DT09-113

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-___

Petition of
Northern New England Telephone Operations LLC
d/b/a FairPoint Communications-NNE
for Waiver of Certain Requirements
Under the Performance Assurance Plan and
Carrier to Carrier Guidelines

Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") hereby petitions the New Hampshire Public Utilities Commission (the "Commission") for a waiver of the incentive payment requirements of the Performance Assurance Plan ("PAP") filed November 21, 2006 in DT 06-168, which was made applicable to FairPoint pursuant to the Order No. 24823 Approving Settlement Agreement with Conditions in DT 07-011 (Feb. 25, 2008).[1] Specifically, FairPoint requests relief from the payment of PAP bill credits to competitive local exchange carrier ("CLEC") customers for the months of March and April 2009, and prospectively for May and June 2009. For the state of New Hampshire, the amount of the bill credits due to date are as follows:

March	$639,738
April	$874,726

Due to the unprecedented and unforeseen issues related to the system cutover launched in February 2009, it is reasonable and appropriate for the Commission to grant a waiver of the payment obligations pursuant to the provisions of Section J of the PAP, relating to situations be-

[1] On March 26, 2009, FairPoint filed a petition to waive certain specific reporting and potential penalty obligations under the PAP and C2C. This request has been assigned to DT 09-059 and is currently being separately processed.

yond FairPoint's control and to data clustering, as applicable, and furthermore to modify the PAP as necessary to remove the need to make any such payments pursuant to the last sentence of Section I of the PAP and the Commission's authority to alter or amend its orders under RSA 365:28.[2]

I. BACKGROUND

In Docket No. DT 01- 006, in conjunction with its efforts to obtain relief from the Federal Communications Commission ("FCC") under Section 271 of the Communications Act, Verizon New England Inc. ("Verizon") proposed to the Commission, and eventually obtained approval of, the PAP, modeled on the performance enforcement mechanisms previously approved by the New York and Massachusetts public utilities commissions.[3] Such a plan had been held by the FCC to be convincing evidence that the regional Bell Operating Companies would continue provisioning high quality service to Competitive Local Exchange Carriers ("CLECs") after obtaining Section 271 authority, an important element of the public interest standard. As part of its settlement of various issues related to the purchase of Verizon's assets in northern New England, FairPoint agreed to adopt the terms of the Verizon PAP.

The PAP is a self-executing enforcement plan based on metrics. "Metrics" is a term of art used to refer to numeric measurements of the quality or timeliness of FairPoint's performance of individual tasks undertaken to enable interconnection between itself and other carriers. These measurements are compared to numerical standards for performance of such tasks. The metrics cover the areas of Pre-order, Ordering, Provisioning, Maintenance and Repair, Billing, Network Performance and Change Control.

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[2] RSA 365:28 provides that the Commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it.

[3] A very similar PAP was also approved by the Maine and Vermont commissions as well.

Metrics are of two types: “Parity” measures, which require parity with FairPoint’s retail operations, and “Benchmark” measures, which compare actual performance to a benchmark. Together, these two types of measures are used to determine whether FairPoint is providing non-discriminatory service to CLECs.

The PAP is divided into three sections, and each type of metric is used in each of these three sections. The three sections are: (1) Mode of Entry ("MOE"), (2) Critical Measures, and (3) Special Provisions. The MOE section of the PAP is designed to measure FairPoint’s overall performance in five categories that correspond to the general modes CLECs use to obtain facilities from FairPoint to support the services that they offer in the local exchange market: Platform, Loop-Based; Resale; DSL; and Interconnection Trunks. The performance for these measurements is evaluated at the industry (aggregate CLEC) level each month for each MOE category. A pre-specified (capped) amount of annual bill credits is available to the CLECs if FairPoint’s performance reaches the maximum allowable unsatisfactory performance in each of the five MOE categories. Each month FairPoint applies statistical tests to the Parity metrics, and compares Benchmark metrics (i.e. those without a retail analog) to a set standard. Payments are due to CLECs when the threshold for unsatisfactory performance in each of the MOEs is exceeded. Each month, one-twelfth (1/12) of the annual amount allotted to the MOE metrics is available for bill credits.

