

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC D/B/A FAIRPOINT
COMMUNICATIONS – NNE

Docket No. DT 09-113

Petition for Waiver of Certain Requirements

**REPLY TO FAIRPOINT’S OPPOSITION TO MOTIONS TO DISMISS
SUPPLEMENTAL PETITION**

Freedom Ring Communications d/b/a BayRing Communications and segTEL, Inc. have reviewed the Objection to Motions to Dismiss filed by FairPoint Communications – NNE (“FairPoint”) on October 1, 2009, and hereby provides the following brief reply comments in response to specific points made in FairPoint’s Objection.

I. Introduction

The Objection arguments made by FairPoint reveal that they have either lost sight of what this docket has been noticed to accomplish, or (worse) that they are attempting to transform a simple waiver request into a full review of how a revised PAP should (in FairPoint’s eyes) look, if metrics related to UNE-P and line sharing products were removed. The Commission should not legitimize nor accept FairPoint’s invitation to turn this docket into a review of PAP modifications that FairPoint believes are necessary. Further, the Commission should stop any further attempts by FairPoint to supplement and change the scope of this proceeding so as to implement an end-run around the agreed upon collaborative process for simplifying and modifying the PAP. As the Commission knows, a collaborative process for such modification is currently underway, and allows for the introduction of such a revised PAP to the Commission for

approval in a docket set up specifically for consideration, with notice to the correct parties, for the approval of PAP modifications.¹

This docket was established to consider FairPoint's request for a waiver of the incentive payment requirements of the Performance Assurance Plan ("PAP"). See FairPoint Petition (6/10/2009) and Order of Notice (7/30/2009). However, instead of proceeding on that request, and only a few days before the technical conference on this Petition, FairPoint filed a "Supplemental Petition" which, for the first time, introduced a request for an overhaul of the PAP to account for the elimination of certain wholesale products, such as line sharing and UNE-P (with the corresponding reduction in "dollars at risk.")

In the Second Order of Notice (8/14/2009), the Commission opened up consideration of FairPoint's "updated petition" so as to "decide the matter on the papers unless a request for a hearing is filed." Second Order of Notice (8/14/2009). As called for in the initial order of notice, a prehearing conference and technical session was held on August 13, 2009 and the parties, including FairPoint, agreed to proceed to brief certain preliminary legal issues that, the CLECs argue, compel a dismissal of both the Petition and the Supplemental Petition without the need for any further adjudicatory proceedings concerning revisions to the PAP.

A second prehearing conference was held on September 3, 2009, at which time the Commission indicated it would wait to see what recommendations came out of the technical session, held on that same day. At the September 3 technical session FairPoint reiterated its refusal to respond to certain data requests regarding some of the specifics of their plan modifications, and instead agreed with the CLECs that the parties would proceed to address

¹ Just this week the MPUC established just such a separate proceeding to investigate and adjudicate if necessary the revised and simplified PAP that FairPoint committed it would develop with the CLECs. See Procedural Order and NOE issued in MPUC Docket No. 334, dated October 13, 2009.

certain legal issues up-front, such as the CLEC claim that the FairPoint petitions were illegal as a matter of contract law due to the terms agreed to in the CLEC Settlement Agreement.

FairPoint's Opposition attempts to disavow these fundamental and potentially dispositive legal issues on dismissal. Instead, FairPoint's Opposition requests that the Commission go right to a hearing on the merits of its modification proposal without any consideration of the fact that this proceeding was never established to undertake a review of PAP modifications at all.

This proceeding, according to FairPoint's initial petition, was merely to consider whether to allow FairPoint a "waiver" of PAP penalties. That question, whether FairPoint should be granted such a "waiver", can be resolved immediately, and in the negative, since FairPoint has already withdrawn the request that formed the basis for the Commission's opening of this docket in the first place.² In its Supplemental Petition, FairPoint instead requested a reduction of dollars at risk. And now, according to FairPoint's Opposition, this docket should no longer be concerned with its "waiver" request but should, instead, be turned into a review of FairPoint's plan for modifying the PAP. Putting aside the fact that BayRing/segTEL question whether the Commission should properly consider such questions in this docket that was established to consider a "waiver" petition, in the event that the Commission denies the Motions to Dismiss, BayRing/segTEL believe that any examination of the specific PAP changes proposed by FairPoint cannot be decided on briefs and will require pre-filed testimony, discovery, and full adjudicatory hearings before the Commission.³

² See FairPoint's Supplemental Petition in this docket, which states, "Rather than the relief requested in the original Petition, FairPoint instead requests that the Commission ... approve, within thirty days, a modification to the PAP to reduce the total dollars at risk in the Performance Assurance Plan ("PAP") by approximately 65% ... effective as of January 1, 2009".

