPUC and GWI itself previously have characterized GWI's February 19 letter as a complaint; and (ii) that letter clearly was intended to invoke the MPUC's *Oxford Order* procedures, which the MPUC intended as a substitute for its pole attachment complaint procedures in at least some cases. Moreover, because GWI also contends that FairPoint no longer has recourse to codified pole attachment complaint resolution procedures, GWI's claim that the *Oxford Order* procedures are not themselves complaint procedures would undermine the basis for concluding that Maine effectively regulates pole attachment issues, and thus the basis for Maine's certification under Section 224(c).

[21] Section 1.1414(e) clearly provides that if final action has not been taken on a complaint within 180 days after the complaint was filed, then jurisdiction over the complaint "reverts" to the Commission (and thus jurisdiction no longer lies with the MPUC in this case). Even if the MPUC continued to have concurrent jurisdiction over that complaint—which it does not—any attempt to require FairPoint to box its poles would "stand as an obstacle to the accomplishment and execution" of federal policy as embodied in the *Pole Attachment Order*, and thus would be subject to preemption. *See, e.g., La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

[22] *Pole Attachment Order* at ¶¶ 8-10.

Attachment Order specifically finds that "[i]f a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all."[23] That being the case, the Commission should declare that FairPoint's decision not to allow GWI to box FairPoint's poles based on the operational standards that FairPoint would employ for itself was and is reasonable and nondiscriminatory, and consistent with the requirements of Section 224, given that FairPoint does not box its poles in the ordinary course of its operations for its own benefit.

* * * * *

For the reasons set forth above, the Commission should issue a declaratory ruling finding that: (i) the MPUC no longer has jurisdiction over GWI's complaint, and thus is obligated under Section 224(c)(3)(B)(i) of the Act and Section 1.1414(e) of the Commission's rules to terminate its investigation of the matters raised therein; and (ii) FairPoint's decision not to allow GWI to box FairPoint's poles based on the operational standards that FairPoint would employ for itself was and is reasonable and nondiscriminatory, and consistent with the requirements of Section 224, given that FairPoint does not box its poles in the ordinary course of its operations for its own benefit.

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[23] *Id.* at ¶ 11.

Respectfully submitted,

/s/ Karen Brinkmann

Karen Brinkmann
Jarrett S. Taubman
LATHAM & WATKINS LLP
555 Eleventh St., N.W., Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200

Counsel for FairPoint Communications, Inc.

Shirley J. Linn
Robin E. Tuttle
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521 E. Morehead Street
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Charlotte, NC 28202
(704) 344-8150

November 3, 2010

EXHIBIT A

ELECTRONICALLY FILED ON OCTOBER 14, 2010

October 14, 2010

Karen Geraghty, Administrative Director
Maine Public Utilities Commission
State House Station 18
Augusta, ME 04333-0018

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARD COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Re: MAINE PUBLIC UTILITIES COMMISSION, Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation, Docket No. 2010-206

Dear Ms. Geraghty:

GWI has received a copy of FairPoint's Motion to Dismiss the above matter and offers the following in response:

1. Procedurally, FairPoint has the facts wrong. GWI has never filed any documents with the Commission concerning this pole attachment dispute other than in response to the Commission's June 30 Notice of Investigation.

FairPoint's Motion is premised on the assertion that GWI filed a complaint with the Commission on February 19, 2010, more than 180 days ago. FairPoint makes this assertion based on the Commission's statement in the Notice of Investigation that it had received a letter from GWI on February 19 outlining a dispute between GWI and FairPoint. Despite the lack of any evidence supporting its extraordinary claim, FairPoint chooses to refer to that letter as "GWI's February 19 Complaint Letter".

In fact, a review of the procedure followed with respect to the pole attachment dispute reveals that no one involved intended or believed that GWI was filing a complaint with the Commission. The history leading up to this dispute begins with a 2006 Order of the Commission in a dispute between Verizon, FairPoint's predecessor in interest, and Oxford Networks (the "Oxford Order").[1] In the Oxford Order, the Commission found

[1] *Oxford Networks F/K/A Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles,* Docket No. 2006-486 (Order dated October 26, 2006).

that certain of Verizon's acts, practices and services with respect to pole attachments were unjust and unreasonable. The Commission also ordered that further disputes be addressed using an expedited process other than the proceedings described in 35-A M.R.S.A. § 711. That process envisioned a quick preliminary decision on the merits of a dispute by the Commission's Director of Technical Analysis without the involvement of the Commission but subject to review by the full Commission.

In December of 2007, this writer corresponded with the Commission's Director of Technical Analysis and the member of the Commission's Legal Department who had been the Hearing Examiner in the Oxford case. GWI was seeking guidance on the applicability of the Oxford Order to other parties with similar concerns and on the implementation of the expedited dispute procedure. The Commission's Staff advised GWI that the Oxford case would apply to all similarly situated third party attachers and that no specific format for the dispute had been established. A copy of that correspondence is attached hereto as Attachment 1.

In the winter of 2010, GWI inquired of the Commission's Director of Telephone and Water Utility Industries about the procedures to be followed under the Oxford Order in view of the fact that the Director of Technical Analysis position no longer existed. That official informed GWI that he was the proper official for processing the expedited dispute procedure from the Oxford Order. Accordingly, GWI sent the February 19, 2010 letter (referenced in the Notice of Investigation) directly to that official and not to the Commission.[2] A copy of the February 19 letter (without attachments) is attached as Attachment 2.

On March 4, 2010, the Director of Telephone and Water Utility Industries wrote to GWI and FairPoint acknowledging receipt of the GWI letter and claiming the authority to act under the delegated authority established in the Oxford Order. As envisioned in the Oxford Order, he scheduled a site visit of the relevant poles and lines for March 9, 2010 and requested that GWI provide certain documents before the visit.[3] A copy of the March 4 letter is attached as Attachment 3.

At FairPoint's request, the Director of Telephone and Water Utility Industries postponed the site visit and permitted a response by FairPoint to the March 4 letter. On March 12, 2010, FairPoint filed that response, a copy of which (without attachment) is attached as Attachment 4. On March 15, 2010, GWI inquired of the Director of Telephone and Water Utility Industries about the status of the site visit. A copy of that correspondence is attached as Attachment 5. GWI never received a response to that inquiry, and no site visit was ever rescheduled.

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[2] GWI intentionally did not file the letter with the Commission by directing it to the Administrative Director or even by sending a copy to the Administrative Director. Chapter 110, Section 301(b) of the Commission's rules requires all filings of documents to be directed to the Administrative Director. Accordingly, the Commission did not formally receive the document, and the Administrative Director did not enter its receipt on any docket. No case was opened at the time, and no docket number was assigned.

[3] GWI supplied the requested documents on time.

Instead, on March 22, 2010, GWI received a letter from a Commission Staff Attorney soliciting a response to the FairPoint March 12 letter (attached as Attachment 6). GWI sent the requested response to the Staff Attorney on March 30, 2010 (attached as Attachment 7). On April 19, 2010, GWI sent an e-mail to the Staff Attorney requesting further direction in pursuit of the expedited dispute process (attached as Attachment 8). GWI heard nothing further on the matter until the Commission issued its Notice of Investigation and docketed the case on June 30, 2010.

Based on that history, it should be apparent that FairPoint is simply wrong in its assertion that a complaint has been pending before the Commission for more than 180 days. While GWI has understandably been disappointed about the response it has received in its efforts to invoke the expedited dispute procedure, none of the history suggests that the Commission has been remiss in processing a complaint for pole attachments. Before the date of the Notice of Investigation, neither the Commission, as an institution, nor any individual Commissioner had formal reason to be aware of the dispute. To date, no party has filed any complaint.

2. FairPoint's legal argument – that the Maine Commission loses jurisdiction if a complaint is not finally resolved within 180 days of a complaint – is unsupported and makes no sense.

