

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 11-061

**Petition of FairPoint Communications
for Approval of Simplified Metrics Plan and
Wholesale Performance Plan**

OPPOSITION AND RESPONSE OF
NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC
D/B/A FAIRPOINT COMMUNICATIONS-NNE
TO MOTION TO STAY PROCEEDING

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and hereby submits its Opposition and Response to the Motion to Stay Proceeding (“Motion”) of Biddeford Internet Corp., d/b/a Great Works Internet, Choice One of New Hampshire Inc., Conversent Communications of New Hampshire LLC, CRC Communications of Maine, Inc. d/b/a OTT Communications, CTC Communications Corp., Freedom Ring Communications, LLC, d/b/a BayRing Communications, Lightship Telecom LLC, National Mobile Communications Corp. d/b/a Sovernet Communications and segTEL, Inc., (together, the “Joint CLECs”). The Joint CLECs urge the Commission to stay this proceeding to approve a Simplified Metric Plan (“SMP”) and Wholesale Performance Plan (“WPP”) until completion of the audit of the existing Performance Assurance Plan (“PAP”) “in the interests of avoiding overlapping and unnecessary litigation and in the interests of efficiency and conservation of the Commission’s and parties’ resources.”¹ However, as FairPoint demonstrates herein, neither of these concerns is implicated by the original Petition in this

¹ Motion at 1.

proceeding. Furthermore, the purported benefits to the stay are dubious and purely speculative, and are vastly outweighed by the irreparable harm to FairPoint as a result of delay. Accordingly, the Motion should be denied.

I. DEVELOPMENT OF THE WPP IS NOT DEPENDENT ON THE RESULTS OF AN AUDIT OF THE EXISTING PAP.

Summoning the Commission's words from the Notice of Stay of DT 09-113 and DT 09-059 ("Notice"), the Joint CLECs assert that "the resolution of both dockets depends on an understanding of the current PAP and its implementation."² However, just as it was in the Notice, this is a conclusory statement, unsubstantiated by any facts and lacking any evidentiary support. It is simply a broad statement that does not provide the slightest detail of how its claims may be true or relevant.

The Joint CLECs claim that "[w]ithout confidence or proof that the C2C and PAP results are accurate, investigation of FairPoint's petition for a restructured PAP may rely on unproven and unsubstantiated data."³ However, they fail to identify any facts that will be elicited in connection with the audit that are necessary to evaluate the proposed SMP and WPP. As the Commission recognized in the first PAP proceeding, development of a performance plan *is not a data driven inquiry*:

The parties and Staff agreed and recommended to the Commission that because the resolution of this docket does not turn on factual questions, hearings would be legislative style rather than adjudicative. The parties and Staff also agreed that the scope of the C2C metrics docket would include consideration of (1) what metrics pertain and (2) what performance measurement plan should be adopted by the Commission to measure Verizon's compliance with the metrics to ensure Verizon's quality of wholesale service."⁴

² *Id.* at 2.

³ *Id.* at 3.

Data about the existing PAP, proven or not, is essentially irrelevant. Just like the original PAP proceeding, the SMP/WPP proceeding is not a factual inquiry into what FairPoint's performance *is or has* been, but what it *should* be. Any factual determinations are confined to a determination of which required wholesale offerings should be measured because they are necessary to ensure fair and non-discriminatory local exchange competition, what the performance level should be, and what amount of billing credits provides the appropriate incentive. None of these facts is dependent on an audit of the existing PAP.

A stay of the WPP approval proceeding accomplishes nothing other than preservation of the status quo, in which the Joint CLECs have a substantial financial stake. Their actual goal is betrayed in their advice to the Commission that “when the audit is concluded, and the recommendations, if any, of the independent auditors *are put in place*, . . . then that *might* be the time to talk about changing the existing PAP”⁵ In other words, as far as the Joint CLECs are concerned, the PAP audit is not really designed to inform the development of the WPP, but merely to refine the existing PAP for continued implementation, after which the Joint CLECS “*might*” be amenable to “talking” about a replacement.

Over the course of many months of FairPoint's efforts to negotiate the development of a simplified performance plan, the Joint CLECs have not presented any plausible or logical explanation of how the results of an audit of the current PAP will contribute to the review and approval of the WPP. As FairPoint has previously explained, if, on the one hand, the audit establishes that PAP metrics have been accurately reported, the parties will find themselves at

⁴ Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan, NH PUC Docket No. DT 01-006, Order No. 23,940 Regarding Metrics and Plan at 3 (March 29, 2002).

⁵ Motion at 5-6 (emphasis supplied).

the starting gate with nothing to show for the time that has been lost. On the other hand, even if the audit reveals that any particular metrics have been misreported, the result (or lack thereof) will be identical, since the results cannot inform which metrics should be included in the WPP. Thus, there appears to be no logical reason why the WPP review process cannot be conducted in parallel with an audit, if an audit is truly necessary. Consequently, it can only be concluded that the Motion is strategically motivated for the purposes of delay.

