

**THE STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 09-059  
DT 09-113  
DT 09-206  
DT 11-061**

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC  
d/b/a FAIRPOINT COMMUNICATIONS NNE**

**Performance Assurance Plan and Carrier to Carrier Metrics**

**Procedural Order**

**ORDER NO. 25,221**

**May 6, 2011**

**I. PROCEDURAL HISTORY**

**A. DT 09-059**

On March 26, 2009, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (FairPoint) filed a petition requesting a permanent waiver of certain requirements under the performance assurance plan (PAP) as amended in the November 21, 2006 filing in Docket No. DT 06-168,<sup>1</sup> waiver of the carrier-to-carrier guidelines, and a temporary waiver of other metrics under the PAP. FairPoint stated that it was continuing to develop and transition towards its own operational systems, and that following the implementation of its own systems it would no longer be able to report certain measures. Therefore, it was requesting that the Commission permanently waive the reporting requirements

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<sup>1</sup> Docket No. DT 06-168 was opened in November 2006, to address a petition from Verizon to amend its PAP consistent with filings it was making in other states in which it was operating. The Commission held a prehearing conference on February 15, 2007, at which there was general agreement that in light of the proposed transfer of assets from Verizon to FairPoint, filed January 31, 2007, in Docket No. DT 07-011, Docket No. DT 06-168 should be suspended. During the course of Docket No. DT 07-011 FairPoint agreed to adopt the Verizon PAP in its existing form and to work cooperatively with the competitive local exchange carriers to develop and implement a simplified PAP after the asset sale closed. Accordingly, the Commission closed Docket No. DT 06-168 and those proposed amendments are not pending.

and associated penalty provisions for these metrics. Further, FairPoint requested a temporary waiver of the reporting requirements beyond the one-month grace period as well as associated penalties for eleven additional metrics for which data would not be available for the months of February and March 2009, due to systems issues, or lack of data due to manual order processing and delays arising from the carrier billing cycle. In support of its petition, FairPoint stated that the waiver was for situations beyond its control.

On April 4, 2009, Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing) objected to FairPoint's petition asserting that FairPoint was violating the letter and spirit of the CLEC settlement agreement approved by the Commission in Order No. 24,823 (Feb. 25, 2008) in Docket No. DT 07-011. BayRing claimed that FairPoint had not demonstrated that a waiver of the PAP metrics was justified and because most of the metrics put forward by FairPoint were parity standards and not benchmark standards, they were not eligible for a waiver. BayRing further stated that FairPoint had failed to file its waiver petition within 45 days from the end of the month as required by the PAP. BayRing argued that it was untenable for FairPoint to agree to abide by the PAP as a merger condition, but then assert after cutover that due to circumstances beyond its control it could no longer abide by certain PAP metrics.

The Commission received petitions to intervene from Comcast Phone of New Hampshire (Comcast), Verizon Access Transmission Services (Verizon), One Communications (One), CRC Communications of Maine Inc. (CRC) and segTEL Inc, (segTEL). A prehearing conference was held on July 8, 2009, during which the Commission granted all petitions for intervention. During the technical session following the prehearing conference the parties considered consolidating Docket No. DT 09-059 and Docket No. DT 09-113 (concerning FairPoint's request for relief from paying bill credits to CLECs for March through June of 2009) and agreed that

consolidation of the dockets would not be the most efficient way to proceed. Rather, the parties and Staff recommended that Docket No. DT 09-113 should be the Commission's priority. On August 4, 2009, the Commission issued a secretarial letter stating that it would hold in abeyance a full procedural schedule for Docket No. DT 09-059. On August 12, 2011, the Office of Consumer Advocate (OCA) filed a letter announcing its intent to monitor the proceeding on behalf of residential ratepayers pursuant to RSA 363:28.

**B. DT 09-113**

On June 10, 2009, FairPoint filed a petition requesting a waiver of the incentive payment requirements of the PAP. Specifically, FairPoint requested relief from payment of bill credits to CLECs for the months of March, April, May, and June 2009. On July 30, 2009, the Commission issued an order of notice stating that the filing raised issues of: (1) whether FairPoint was entitled to a waiver of the payment requirements established by the PAP and Commission Order No. 24,823; (2) whether the PAP should be subject to modification pursuant to section II paragraphs I and K; and (3) whether FairPoint is permitted to withhold payments in the absence of an approved waiver.

On August 7, 2009, FairPoint filed a supplement to its petition. Rather than the relief requested in its original filing, FairPoint requested that the Commission approve within 30 days a modification to the PAP to reduce the total dollars at risk by approximately 65%, and asking that the change be retroactive to January 1, 2009.

The Commission held a prehearing conference on August 13, 2009, followed by a technical session. Interventions were received from One, DIECA Communications Inc. d/b/a Covad Communications Company, (Covad) Comcast, BCN Telecom Inc, CRC, and segTEL. On August 12, 2011, the OCA filed a letter announcing its intent to monitor the proceeding on

behalf of residential ratepayers pursuant to RSA 363:28. Staff and the parties agreed to a procedural schedule and a supplemental order of notice and further recommended that the Commission should decide the matter based upon the record without a hearing.

