

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 09-206

**Petition to Establish the Simplified Performance Assurance Plan for Northern New
England Telephone Operations LLC d/b/a FairPoint Communications**

**OPPOSITION OF
NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC
D/B/A FAIRPOINT COMMUNICATIONS-NNE
TO PETITION TO SUPPLEMENT AND MODIFY INITIAL FILING**

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and hereby submits its Opposition and Response to the Petition to Supplement and Modify the Initial Filing of Freedom Ring Communications LLC d/b/a BayRing Communications and segTEL, Inc., filed February 23, 2011 (the “Supplemental Petition” and together, “Petitioners”). The Supplemental Petition, as with the original Petition before it, is redundant and duplicative in that it consists of a variety of requests for relief that have been culled from the Petitioners’ filings in other proceedings related to the Performance Assurance Plan (“PAP”) in New Hampshire. As such, it does not stand independently on its own and should be dismissed.¹

The Petitioners seek to modify their original Petition in this proceeding to, among other things, reverse their request that the Commission initiate a proceeding to coordinate the development and implementation of a simplified PAP, and to “also modify those parts of the

¹ This Opposition presumes that the Supplemental Petition is a complete renewal, restatement and replacement of the Petitioners’ original request for relief in this proceeding. FairPoint requests leave in advance to amend this Opposition if this presumption is determined to be incorrect.

petition that contemplate the development of a simplified wholesale performance assurance plan.”² Although FairPoint anticipates that it will be filing a proposed simplified “Wholesale Performance Plan” (“WPP”) in the coming weeks, it does not object to this request by the Petitioners, under the condition that it is granted without prejudice to any party to request approval of a revised and/or simplified wholesale performance plan in the future.

The Supplemental Petition then proceeds to refresh and restate previous requests and arguments by Petitioners and others. Primary among them is a request for the Commission to conduct an audit of the PAP. In addition, Petitioners are also requesting an audit of *all* Carrier to Carrier (“C2C”) metrics, not just those that are included in the PAP, thus expanding the scope of this audit far beyond that which was agreed to in the Staff Settlement Agreement.³ By Petitioners’ own admission, this request is duplicative of one that the Petitioners have made in three recent filings,⁴ to which FairPoint has responded.⁵ FairPoint reiterates that an audit of the current PAP would be an unproductive waste of time and resources, a backward looking endeavor that would review issues that have already come to light and/or are expected to be eliminated in the prospective Wholesale Performance Plan (“WPP”). Rather than devoting resources to investigating problems with an existing PAP that has proven difficult for many parties to understand and monitor, it would be best for all involved to focus instead on developing a WPP and auditing that plan once it has been in place for some reasonable period of time.

² Supplemental Petition at 3.

³ *Id.*

⁴ *Id.*

⁵ DT 07-11, Letter from P. McHugh, FairPoint to D. Howland, NH PUC (Nov. 23, 2010), Letter from P. McHugh, FairPoint to D. Howland, NH PUC (Dec. 22, 2010), Letter from P. McHugh, FairPoint to D. Howland, NH PUC (Jan. 12, 2011), all incorporated in by reference in this Opposition.

Furthermore, by seeking to audit the C2C as well, the Petitioners are suggesting a material expansion of the Staff Settlement Agreement. Section 9.4 of the agreement is specific – FairPoint agreed to pay for the cost of an audit of the PAP. FairPoint did not agree to pay for the cost of an audit of the C2C metric reports. FairPoint reports 358 PAP metrics and 553 C2C metrics. An audit of the PAP metrics alone would be costly and time consuming. Including an audit of the C2C metrics would drive up significantly the cost and length of such an audit as well as consume considerable resources with no benefit at all.⁶ Such an audit was not contemplated by FairPoint when it signed the Staff Settlement Agreement and the plain language of the Staff Settlement Agreement contains no provision for an audit of the C2C metric reports. The Commission should not revise what is a clearly worded provision in the Staff Settlement Agreement.

Finally, the issue of the PAP audit has already been taken up by the Commission in its Secretarial Letter of February 25, 2011 in Dockets DT 09-059 and DT 09-113. Although FairPoint disagrees with the Commission’s action in the Secretarial Letter and has sought reconsideration,⁷ that forum is clearly where the issue of a PAP audit resides. Accordingly, the Commission should dismiss the Supplemental Petition as it concerns a PAP audit and refer the relevant issues to the existing proceeding.