II. A STAY WILL PERPETUATE AN INHERENTLY AND OVERLY COMPLEX SCHEME THAT DOES NOT REFLECT ACTUAL WHOLESALE PERFORMANCE.

The Joint CLECs admit that “[t]he efforts, time and resources necessary to litigate a new PAP in New Hampshire will be substantial” and that “[t]his matter involves complex issues and cannot be quickly decided,”⁶ but neither explain how delaying the proceeding will reduce this burden, nor what will be revealed by the PAP audit that will have any bearing. The Joint CLECs also claim that “[i]t is unquestionable that since FairPoint implemented its new systems at the February 2009 cutover, there has been considerable backsliding in FairPoint’s wholesale performance and a corresponding increase in PAP credits resulting from the decline in FairPoint’s wholesale performance.”⁷ However, this assertion is grounded not in any actual experience recited by the Joint CLECs, but solely on the basis of the amount of billing credits that the PAP generates on a monthly basis, which is an extremely misleading indicator of the level of FairPoint’s performance in meeting its wholesale obligations.

FairPoint is preparing testimony that will establish that the existing PAP is an overly-complicated and ineffective relic of a different time, a different competitive landscape, a different CLEC business model, and different measurement systems. The total dollars at risk

⁶ *Id.* at 5.

⁷ *Id.* at 4.

across the three northern New England states are over \$86 million. Many of the measured offerings are no longer required to be provided, are no longer ordered by CLECs, or are for systems no longer in use. The minimum threshold scores for the existing PAP are a calculated value based on the number of overall metrics, but have not been adjusted to reflect the reduced number of reportable metrics with activity, thus increasing penalties. If some metrics have no activity, the dollars at risk for that segment are not reduced, but merely reallocated to the remaining metrics, arbitrarily increasing the penalty for metrics scored as a miss. Some metrics, like flow-through, carry penalties based on *how* FairPoint performs the task, even if FairPoint meets the deadline. Finally, there is no consideration given for the degree to which a measure misses. A single order or trouble report is sometimes the difference between meeting and missing a metric.

While the existing PAP includes offerings that FairPoint is no longer obligated to provide, such as UNE-P and line sharing, the metrics for these services are still reported and still impact the calculated monthly billing credits for non-related services, even for CLECs who not only may not have had any transactions in that month, but may not even use those offerings. As an example, in January 2011, a single transaction in Maine was the difference between a met and missed standard which impacted four Modes of Entry (“MOEs”). The resulting bill credits associated with this metric were calculated at over \$26,000, because of a *single transaction*. In New Hampshire, in January 2011, the Mode of Entry for UNE Loop generated bill credits calculated at *nearly \$250,000*. This was driven by just 4 metrics scored as a miss out of 41, exacerbated by the fact that these 4 metrics were overly weighted because there was no activity or a small sample size on 15 of the other metrics. In another January 2011 example, only 3 DSL

performance measures were scored as missed out of 62 reported performance metrics, but still resulted *in over \$75,000* in calculated bill credits.

While details of FairPoint's case are better left to the witnesses, there should be little argument on one fact – the existing PAP and C2C metrics are extremely and inherently complex. As such, FairPoint also believes the simplified wholesale performance plan process will benefit from the assistance of an independent, three-state expert consultant. This consultant should be retained jointly on behalf of the Commission, the Maine Public Utilities Commission and the Vermont Public Service Board. FairPoint would pay the expert consultant's fees and expenses. This would provide the three state regulatory agencies with independent advice on what metrics really need to be measured and what metrics are not relevant. An expert consultant also would be able to provide independent opinions as to whether or not FairPoint's operating support systems can properly and correctly measure the final metrics. Moreover, an independent consultant will not be tainted by the litigation process and should provide comfort to all parties that their proposals and counter proposals received fair and unbiased consideration.

A stay would require FairPoint to waste resources on fixing a process that is fundamentally flawed and overly complex. The Commission should reject the Joint CLECs' request due to the lack of any evidence supporting a stay and because it would unnecessarily prolong the unreasonable impact of the current PAP. FairPoint has proposed a plan with metrics that are fair and relevant to measuring the performance FairPoint provides to CLECs and which generates penalties that are rationally proportional with the scored misses. It is entitled to a timely Commission evaluation of its proposal, in the interest of simplifying the current plan as soon as possible.

III. A STAY WILL DO NOTHING TO CONSERVE RESOURCES.

A simplified PAP proceeding and a PAP audit are not mutually exclusive endeavors. In the first place, as FairPoint has previously noted, an independent audit of the PAP will not place any strain at all on the Joint CLECs or any other CLECs, who would by definition be barred from participating in any way in an independent third party audit, 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 demonstrating the merits of its proposed simplified wholesale performance plan.