All of FairPoint's legal arguments are premised on its reading of 47 U.S.C. § 224 and the regulations promulgated thereunder. That statute is the Congressional grant of authority to the Federal Communications Commission ("FCC") to regulate pole attachments. Section 224(b) states the general rule that the FCC shall regulate the rates, terms and conditions for pole attachments and to hear and resolve complaints about them. Section 224(c) takes away that jurisdiction under certain stated conditions. Nothing in Section 224 states or even suggests that the FCC's jurisdiction is exclusive. Nothing in Section 224 purports to deprive the State of Maine or its Public Utilities Commission of any jurisdiction otherwise granted by the Legislature under 35-A M.R.S.A. § 711. Nowhere does FairPoint argue that 47 U.S.C. preempts the states from acting in any defined field of regulation.

It is difficult to understand what FairPoint is trying to argue in its Motion to Dismiss. At most, if FairPoint were correct about its assertions of fact about the proceedings to date – which it is not – the logical conclusion would be that the FCC could lawfully assert jurisdiction if GWI asked it to. That conclusion does not even speak to the issue of whether this Commission may assert its jurisdiction under 35-A M.R.S.A. § 711.

In summary, FairPoint's spurious arguments in its Motion to Dismiss constitute a transparent attempt to inject further delay into a dispute that has already gone on much longer than the facts can possibly justify. The Commission should dispose of the motion summarily and take whatever actions are necessary to bring this matter to a speedy and just resolution.

Very truly yours,

Frederick S. Samp
General Counsel

ATTACHMENT 1

Eric Samp <esamp@staff.gwi.net>

RE: Pole Attachment Disputes

2 messages

Huntington, Faith <Faith.Huntington@maine.gov> **Mon, Dec 10, 2007 at 12:13 PM**
To: Eric Samp <esamp@gwi.net>
Cc: "Tannenbaum, Mitchell" <Mitchell.Tannenbaum@maine.gov>

Mitch - can you advise? Thanks.

-----Original Message-----
From: Eric Samp [mailto:esamp@gwi.net]
Sent: Friday, December 07, 2007 4:20 PM
To: Huntington, Faith
Subject: Pole Attachment Disputes

Faith

In the Oxford Networks pole attachment case (Docket No. 2005-486, Order dated October 26, 2006), the Commission found that several of the third-party attachment policies and requirements of Verizon constitute unjust and unreasonable acts, practices and service. Although the case arose in the context of a complaint by Oxford, there appears to be nothing about the findings that are specific to Oxford, as an attacher, as opposed to any CLEC seeking to attach. If I am reading the Order correctly, it should be equally applicable to any party encountering the same kinds of acts, practices and service. The Order delegates authority to resolve pole attachment disputes to the Director of Technical Analysis pursuant to 35-A M.R.S.A. Section 107(4). Unless something has changed, I understand that you hold that position, and I was wondering if you have established or want to establish any specific format for bringing such a dispute to you. If not, I assume that you would simply like a complainant to be as specific as possible about the facts underlying the dispute.

If it is not obvious, GWI may well need to bring such a matter to you in the near future.

Eric Samp
General Counsel
Great Works Internet
8 Pomerleau Street
Biddeford, Maine 04005-9457
t. (207) 602-1136
f. (207) 286-2061
esamp@gwi.net

Tannenbaum, Mitchell <Mitchell.Tannenbaum@maine.gov> **Mon, Dec 10, 2007 at 12:53 PM**
To: "Huntington, Faith" <Faith.Huntington@maine.gov>, Eric Samp <esamp@gwi.net>

Eric

You are correct that the Oxford case would apply to all similarly situated third party attachers. We have no specific format for bringing a dispute to the Commission. A complaint with specific information would be sufficient.

Mitch

[Quoted text hidden]

ATTACHMENT 2

February 19, 2010

Andrew Hagler, Esquire
Maine Public Utilities Commission
State House Station 18
Augusta, ME 04333-0018

Re: Proposed Attachments by Biddeford Internet Corporation ("GWI") to Poles Located In West Bath and Bath, Maine Owned or Administered by FairPoint

Dear Mr. Hagler:

On October 26, 2006, in a proceeding initiated by Oxford Networks, the Commission issued an Order concerning the reasonableness of certain acts, practices and service of FairPoint's predecessor in interest (Verizon).[1] The Commission found that several of Verizon's third-party attachment policies and requirements constituted unjust and unreasonable acts, practices and services. As a result, the Commission directed Verizon to cease those acts and practices and to replace them with alternative policies and procedures as described in the Oxford Order. In addition, the Commission established an expedited dispute resolution mechanism in which pole attachment disputes are delegated to the Director of Technical Analysis. It is my understanding that there is no longer a Director of Technical Analysis at the Commission and that you are the official to whom the Commission has delegated the authority described in the Oxford Order.

In the autumn of 2009, GWI submitted to FairPoint applications to attach fiber optic cable to certain poles located in West Bath and Bath, Maine[2] for which FairPoint administers the telecommunications space either as owner or by agreement with the owner. By two letters dated October 7, 2009 (one letter for each municipality), FairPoint outlined certain make-ready work that it would require before allowing attachment and solicited GWI's authorization and agreement to pay for the proposed work. The two letters for West Bath and Bath are attached hereto as Exhibits A and B respectively. As shown in the attachments to those letters, FairPoint would require make-ready work for 45 out of the 56 poles in West Bath and for 23 out of the 47 poles in Bath. In the vast majority of cases, the work to be performed would be the raising of the existing cable TV line by one foot allowing GWI to occupy the current cable TV space.

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[1] *Oxford Networks f/k/a Oxford County Telephone, Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Docket No. 2005-486 (Order dated October 26, 2006) (the "Oxford Order").

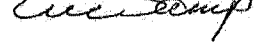
[2] The applications sought authority to attach to 56 poles in West Bath and 47 poles in Bath.

Following receipt of the two letters, GWI surveyed the routes and poles in order to get a better understanding of the need for the make-ready work proposed by FairPoint. Based upon that survey, GWI concluded that the make-ready work for every pole could be avoided by boxing the pole and that boxing could be achieved consistently with the requirements of applicable codes. GWI also concluded that each pole can be safely accessed by bucket trucks, ladders or emergency equipment. We understood the Oxford Order to stand for the proposition that it is unreasonable for FairPoint not to allow boxing under such circumstances.[3] The results of the GWI survey are shown on Exhibits C and D for West Bath and Bath respectively.

Following the completion of the survey work, GWI unsuccessfully attempted to engage FairPoint about the need for the proposed make-ready work and the proper application of the standards outlined in the Oxford Order. As shown in the email correspondence attached hereto as Exhibit E, it became clear that FairPoint does not believe it is obligated to discuss the need for make-ready work or the application or the standards in the Oxford Order with any CLEC other than Oxford Networks. GWI has made no progress in its attempts to resolve the issues with FairPoint.

There is nothing about the standards discussed in the Oxford Order that is unique to Oxford Networks. Any fair reading of the Order must lead to the conclusion that the acts and practices described as unreasonable remain so regardless of the CLEC that is the victim of the unreasonable behavior. GWI therefore requests that you exercise your delegated authority to determine that FairPoint has acted unreasonably in its make-ready proposals and should be required to allow pole attachments as proposed by GWI in Exhibits D and E.

Very truly yours,



Frederick S. Samp
General Counsel

Via U.S. Mail and email

Cc: Michael Morrissey, Esquire
Audrey Prior, Esquire

[3] GWI also noted that in most instances, make-ready work could be avoided simply by allowing the fiber sheath to be placed in the space above the Cable TV line. GWI was aware of no applicable code provision that would prevent such a deployment.

ATTACHMENT 3

STATE OF MAINE
PUBLIC UTILITIES COMMISSION
101 Second Street, Hallowell, Maine 04347
18 State House Station
Augusta, Maine 04333-0018

SHARON M. REISHUS
CHAIRMAN

VENDEAN V. VAFIADES
JACK CASHMAN
COMMISSIONERS

March 4, 2010

Eric Samp
Great Works Internet
8 Pomerleau Street
Biddeford, ME 04005

Michael Reed
FairPoint-Maine
1 Davis Farm Road
Portland, ME 04103

Dear Mssrs. Samp and Reed:

By letter dated February 18, 2010 (attached hereto) Biddeford Internet Corporation, d/b/a Great Works Internet ("GWI"), complains that Northern New England Telephone Operations, d/b/a FairPoint Communications-NNE ("FairPoint"), is seeking to enforce certain make-ready requirements in connection with a request by GWI to attach its facilities to certain telephone poles owned or administered by FairPoint in Bath and West Bath, Maine, in a fashion previously declared by the Commission to be unreasonable and therefore unlawful.