In support of its supplemental request, FairPoint noted that Verizon had petitioned and received similar relief in a number of states, in part due to an assertion that competition had replaced regulation as a major driver of wholesale service quality. FairPoint asserted that reduction in the number of required unbundled network elements and changes in the competitive market had reduced the pool of CLECs over which PAP penalties were spread resulting in the remaining CLECs being eligible for larger maximum payments. FairPoint claimed that Verizon's petition in Docket No. DT 06-168 was similar to FairPoint's request and was first delayed by the asset transfer from Verizon to FairPoint and later superseded by FairPoint's willingness to abide by the current PAP. In addition, FairPoint asserted that the dollars at risk established by the Federal Communications Commission (FCC) in a proceeding covering Verizon's New York operations should be no more than 36 percent of Verizon's net return, as reported in the FCC Automated Reporting Management Information System (ARMIS), which was subsequently increased to 39 percent, and was then used as the standard for total dollars at risk applied to the Verizon PAP in the northern New England states. FairPoint asserted that its net return in recent years is well below the total current dollars at risk, and thus requested that the Commission approve a reduction in the at risk amount from \$42.8 million to \$14.7 million on an annual basis. Furthermore, citing Section II.K.2 of the current PAP, FairPoint argued that the Commission has 30 days after the filing to determine whether to adopt, reject or modify the filing.

The Commission issued a supplemental order of notice on August 14, 2009, and held an additional prehearing conference on September 3, to address the modified scope of the proceeding. On September 22, 2009, the Commission received a motion to dismiss or stay proceedings, filed by One. Similar motions were filed by CRC and BayRing on September 23, 2009. According to One, by seeking a 65 percent reduction in the total “at risk” amount and requesting that it be retroactive to January 2009, FairPoint was obligating CLECs to repay bill credits. One recommended that the Commission dismiss FairPoint’s supplemental petition, arguing: (1) it violated the Commission’s Order No. 24,823 approving the sale of Verizon assets to FairPoint; (2) the terms of the PAP do not permit retroactive permanent modification; and (3) FairPoint has already implemented reductions in PAP penalty payments through its Wholesale Advantage Agreements with CLECs. One further stated that if the Commission determined that dismissal was not warranted, then the proceeding should be stayed pending the outcome of the collaborative discussions between FairPoint and the CLECs regarding a new PAP.

Both Covad and CRC concurred with One, and CRC further requested that if the Commission chose not to dismiss FairPoint’s supplemental petition, that it dismiss FairPoint’s request to waive the PAP penalties. BayRing and segTEL filed a joint motion to dismiss, claiming that: (1) FairPoint’s petition lacked New Hampshire specific data; (2) there was no legal authority to retroactively recover credits lawfully applied to CLECs; and (3) the petition misrepresented the financial impacts of the dollars at risk.

On October 1, 2009, the Commission received a motion to accept a late filed objection to motions to dismiss from FairPoint. FairPoint objected to the motions to dismiss, claiming that there were numerous questions of fact and law unanswered by both FairPoint and the CLECs, including whether: (1) the PAP allows for modifications; (2) FairPoint obtained relief pursuant

to the Wholesale Advantage Agreements; (3) the current FairPoint request was subsumed by the collaborative process; and (4) there were additional public policy considerations. Claiming that legitimate issues of law and fact were before the Commission, FairPoint asserted the motions to dismiss must be denied. Following a letter submitted by BayRing requesting permission to file reply comments in response to FairPoint's objection of October 1, 2009, the Commission issued a secretarial letter permitting an additional round of filings on the September motions to dismiss.

In their joint reply to FairPoint's objection, BayRing and segTEL stated among other things that: (1) the Commission should stop attempts by FairPoint to supplement and change the scope of this proceeding; (2) any examination of the specific PAP changes proposed by FairPoint would require prefiled testimony, discovery and full adjudicatory hearings before the Commission; (3) FairPoint's supplemental petition seeks the same adjustment of metrics and penalties as is under discussion in the collaborative process; (4) FairPoint is seeking to both provide poor service and be removed from any financial incentives in the PAP; (5) there is no authority in the PAP or statute allowing FairPoint to seek retroactive relief to recover bill credits already disbursed; and (6) FairPoint already received a substantial portion of its requested relief through the Wholesale Advantage Agreements.

In its reply to the opposition to motions to dismiss dated October 23, 2009, FairPoint reiterated that the initial petition in this proceeding was to allow a waiver of PAP penalties, that the issues contained in FairPoint's supplemental petition were discussed at the August 14 technical session, and that on the same day the Commission issued a supplemental order of notice announcing FairPoint's supplemental request. In response to further comments from the CLECs, FairPoint asserted that it had never invoked the Wholesale Advantage Agreements as a

justification for its request to reduce the total dollars at risk. Rather, its position was that the PAP and Wholesale Advantage Agreements are unrelated issues.

On November 10, 2009, the Commission issued a secretarial letter granting FairPoint's request for a general scheduling order to stay all pending proceedings as a result of the FairPoint bankruptcy proceeding. The docket was not adjudicated during the pendency of FairPoint's reorganization.