The only party with substantial demand on its resources is FairPoint. An audit would take up even more of those resources. Any party that is truly concerned about conserving FairPoint's resources would recognize that the attempts to delay these proceedings only prolong the unfair drain on FairPoint's resources by the current PAP.

IV. A STAY WILL VIOLATE THE CLEC AND STAFF SETTLEMENT AGREEMENTS.

Section 6.c of the Stipulated Settlement Terms to the CLEC Settlement Agreement in DT 07-011, which was adopted by the Commission Staff and approved by the Commission⁸ provides that “[a]fter the Merger closing date, FairPoint will work cooperatively with the CLECs and state utility regulatory staff in good faith to develop and implement a simplified, uniform PAP applicable to Telco in Maine, New Hampshire and Vermont.” No conditions were attached to this provision. FairPoint entered into the CLEC Settlement Agreement with the understanding that it would be able to negotiate, in good faith, a new, simplified PAP and would not be forced to operate under the existing PAP indefinitely. Notwithstanding the CLEC Settlement

⁸ Verizon New England, et al. Petition for Authority to Transfer Assets and Franchise, DT 07-011; Order No. 24,823 Approving Settlement Agreement with Conditions at 89 (Feb. 25, 2008) (“Merger Order”).

Agreement, the Joint CLECs have not meaningfully participated in developing a simplified performance plan.

Now, with their Request for Stay, the Joint CLECs are in clear violation of another provision of the CLEC Settlement Agreement that provides that “[t]he Parties further agree not to take any actions in any forum that would reasonably appear to contradict or diverge from the terms set forth in these CLEC Settlement Conditions . . .”⁹ To make matters worse, the Joint CLECs have asserted that “[o]nly when FairPoint has demonstrated that it is in full compliance with its *existing* obligations at the conclusion of the audit, should the Commission consider whether to modify those obligations.”¹⁰ This condemns FairPoint to a Sisyphean task, has no basis in any settlement agreement or Commission order, and is blatantly punitive.

The Joint CLECs and the Commission Staff have committed to developing a simplified replacement PAP with FairPoint in agreements that were approved by the Commission and on which the FairPoint merger was conditioned in part. Any postponement of this requirement is a violation of these agreements, violates FairPoint’s good faith expectations, and exposes FairPoint to unjust and unreasonable penalties.

V. CONCLUSION

A stay of docket DT 10-061 is unsupported by the facts, violates principles of fair dealing, and subjects FairPoint to unjust and unreasonably punitive penalties for an indefinite period. Furthermore, as FairPoint has explained in other pleadings, an audit of the existing PAP

⁹ CLEC Settlement Agreement § 9. This provision applies to all CLECs, not just the signatories of the CLEC Settlement Agreement; *see* Merger Order at 74 (“By incorporating [the CLEC Settlement Agreement] into the [Staff] settlement agreement, the Signatories agreed that the terms would apply to all CLECs.”) Furthermore, Commission Staff agreed to a similar provision. “The Signatories agree not to take any action in any forum that would reasonably appear to contradict or diverge from the terms set forth in this Agreement for so long as this Agreement is in force.” Staff Settlement § 13.3.

¹⁰ Motion at 4 (emphasis original).

is of limited values and a waste of resources. Rather than proceed with a an audit of the existing PAP, especially in lieu of a proceeding to approve the proposed SMP and WPP, FairPoint respectfully suggests that the Commission:

- 1) deny the Motion to Stay;
- 2) proceed with review and approval of the SMP and WPP in this docket;
- 3) in cooperation with its counterparts in Maine and Vermont, retain, at FairPoint expense, an independent expert consultant to evaluate FairPoint's SMP and WPP proposals; and
- 4) to the extent that the Commission believes that an audit is still necessary, conduct such audit six months following implementation of a replacement performance plan and restrict such audit to those metrics that are finally determined to be penalty influencing.

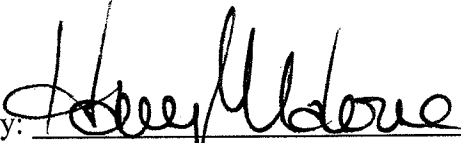
Respectfully submitted,

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d/b/a FairPoint Communications-NNE

By their Attorneys,

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Dated: April 13, 2011

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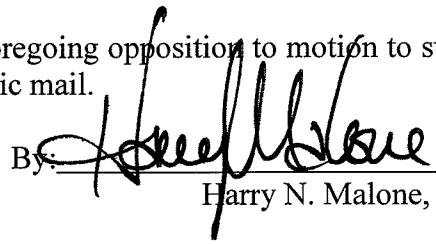
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing opposition to motion to stay proceeding was forwarded this day to the parties by electronic mail.

Dated: April 13, 2011

By: _____



Harry N. Malone, Esq.