Pursuant to the dispute resolution process established by the Commission in its October 27, 2006 Order in Docket 2005-486, and the delegated authority created therein, I request that FairPoint respond, in writing, to GWI's February 18 letter on or before March 8, 2010 at 12:00 p.m.

In addition, and in furtherance of the dispute resolution process, notice is hereby given that Commission Staff will conduct a site visit of the relevant poles and lines, commencing at 9:00 a.m. on March 9, 2010. To facilitate the inspection, GWI is directed to file, on or before March 8, 2010 at 12:00 p.m., a detailed driving route map with pole numbers clearly identified. The driving route should commence from the location of Mae's Café and Bakery, located at 160 Centre Street in Bath, Maine. GWI and FairPoint are each invited to send representatives to accompany the Commission's staff on their inspection.

Very truly yours,

Andrew S. Hagler
Director, Telephone and Water Utility Industries

cc: Audrey Prior
Michael Morrissey, Esq.

Attachment 4

FairPoint communications

1 Davis Farm Road
Portland, ME 04103

March 12, 2010

Andrew S. Hagler
Maine Public Utilities Commission
State House Station 18
Augusta, ME 04333-0018

Dear Mr. Hagler:

Pursuant to the request in your letter dated March 4, 2010 to Michael Reed and Fredrick Samp , Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") responds as follows:

FairPoint and Biddeford Internet Corp. d/b/a Great Works Internet ("GWI") are parties to a pole attachment agreement dated November 4, 2004. The Agreement is attached hereto and marked as "Exhibit A" for reference.

In your letter you invoke the dispute resolution process established by the Maine Public Utilities Commission (the "Commission") in its October 26, 2006 Order in Docket 2005-486 (the "Order"). FairPoint respectfully asserts that this dispute resolution process can only be invoked by Oxford Networks or FairPoint to resolve a dispute stemming from the implementation of the Order. The entirety of the Order is directed to resolution of issues between Oxford and FairPoint, and the actions ordered by the Commission are directed solely to activities of Verizon vis a vis Oxford. The "Oxford Rules" simply do not apply to GWI. The Commission's decision in Docket 2005-286 was based on a fact specific analysis of the actions, arguments and representations of the two parties before it. The Commission relied on representations made by Oxford, for example:

> *Moreover, we rely on Oxford statements during the proceeding that boxing is not preferred and will only occur when consistent with proper engineering. We understand these statements to mean that Oxford will not box poles when the cost of placing its facilities on the road side of poles is not significant or minimal.*

The dispute resolution process is a component of an oversight process by which the Commission monitored the actions of FairPoint and Oxford pursuant to the Order. The Commission did not provide that the monitoring and dispute resolution process (nor the directives in the Order) were to apply to parties other than Verizon and Oxford. The deliberate and measured tone of the Order and the limitations placed on the Commission's directives to Verizon confirm the Commission's express words that direct Verizon's actions with respect to pole attachment activity of Oxford. Therefore, applying the dispute resolution process of the Order in this case exceeds the scope of the Commission's Order and further deprives FairPoint of the due process specifically described in 35-A MRSA §711.

Both the state statute authorizing the Commission to oversee pole attachments and the Commission's own rules indicate that inquiries by the Commission are fact specific and are directed to resolving disputes between the two parties involved in the dispute.

35-A MRSA §711(1), the state statute that authorizes the Commission to order joint use of the poles and prescribe reasonable terms and conditions for joint use of the poles requires a hearing and a finding that:

A. *That public convenience and necessity require the use by one public utility or cable television system of the conduits, subways, wires, poles, pipes or other equipment, or any part of them, on, over or under any street or highway and belonging to another public utility or cable television system;*
B. *That joint use will not result in irreparable injury to the owner or other users of the conduits, subways, wires, poles, pipes or other equipment or in any substantial detriment to the service; and*
C. *That the public utilities or cable television system have failed to agree upon the use or the terms and conditions or compensation for the use.*

Not providing FairPoint the right to a hearing and affording it the opportunity to argue that any of the conditions listed above are not met runs in direct contravention of the statutory scheme.

Additionally, while the Commission has not held a hearing, the Pole Attachment Agreement executed by both GWI and FairPoint establishes an agreed upon and contractually binding process for dispute resolution between GWI and FairPoint. Pursuant to the dispute resolution terms set forth in Article 15 Section 10 of the agreement, if GWI believed that a term or condition that FairPoint was applying to GWI was unjust or unreasonable it should have presented that to FairPoint in writing. GWI did present its objections in writing and FairPoint responded in writing acknowledging the dispute and requesting a meeting to discuss GWI's objections. GWI, pursuant to the dispute resolution provision, was required to participate in that meeting as outlined in Article 15 Section 10. GWI did not do this. GWI made clear in the correspondence from Fletcher Kittredge to Lisa Varney that GWI wanted to litigate FairPoint's position on Docket 2005-486 and had no interest in discussing the terms of the Agreement between the parties or GWI's actual dispute with the attachments.

GWI's bypassing of the process in Section 15.10 and its grasping at a process intended for Oxford evidences a desire to precipitate litigation, rather than seek to resolve issues between the parties. FairPoint asserts that this is not the appropriate way to approach the make ready dispute between the parties. FairPoint believes that meeting with GWI and providing GWI a chance to mount its specific objections and discussing the basis for the decisions FairPoint made is absolutely essential. This meeting will allow the parties to establish if there is actually a dispute, a determination that needs to be made prior to further involvement by the Commission.

For example, with respect to the Bath route the joint ride out make ready assessments require work by Comcast Cable on 28 poles, work by Central Maine Power on 13 poles and work by FairPoint on 8 poles. If GWI objects to all or some of the make ready work, GWI needs to be specific with FairPoint about which pieces and why. This is the only way that FairPoint can address GWI's concerns. If GWI objects to

make ready work to be performed by Central Maine Power or Time Warner Cable, that Company will also need to be involved in the discussion. If GWI is allowed to run to the Commission under these circumstances, a precedent may be established that will bring to the Commission's doorstep more premature litigation from parties seeking to short-circuit the process.

For all the reasons outlined above FairPoint believes that the appropriate next step is for the parties to meet to discuss possible disputes regarding FairPoint's assessment of make ready work. FairPoint requests that the Commission defer consideration of GWI's complaint in order to determine whether it is still necessary to do so after the proper process has been followed.

Sincerely,

Sarah A. Davis
Regulatory Attorney
FairPoint Communications
1 Davis Farm Road
Portland, ME 04103
(207) 648-3107
sdavis@fairpoint.com

cc: Fredrick S. Samp, Esq.
Michael Reed

ATTACHMENT 5

Eric Samp <esamp@staff.gwi.net>

Re: Response Letter

1 message

Eric Samp <esamp@gwi.net> **Mon, Mar 15, 2010 at 2:27 PM**
To: "Hagler, Andrew S" <Andrew.S.Hagler@maine.gov>
Cc: "Reed, Michael" <mreed@fairpoint.com>, "Prior, Audrey [So. Portland, Me.]" <audrey.prior@fairpoint.com>, "Davis, Sarah (So Portland, ME)" <sdavis@fairpoint.com>

Andy

Did the ride out get rescheduled?

Thanks,

Eric

On Fri, Mar 12, 2010 at 2:49 PM, Davis, Sarah (So Portland, ME) <sdavis@fairpoint.com> wrote:

Andy:

Attached please find FairPoint's Response to your letter dated March 4, 2010 to Michael Reed.

Thanks,

Sarah A. Davis – ***Regulatory Attorney***

FairPoint Communications | 1 Davis Farm Road, Portland, ME 04103 | sdavis@fairpoint.com

207.648.2000 main | 207.648.3107 office | 207.272.7541 cell | 207.797.5022 fax

Any statements in this communication regarding tax matters are not intended or written by us to be used, and may not be used by any recipient of this communication, for the purpose of avoiding penalties that the Internal Revenue Service may seek to impose. The Internal Revenue Service has issued requirements regarding the formality and level of detail required in written analysis to be relied upon to avoid penalties; this communication does not meet those requirements.