By secretarial letter dated February 25, 2011, the Commission stated that it would conduct an audit of FairPoint's existing PAP and that Docket Nos. DT 09-059 and DT 09-113 would be stayed pending the completion of the audit. On March 4, 2011, FairPoint submitted a letter asking the Commission to reconsider its decision to conduct an audit pursuant to NH RSA 541:3 and N.H. Code Admin. Rule Puc 203.33, claiming that the Commission made such decisions without adequate notice in violation of FairPoint's due process rights. In its letter, FairPoint asked the Commission to rescind the secretarial letter and schedule a hearing during which interested parties could present their opinions regarding an audit.

Claiming that an audit is an unproductive use of time and resources, FairPoint stated that an audit would look backward when most of the issues have already been identified and are expected to be eliminated in the PAP FairPoint intends to submit to replace the current PAP. FairPoint also indicated that within 30 days it would file a draft of its proposed PAP. FairPoint suggested that the scope of the audit be limited to those metrics, approximately 69 out of the current 358, that could be expected to be in the new plan, and be confined to a specific time period. FairPoint further stated that the structure of the audit should encourage a focus on improving the new PAP rather than a post mortem of the existing PAP. Citing a series of traditional auditing tasks to be performed under the audit, FairPoint indicated its belief that

questions regarding metric definitions, the appropriateness and/or limitations of current metrics, PAP methodology and procedures, and reporting scope and format would be best reserved for the approval proceeding on the new PAP.

Finally, in its March 4 letter FairPoint objected to the stay of Docket Nos. DT 09-059 and DT 09-113. Regarding Docket No. DT 09-113, FairPoint claimed that the outcome of a PAP audit will have no bearing on the reasonableness of the dollars at risk and that the current dollars at risk are out of proportion to its net return, as well as to any harm to CLEC wholesale customers. In FairPoint's view, maintaining the current dollars at risk level represents a punitive transfer of money that is distorting competitor incentives and is incompatible with the development of a stable, non-discriminatory competitive market. FairPoint has indicated its willingness to include the issues that arose in Docket No. DT 09-059 in the impending approval proceeding on the new PAP, and to terminate Docket No. DT 09-059. If, however, the Commission does not agree to such an approach, or if the proceeding on the new PAP is unusually delayed, FairPoint believes that Docket No. DT 09-059 should remain active.

In response to FairPoint's March 4, 2011 letter, BayRing, CRC, segTEL, Biddeford Internet Corp (Biddeford), One, and National Mobile Communications Corp., d/b/a Sovernet Communications (Sovernet) submitted a letter, received on March 23, 2011, which argued that the Commission should proceed with a thorough and complete audit of FairPoint's PAP, and that FairPoint could solve its penalty payment problems by remedying the underlying wholesale service quality problems. The CLECs observed that serious questions have been raised concerning the integrity of FairPoint's PAP related data, and FairPoint's ability to collect and manipulate the data.



In response to FairPoint's request for reconsideration of the audit requirement, the CLECs claim that, under the terms of the PAP, the Commission may audit the PAP, and that under Order No. 24,823 and the negotiated Settlement in Docket No. DT 07-011 between Staff and FairPoint (2008 Agreement), the Company agreed to an independent audit of the PAP if a simplified PAP was not in place by June 2010. Concerning the audit, the CLECs indicated that; FairPoint should not unilaterally seek to narrow the scope, the audit should be able to compare FairPoint and CLEC generated data, and communication should be open with limited confidentiality. Finally, the CLEC letter agreed it was appropriate to stay the other PAP related dockets, but requested that the Commission ensure that FairPoint continue to provide bill credits and requested that the dollars at risk waivers FairPoint filed in Docket No. DT 09-113 not be made retroactive.

On March 24, 2011, FairPoint filed an amended petition, further modifying its proposal on the dollars at risk, and requesting to lift the stay of Docket No. DT 09-113. FairPoint asserted that this filing was precipitated by the passage of time, FairPoint's emergence from bankruptcy, and the continued evolution of its business processes. FairPoint further stated that its amended petition is a complete statement of the requested relief and is in place of the relief requested by the original petition and supplement.

In the March 24 filing, FairPoint requested that the Commission approve a modification to the PAP to adjust the total dollars at risk so that any adjustment would be effective as of March 31, 2011, rather than January 1, 2009 as originally filed, and that a yearly cap be established at 39 percent of the northern New England combined five year rolling average of FairPoint's ARMIS, or ARMIS equivalent, net return, rather than the \$14.7 million formerly proposed. In addition, FairPoint requested that the Commission approve a disbursement policy

that will allocate one twelfth of the revised total dollars at risk per month, such that if the sum of the bill credits for all missed metrics for all CLECs combined, exceeded a monthly cap, the maximum monthly dollar amount would be distributed to each affected CLEC, based on its proportion of total calculated bill credits.

In support of its petition FairPoint argued that: (1) the current dollars at risk were originally designed to represent 39 percent of Verizon's regulated earnings but actually represent over 100 percent of FairPoint's regulated earnings in the northern New England states; (2) section II. K. of the PAP permits modifications to the PAP as the correct means to grant the requested relief; (3) the PAP is primarily an incentive plan and not a means to remedy any injuries of the past; (4) FairPoint has operated in good faith and cannot be further motivated by excessive PAP payments; and (5) given that the PAP is designed to promote fair competition in the wholesale market, the bill credits would be better directed to supporting FairPoint operations.

