STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-113

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

OBJECTION TO MOTIONS TO DISMISS

Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") hereby objects to the Motions to Dismiss FairPoint's Supplement to Petition ("Supplement") that were filed September 22, 2009 in the above captioned docket by Freedom Ring Communications d/b/a BayRing Communications and segTEL, Inc. ("BayRing/segTEL"), One Communications ("OneComm") and CRC Communications of Maine, Inc. ("CRC") (collectively "CLECs").

While the motions are styled as "Motions to Dismiss," they nonetheless argue the facts and read like briefs on the merits. As such, they are self-defeating, filled as they are with allegations, arguments and offers of proof. Moreover, despite the CLECs' conclusory statements regarding these allegations, they add to the questions before the Commission on which FairPoint is entitled to be heard.

I. STANDARD OF REVIEW

The Commission has previously denied a Motion to Dismiss if "sufficient questions remain unanswered to provide reasonable grounds to conduct a full and formal investigation."[1] In making this evaluation, it is Commission practice to "assume[] that each allegation [is] true and, if true, whether the allegations set forth a legitimate basis for relief."[2] As explained in greater detail below, FairPoint has made a number of allegations regarding the terms of the PAP, public interest considerations and the Commission's authority to grant relief that merit consideration.

Furthermore, the CLECs have themselves made new allegations that FairPoint disputes and to which it is entitled to respond. For example, FairPoint disputes the CLEC allegation that FairPoint has already obtained the remedy it seeks through the operation of the Wholesale Advantage Agreements that it assumed from Verizon. FairPoint also disputes that it agreed to "freeze" the PAP metrics and billing credits in New Hampshire, as well as the terms that were "effective" as of the date of the merger. Clearly, sufficient questions – of fact and law – remain unanswered and the Commission should deny the Motions to Dismiss.

II. AN ACTUAL ISSUE OF FACT AND LAW EXISTS REGARDING WHETHER THE PAP ALLOWS FOR MODIFICATIONS.

OneComm and BayRing/segTEL argue that FairPoint agreed to the PAP as of the effective date of the merger, either implying or expressly stating that all terms of the PAP were frozen in place and that no modifications of any kind were to be made to the PAP.[3] Citing a non-

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[1] DE 01-023, Guillemette v. Public Service Company Of New Hampshire, Order Denying Motion to Dismiss at 10-11 (June 28, 2001).
[2] DC 90-106, Turner v. Public Service Company of New Hampshire, Order No. 19,999 (December 4, 1990.)
[3] OneComm at 3. ("The Commission also indicated that its approval of the Verizon - FairPoint transaction was conditioned by the terms of the settlement agreement. Section 2.e of Exhibit 2 of

New Hampshire order, BayRing/segTEL assert that that FairPoint agreed to freeze the terms of the PAP as of the effective date pursuant to "clear and unambiguous terms in the CLEC Settlement Agreement."[4]

FairPoint disputes that these terms are as straightforward as BayRing/segTEL assert. The New Hampshire settlement agreement merely states that "Telco will be subject to the Performance Assurance Plan (PAP) in effect as of the Merger closing date . . . and will not challenge the jurisdiction of the state utility regulatory commission to enforce the PAP."[5] However, FairPoint did not agree to "freeze" the terms of the New Hampshire PAP as of the effective date. Furthermore, nothing in the Settlement Agreement indicated that only selected provisions of the PAP would be in effect. The PAP, as effective on the day of the merger, contained a number of provisions for modifications and adjustments. For instance, in addition to the exceptions and waiver provisions of Section J, Section K.1. provides that on a yearly basis, "the Commission and [FairPoint] may review and/or audit the Performance Assurance Plan to determine whether modifications or additions should be made. . . . *All aspects* of the Plan . . . will be subject to review." (emphasis supplied).[6] Furthermore, as FairPoint explained in the

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the settlement agreement states: Telco will be subject to the Performance Assurance Plan (PAP) in effect as of the Merger closing date . . ."); s*ee also* BayRing/segTEL at 9 ("FairPoint's attempts to change the PAP are directly adverse to its agreement to abide by the terms of the PAP 'in effect' and its agreement to keep the existing PAP unchanged until a new PAP is arranged through a collaborative process.")