As if a grossly expanded wholesale metrics audit were not enough, the Supplemental Petition also seeks relief in the form of an “investigation,” over and above the extensive audit and other relief that the Petitioners have already requested. This investigation would review “FairPoint's past, current and *future* compliance with existing PAP and C2C guidelines.”

⁶ The C2C metrics results are reported but only a subset are associated with any dollars at risk for potential billing credits.

⁷ See DT 09-059 and DT 09-113, FairPoint’s Response to Secretarial Letter (Mar. 4, 2011), incorporated by reference in this Opposition.

(emphasis added). This request is vague and overbroad, to say the least, and the Petitioners have provided no other guidance as to what issues should be investigated beyond what a PAP audit, however ill-advised, might be focused. Petitioners have made a number of non-specific allegations that purportedly support the need for an investigation, but given the fact that all this information was voluntarily provided by FairPoint, any benefit of such an investigation could bring remains unclear. FairPoint has been in renewed discussions with the CLEC community since October 2010 toward development of the WPP. To further those discussions, FairPoint has cooperated with the CLECs and Commission Staff in answering relevant and reasonable questions regarding FairPoint's performance under the current PAP. All of the information supporting the allegations in the Supplemental Petition was derived from FairPoint's good faith responses to these queries. In return, the Petitioners seek to use this information against FairPoint in pursuit of an agenda that seems designed only to undermine the collaborative process and produce distraction and delay.

To make matters worse, the Petitioners have twisted this information in order to justify their claims. For example, the Petitioners criticize FairPoint because it "continues to focus on changing the calculation of and reducing the number of metrics, instead of assessing and correcting its actual service performance."⁸ This is hypocritical, considering that it was the Petitioners themselves who, *in this very proceeding which they initiated*, had until this moment demanded that the Commission "[o]pen this Docket to oversee and approve the simplified PAP required by the CLEC Settlement Agreement and the Commission's Order in DT-07-011."⁹ Moreover, as the Petitioners also noted in their original Petition, FairPoint is obligated by its

⁸ Supplemental Petition at 4.

⁹ DT 09-206, Petition to Establish the Simplified Performance Assurance Plan for Northern New England Telephone Operations LLC d/b/ a FairPoint Communications at 8 (Oct. 29, 2009).

agreement *with the Petitioners as signatories* and by the Commission's order to work toward developing a simplified PAP. It is disingenuous of the Petitioners to now criticize FairPoint for meeting this obligation, not to mention using information obtained in this process to attack it. Furthermore, it implies that FairPoint has focused on changing the PAP to the exclusion of improving its performance, which this Commission knows to be false.

The Petitioners also exaggerate the "discrepancies" in the reported data when compared to Verizon's old systems, calling them "glaring" – a characterization with which FairPoint disagrees. The reality is that the current PAP was developed to address market conditions, systems and processes specific to Verizon during the period of time from the passage of the Telecom Act in 1996 through the last UNE remand order in 2005.¹⁰ These circumstances no longer exist. The efforts of all parties are best directed at developing a plan that is relevant to market conditions, systems and processes for FairPoint in Northern New England as of 2011 and beyond.

As another example, the Petitioners also claim that "FairPoint has admitted that when it could not meet PAP-required parity comparisons/benchmarks over time, FairPoint indicated they wished to establish their own criteria, thus making their own determination about whether a PAP requirement was 'reasonable.'"¹¹ Again, there are no specifics, but FairPoint assumes that this relates to FairPoint's pending waiver request in DT 09-059. Aside from the metrics that were identified in the waiver request in that proceeding, FairPoint has not proposed or implemented any changes to any other metrics or standards in the existing PAP.

¹⁰ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005).

¹¹ Supplemental Petition at 5.

FairPoint submits that the collaborative process it has been driving can produce results and thus obviates the need for a Commission directed investigation. Furthermore, to the extent that such an investigation could be distinguishable from a PAP audit (which FairPoint doubts), FairPoint's position is unchanged. Such an investigation would merely be a post-mortem that would contribute nothing to the improvement of FairPoint's wholesale performance or development of a new wholesale performance plan. Accordingly, the Commission should dismiss the request for an investigation.