³ In other words, resolving the specific metrics change that will be needed to accommodate any reduction in "at risk" dollars to reflect the elimination of UNE-P cannot be done simply in briefs.

Such a hearing could never be as simple as FairPoint suggests, and BayRing/segTEL respectfully suggest that all appropriate parties⁴ would need to be informed of the nature of these hearings. Should the Commission determine that consideration of PAP modifications is in order in this docket, which BayRing/segTEL believe is not only improper but foreclosed by FairPoint's contractual obligations and by the Order of Approval in DT-07-011, BayRing/segTEL would request that a new procedural schedule be developed, to include expert testimony, additional discovery, and a full hearing on the merits.

BayRing/segTEL assert that FairPoint's initial petition is moot, that its Supplemental Petition should be dismissed, and this docket closed.

II. BAYRING/SEGTEL REPLY TO SPECIFIC FAIRPOINT COMMENTS REGARDING THE CLEC SETTLEMENT IN DT-07-011

A. FairPoint Is Attempting To Derail The CLEC Collaboratives That Are Currently Considering Plans to Modify The PAP.

In the BayRing/segTEL Motion to Dismiss we pointed out that FairPoint's petition is barred by its agreement to comply with the PAP in effect at the time of closing. We further pointed out that while the PAP in effect does allow for an annual review, that review process is underway in the NNE FairPoint/CLEC collaborative effort to revise the PAP, a contractual requirement of the CLEC Settlement Agreement. We highlighted that any effort to do an end-run around these contractual commitments is improper and should be dismissed.

FairPoint's response to these arguments avoids the contractual obligations entirely and instead suggests that there are "issues of fact" regarding whether, and what type, of

⁴ Neither Broadview nor MCI Business, two of the most vocal UNE-P providers, have intervened in this docket, arguably because they assumed that the docket was to consider a PAP waiver, not to consider modifications to the PAP that specifically involve the status of UNE-P. At last check, the intervenors in this docket are Mid-Maine Communications, segTEL, BayRing, One Communications, Comcast, BCN and COVAD. We are not aware of any additional requests for intervention after the supplemental order of notice.

modifications FairPoint is authorized to implement, without any input from the CLECs.

Specifically, FairPoint asserts that this Supplemental effort is nothing but a “stop gap” measure that has nothing to do with the collaborative efforts now considering modifications to the PAP, and that these two can proceed simultaneously. FP Opposition at 7. FairPoint further asserts that the “collaborative process is much broader, as it is devoted to reconsidering the number of metrics and the redistribution of penalties to those metrics.” FP Opposition at 7. Essentially FairPoint attempts to convince the Commission that its petition is so simple that it too can be decided quickly and without much fuss.

The Commission must reject FairPoint’s over-simplified invitations. What FairPoint conveniently neglects to point out to the Commission is that its Supplemental Petition seeks to reduce the dollars at risk precisely to accomplish, without the need for collaborative discourse, the very same adjustments of the metrics and redistribution of penalties being discussed in the PAP collaboratives with the CLECs.⁵ Indeed, FairPoint’s Supplemental Petition concedes this inextricable linkage when it states that its Supplemental Petition “request is fully consistent with Version 4 of the PAP,” which is, of course, the Verizon PAP version to implement a significant re-working of the metrics.⁶

⁵ FairPoint’s Supplemental Petition is replete with references to the linkage of the 65% reduction in New York to correspond to the elimination of certain PAP metrics such as line sharing and UNE-P. In other words, it is not so simple a matter to bifurcate the matter of dollars at risk and the metrics themselves, and the Commission should not endorse this stunted effort to divest the collaborative with the opportunity to work through agreed upon changes without the distraction of having to engage in a duplicative adjudicatory proceeding in this docket.

⁶ This statement further begs the question of why the Commission would, or should, consider one part of the PAP separately (dollars at risk and reallocations) that, by FairPoint’s admission, is inextricably linked to FairPoint’s proposal in Version 4 that is pending review in the collaborative (metrics eliminations). BayRing/segTEL suggests that the Commission should not consider these matters separately over the objections of the CLECs and in conflict with contractual commitments made in the CLEC Settlement Agreement).