Another section of the PAP is Critical Measures. This includes stand-alone Critical Measures that cover FairPoint’s service in areas critical to the CLECs. Should FairPoint’s performance miss an applicable performance standard for even one of the Critical Measures, each eligible CLEC is entitled to a bill credit. Each month, one-twelfth (1/12) of the annual amount allotted to each Critical Measure is available for billing credits.

The final section of the PAP is Special Provisions. This includes stand-alone Special Provision Measures that cover FairPoint's service in areas determined to be most critical to the CLECs. Should FairPoint's performance miss an applicable performance standard for even one of the Special Provision measures, each eligible CLEC is entitled to a bill credit. Each month, one-twelfth (1/12) of the annual amount allotted to each Special Provision measure is available for billing credits. In New Hampshire, incentives for the MOE, Critical Measures and Special Provisions sections of the Plan total $41,450,000 annually, or $3,454,000 per month.

Beginning in February 2009, FairPoint performed a cutover of its operations from the systems provided by Verizon under the terms of the Transition Services Agreement between the two parties. Despite extensive testing by FairPoint and its systems development contractor (Capgemini), and notwithstanding tremendous efforts on its part, FairPoint experienced severe problems in servicing its retail and wholesale customer base. These problems, which have been well documented, resulted in FairPoint missing a large number of PAP metrics for the months of March and April, and it expects to miss these metrics for May and June as well. The total amount of bill credits at issue for February, March, and April, total $2,859,471 across the three Northern New England states.

II. WAIVER OF PAP PAYMENTS IS CONSISTENT WITH THE WAIVER PROVISIONS OF THE PAP.

Recognizing that PAP data may be influenced by factors beyond FairPoint's control, Section J of the PAP permits FairPoint to petition the Commission seeking to have the monthly service quality results modified on three generic grounds. The first involves the potential for "clustering" of data, and the effect that such clustering has on the statistical models used in the PAP. The second ground for filing exceptions relates to unusual CLEC behavior. If such action negatively influences FairPoint's performance on any metric, FairPoint is permitted to petition for relief. The third ground for filing waivers relates to situations beyond FairPoint's control that negatively affect its ability to satisfy certain standards. The performance requirements dictated by these standards establish the quality of service under normal operating conditions, and do not necessarily establish the level of performance to be achieved during periods of emergency, catastrophe, natural disaster, severe storms, or other events beyond FairPoint's control.

A. FairPoint Qualifies for an Extraordinary Event Waiver.

As the Commission is aware, the terms of the FairPoint merger agreement with Verizon required FairPoint to build its own OSSs. Rather than duplicating Verizon's legacy systems (some going back four decades), FairPoint developed its own systems designed for its needs and reflecting the recommendations of its consultant, Capgemini. This involved the creation of 60 systems necessary to provide service to 1.5 million lines and was an effort long dreamed of, but still unprecedented, in industry history. There is no other instance in which such a large number of complex, integrated systems were created at a single time to serve such a large number of customers.

It is clear that the cutover problems were unforeseen and beyond FairPoint's control. PAP payments prior to cutover were negligible, and there was no reason to expect that they would not continue to be so. FairPoint has worked diligently and at great expense to resolve the problems in good faith. The cutover was an extraordinary event for which a waiver is appropriate.

B. FairPoint Qualifies for a Clustering Event Waiver

The PAP is highly statistical. At its base, the measurement model assumes that the data are independent. In some instances, events included in the performance measures of provisioning and maintenance of telecommunication services are not independent. The lack of independence contributes to "clustering" of data. Clustering occurs when individual items (orders, troubles, etc.) are clustered together as one single event. An example of a clustering problem is a cable failure. If a particular CLEC has a large number of troubles, but they are all within the same cable with a long duration failure, the performance will appear out of parity. Another example of clustering is if there is an incredible barrage of orders on a particular day that are way beyond the norm. A third example is if a particular location is down, i.e. a remote switch.[4]

Although OSS cutover problems were clearly not anticipated as a "clustering" problem, the cutover is a similar type of statistical anomaly. It has been a single (albeit large) event *when considered over the term of the business relationships with the CLECs,* and thus should be treated as a clustering problem, for which a waiver is appropriate.