[4] BayRing/segTEL at 3 (citing Vermont PSB).

[5] DT 07-011, *Transfer of Assets to Fair Point Communications, Inc.*, Staff Settlement Agreement § 2.e.

[6] These reviews are to be initiated no sooner the 6 months prior to the anniversary of Verizon's entry into the long distance market pursuant to Section 271. Verizon was granted Section 271 authority in New Hampshire on September 25, 2002. *See Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware,* WC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660 (2002). The original petition in this docket, along with the supplement, were filed within this window of time.

Supplement, Section II.K.2 of the current PAP in New Hampshire provides that "Verizon will file changes to the New York Plan adopted by the New York PSC with the New Hampshire Commission within 30 days of the compliance filing in New York for *review and inclusion* in the New Hampshire Plan upon the Commission's approval."[7] (emphasis supplied).

BayRing/segTEL also argue that "[d]evelopments in New York are totally irrelevant to the enforcement of the unequivocal contractual commitments contained in FairPoint's agreement with these CLECs in New Hampshire,"[8] but this is contradicted by the plain language of the PAP. Section II.K.2. of the PAP *in effect at the time of the merger* unequivocally provides that changes in New York would be considered by the Commission for inclusion in the PAP.

In the event that such consideration is called for (and FairPoint submits that it is), BayRing/segTEL maintain that it cannot be conducted "without data, analysis and/or testimony describing the specific market conditions (and level of service quality) in New Hampshire . . . as a starting point . . . to the Commission's independent analysis."[9] Given the ARMIS data that FairPoint has already provided, and the voluminous record in DT 07-011 of the state of its operations, FairPoint does not believe that such an inquiry is necessary in this proceeding, although it is confident that the outcome would be highly supportive of its request. Nevertheless, an investigation of the scope BayRing/segTEL suggest would preclude any thought of dismissing this proceeding.

The CLECs also argue that the proceeding should be dismissed because the PAP does not provide for the retroactive relief that FairPoint requests. FairPoint disputes this contention, and submits that the PAP is silent on this issue and does not prohibit such relief. Furthermore, even

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[7] The changes at issue were filed with the Commission in November 2006 in DT 06-168.
[8] BayRing/segTEL at 8.
[9] *Id.* at 10-11.

if the Commission determines that retroactive relief is not available, this does not dispense with the case, since prospective relief is not ruled out.

III. AN ACTUAL ISSUE OF FACT AND LAW EXISTS REGARDING WHETHER FAIRPOINT HAS OBTAINED RELIEF PURSUANT TO WHOLESALE ADVANTAGE AGREEMENTS.

The CLECs argue that the proceeding should be dismissed because FairPoint has already obtained comparable relief pursuant to provisions of the Wholesale Advantage Agreements ("WAAs") that it has entered with some CLECs.[10] This argument is a red herring that seeks to import an unrelated controversy into this proceeding. The PAP and the WAAs are separate agreements, related only in that they are agreements concerning wholesale services.

Contrary to the impression that the CLECs promote, the WAA does not act as a modification of the PAP. Rather, the PAP-related provisions of the WAA are a bargained-for benefit. In addition to other consideration, the CLECs exchanged a *potential* stream of payments from the PAP for something else of *immediate and tangible* value, i.e. access to a wholesale switching service to which they had no legal right but which was considered vital to their businesses. For years, while PAP billing credits were measured in the low five figures, the balance of benefits accrued to the CLECs. In exchange for forgoing their portion of a then-negligible pool of billing credits, they continued to operate as usual. However, now that the billing credits have grown, the CLECs argue that it is unfair that FairPoint should receive the benefit of its bargain in return.

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[10] OneComm at 7 ("FairPoint has, in effect, already implemented the reduction its seeks to the tune of 40-60% of the PAP penalty payments otherwise due.") *See also* CRC at 6 ("By all accounts [the dollars at risk] will be far, far less than the $14.7 million for New Hampshire that FairPoint claims in its Petition."); BayRing/segTEL at 14 ("This is because FairPoint calculates PAP penalties based on wholesale services provided to CLECs in the aggregate, but does not provide any credits for any product to CLECs that have entered into a 'Wholesale Advantage' agreement.")