B. FairPoint's Request To Modify The PAP is Barred By The Clear Language Of Its Agreement With The CLECs, Which The Commission Adopted In Its Transaction Approval Orders In DT 07-011.

FairPoint's Objection attempts to mischaracterize the clear language of the CLEC Settlement Agreement and the Agreement reached with Staff concerning the commitments made with regard to the PAP and the agreed upon process for further modifying the PAP in New Hampshire. In the BayRing/segTEL Motion to dismiss we pointed out that FairPoint agreed to certain protections to ensure that CLECs would not be adversely impacted by the substitution of FairPoint from Verizon as the wholesale provider of UNEs to CLECs in New Hampshire. One of the protections bargained for in the CLEC Settlement Agreement was FairPoint's agreement to accept the metrics and penalties that existed in the PAP "in effect" as of the closing date.

In addition, the CLEC Agreement calls for FairPoint to: "work cooperatively with the CLECs and state utility regulatory staff in good faith to develop and implement a simplified, uniform PAP applicable to [FairPoint] in Maine, New Hampshire and Vermont. FairPoint agrees to *begin this process by proposing for consideration by the CLECs* a revised PAP that could be implemented in all three states." Id. provision 6.c., emphasis added. Yet, instead, FairPoint continues to request that the Commission act first, without allowing the CLEC collaborative to do its work.

Now that the PAP bill credits have increased as a direct result of FairPoint's failure to provide adequate wholesale service FairPoint seeks to unilaterally slash the PAP's dollars at risk to 65%, merely because that was a figure that was once adopted by New York as applicable to Verizon under circumstances vastly different than in New Hampshire today. Moreover, as we pointed out, FairPoint's "dual track" approach is directly contravened by the express terms of the

CLEC Settlement Agreement, where FairPoint agreed to be bound by the terms of the PAP “in effect” as of the closing date.

It is therefore not surprising that FairPoint “disputes that these [CLEC Settlement] terms are as straightforward as BayRing/segTel assert.” FP Objection at 3. BayRing/segTEL respectfully disagree and maintain that the terms of the CLEC Settlement concerning the PAP could not be more straightforward, unambiguous and binding on FairPoint. The interpretation suggested by FairPoint is completely nonsensical and is underscored by the following rhetorical question: Why in the world would the CLECs have agreed that FairPoint could immediately implement changes to the PAP by stripping out the bill credits available to protect the CLECs (in part) for poor service, or “backsliding,” when the agreement was designed to provide at least the same protection to the CLECs that existed as of the closing date as the *quid pro quo* for the removal of the CLECs objection to the merger. FairPoint’s argument necessarily assumes the ridiculous; that the CLECs willingly bargained away their many objections and concerns regarding the Verizon/FairPoint transaction in exchange for less protections regarding wholesale service quality.

Put another way, FairPoint’s characterization of the CLEC Settlement is actually quite bizarre by the suggestion that the CLECs agreed to terms in the CLEC Settlement Agreement that would entirely undercut their interests, by allowing FairPoint to both provide poor service quality to CLECs and to be removed from any financial incentive (or penalty) to induce better quality of service to CLECs going forward. The Commission must discard this interpretation outright and it may do so as a matter of law under basic rules for contract interpretation, as described in more detail in the BayRing/segTEL Motion to Dismiss.

C. FairPoint's Request To Modify The PAP is Barred By The Clear Language Of Its Agreement With Commission Staff, Which The Commission Adopted In Its Transaction Approval Orders In DT 07-011.

In addition to its agreement with the CLECs, Verizon and FairPoint entered into a Settlement Agreement with Staff (Staff Agreement) which was filed with the Commission on January 23, 2008, in DT 07-011, and which was adopted by the Commission in its orders approving the transaction. The Staff Agreement incorporates the CLEC Agreement, but has its own wholesale provisions as well, calling for FairPoint to pay for an independent audit of the PAP (as stated in ¶ 9.4 of the FairPoint/Staff Settlement Agreement dated January 23, 2008 in DT-07-011) In ¶ 9.4 of the FairPoint/Staff Agreement, FairPoint agreed to pay for an independent audit of the simplified PAP, if completed by June 1, 2010 and if not so completed to pay for an independent audit “of the existing wholesale assurance plan.” FairPoint’s red-lined changes and modifications to the existing PAP presented in this supplemental petition are not the result of any audit. On the contrary, these proposed self-serving modifications ignore the contractual commitments and timing of future modifications to be presented after an independent audit of either the new simplified PAP or the existing PAP.