The information transmitted herein is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the email and any attachments from any computer.

This e-mail message and its attachments are for the sole use of the intended recipients. They may contain confidential information, legally privileged information or other information subject to legal restrictions. If you are not the intended recipient of this message, please do not read, copy, use or disclose this message or its attachments, notify the sender by replying to this message and delete or destroy all copies of this message and attachments in all media.

--
Eric Samp
General Counsel
Great Works Internet
8 Pomerleau Street
Biddeford, Maine 04005-9457
t. (207) 602-1136
f. (207) 286-2061
esamp@gwi.net

ATTACHMENT 6

STATE OF MAINE
PUBLIC UTILITIES COMMISSION
101 Second Street, Hallowell, Maine 04347
18 State House Station
Augusta, Maine 04333-0018

SHARON M. REISHUS
CHAIRMAN

VENDEAN V. VAFIADES
JACK CASHMAN
COMMISSIONERS

March 22, 2010

Eric Samp
Great Works Internet
8 Pomerleau Street
Biddeford, Me 04005

Dear Eric:

The Commission is in receipt of a letter dated March 12, 2010 wherein Northern New England Telephone Operations d/b/a FairPoint Communications-NNE (FairPoint) makes it responses to complaints by Biddeford Internet Corporation (GWI) that FairPoint is seeking to enforce make ready work requirements prior to allowing GWI to attach its facilities to telephone poles owned or administered by FairPoint in Bath and West Bath, Maine, that have been determined by the Commission to be unlawful in *Oxford Network F/K/A Oxford County Telephone, Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles.* Docket No. 2005-486 (October 2006).

In its response, FairPoint argues that the dispute resolution process established by the Commission in Docket No. 2008-456 may only be invoked by Oxford Network F/K/A Oxford County Telephone (Oxford Networks) or FairPoint to resolve a dispute that arise from the matters to which the Order issued on October 27, 2006 in Docket No. 2008-456 pertained. Additionally, FairPoint argues that allowing GWI to invoke the dispute resolution process established in Docket No. 2005-486 deprives FairPoint of due process; specifically the hearing indicated in 35-A M.R.S.A. § 711. Finally, FairPoint argues that resolution of any dispute regarding pole attachment requirements should be resolved using the dispute resolution process contained in the Pole Attachment Agreement executed between FairPoint and GWI and that involvement by the Commission in this dispute is premature.

Please provide GWI's response to these arguments, in writing, by March 30, 2010.

Very truly yours ,

Matthew S. Kaply
Staff Attorney

ATTACHMENT 7

March 30, 2010

Matthew S. Kaply, Esquire
Maine Public Utilities Commission
18 State House Station
Augusta, Maine 04333-0018

Re: Pole Attachment Dispute with FairPoint

Dear Mr. Kaply:

On March 22, 2010, you sent me a letter requesting GWI's response to arguments raised by FairPoint's counsel in a letter to Andrew S. Hagler dated March 12, 2020. Specifically, you requested that GWI address three issues raised by the March 12 letter: 1) whether the dispute resolution process established by the Commission in Docket No. 2005-486 may be invoked by any entity other than Oxford Networks; 2) whether pursuit of the resolution process established in Docket No. 2005-286 without a hearing would deprive FairPoint of due process of law; and 3) whether invocation of the dispute resolution process at this stage is prohibited by the pole attachment agreement between FairPoint and GWI.

1. The availability of the alternative dispute resolution process to parties other than Oxford Networks.

In its October 26, 2006 Order in Docket No. 2005-286, the Commission examined certain of Verizon's policies and practices with respect to third-party pole attachments, including Verizon's policy of prohibiting third-party attachers from boxing poles except in the precise circumstances in which it boxes poles. Under the authority of 35-A M.R.S.A. § 1306 (2),[1] the Commission found several of Verizon's acts and practices, including those related to boxing of poles by third-party attachers, to be unreasonable and discriminatory. Accordingly, the Commission directed Verizon "to cease those acts and practices and to replace them with alternative policies and procedures as described in [the] Order".[2]

[1] "If after a public hearing the commission finds that a term, condition, practice, act or service complained of is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of this Title or if it finds that a service is inadequate or that reasonable service cannot be obtained, the commission may by order establish or change terms, conditions, measurement, practice, service or acts, as it finds to be just and reasonable."

[2] Order at 20.

The Order could not be clearer. This was not private litigation resolving a personal claim between Verizon and Oxford. The case was a Commission investigation instigated on Oxford's complaint into Verizon's acts and practices. The Commission's findings were unambiguous – as described in the Order, the acts and practices were unreasonable. The Commission ordered Verizon to cease those acts and practices – not simply to stop abusing Oxford. To the extent that FairPoint, as Verizon's successor, continues those unreasonable acts and practices with respect to any third-party attacher, it is in violation of the Order.

Likewise, the Commission was equally clear as to its intent with respect to the alternative dispute resolution process established in the October 26, 2006 Order:

> As discussed above, there is a strong public policy favoring the development of infrastructure to support the provision of modern telecommunications services throughout the State. As a result, we have the obligation to carefully scrutinize the pole attachment policies, practices and procedures of Verizon to ensure that they are just, reasonable and nondiscriminatory. This is especially the case in the current situation in which Verizon administers pole attachments for its direct competitors. . . . [T]o ensure that the intent of this Order is implemented without undue delay, we put into place an expedited dispute resolution mechanism in which pole attachment disputes are delegated to our Director of Technical Analysis. On balance, the directives of this Order will promote public policy without impeding on Verizon's ability to administer the telecommunications space in a fair and efficient manner.[3]

The Commission did not assert that the mechanism would or should be available to Oxford Networks but not to any other competitors. Such a reading would directly thwart the stated intent that all competitors be treated in a nondiscriminatory manner and would provide a poor framework for the public policies enunciated in the Order. There is nothing in the Order to support FairPoint's assertion that the process was designed to address situations factually specific to Oxford Networks as opposed to situations that might be faced by any third-party attacher.

2. FairPoint's right to due process.

FairPoint argues that "applying the dispute resolution process of the Order in this case exceeds the scope of the Commission's Order and further deprives FairPoint of the due process specifically described in 35-A M.R.S.A. § 711". The sentence is difficult to parse. It is not clear from the letter whether FairPoint means to be arguing a denial of due process because the Commission would be enlarging the scope of the Order or because any process that envisions pole attachment requirements before a hearing is either unconstitutional or in violation of statutory requirements.

[3] Order at 20-21.

If FairPoint intends the former argument, as discussed above, the Commission's October 26, 2006 Order can only be reasonably read, consistent with the stated public policy, to allow all competitive telecommunications providers equal and nondiscriminatory access to the alternative dispute resolution process. If FairPoint intends the latter argument – that it is constitutionally or statutorily entitled to a hearing before it must allow any third-party pole attachment, the issue has already been decided by the Commission in the Oxford case. Under any reading of the Order, the Director of Technical Analysis may, under certain circumstances (subject to appeal rights to the full Commission), resolve pole attachment disputes without a hearing. Verizon did not appeal the Oxford Order, and it is final and binding on FairPoint.

But the argument, in any event, shows a basic misunderstanding about the nature of the actions taken by the Commission in the Oxford case. The case was not fundamentally about the terms and conditions under which Oxford could lease space on poles owned or administered by Verizon. Oxford and Verizon already had a pole attachment agreement in place, and most substantive issues related to pricing policies were already resolved by Chapter 880 of the Commission's Rules. As should be clear from the Order, the Commission was reviewing the acts and practices of Verizon and found them to be unreasonable and discriminatory. FairPoint should not be permitted to demand a new hearing about those same acts and practices as a prerequisite to any enforcement activity.