The Supplemental Petition also refers to and seeks relief related to Docket DT 09-059, in which FairPoint requested that the Commission waive the requirement that FairPoint report certain metrics. The Petitioners note, unremarkably, that FairPoint has not reported these metrics during the pendency of the request, and they seek relief from the Commission in the form of

“enforce[ment of] the proper treatment of those metrics that FairPoint has failed to report or has under-reported, including a Commission ruling that FairPoint's failure to report a metric shall be considered a complete miss for the purpose of determining performance and establishing penalties . . . [and] the appropriate assessment of penalties for all months in which such failure to report or under-reporting has occurred.”¹²

However, this request for relief is associated with an existing docket and is duplicative of the arguments and requests that the Petitioners have already made as intervenors in DT 09-059.¹³ As

¹² Supplemental Petition at 6. Petitioners also misleadingly assert that FairPoint “requested the Commission hold its waiver request in abeyance.” Supplemental Petition at 4. In actuality, *all* of the parties, including the Petitioners, agreed that the issues in DT 09-059 were subordinate to DT 09-113, *see* DT 09-059, Staff Report (Jul. 20, 2009), and the Commission accordingly held the procedural schedule in abeyance. DT 09-059 Secretarial Letter (Aug. 4, 2009). It should also be noted that BayRing, as party to a mutual Settlement and Release with FairPoint, is barred from most of this particular relief, having released FairPoint from all claims existing prior to August 5, 2010.

¹³ *See, e.g.* DT 09-113; Letter from A. Shoer, Counsel to BayRing to D. Howland, NH PUC (June 26, 2009).

such, the Supplemental Petition should be dismissed as it pertains to metrics enforcement and penalty assessment, with the relevant issues referred back to DT 09-059.

The Petition also invokes DT 09-113 when it seeks relief that would “require FairPoint to continue to provide bill credits . . . under the existing PAP and provide stability for CLECs by ensuring all parties that the dollars-at-risk waivers filed by FairPoint, if approved, will not be retroactive.” As with the other requests for relief, this request is associated with an existing docket and is duplicative of the arguments and requests that the Petitioners have already made as intervenors in DT 09-113.¹⁴ Again, the Petition should be dismissed as it pertains to interpretation of the PAP and dollars-at-risk, with the relevant issues referred back to DT 09-113.

Finally, to complete the reversal of its original position, the Petitioners request that the Commission “[e]liminate the strain on FairPoint, CLECs, and Commission Staff resources by tabling discussions of a simplified/modified PAP until an audit of the existing plan is completed.” It is presumptuous, if not disingenuous, of the Petitioners to express concern with any “strains” on FairPoint within the body of a repetitious pleading that merely recites issues that are before the Commission in many forms already. In any event, simplified PAP negotiations and a PAP audit are not mutually exclusive endeavors. In the first place, an *independent* audit of the PAP will not place *any* strain at all on the Petitioners or any other CLECs, who would by definition be barred from participating in any way, and it would impose a limited burden on the Commission, which would outsource the effort to an independent auditor. As for FairPoint, it looks forward to developing a simplified wholesale performance plan that is understandable and manageable. FairPoint advised the Commission in its March 4th letter in DT 09-059 and 09-113

¹⁴ *Id.*

that it plans to file a proposed plan with 30 days,¹⁵ and is willing to undertake the effort even in the face of a PAP audit, if it must come to that. Consequently, any support for this particular request for relief melts away, since simplified wholesale performance plan negotiations, if undertaken in good faith, will not impose an additional burden on any party.

In conclusion, the Petition presents no new issues, allegations or requests for relief that are not being explored in other Commission proceedings. In the interest of judicial economy, and to deter the proliferation of further redundant, duplicative and vexatious pleadings in multiple dockets, it should be dismissed and all relevant issues addressed in their respective proceedings.

Respectfully submitted,

Northern New England Telephone Operations, LLC
By its Attorneys,

By:  _____

Dated: March 7, 2011

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¹⁵ See *supra*, n. 7.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing opposition to petition to supplement and modify initial filing was forwarded this day to the parties by electronic mail.

Dated: March 7, 2011

By: _____


Harry N. Malone, Esq.