CRC complains that CLECs were "forced" to sign the WAA agreements,[11] but this is neither credible nor relevant. First, it is presumed that all of them were represented by counsel. Second, it has now been over five years since the FCC determined that ILECs no longer had to provide unbundled switching, finding that "it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation."[12] After all this time, it can only be concluded that any CLEC that operates under a WAA is doing so as a well-considered business decision that has weighed all of the factors.

Although FairPoint disagrees, the CLECs obviously consider this issue to be relevant to this proceeding, so much so that CRC has made an offer of proof to "provide full argument (and *perhaps testimony and evidence*) on both FairPoint's substantive arguments as well as the Wholesale Advantage issues raised in this filing."[13] Having raised this issue, and admitting that it is an important one, the motions to dismiss become self-contradictory and unsupportable.

IV. AN ACTUAL ISSUE OF FACT AND LAW EXISTS REGARDING WHETHER THE CURRENT REQUEST IS SUBSUMED BY THE COLLABORATIVE PROCESS.

The CLECs also claim that the proceeding should be dismissed in favor of the collaborative process, arguing that it is a poor use of resources to pursue temporary changes to the current PAP.[14] BayRing/segTEL accuse FairPoint of "leap-frogging over the collaborative process . . . in violation of the Commission's Order in DT 07-011."[15] OneComm criticizes FairPoint for seeking "to litigate changes to the PAP while the very same changes are pending

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[11] CRC at 6 n.2.
[12] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 para. 204 (2005).
[13] CRC at 7 n.4.
[14] *See* BayRing/segTEL at 4.
[15] *Id.* at 3.

before the collaborative."[16]

The changes at issue are not "the very same changes" and the Supplement is not a "leap-frog." It is, rather, a stop-gap measure that falls far short of violating any order of the Commission. FairPoint is seeking relief from *one* provision of the current plan that it considers unreasonably onerous under all the circumstances. As FairPoint explained in the Supplement, it is not its intention to complicate the process. The collaborative proceeding is much broader, as it is devoted to reconsidering the number of metrics and the redistribution of penalties to those metrics. This proceeding is intended to address the urgent need for reduction in the PAP dollars at risk to a reasonable level and is best considered apart from the collaborative proceeding.

V. AN ACTUAL ISSUE OF LAW AND FACT EXISTS REGARDING PUBLIC INTEREST CONCERNS.

In addition to the various issues that have been raised by the CLECs, FairPoint should be heard on the public policy considerations that comprise the strongest justification for the requested modification. As FairPoint explained in the Supplement, the amount of the total dollars at risk in the current PAP is unreasonably large in relation to FairPoint's earnings. Recent monthly PAP penalties have been calculated in excess of $3 million per month for Northern New England, which exceed 50% of the NNE operation's unseparated net return for 2005, 2006 and 2007, and *all* of the pro forma net return for the period in 2008 following the merger. The PAP is an incentive plan, designed to deter "backsliding" by a dominant ILEC.[17]

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[16] OneComm at 8.

[17] DT 01-006, *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan*, Order Regarding Metrics and Plan, Order No. 23,940 at 73 (Mar, 29, 2002). *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).

It was never designed as a crippling blow that wipes out all of the ILEC's earnings.

As the Motions to Dismiss demonstrate, however, there are opposing points of view on this issue. BayRing/segTEL allege that there are "countervailing and more important public policy reasons that support enforcement of the CLEC Settlement Agreement."[18] FairPoint disputes this, but in any event BayRing/segTEL have established that this is yet another disputed fact to be settled in this proceeding and which precludes an order of dismissal.

[18] BayRing/segTEL at 5.

VI. CONCLUSION

FairPoint has raised a number of important factors that justify relief that the Commission is empowered to grant. The CLECs dispute FairPoint's justifications and deny that the Commission is in a position to grant this requested relief. Legitimate issues of law and fact are before the Commission for which FairPoint is entitled to be heard, and the CLECs have not met their burden of establishing that there is no basis for any of the relief that FairPoint has requested. FairPoint respectfully requests that the CLECs motions to dismiss be denied.

Respectfully submitted,

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By their Attorneys,
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Dated: October 1, 2009

By: _____

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