**C. DT 09-206**

On October 29, 2009, BayRing and segTEL jointly filed a petition requesting that the Commission initiate a proceeding to coordinate the development and implementation of a modified PAP for New Hampshire. Additionally, they requested that the Commission: (1) require FairPoint to continue to report metrics required by the existing PAP and provide bill credits; (2) establish the proper treatment for metrics for which FairPoint has not reported or requested a waiver; and (3) make clear that "dollars at risk" will be a matter for the Commission to establish in the context of a fully audited PAP. BayRing and segTEL avowed that FairPoint was not meaningfully collaborating with the CLECs on a new PAP and carrier-to-carrier guidelines despite its agreement in Docket No. DT 07-011, and that it was withholding bill credits without Commission authorization. BayRing and segTEL asserted that it was vital for the

Commission to establish certain ground rules to ensure the success of the collaborative process, and reminded the Commission that the 2008 Agreement called for FairPoint to pay for an independent audit of the existing PAP if a simplified PAP was not in place by June 1, 2010.

On November 10, 2009, the Commission issued a secretarial letter granting FairPoint's request for a general scheduling order to stay all pending proceedings as a result of the bankruptcy proceeding. The docket was not adjudicated during the pendency of FairPoint's reorganization.

On February 24, 2011, BayRing and segTEL submitted a petition to supplement and modify their October 29, 2009, filing. In their modified petition, BayRing and segTEL eliminated the request to coordinate the development of a simplified PAP, and added a request that the Commission order a thorough audit of both FairPoint's performance under and compliance with the existing PAP. They asserted that an audit of the existing PAP should precede any movement towards a simplified PAP. In support of the petition, BayRing and segTEL claimed that: an audit was urgently needed to review the adequacy of FairPoint's performance, systems, and processes for past, present, and future compliance; such an audit was critical to the establishment of a baseline to make decisions regarding FairPoint's compliance with its obligations; and an audit would allow the Commission to understand the current status of FairPoint's systems, as well as their likely future capabilities.

On March 7, 2011, FairPoint opposed the initial filing of BayRing and segTEL. In its opposition, FairPoint stated that BayRing and segTEL were seeking to expand the scope of the audit beyond that agreed to in the 2008 Agreement; that any audit of the current PAP would be backward looking; and that discussion of an audit in this docket should be dismissed because the Commission has taken up the audit by secretarial letter of February 25, 2011, in Docket Nos. DT

09-059 and DT 09-113. Additionally, FairPoint pointed out that BayRing and segTEL sought relief for metrics and for the provision of bill credits, which were being addressed by the Commission in Docket Nos. DT 09-059 and DT 09-113.

**D. DT 11-061**

On March 24, 2011, FairPoint submitted a petition for approval of a simplified metrics plan (SMP) and a wholesale performance plan (WPP) to replace the existing carrier to carrier guidelines and PAP. In support of its petition, FairPoint stated that it had committed to working cooperatively with the CLECs and Commission Staff to develop a simplified PAP applicable to the three northern New England States, that it had held a number of teleconferences between May 2009 and November 2010 concerning the establishment of a simplified plan, and that it had circulated a proposed simplified PAP to CLECs in all three states. According to FairPoint, the current proposal reduces the complexity of the current PAP by eliminating metrics for services no longer provided and where operational support systems interfaces no longer exist, as well as removing those metrics for which there has been little or no activity. FairPoint indicated that similar petitions were being filed in Maine and Vermont and urged the Commission to coordinate with those states regarding scheduling, and to consider the possibility of joint hearings. The petition further requested that Docket No. DT 06-168 be terminated without prejudice in favor of the WPP, and pointed out that FairPoint continued to seek relief under Docket No. DT 09-113 with its amended petition. Finally, FairPoint requested that Docket No. DT 09-206 be terminated with any surviving issues adjudicated in Docket No. DT 09-113 or this new proceeding.

On April 7, 2011, the Commission received a motion to stay the proceeding pending the outcome of the PAP audit filed by One, Sovernet, SegTEL, CTC, Biddeford, and BayRing. In

support of the motion the CLECs argued that: (1) the Commission should stay the FairPoint petition on the SMP and WPP; (2) the PAP is designed to ensure that a competitive telecommunications market continues to operate in New Hampshire; and (3) without proof that the PAP and carrier-to-carrier results are accurate, investigation of FairPoint's petition for a restructured PAP may rely on unproven and unsubstantiated data, and will limit progress on a meaningful successor plan. Accordingly, the CLECs recommended that the Commission stay all PAP related New Hampshire proceedings, including DT 11-061, until the audit is completed.

On April 13, 2011, FairPoint submitted to the Commission its opposition and response to the CLECs' motion to stay the proceeding. In support of its opposition, FairPoint stated that: (1) development of the WPP is not dependent on the results of an audit of the existing PAP; (2) the CLECs have not demonstrated how an audit of the current PAP will contribute to a review and approval of the WPP; and (3) a stay will perpetuate an inherently complex scheme that does not reflect actual wholesale performance, will do nothing to conserve valuable FairPoint resources, and will violate the terms of the 2008 Agreement. FairPoint also stated that a simplified PAP would benefit from an independent expert, acting on behalf of the three states, who would provide advice on which metrics need to be measured and which metrics are no longer relevant.