3. The FairPoint-GWI Pole Attachment Agreement.

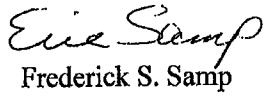
As a further reason for ignoring the alternative dispute resolution process established in the Oxford Order, FairPoint argues that GWI has violated the FairPoint-GWI Pole Attachment Agreement by bringing this dispute to the Commission Staff at this time. FairPoint offers no argument and it is not obvious what the argument would be that the Commission has any jurisdiction to interpret and enforce such a private contract between the parties. But assuming, for the sake of argument, that the Commission or the Staff has such jurisdiction and responsibility, it is clear that GWI has taken all reasonable steps required by the agreement to avoid bringing the dispute to the Commission Staff. GWI believes that the make ready work proposed by FairPoint for the disputed pole attachments is unreasonable. Much of it could be avoided altogether simply by allowing GWI to attach in existing adequate space above the CATV facilities. Nevertheless, along much of the route, FairPoint has deemed it necessary (at substantial cost) that the CATV facilities be moved up by one foot so that GWI facilities can be attached in the space now occupied by the CATV facilities. While from GWI's point of view, the preferred solution would be to leave existing facilities where they are, boxing is a viable alternative, under applicable codes and the Commission's standards, to the substantial expense of relocating the CATV facilities.

As is clear from the correspondence attached as Exhibit E to my letter of February 19, 2010, FairPoint and GWI scheduled a telephonic meeting for Friday, December 18, 2009 to discuss these matters, as envisioned by the pole attachment agreement. When GWI made clear that it expected to discuss the acts and practices covered by the Oxford

Order, FairPoint stated unequivocally that it had no obligation to enter into such discussions and cancelled the meeting. It is difficult to understand what counsel for FairPoint is talking about when she asserts in her March 12 letter that "GWI made clear that [it] . . . had no interest in discussing the terms of the Agreement between the parties or GWI's actual dispute with the attachments."

If FairPoint is prepared to discuss the appropriate boxing of poles or any preferred alternative to expensive make ready work consistent with the Oxford Order, GWI is happy to do so as long as time limits or similar precautions are put into place to prevent further unconscionable delays in the process. Perhaps it would be useful and time-saving if such discussions were held during the site visit contemplated in the Oxford Order.

Very truly yours,



Frederick S. Samp
General Counsel

ATTACHMENT 8

Eric Samp <esamp@staff.gwi.net>

Re: Bath-Brunswick Pole Attachments

1 message

Eric Samp <esamp@gwi.net> **Mon, Apr 19, 2010 at 5:58 PM**
To: "Kaply, Matthew S" <Matthew.S.Kaply@maine.gov>, "Hagler, Andrew S" <Andrew.S.Hagler@maine.gov>
Cc: SDAVIS@fairpoint.com, mreed@fairpoint.com
Bcc: Fletcher Kittredge <fkittred@staff.gwi.net>, Dave Allen <davea@staff.gwi.net>, Brett Misenor <bmisenor@staff.gwi.net>, Josh Broder <jbroder@tilsontech.com>

Matthew

We have not heard anything further from the Commission Staff on GWI's pending request for use of the alternative dispute resolution process outlined in the Oxford case. Because of the press of and potential loss of business, if no action is taken in the very near future, GWI will need to move forward with the proposed fiber project without benefit of any regulatory intervention to which it might otherwise be entitled. In that event, GWI would likely request the full Commission to initiate a new investigation, largely duplicative of the one it conducted in the Oxford case, to establish that the practices complained of continue to be unreasonable and that GWI should not be treated differently from Oxford with respect to pole attachments. GWI would also expect to request that the Commission order the reimbursement of excessive make-ready costs as discussed at page 19 of the Oxford Order.

Please advise as soon as reasonably possible what further actions the Staff might be contemplating in this case.

Eric

On Tue, Mar 30, 2010 at 6:22 PM, Eric Samp <esamp@gwi.net> wrote:

Matthew

Attached please find an electronic copy of the letter I sent to you today by U.S. Mail. I have provided electronic copies to the above listed representatives of FairPoint.

Eric

--
Eric Samp
General Counsel
Great Works Internet
8 Pomerleau Street
Biddeford, Maine 04005-9457
t. (207) 602-1136
f. (207) 286-2061
esamp@gwi.net

--
Eric Samp
General Counsel
Great Works Internet
8 Pomerleau Street
Biddeford, Maine 04005-9457
t. (207) 602-1136
f. (207) 286-2061
esamp@gwi.net

EXHIBIT B

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-206

June 30, 2010

MAINE PUBLIC UTILITIES COMMISSION
Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation

NOTICE OF INVESTIGATION

REISHUS, Chairman; VAFIADES and CASHMAN, Commissioners

I. SUMMARY

Through this Notice, we initiate an Investigation into the acts and practices of Northern New England Telephone Operations d/b/a FairPoint Communications-NNE (FairPoint) regarding its administration of pole attachments that involve Biddeford Internet Corporation (GWI).

II. BACKGROUND

Each utility pole has space dedicated to the placement of both electric facilities and communications facilities. By virtue of ownership, or through agreements with other Transmission and Distribution (T & D) Utilities, FairPoint administers the attachment of competitor's facilities within the dedicated communications space on utility poles throughout Maine. In this role, FairPoint sets the requirements and fees associated with attachment of telecommunications facilities owned by FairPoint's competitors.

Both State and Federal governments have recognized that practices and policies that inhibit competition are most likely to occur where a single entity has control over local exchange facilities. Simply put, these facilities create a bottleneck wherein Incumbent Local Exchange Carriers (ILECS) can prevent competition. Utility poles are perhaps the clearest example of this sort of structural bottleneck. Any facilities-based telecommunications utility must attach its facilities to pre-existing utility poles in order to reach potential customers. To duplicate this infrastructure would be beyond the ability of all but the largest companies. In addition, such duplication would be economically inefficient in light of the fact that nearly every residence or business receives utility services through existing poles. Accordingly, an entity that controls access to utility poles controls access to customers and therefore the marketplace.

To prevent practices that would inhibit competition, Congress enacted, as part of the Telecommunications Act of 1996, a requirement that Local Exchange Carriers "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services." 47 U.S.C §251(b)(4). Likewise, 35-A M.R.S.A. § 711(1), authorizes the Commission to initiate a proceeding to prescribe reasonable rates, terms and conditions for the joint use of utility poles through an

adjudicatory proceeding. In addition, Chapter 880 of the Commission's rules governs the procedure for the resolution of disputes arising under Section 711, the allocation of costs for the joint use of utility poles, and the apportionment of the physical space allotted to different categories of utility facilities.

The Commission previously confronted issues surrounding its practices in administering pole attachments in a dispute between Oxford County Telephone Company, d/b/a/ Oxford Networks (Oxford) and FairPoint's predecessor Verizon New England, Inc., d/b/a Verizon Maine (Verizon). *Oxford Networks F/K/A Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles,* Docket No. 2006-486. In an Order issued on October 26, 2006 in that docket (the Oxford Order), the Commission determined that certain requirements imposed by Verizon in connection with requests by a competitor to attach its facilities to Verizon's poles were unjust and unreasonable. In that case, the Commission ordered that further disputes be addressed using an expedited process other than the proceedings described in Section 711.

The reasonableness of the administrative and pricing practices of Verizon's successor, FairPoint, with regards to pole attachments, and the question of whether the expedited dispute resolution process described in the Oxford Order is applicable to disputes arising between FairPoint and competitors other than Oxford, have now been raised in a dispute between Biddeford Internet Corporation (GWI) and FairPoint regarding the attachment of GWI's facilities to utility poles owned or operated by FairPoint.

A. Dispute with GWI

February 19, 2010, the Commission received a letter from GWI detailing a dispute between FairPoint and GWI regarding certain make-ready work required by FairPoint as a condition of allowing GWI to attach its facilities to poles owned or operated by FairPoint. Specifically, GWI submitted applications to FairPoint to attach its facilities to 103 utility poles owned or administered by FairPoint in the area of Bath and West Bath, Maine. In response, FairPoint provided GWI with a list of 68 poles that would require make-ready work prior to attachment of GWI's facilities. .