C. Other Aspects of the Waiver Request are Justified

Although Section J of the PAP requires that waiver requests be filed within 45 days of the end of the month in which the triggering event occurred, this request is timely. Although the initial triggering event related to cutover, which occurred in February, the waiver request is also due to FairPoint's subsequent efforts in addressing cutover-related issues, which have been ongoing since that time. In the event there is any issue in this regard, FairPoint requests that the 45-day requirement be modified as necessary pursuant to the last sentence of Section I of the PAP or pursuant to the Commission's authority to alter its Order of February 25, 2008, in DT 07-011, under RSA 365:28.

The waiver request seeks relief from PAP payments already made, as well as prospective payments, because FairPoint was not in a position, as a practical matter, to seek the relief before now. During the period immediately after cutover, FairPoint devoted its resources to addressing

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[4] *See* PAP Appendix D, Section C.

cutover-related issues. As the first post-cutover information became available, it was clear that there were reporting system issues requiring attention, leading to the prior PAP waiver request. As the impact of the PAP payments has increased, the need for a waiver became a higher priority relative to other issues. In addition, nothing in the PAP precludes relief with respect to prior PAP payments. Under the provisions of Section J of the PAP, FairPoint "may file Exception or Waiver petitions with the Commission seeking to have monthly service quality results modified." Such modifications to the results are not limited under Section J to those relating to previous PAP payments.

Finally, for all the reasons set forth in this Petition, the PAP provisions concerning waiver requests based on circumstances beyond FairPoint's control should be extended to parity measures. To the extent such relief is available only through a modification of the PAP, FairPoint hereby requests such relief pursuant to the last sentence of Section I of the PAP and the Commission's authority to alter its Order of February 25, 2008, in DT 07-011, under RSA 365:28.

III. A MODIFICATION OF THE PAP IS ALSO AN APPROPRIATE MEANS FOR GRANTING THE REQUESTED RELIEF.

The last sentence of Section II.I of the PAP provides that until a replacement mechanism is developed or the Plan is rescinded, the PAP will remain in effect "as it may be modified from time to time by the Commission." Section II.K provides that the PAP is subject to an annual review by the Commission and FairPoint, "to determine whether any modifications or additions should be made." Section II.K provides that "[a]ll aspects of the Plan ... will be subject to review," including, specifically, the measures and weights, distribution of dollars at risk, modification of exceptions and bill credit methodologies. Section II.K concludes, "Any modifications to the Plan will be implemented as soon as reasonably practical after Commission approval of the modifications."

The following considerations support a determination that modification of PAP to the extent necessary to grant the relief requested should be made.

A. The PAP is Primarily an Incentive Plan to Promote Open Competition.

To appreciate why a waiver of the bill credit payments is appropriate, it is important to understand the underlying purpose of the PAP. PAPs were developed at the instigation of the FCC to ensure that the Bell Operating Companies would continue to meet their Section 271 obligations after obtaining Section 271 relief.[5] Thus, the PAPs are primarily motivational, as opposed to punitive. In other words, PAPs are more concerned with maintaining future performance than remedying any injuries that CLECs may have incurred in the past.

At the start, the FCC characterized PAPs as incentives. "We find that these PAPs, together with our section 271(b)(6) authority and the continuing oversight of the respective state commissions, provide *reasonable assurance* that the local market will remain open after 271 authority is granted."[6] In the Maine 271 proceeding, the FCC found that "the Performance Assurance Plan (PAP) currently in place in Maine will provide assurance that the local market will remain open after Verizon receives section 271 authorization."[7] It determined that the PAP was "likely to provide *incentives* that are sufficient to foster post-entry checklist compliance."[8] The

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[5] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543 para. 393 (1997) ("*Ameritech Michigan Order*").

[6] *Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, Inter-LATA Services in New Hampshire and Delaware*, CC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660 para. 171 ("*Verizon NH 271 Order*") (emphasis supplied).

[7] *Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, Inter-LATA Services in Maine*, CC Docket No. 02–61, Memorandum Opinion and Order, 17 FCC Rcd 11659 para. 61 ("*Verizon ME 271 Order*")

[8] *Id.* para. 61 (emphasis supplied).

Commission itself succinctly describes PAPs as being designed "to *prevent backsliding* after Section 271approval is granted . . . ."[9]

When viewed in these terms, it can hardly be said that FairPoint Communications has been "backsliding." FairPoint was operating at very high levels prior to the cutover, and fully expected to continue to do so post-cutover.[10] Any problems it has experienced in the past few months are solely related to cutover issues, not "backsliding" or systemic anti-competitive practices. On the contrary, as discussed further below, FairPoint has gone to extraordinary lengths and great additional expense to remedy these problems.