## **II. COMMISSION ANALYSIS**

### **A. Decision to Audit FairPoint's PAP**

Based on the records and the inter-related issues in the various dockets to date, we have determined that an audit of FairPoint's existing PAP is a necessary foundation for informed decisions about reasonable and appropriate wholesale business interactions between FairPoint and the CLECs following FairPoint's emergence from Chapter 11 bankruptcy. In the FCC order approving the first PAP for Verizon's interLATA entry in New York, the FCC accepted the PAP

as a “benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service,” *In re Verizon New England, Inc.*, 17 F.C.C.

Rcd. 18660, 438 (2002). The FCC stated that a PAP has the following important characteristics:

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- And reasonable assurances that the reported data is accurate.

*In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of*

*the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15

FCC Rcd. 3953, 433 (1999). Accordingly, we will proceed with an investigation intended

ultimately to result in an appropriate performance plan for FairPoint that meets each of the goals described by the FCC.

In reaching this conclusion we address FairPoint’s request for reconsideration of an audit as filed in its March 4, 2011 letter responding to the February 25, 2011 secretarial letter announcing the Commission’s intention to audit FairPoint’s PAP and stay Docket Nos. DT 09-059 and 09-113. By its letter<sup>2</sup> FairPoint asked the Commission to reconsider, pursuant to RSA 541:3 and N. H. Code of Admin. Rules Puc 203.33, the decisions contained in the secretarial letter. According to FairPoint, the decisions reflected in the secretarial letter were made in violation of FairPoint’s due process rights. FairPoint therefore requested that the Commission: (1) rescind the secretarial letter; and (2) schedule a hearing during which interested parties may

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<sup>2</sup> Though we rule upon this request as if it were a motion for rehearing, we note that in so doing we are not agreeing that FairPoint’s letter constitutes a properly filed motion for rehearing pursuant to Puc 203.04, Puc 203.07, Puc 203.33, and RSA 541:3.

present their positions regarding the issues raised by the secretarial letter. FairPoint then makes other arguments concerning the scope of the proposed audit and the propriety of staying Docket Nos. DT 09-059 and DT 09-113.

Generally, to prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable. *See* RSA 541:3 and RSA 541:4. Good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued. *Kearsarge Telephone Co., et al.* Order No 25,194 (Feb. 4, 2011).

We first address FairPoint's contention that the Commission's February 25, 2011 secretarial letter violated its due process rights. Initially, we note that other than a single reference on the first page of its letter, FairPoint offers no specific argument about how its due process rights are implicated or violated by beginning an audit that was, in fact, expressly contemplated and agreed to by FairPoint as a compliance matter emanating from Docket No. DT 07-011. Generally, this, in itself, would be sufficient grounds to deny the motion. *Buchholz v. Waterville Estates Assn.*, 156 N.H. 172, 177 (2007) ("Passing reference to 'due process,' without more, is not a substitute for valid constitutional argument." (brackets and quotations omitted)). Nevertheless, for completeness we address the due process argument relative to our commencement of the audit.

Because FairPoint has contended that it did not receive proper notice and an opportunity to be heard, we will consider whether procedural due process has been accorded. In determining whether particular procedures satisfy the requirements of due process, the New Hampshire Supreme Court typically employs a two-prong analysis. *Appeal of Town of Bethlehem*, 154 N.H. 314, 328 (2006). Initially, it must be ascertained whether a legally protected interest has been

implicated. *Id.* The question then is whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest. *Id.* A successful due process claim must be based upon a protected liberty or property interest. *Id.*

Because no protected liberty interest is at stake here, we will consider whether there is a protected property interest at stake. “The hallmark of a legally protected property interest is an individual entitlement grounded in State law.” *Id.* at 329. FairPoint has not identified any individual entitlement grounded in law. Furthermore, the 2008 Agreement among the joint petitioners and Staff, to which FairPoint is a signatory, states, in relevant part:

9.4 FairPoint agrees to pay for the conduct of an independent audit of its wholesale performance assurance plan. If a simplified wholesale performance assurance plan is adopted prior to June 1, 2010, the audit shall take place following the first six months during which that plan is in effect. If no simplified plan is in effect by June 1, 2010, or if efforts to develop such a plan have terminated before that date, then FairPoint agrees to such an independent audit of the existing wholesale performance assurance plan. The Commission will be solely responsible for the choice of the independent auditor, but will afford FairPoint the opportunity to submit the names of firms to be included within the list of firms to receive requests for proposals for the provision of such services.

Thus, FairPoint has already agreed to the Commission’s audit. Further, the secretarial letter stated that the Commission would be conducting the audit pursuant to its authority under RSA 365:5 which reads:

The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission.

Even if FairPoint had not agreed to an audit of its existing PAP, the Commission possesses the authority, on its own motion, to “make inquiry” of “any act or thing having been done, or having



been omitted or proposed.” Thus, there is no entitlement under state law giving rise to a protected right. In the absence of such a right, we conclude that there has been no violation of FairPoint’s due process rights.