In its February 19 letter, GWI asserts that the make-ready work identified by FairPoint involves the raising of existing cable television lines on the poles in order to accommodate installation of GWI's facilities. According to GWI, this work is largely unnecessary because GWI's facilities can readily be installed by attaching them to the side of the utility pole farthest from the road pursuant to a procedure commonly known as "boxing." GWI notes that FairPoint's refusal to permit the boxing of poles as a means of attaching a competitors' facilities to the poles was found by the Commission, in its Oxford Order, to be an unreasonable utility practice. According to GWI, FairPoint is also obligated, pursuant to the Oxford Order, to submit to the expedited review process established in that case for the resolution of disputes such as those raised here.

In response, by letter sent on March 12, 2010, FairPoint claims that the expedited process established in the Oxford Order was intended only to apply to disputes between Oxford Networks and Verizon (now, FairPoint) that might arise from implementing the Commission's Order in connection with the dispute presented in that particular case. In addition, FairPoint claims that GWI should first participate in a dispute resolution process set forth in the Pole Attachment Agreement executed by GWI, before it invokes the authority of the Commission to resolve the dispute. In this regard, FairPoint asserts that GWI has not provided it with the specific objections to the make-ready work requirement for each of the poles in question and that the process envisioned in the Pole Attachment Agreement is essential before FairPoint can even begin to address the concerns raised by GWI to the Commission. Finally, FairPoint argues that the make-ready work assessment it sent to GWI would require the participation of other utilities that would be required to perform work on the poles and that the participation of those parties would be essential to the resolution of any dispute regarding make-ready work requirements.

GWI, in reply, asserts that its efforts to follow the dispute resolution process set forth in its Pole Attachment Agreement to resolve this dispute in a manner that is consistent with the substantive findings of the Commission in the Oxford Order, but that such attempts have been unsuccessful. Consequently, claims GWI, the Commission's involvement in this dispute is both timely and necessary in order to achieve resolution.

III. INVESTIGATION

Section 14 of Chapter 880 of our rules provides that a proposed joint user of utility poles may file a complaint to commence an adjudicatory proceeding to establish the rates, terms and conditions for pole attachments or other joint use, and that the Commission may act on the complaint if it finds, among other things, that the parties have failed to reach agreement. Having made this threshold finding, Chapter 880 contemplates that the Commission will open an investigation to resolve the dispute and determine rates, terms, and conditions for the joint use of utility poles. However, the Commission may, on its own motion, initiate a proceedings to prescribe reasonable rates, terms and conditions for the joint use of utility poles pursuant to 35-A M.R.S.A. § 711(1).

As stated in the Oxford Order, there exists "a strong public policy, both State and federal, in favor of fostering competition for the provision of modern telecommunications services and the wide deployment of broadband access to the network." *Oxford Order*, p. 9. Accordingly, the Commission has an obligation to insure non-discriminatory and reasonable access to the communications space of utility poles in pursuit of this public policy. Additionally, it is clear that GWI and FairPoint have failed to reach an agreement on the terms of pole attachments in Bath and West Bath and that there is an ongoing dispute between them. The Commission therefore opens an investigation to resolve this dispute pursuant to 35-A M.R.S.A. § 711 and Chapter 880 of the Commission's rules.

IV. PARTIES AND PROCEDURE

GWI and FairPoint are made parties to this Investigation. Interested persons wishing to participate as parties in this proceeding must file a petition to intervene in conformity with the requirements of section 722 of the Commission's Rules of Practice and Procedure with the Commission no later than July 19, 2010. Copies of petitions to intervene should be sent to:

Sarah Davis, Esquire
FairPoint Communications
1 Davis Farm Road
Portland, ME 04103

Eric Samp
Great Works Internet
8 Pomerleau Street
Biddeford, ME 04005

The Hearing Examiner assigned to this proceeding shall convene a case conference to rule on petitions to intervene and establish a schedule for the processing of this Investigation.

V. SERVICE OF NOTICE

A copy of this Notice shall be sent to all facilities-based local exchange and interexchange telephone utilities doing business in Maine, all transmission and distribution utilities in Maine, and all cable television companies in Maine.

Dated at Hallowell, Maine, this 30th of June, 2010.

BY ORDER OF THE COMMISSION

_____
Karen Geraghty
Administrative Director

COMMISSIONERS VOTING FOR: Reishus
Vafiades
Cashman

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

EXHIBIT C

PIERCE ATWOOD
LLP
ATTORNEYS AT LAW

William D. Hewitt
One Monument Square
Portland, ME 04101

207-791-1337 voice
207-791-1350 fax
whewitt@pierceatwood.com

pierceatwood.com

ELECTRONICALLY FILED ON OCTOBER 7, 2010

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARDCOPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Ms. Karen Geraghty
Administrative Director
Maine Public Utilities Commission
18 State House Station
Augusta, ME 04333

Re: Maine Public Utilities Commission; Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation Docket No. 2010-206

Dear Ms. Geraghty:

Enclosed for filing in the above-referenced proceeding please find two copies of a Motion to Dismiss and for Expedited Stay filed on behalf of Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE.

Please feel free to contact me if you have any questions concerning this Motion.

Very truly yours,

William D. Hewitt

WDH:rrp
Enclosures
cc: Service List (via e-mail)

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-206
October 7, 2010

MAINE PUBLIC UTILITIES COMMISSION; Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation	))))	**FAIRPOINT COMMUNICATIONS-NNE'S MOTION TO DISMISS AND FOR EXPEDITED STAY**

INTRODUCTION

Jurisdiction over disputes concerning rates, terms and conditions for pole attachments rests with the Federal Communications Commission ("FCC"). Pursuant to federal law, Maine and several other states have been granted jurisdiction over pole attachment disputes arising in their respective states after certifying to the FCC that the state has a regulatory framework in place to resolve such disputes. Federal law is clear, however, that the state's jurisdiction is limited. Specifically, the dispute resolution jurisdiction ceded to a state will revert to the FCC if the state has not taken final action on a particular dispute within 180 days of the filing of the complaint. 47 U.S.C. § 224(c)(3)(B); 47 C.F.R. § 1.1414(e). Because the 180-day period for final action on GWI's February 19, 2010 complaint at issue here expired on August 18, the Commission no longer has subject matter jurisdiction over this dispute.[1] Accordingly, for the reasons stated herein, Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE ("FairPoint") respectfully requests that the Commission dismiss this proceeding and issue an expedited stay of this docket pending the Commission's decision on the Motion to Dismiss.

[1] FairPoint did not become aware that there was a 180-day deadline that applied to the Commission's jurisdiction over this dispute until weeks after the deadline had passed.

BACKGROUND

This proceeding involves a dispute between GWI and FairPoint concerning pole attachments that was brought to the Commission on February 19, 2010 by letter from GWI ("GWI's February 19 Complaint Letter"). The Commission's June 30, 2010 Notice of Investigation in this docket summarizes the February 19 Complaint Letter and describes the dispute as follows:

> [On] February 19, 2010, the Commission received a letter from GWI detailing a dispute between FairPoint and GWI regarding certain make-ready work required by FairPoint as a condition of allowing GWI to attach its facilities to poles owned or operated by FairPoint. Specifically, GWI submitted applications to FairPoint to attach its facilities to 103 utility poles owned or administered by FairPoint in the area of Bath and West Bath, Maine. In response, FairPoint provided GWI with a list of 68 poles that would require make-ready work prior to attachment of GWI's facilities.
>
> In its February 19 letter, GWI asserts that the make-ready work identified by FairPoint involves the raising of existing cable television lines on the poles in order to accommodate installation of GWI's facilities. According to GWI, this work is largely unnecessary because GWI's facilities can readily be installed by attaching them to the side of the utility pole farthest from the road pursuant to a procedure commonly known as "boxing." GWI notes that FairPoint's refusal to permit the boxing of poles as a means of attaching a competitors' facilities to the poles was found by the Commission, in its Oxford Order, to be an unreasonable utility practice. According to GWI, FairPoint is also obligated, pursuant to the Oxford Order, to submit to the expedited review process established in that case for the resolution of disputes such as those raised here.

Notice of Investigation at 2.