B. PAPs are not Focused on Remedying Specific Injuries.

While it is true that the pending PAP payment obligations are evidence that some CLECs have been disadvantaged to a certain extent, these payments cannot be considered as money damages. As discussed above, PAP payments are designed merely to be the force underlying the incentive nature of the PAP. This is apparent by the fact that the total yearly payments are capped, and are not based on any quantifiable assessment of CLEC injuries (if any.) The amount of the payments is designed to be only enough to deter FairPoint from anti-competitive activities, not to remedy any injuries to CLECs. As the Commission explained, a good PAP only "include[es] incentives high enough to exceed the benefits Verizon-NH might derive by inhibiting

[9] Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan, DT 01-006, Order No. 23,940 Regarding Metrics and Plan at 73 (Mar. 29, 2002) (emphasis supplied). *See also Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02–61, Report of the Public Utilities Commission at 88 (Apr. 10, 2002) ("*Maine 271 Report*") ("The revised PAP provides a comprehensive, self-executing enforcement mechanism intended to *deter backsliding* and the provision of substandard performance.") (emphasis supplied).
[10] *See* DT 07-011, FairPoint Stabilization Plan (Apr 1, 2009).

competition."[11] This is also consistent with the determination of the Maine Commission, which explained that "the Verizon PAP contains a sufficient dollar amount at risk and an acceptable mechanism for calculating the actual penalty amount to meet our goal of deterring backsliding."[12]

To reiterate, most PAP payments are not related to specific injuries. For example, MOE payments are not distributed based on performance for individual CLECs, but on aggregate performance. In other words, PAP metrics are not so much designed to record and remedy individual failures, but rather to paint a picture of FairPoint's overall performance. As the FCC explained, "performance monitoring establishes a benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market."[13] In that regard, the Commission has stated "the underlying truth that every plan for statistically measuring Verizon NH's wholesale performance is merely a surrogate: a statistical assessment of competition that substitutes observations of Verizon NH's business processes for actual observations of the *impact on competitors and competition.*"[14]

C. The Public at Large, not CLECs, is the Primary Intended Beneficiary of the PAPs.

The PAP is designed to benefit *competition*, not individual *competitors*. As the FCC stated, a PAP "provides a mechanism by which to gauge a BOC's present compliance with its

[11] New Hampshire Performance Assurance Plan, DT 01-006, Order Regarding Metrics and Plan, Order No. 23,940 at 67 (Mar. 29, 2002) ("*NH PAP Order*").

[12] *Maine 271 Report* at 110.

[13] *Ameritech Michigan Order* para. 393.

[14] *Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, CC Docket No. 02-157, Consultative Comments of the New Hampshire Public Utilities Commission at 18 (July 17, 2002) ("*NH 271 Comments*") (emphasis supplied).

obligation to provide access and interconnection to new entrants in a nondiscriminatory manner."[15] The Commission reiterated that "[t]he goal of a PAP is to assure parity performance,"[16] and has further emphasized that "*the ultimate fact in question*" is the "impact on competitors and on competition in New Hampshire."[17]

D. FairPoint has Performed in the Spirit of the PAPs, and Can be no Further Motivated by Making PAP Payments.

A waiver of the PAP payments is appropriate because, notwithstanding post-cutover performance issues, no one can argue that FairPoint's problems are in any way motivated by anti-competitive intent or even competitive disregard. On the contrary, FairPoint has been operating in abundant good faith and has undertaken extraordinary efforts. For example, it has, among other things:

- hired consultants to evaluate its management structure and its information technology organization;
- assigned senior management attention to this issue;
- caused its employees to work extraordinary hours on cutover matters;
- instituted parallel manual loop qualification and CSR process while CLEC pre-ordering problems were addressed;
- increased staffing in areas of the organization that were suffering from backlogs;
- deployed "SWAT" teams to support key functions;
- conducted extensive training and/or retraining of personnel;
- established CLEC focus groups and wholesale user forums to identify problems and collaborate on solutions;
- conducted numerous audits related to facilities inventory, false positive reports, and order completion validation;
- accelerated the delivery of line loss reports by "pushing" them out to CLECs.