Turning to FairPoint’s other arguments, it contends that an audit of the existing PAP will be unproductive because “it is a backward looking endeavor that will review issues that have already come to light and/or are expected to be eliminated in the prospective Wholesale Performance Plan.” FairPoint March 4, 2011 Letter at 1. FairPoint’s argument ignores the fact that it has agreed to an audit of its existing PAP if a new one was not in place by June 1, 2010. Moreover, we do not agree that an audit would be largely unproductive, as claimed by FairPoint. FairPoint’s argument seems to assume that everything to be uncovered or evaluated in the audit is either: (1) already known (and presumably being addressed); or (2) set to be eliminated. Whether all significant problems are already known and whether any particular items in the PAP will, or should be, eliminated are matters of some dispute.

As evidenced by numerous letters filed in recent months, collaboration on a new PAP between FairPoint and the CLECs has failed to reach a resolution. According to the CLECs, the collaboration between FairPoint and the CLECs has failed because the CLECs have no assurances that the current PAP is being implemented and applied correctly. Before a new PAP is devised and implemented, it is essential to know whether FairPoint has applied the current PAP properly or, if it has not, where its weaknesses lie so that they may be addressed in developing the new PAP. Adopting a new PAP or amending the current one, without a reasonably complete understanding of the current PAP, or FairPoint’s ability to adhere to it, would appear to be more unproductive than developing an understanding of the current PAP and its implementation before moving forward.

FairPoint has now proposed its WPP which, according to FairPoint, reduces the number of metrics from 358 to 58 and, it claims, eliminates many of the complexities of the existing PAP. Therefore, FairPoint contends, efforts should be expended upon review and approval of the new WPP and not on understanding the old one. It appears FairPoint's proposed WPP has been developed without collaboration with the CLECs, contrary to the 2008 Agreement. Accordingly, the review process of FairPoint's proposal may require more CLEC input than if a revised PAP had been created collaboratively. Moreover, without, for example, a common understanding of each metric and the processes used to collect data for measurement, knowledge of how the metric data is accumulated, recorded, classified, and validated; and knowledge of whether it is timely reported and whether the bill credits are appropriately calculated, it may be difficult to understand whether the metrics selected by FairPoint for its proposed WPP, as its simplified PAP, are appropriate and sufficient. Thus, we find that an audit of the current PAP will lead to useful information.

Next, FairPoint contends that if the Commission intends to go forward with an audit, the audit should be confined to certain parameters. For example, FairPoint seeks to exclude from the audit "questions regarding metric definitions, the appropriateness and/or limitations of current metrics, PAP methodology and procedures and reporting scope and format." FairPoint March 4, 2011 Letter at 3. According to FairPoint, such matters are best left to a proceeding relating to the new PAP. FairPoint's view appears to be related to its dismissal of any audit of the current PAP as inherently backward-looking and only of historical value. The Commission, however, views an audit of the current PAP as a necessary step in determining the scope and nature of any future PAP. Thus, we disagree that the scope of the PAP audit should be limited in the manner suggested by FairPoint.

**B. Conduct of Docket No. DT 09-113**

FairPoint's letter also contends that there is no cause to stay Docket Nos. DT 09-059 and DT 09-113 during the pendency of the audit. FairPoint argues that the Commission erred in staying the proceedings because the secretarial letter "contains no support or legal reasoning in support of the decision. The secretarial letter contains no facts to support a determination that the above referenced dockets depend upon an understanding of the current PAP." FairPoint March 4, 2011 Letter at 4. According to FairPoint, "By postponing resolution of this issue without a valid cause, the Commission simply perpetuates th[e] injustice," of turning the PAP from an incentive mechanism into a "punitive transfer of money." FairPoint March 4, 2011 Letter at 4. Assuming, without deciding, that such facts or reasoning are necessary they are set out as follows.

As noted above, Docket No. DT 09-113 concerns FairPoint's request to decrease the amount of money at risk under the PAP. The PAP functions by measuring certain performance metrics and, where the performance does not meet a specified threshold, assessing a penalty. That penalty is a certain percentage of the overall dollars at risk under the PAP. FairPoint contended in Docket No. DT 09-113 that the current dollars at risk are out of proportion to its net return. According to FairPoint, nothing will be revealed in the audit that will have a bearing on whether the overall dollars at risk is a reasonable amount and staying the docket is error. We disagree.

Pending in Docket No. DT 09-113 is a dispute among the parties as to the impact of the Wholesale Advantage Agreements on the overall dollars at risk under the current PAP. According to various CLECs in that docket, the existence of these agreements has already significantly reduced the dollars at risk under the PAP. *See* One motion to dismiss or stay

proceedings (Sept. 22, 2009) at 6-7; CRC motion to dismiss, or alternatively, motion to stay proceedings (Sept. 23, 2009) at 5-7; BayRing and segTEL, motion to dismiss supplemental petition (Sept. 23, 2009) at 13-14. While FairPoint disputes the CLECs' arguments, *see* FairPoint objection to motions to dismiss (Oct. 1, 2009) at 5-6, there is, nonetheless, a question about what amounts truly are at risk under the PAP. Without some understanding of the amount of money currently at risk, an issue that would likely be revealed by an audit of the PAP, it is premature to conclude that the results of the audit would have no bearing on the dollars at risk.