III. BayRing/segTEL Reply Comments Regarding New York Changes to the PAP and to FairPoint's Request for Retroactive Relief

After conveniently seeking to ignore the commitments FairPoint made in the CLEC Settlement and in the Staff Settlement, FairPoint's Opposition then asserts that the PAP in New Hampshire already allows for continued modifications, through “Section II.K.2 of the current PAP in New Hampshire” as providing that “Verizon 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 . . .” FP Opposition at 4. FairPoint’s argument ignores the fact that Verizon is no longer providing wholesale service to CLECs in New Hampshire. FairPoint also fails to acknowledge that it is improper for FairPoint to attempt to modify the PAP based on Verizon’s ARMIS data. FairPoint is an entirely different company with an entirely different financial portfolio, as the Commission is painfully aware from the proceedings in DT-07-011.

Finally, FairPoint’s argument about importing New York changes assumes that the parties agreed to continue to work out future PAP changes based on developments several years ago in New York. BayRing/segTEL briefed this position with detail and pointed out that even the other state authorities cited by FairPoint do not support the proposition that other state Commissions have rubber stamped New York findings without a careful examination of specific conditions in their respective regions. This type of examination is exactly what is occurring in the context of the CLEC collaborative discussions and there is nothing to be gained by undertaking the same analysis in a parallel investigation in this proceeding. FairPoint points to no agreements (because there are none) to show that CLECs agreed that future changes to the PAP would be derived from changes implemented in New York. The only document that memorializes the intent of the parties as regards future changes to the PAP is the CLEC Settlement Agreement, which acknowledges that CLECs will work on a modified PAP with FairPoint.

In regards to the matter of whether FairPoint can disgorge bill credits made to CLECs retroactively in reflection of past poor service quality, that issue also appears ripe for dismissal. In our Motion to Dismiss BayRing/segTEL pointed out that there is no authority, in the PAP or in statute, to allow FairPoint to seek retroactive relief to recover bill credits already made as a result of poor service. FairPoint’s Objection memo concedes that there is no such authorization

in the PAP and points to no other authority. (FairPoint “submits that the PAP is silent on this issue . . .” at pg. 4). The Commission should reject this retroactive relief request outright.

IV. BayRing/segTEL Reply Comments Regarding the Relevance of the Wholesale Advantage Agreements

As regards FairPoint’s position on the interplay of the CLECs that have signed certain commercial agreements (the Wholesale Advantage Agreements or WAAs) it is important for the Commission to understand that BayRing and segTEL did not sign any such agreements with Verizon or FairPoint nor did they waive any rights to bill credits for products covered by commercial agreements in the manner suggested by FairPoint in its Opposition. Nevertheless, BayRing/segTEL dispute that these commercial agreement terms can be construed so as to disgorge all CLECs of the rights to bill credits in the PAP for impaired Section 251 UNEs. Accordingly, FairPoint’s argument that “the PAP- related provisions of the WAA are a bargained for benefit” where “the CLECs exchange a potential stream of payments from the PAP for something else of immediate and tangible value, i.e. access to a wholesale switching services” has no applicability to BayRing and segTEL. Accordingly, the argument that FairPoint should be allowed to reduce the PAP bill credits at risk to BayRing and segTEL as a consequence of WAAs with other CLECs fails.

Moreover, whether certain CLECs signed, or did not sign, these commercial agreements does nothing to assist the Commission in determining whether FairPoint is legally authorized in unilaterally seeking to modify the PAP to implement New York changes without regard to circumstances in New Hampshire. The only important, and undisputed fact, concerning the commercial agreements is that FairPoint has already achieved a substantial portion of the very relief it seeks here in the form of reductions in dollars truly “at risk,” by its unilateral implementation of the provisions of the WAA. Despite FairPoint’s claims, for instance, that

“PAP penalties have been calculated in excess of \$3 million per month for Northern New England” (FP Opposition at 7), FairPoint’s unauthorized elimination of PAP bill credits related to certain UNE-P and other wholesale services effectively reduces those penalties by 52%, as described in more detail in our Motion to Dismiss (at page 14). FairPoint’s statements ignore this substantial reduction. FairPoint continues to vastly overstate the financial impact of the current PAP in its Supplemental Petition.

For all these reasons, and for the reasons briefed in the BayRing/segTEL Motion to Dismiss, the Commission should dismiss FairPoint’s Supplemental Petition.

Respectfully submitted,

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