It should also be noted that the new FairPoint OSSs are blind to whether orders are retail or wholesale, so it is structurally impossible for the order entry function to be discriminatory.

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[15] *Ameritech Michigan Order* para. 393.

[16] *NH PAP Order* at 77.

[17] *Id.* at 68 (emphasis supplied).

The post-cutover problems that contributed to the missed PAP metrics were an unexpected anomaly. FairPoint is, and has been, under intense pressure from retail and wholesale customers, state commissions, the press and the financial community to improve its performance.

IV. GIVEN THAT PAPs ARE DESIGNED TO ENSURE COMPETITION AND BENEFIT THE PUBLIC IN GENERAL, ANY PAP PAYMENTS ARE BETTER DIRECTED TO OPERATIONS.

This Petition is entirely consistent with FairPoint's recent efforts to focus efforts on improving its operations. The cutover issues required significant staff and senior management attention, diverting their focus from other revenue generating efforts. The cash made available by waiving the PAP payments will be directed to, among other things, providing resources to return to business as usual and meet build-out commitments.

Given the intent of the PAP, as discussed in the previous section, equitable considerations dictate that the PAP payments should be waived as requested. PAPs are ultimately intended to benefit the public, not just CLECs, and the public interest in reliable telephone service and responsive customer service must take precedence in this extraordinary situation.

Like many other companies in today's economy, FairPoint has a justifiable concern about cash flow, and this Petition is entirely consistent with FairPoint's recent efforts to conserve cash for the benefit of its primary POTS, wholesale and broadband operations. FairPoint, like most companies, has been affected by the current state of the national economy while also experiencing numerous issues related to the cutover. Cutover issues alone contributed to $19.4 million of incremental expenses in the first quarter of 2009, including third-party contractor costs and internal labor costs in the form of overtime pay.

FairPoint expects to continue to incur additional incremental costs during the second quarter of 2009, although the amount of such costs should decline as operations return to business as usual. In addition to the extra expenses, revenues have been below expectations and there have been cutover related billing issues (since resolved) that have reduced cash receipts. This in turn has led to interest coverage ratio issues, credit rating downgrades, and a search for sources of cash, most notably the tapping of the company's $50 million reserve in New Hampshire.

FairPoint assures this Commission that all available cash is being directed to critical uses for the benefit of its entire customer base. Cost containment initiatives are in place and cash is not being used for non-essential purposes. It is also important to emphasize that all of FairPoint's customers, *including CLECs*, will actually benefit more if all available cash is spent on returning to business as usual instead of making payments to individual CLECs. The cash made available by waiving the PAP payments will be directed to providing resources to return to business as usual, and maintaining other necessary operations and activities that benefit all customers. Funds devoted to PAP payments will have greatest leverage if directed at improving operations that affect all customers, rather than payments that improve the margins of a few carriers. In this way, all CLECs – and their customers – will benefit in the aggregate far more than if PAP payments are spread around to individual CLECs.

Given the intent of the PAP, as discussed in the previous section, equitable considerations dictate that PAP payments should be waived. In fact, if payments are made to CLECs, there is no assurance that the funds will even be applied to benefit New Hampshire business and residential consumers. Furthermore, waiving the PAP payments will have virtually no effect on CLEC finances, since PAP payments prior to the extraordinary event of the cutover were at most a few hundreds of dollars per month per CLEC.

PAPs are ultimately intended to benefit the public, not just CLECs, and the public interest in reliable telephone service and responsive customer service must take precedence in this extraordinary situation.

V. CONCLUSION

The events of the last few months have been extraordinary and unprecedented in the history of the telecommunications industry. FairPoint is as disappointed as any other stakeholder by the unexpected disruptions that the cutover from Verizon to FairPoint systems has entailed. However, the Commission should not lose sight of the ultimate expectation, shared by most, that the transition of Verizon's wireline business to FairPoint will result in significant benefits to all customers, retail and wholesale, that would not have been achieved otherwise. By waiving the PAP payments and permitting FairPoint to direct those funds to more productive uses, the Commission will help ensure that those benefits arrive as soon as possible.

WHEREFORE, FairPoint requests that the Commission waive the PAP payment requirements for the months of February through June, 2009.

Northern New England Telephone Operations LLC
d/b/a FairPoint Communications-NNE

By their Attorneys,
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Dated: June 10, 2009

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