Furthermore, in the supplement to its petition in Docket No. DT 09-113, FairPoint notes that Verizon had proposed various reductions to the dollars at risk under its PAPs in various states. According to FairPoint, when proposing potential amendments to its PAP in northern New England prior to selling its northern New England assets to FairPoint, Verizon:

explained that changes in the marketplace have replaced competition, rather than regulation, as the major driver of wholesale service quality and that these *competitive forces further justified a reduction in the total dollars at risk under the PAP*. Competition from all modes of providers is increasing, particularly from cable voice offerings and wireless, and this *market pressure alone provides sufficient incentives for the ILEC to provide good service to its CLEC customers*. . . *FairPoint concurs*, and is on record in its support of CLECs' ability to compete.

FairPoint Supplement to Petition (Aug. 7, 2009) at 3 (emphasis added).

Even presuming market forces were sufficient to ensure effective wholesale performance by Verizon using Verizon systems, it is not clear that they are currently sufficient to ensure effective performance by FairPoint, given the increases in PAP penalties since FairPoint took control of the northern New England business. To reduce penalties under the current PAP, thereby further reducing the regulatory pressure on FairPoint's wholesale performance, while a full understanding of its implementation is not available, is not a course we support.

Accordingly, we do not agree that going forward with Docket No. DT 09-113 is the best course. Instead, the results of the audit will be instructive as to what amounts are currently at risk, which will aid in determining the amounts that ought to be at risk in the future in light of any pressure from market forces.

FairPoint's request in Docket No. DT 09-113 was not adjudicated during the pendency of FairPoint's bankruptcy proceedings. FairPoint's March 24, 2011 request to further modify its proposal on dollars at risk pointed out that certain of its obligations had been discharged by the bankruptcy court, that its business operations were further distinguished from its predecessor Verizon, and that a simplified metrics plan was imminent. Thus, according to FairPoint, the focus of Docket No. DT 09-113 should be on the reasonableness of the amount of dollars at risk relative to FairPoint's financial results, rather than Verizon's. While there is some merit in FairPoint's argument about the focus of DT 09-113, it does not obviate the need for the audit. Following the audit, we expect to be in a better position to consider the potential risk level that provides a meaningful and significant incentive to FairPoint to comply with its designated performance standards.

### **C. Conduct of Docket Nos. DT 09-059 and DT 09-206**

According to FairPoint, Docket No. DT 09-059 concerns FairPoint's request to waive "certain metrics, some of which are particular to Verizon's old systems and which FairPoint does not track." FairPoint March 4, 2011 Letter at 4. FairPoint goes on to state: "FairPoint's exposure regarding these metrics is continuing and must be addressed." *Id.* FairPoint concludes:

Because these metrics would naturally be eliminated in the [new PAP], FairPoint is amenable to folding the issues in Docket DT 09-059 into the impending [new PAP] approval proceeding and terminating Docket DT 09-059. However, if the

Commission does not agree to this plan or the [new PAP] proceeding is unusually delayed, Docket DT 09-059 should remain active so that these issues can be resolved in a timely manner. *Id.*

First, we note that FairPoint's request in Docket No. DT 09-059 to permanently waive certain reporting requirements was put on hold, by request of the parties, including FairPoint, until after resolution of Docket No. DT 09-113. *See* secretarial letter, dated August 4, 2009 in Docket No. DT 09-059. Additionally, as noted by the CLECs in Docket No. DT 09-059, FairPoint agreed to be "subject to the Performance Assurance Plan (PAP) in effect as of the Merger closing date" and that it would "adhere to the applicable PAP and [Carrier-to-Carrier] Guidelines as implemented in each of the three states and be subject to the potential penalties and enforcement mechanisms set forth in those documents." *See* 2008 Agreement Terms, Exhibit 2 at §§ 2.e., 6.a. Thus, FairPoint agreed to adopt the obligation to track all metrics as they had existed under Verizon. While it may be true that FairPoint does not currently track certain metrics particular to Verizon's systems, we have not concluded that those metrics would "naturally be eliminated" from any new PAP. An audit could reveal whether there are certain important metrics that FairPoint should track in a simplified PAP.

For the reasons previously stated, we conclude that an audit of the PAP will identify which metrics are tracked and which are not, and provide a basis for determining which metrics should be retained or eliminated from any new PAP. These issues will also be considered in our comprehensive investigation to establish an appropriate performance plan which meets the characteristics articulated by the FCC.

Docket No. DT 09-206 was opened to address BayRing and segTEL's request to initiate and coordinate a proceeding to develop a simplified PAP. The petition was modified on February 24, 2011, to request an audit of the existing PAP and eliminate the request to develop a

simplified PAP. Because we have determined to conduct an audit of the existing PAP and to proceed with an investigation of all the issues required to develop a new performance plan, we will close Docket No. DT 09-206.

**D. Conduct of Docket No. DT 11-061**

Finally, FairPoint proposed a new WPP and SMP in filings now docketed as DT 11-061. These plans, along with an opportunity for filings by CLECs concerning their effectiveness and scope, will be considered in determining whether these plans are appropriate when judged against the standard for PAPs articulated by the FCC. In order to determine whether there are reasonable assurances that FairPoint's reported data is accurate for purposes of a new PAP, in addition to reasons stated above, our audit of the existing PAP will pay particular attention to those elements that are common to the revised PAP FairPoint has proposed. Upon first inspection, it appears that FairPoint's proposed WPP is essentially a subset of existing measurements. The audit will include each of the metrics proposed in the WPP as well as additional metrics that are important to competition as may be identified by the CLECs.