Based on GWI's February 19 Complaint Letter and other information received by the Commission, it opened this investigation:

> Section 14 of Chapter 880 of our rules provides that a proposed joint user of utility poles may file a complaint to commence an adjudicatory proceeding to establish the rates, terms and conditions for pole attachments or other joint use, and that the Commission may act on the complaint if it finds, among other things, that the parties have failed to reach agreement. Having made this threshold finding, Chapter 880 contemplates that the Commission will open an investigation to resolve the dispute and determine rates, terms, and conditions for the joint use of utility poles. However, the Commission may, on its own motion, initiate a proceedings to prescribe reasonable rates, terms and conditions for the joint use of utility poles pursuant to 35-A M.R.S.A. § 711(1).

> As stated in the Oxford Order, there exists "a strong public policy, both State and federal, in favor of fostering competition for the provision of modern telecommunications services and the wide deployment of broadband access to the network." *Oxford Order*, p. 9. Accordingly, the Commission has an obligation to insure non-discriminatory and reasonable access to the communications space of utility poles in pursuit of this public policy. Additionally, it is clear that GWI and FairPoint have failed to reach an agreement on the terms of pole attachments in Bath and West Bath and that there is an ongoing dispute between them. The Commission therefore opens an investigation to resolve this dispute pursuant to 35-A M.R.S.A. § 711 and Chapter 880 of the Commission's rules.

Id. at 3.

Thus, the NOI confirms two key points that are significant to this Motion:

- On February 19, 2010, the Commission received a letter from GWI "detailing a dispute between FairPoint and GWI regarding" make-ready work for 103 utility poles in Bath and West Bath to which GWI seeks to attach by "boxing;" and

- Based on GWI's February 19 Complaint Letter and other information, the Commission concluded that "it is clear that GWI and FairPoint have failed to reach an agreement" on pole attachments in Bath and West Bath, "there is an ongoing dispute between them" and the "Commission therefore opens an investigation to resolve this dispute."

ARGUMENT

I. This Proceeding Must Be Dismissed Because Jurisdiction Over the Dispute Between GWI and FairPoint Has Reverted to the FCC By Operation of Federal Law.

In 47 U.S.C. § 224(b), Congress vested the FCC with jurisdiction over the regulation of rates, terms and conditions that apply to pole attachments and related disputes:

> (b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations
>
> (1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any

> determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.
> (2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(Emphasis added.)

In Section 224(c)(1), Congress carved out state jurisdiction for pole attachment rates, terms and conditions "in any case where such matters are regulated by a State." For a state to demonstrate that it regulates in this area, it must file a written certification to that effect with the FCC. *Id.* § 224(c)(2). Once certified, however, the state's jurisdiction over pole attachments and related disputes is not absolute. For example, and relevant to this Motion, a state will "not be considered to regulate the rates, terms, and conditions for pole attachments":

> (B) <u>with respect to any individual matter, unless the State takes final action on a complaint regarding such matter</u> -
> (i) <u>within 180 days after the complaint is filed with the State</u>, or
> (ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

Id. § 224(c)(3)(B) (emphasis added).

Thus, notwithstanding a state's compliance with the certification requirement in Section 224(c)(2), the state is deemed to no longer regulate the rates, terms and conditions for a particular pole attachment dispute if the state has failed to take "final action" on that dispute within 180 days of the complaint. The FCC's implementing regulations, entitled "Pole Attachment Complaint Procedures,"[2] similarly provide in pertinent part:

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[2] In Section 224(b)(2), Congress directed the FCC to enact rules to implement Section 224. The FCC's Rules are codified at 47 C.F.R. §§ 1.401-1.418 (Subpart J—Pole Attachment Complaint Procedures).

> (e) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:
>
> (1) Within 180 days after the complaint[3] is filed with the state, or
>
> (2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

47 C.F.R. § 1.1414(e).

Consistent with the statute, the FCC's regulations clearly state that if the state has not taken final action on a pole attachment complaint within 180 days, then "jurisdiction will revert to [the FCC] with respect to" that "individual matter."

Here, pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e), the Commission retained jurisdiction over the dispute for the 180 day period after GWI filed its February 19 Complaint Letter with the Commission. When that 180 day period expired on August 18, 2010 without "final action" on the matter, jurisdiction over this dispute "reverted" to the FCC by operation of federal law. Thereafter, the Maine PUC no longer has jurisdiction over the subject matter of this dispute, and this proceeding must be dismissed. *See* M.R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Fletcher v. Feeney*, 400 A.2d 1084, 1089 (Me. 1979) ("Jurisdiction is the essential basis upon which all court powers rest, and even willing submission by the parties of their dispute cannot confer it.")[4]; *In re Certification by the Maryland Pub. Serv.*

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[3] The FCC's rules define a complaint as: "a filing by a . . . telecommunications carrier . . . alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable." 47 C.F.R. § 1402(d) (definition of complaint).

[4] Given that the Commission no longer has jurisdiction over this dispute, any final order that the Commission were to issue on the merits would be subject to collateral attack. *In re Guardianship of Gabriel W.*, 666 A.2d 505, 507-08 (Me. 1995) ("Lack of subject matter jurisdiction may be raised at any time, including in collateral proceedings when lack of subject matter jurisdiction appears on the face of the record of the judgment attacked.") (citations omitted).

Comm'n Concerning Regulation of Cable Television Pole Attachments, 1986 WL 291472 (FCC Apr. 8, 1986) ¶¶ 6,7 (denying declaratory ruling that state does not regulate rates, terms and conditions of pole attachments in accordance with 47 U.S.C. § 224(c), in part, due to absence of "any evidence of a complaint which has been pending in Maryland longer than the 180 day period the [federal] statute allows").

Finally, FairPoint emphasizes that, although this Commission no longer has jurisdiction over this dispute between FairPoint and GWI, they are not without a venue to resolve their dispute. FairPoint is hopeful that GWI and the Commission will work with FairPoint to smoothly transfer the record for this dispute to the FCC for further proceedings.

II. This Proceeding Should Be Stayed Pending the Commission's Decision on the Motion to Dismiss.

FairPoint also requests that the Commission issue, on an expedited basis, an order staying this proceeding while the Commission considers and rules on the Motion to Dismiss. If the Commission ultimately concludes that it no longer has jurisdiction over this dispute (as it must for the reasons stated above), then in the meantime the Commission Staff and the parties will be spending time and effort on a dispute after jurisdiction has already reverted to the FCC. Conservation of the resources of the Commission and the parties militates that this docket be stayed pending a ruling on the Motion to Dismiss. *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (trial court has "broad discretion and inherent power" to stay proceeding until questions that may dispose of case are resolved); *U.S. v. County of Nassau*, 188 F.R.D. 187, 188-89 (E.D.N.Y. 1999) (motion to stay discovery pending resolution of motion to dismiss granted where dispositive motion raised issue "strictly" of law raising a "substantial issue" that would

dispose of entire case if granted and where it was "self-evident" that the cost of discovery would be an unnecessary expense and employees would be unnecessarily distracted from their work in the event defendant's motion were granted).

CONCLUSION

For all of these reasons, FairPoint respectfully requests that the Commission stay this proceeding pending its ruling on the Motion to Dismiss, and that it dismiss this proceeding on the basis that jurisdiction has reverted to the FCC by operation of federal law.

Dated: October 7, 2010

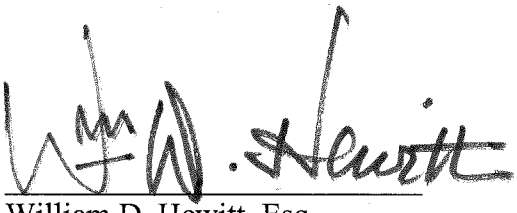

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EXHIBIT D

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October 12, 2010

ELECTRONICALLY FILED ON OCTOBER 12, 2010

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARDCOPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Ms. Karen Geraghty
Administrative Director
Maine Public Utilities Commission
18 State House Station
Augusta, ME 04333

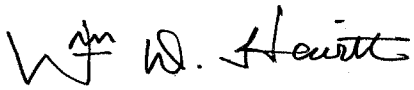
Re: Maine Public Utilities Commission; Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation
Docket No. 2010-206

Dear Ms. Geraghty:

Enclosed for filing in the above-referenced proceeding please find two copies of Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE's Objections to GWI's First Set of Data Requests.

Please feel free to contact me if you have any questions concerning this matter.

Very truly yours,



William D. Hewitt

WDH/rrp
Enclosures
cc: Service List (via e-mail)

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-206
October 12, 2010

MAINE PUBLIC UTILITIES COMMISSION; Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation	))))	**FAIRPOINT COMMUNICATIONS-NNE'S OBJECTIONS TO GWI'S FIRST SET OF DATA REQUESTS**

Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE ("FairPoint") objects to GWI's First Set of Data Requests as follows:

Directed to Testimony of Lisa Varney:

1. With respect to each pole attachment agreement applicable to attachments in the State of Maine referenced in Answer Number 5, please provide:
   a. A list of all such currently effective agreements to which FairPoint or Verizon is a party, including the names of the party or parties to each such agreement and the effective date of each such agreement.
   b. With the exception of the GWI Agreement offered as Exhibit FP-LV-1 or any other agreement to which GWI is a party, a copy of each such agreement.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this request on the basis of, and to the extent that it is overbroad, unduly burdensome and seeks confidential and proprietary business information.

2. With respect to the determination as to make-ready work and the preparation of make-ready estimates discussed in Answer 14 and with respect to any subsequent consideration of the proposed make-ready work, please provide:
   a. The names of the person or persons who made the determination and the date or dates on which such determination was made.
   b. Copies of any documents, whether in written or electronic form, in which the need for the make-ready work and the specific make-ready proposals are discussed or otherwise referred to.

c. Written summaries (please prepare summaries to the extent none has heretofore been prepared) of any conversations involving a representative, agent or employee of FairPoint in which the need for the make-ready work and the specific make-ready proposals are discussed or otherwise referred to.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request to the extent it seeks information that is protected from disclosure by the attorney-client privilege and/or work product doctrine.

Directed to Testimony of Erin Austin:

3. With respect to FairPoint's engineering policies regarding pole attachments, please provide:
   a. All documents prepared by Verizon or FairPoint, whether written or in electronic form, that describe or discuss engineering policies related to pole attachments.
   b. To the extent engineering policies related to pole attachments have been approved or adopted by FairPoint, copies of the policies, a description of the procedure by which the policies were approved or adopted and the date of their approval or adoption.
   c. All documents prepared by or under the direction of Legal and/or Regulatory of FairPoint or Verizon, whether written or in electronic form, that discuss or mention the Oxford Order, its effect on policies for pole attachments and/or the identification of CLECs to which the standards of the Oxford Order shall apply.
   d. Written summaries (please prepare summaries to the extent none has heretofore been prepared) of any conversations involving a representative or representatives of Legal and/or Regulatory of FairPoint or Verizon that discuss or mention the Oxford Order, its effect on policies for pole attachments and/or the identification of CLECs to which the standards of the Oxford Order shall apply.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request to the extent it seeks information that is protected from disclosure by the attorney-client privilege and/or work product doctrine.

4. With respect to poles located within the State of Maine, please identify (regardless of ownership of the pole) by municipality, by route or street name and, if available, by pole number or other distinctive mark, all poles to which a line owned or operated by FairPoint is attached to the field side of the pole. With respect to each such pole, please provide:
   a. The date on which the line was first attached to the field side of the pole.
   b. The reason each such field side attachment was permitted within the then effective policies of Verizon or FairPoint.
   c. Any documents, whether written or in electronic form, that discuss the need for or reasons for allowing the field side attachment.
   d. To the extent the attachment was allowed initially under policies that were different than those in effect today, any documents, whether written or in electronic form, that describe the policies in effect at the time of the initial attachment.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

5. With respect to each of the "problems" identified in Answer 15, please provide:
   a. Copies of all documents, whether written or in electronic form, that describe or discuss the problem.
   b. Copies of all written or electronic contacts by FairPoint to Oxford concerning the problem.
   c. To the extent that no written or electronic contact was made by FairPoint to Oxford concerning the problem, a description of the nature of the problem and the form and substance of the communication between FairPoint and Oxford.
   d. A description of the actions taken Oxford to remedy the problem.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

6. Please provide a copy of or a reference allowing electronic access to the FCC Order described in Answer 19.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served.

Directed to Testimony of George Woods:

7. Answers 8 and 9 present an "example" of a situation under which FairPoint's engineering policies would allow attachment by FairPoint to both the field and road sides of a pole – when there is an obstruction or other field condition that prevents placement of a replacement pole adjacent to or behind an existing pole and when FairPoint has plans to retire the existing cables from the field side of the pole in the near future.
   a. With respect to each pole in Maine that has been boxed by Verizon or FairPoint and remains boxed today that conforms to this example, please provide all available evidence of FairPoint's plans to retire the existing cables from the field side of the pole in the near future.
   b. Please describe any other examples of situations under which FairPoint's engineering policies would allow attachment by FairPoint to both the field and road sides of the pole.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

8. Please provide the specifics for and evidence supporting the need for each addition of a "section throw" that has resulted from replacement of a boxed pole for Verizon or FairPoint as described in Answer 12.

OBJECTION:
FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

9. Please provide the specifics for and evidence supporting each determination of damage to FairPoint's plant caused by overlashing in the vicinity of a boxed pole as described in Answer 14.

OBJECTION:

FairPoint objects to this Request on the basis that the Commission no longer has jurisdiction over this dispute pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e) and, therefore, there is no legal authority for the discovery that GWI has served. FairPoint further objects to this Request on the basis that it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Dated: October 12, 2010

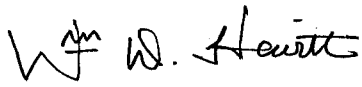


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EXHIBIT E

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-206

October 15, 2010

MAINE PUBLIC UTILITIES COMMISSION
Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation

PROCEDURAL ORDER

The Commission is in receipt of FairPoint's Objection to GWI's First Set of Data Requests. The Hearing Examiner presumes that the parties are working to resolve these discovery disputes without the necessity for Motions to Compel.

Observing that FairPoint has interposed objections as to each of the requests on the grounds that there is presently pending before the Commission a Motion to Dismiss for lack of subject matter jurisdiction, those objections are hereby overruled.

Additionally, OTT Communications' petition for intervention is hereby granted.

Dated at Hallowell, Maine this 15th day of October, 2010.

BY ORDER OF THE HEARING EXAMINER

Matthew S. Kaply

EXHIBIT F

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ELECTRONICALLY FILED ON OCTOBER 15, 2010

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARDCOPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Matthew S. Kaply, Esq.
Hearing Examiner
Maine Public Utilities Commission
18 State House Station
Augusta, ME 04333

Re: Maine Public Utilities Commission; Commission Investigation into FairPoint's Practices and Acts Regarding Access to Utility Poles Related to Biddeford Internet Corporation
Docket No. 2010-206

Dear Matt:

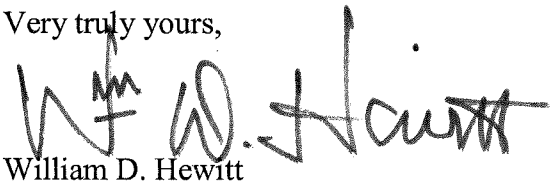
Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") is in receipt of the Procedural Order issued today in the above-referenced docket that, among other things, overrules jurisdictionally-based discovery objections asserted by FairPoint in connection with GWI's pending discovery requests. Responses to GWI's discovery requests are due on Monday, October 18. The purpose of this letter is to seek clarification of the basis for that ruling.

Although the Procedural Order overrules FairPoint's jurisdictionally-based objections, the basis for that ruling has not been provided in the Order. Specifically, the Procedural Order does not identify whether the ruling is based on the conclusion that jurisdiction over this dispute remains with the Commission and has not reverted to the FCC pursuant to 47 U.S.C. § 224(c)(3)(B) and 47 C.F.R. § 1.1414(e), or whether the ruling is based on some other ground.

Accordingly, FairPoint respectfully requests clarification of the basis for the October 15 ruling on FairPoint's objections to the jurisdictionally-based objections.

I appreciate your consideration of this matter.

Very truly yours,



William D. Hewitt

WDH:sko
Enclosures
cc: Service List (via e-mail)