We direct Staff to work with the CLECs and FairPoint to gain their input regarding the metrics to be audited. We encourage everyone to be practical and formulate their recommendations, in writing, with the goal of developing a new PAP embodying the characteristics of an adequate PAP as set forth above. We further direct Staff to conduct a meeting with the CLECs and FairPoint, after receiving written recommendations, to assist Staff in evaluating and consolidating the recommended metrics. By limiting the audit to a subset of the existing PAP, we hope to encourage the parties to identify metrics that are obsolete or no longer relevant or useful as well as to indicate those which are most relevant. Once the audit is complete, we will have a better understanding of whether the business rules are clearly

articulated and whether the measurements are capable of detecting performance problems if they occur.

The petition in Docket No. DT 11-061 raises issues related to whether the proposed WPP and SMP contain the appropriate characteristics of a performance assurance plan identified by the FCC, and whether the issues in DT 09-059 and DT 09-113 should be consolidated with DT 11-061. For the reasons articulated above, until the audit is complete, we will stay Docket Nos. DT 09-059 and DT 09-113. During the course of the investigations, the existing PAP will remain in place as FairPoint agreed in paragraph 6 of Exhibit 2 to the 2008 Agreement. We note that the Effective Date of FairPoint's reorganization was January 24, 2011. Though the audit will evaluate performance from July 1, 2010 through June 30, 2011, the Commission will not apply the results of the audit to activity prior to the Effective Date.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the Commission shall solicit proposals from candidates, and select and retain an independent, third party to audit FairPoint's Performance Assurance Plan and the relevant Carrier-to-Carrier Metrics; and it is

**FURTHER ORDERED**, that, as discussed herein, Staff shall work with the CLECs and FairPoint to identify the metrics to be audited; and it is

**FURTHER ORDERED**, that Docket No. DT 09-059 is stayed pending completion of the audit; and it is

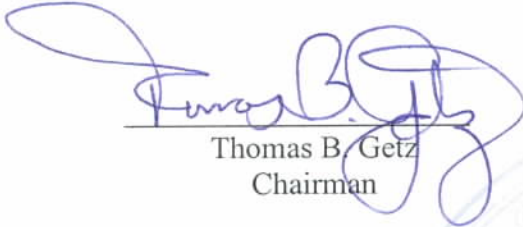
**FURTHER ORDERED**, that Docket No. DT 09-113 is stayed pending completion of the audit; and it is


**FURTHER ORDERED**, that Docket No. DT 09-206 is closed as the issues raised will be addressed by the audit and in Docket No. DT 11-061; and it is

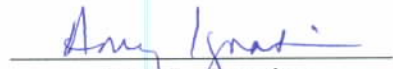


**FURTHER ORDERED**, that an order of notice regarding FairPoint's proposed PAP in Docket No. 11-061 will be forthcoming.


By order of the Public Utilities Commission of New Hampshire this sixth day of May, 2011.

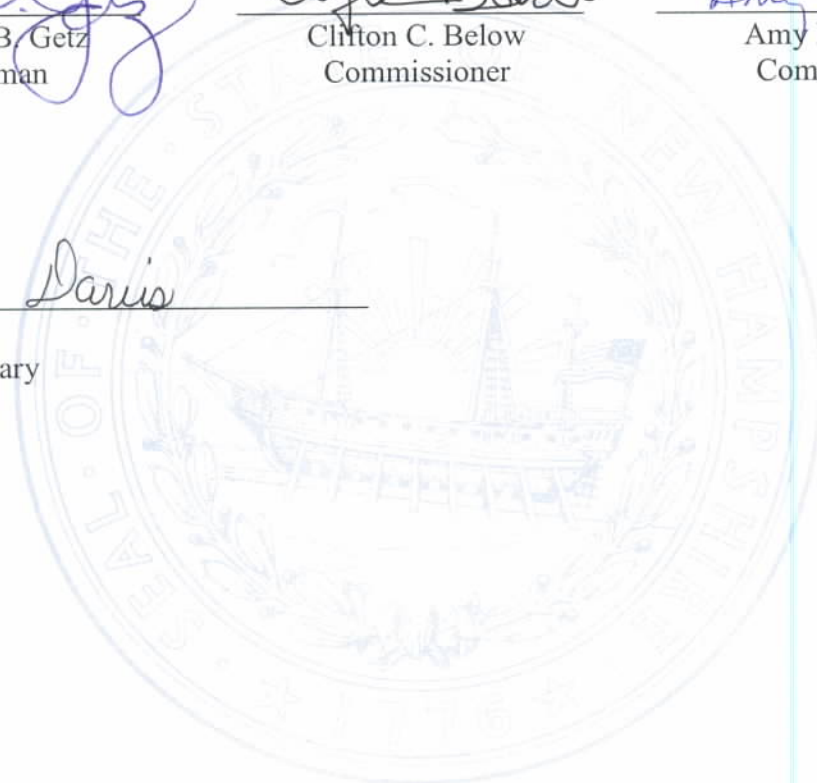
  
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Docket #: 09-206 Printed: May 06, 2011

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