

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
Under the Performance Assurance Plan and
Carrier-to-Carrier Guidelines

Docket No. DT 07-011

Verizon New England, et al.
Transfer of Assets to FairPoint Communications,
Inc.

MOTION FOR IMPOSITION OF CIVIL PENALTIES

Freedom Ring Communications d/b/a BayRing Communications (BayRing), One Communications, segTEL, Inc., and CRC Communications of Maine, Inc. (together referred to as Competitive Local Exchange Carriers or CLECs), hereby request that the New Hampshire Public Utilities Commission (the Commission) impose civil penalties against FairPoint, pursuant to New Hampshire RSA 365:41.¹

The basis for this request is FairPoint's unauthorized and unprecedented declaration that it has unilaterally ceased providing any bill credits to CLECs as required by the Performance Assurance Plan ("NH PAP") and as required by the Commission's February 25, 2008 Order No. 24,823 in Docket No. DT 07-011 (imposing obligations on FairPoint to comply with the NH PAP). Such disregard of the Commission's Order and the financial distress that this causes CLECs requires appropriate penalties to be imposed on FairPoint.²

¹ Pursuant to RSA 365:41, a utility that "fails, omits or neglects to obey, observe or comply with any order, direction or requirement of the commission, shall be subject to a civil penalty, as determined by the commission, not to exceed \$250,000 or 2.5 percent of the annual gross revenue that the utility received from sales in the state, whichever is lower."

² A similar request was filed on behalf of several CLECs in Maine Docket Nos. 2009-185 and 2007-67.

INTRODUCTION

Following FairPoint's request to seek both temporary and permanent changes to the current NH PAP (filed in Docket No. DT 09-059), FairPoint filed a further Petition on June 10, 2009, seeking a waiver of the incentive payment requirements of the NH PAP ("FairPoint Petition").³ FairPoint's Petition specifically requests relief from paying *all* NH PAP bill credits due and owing to CLECs "for the months of March and April, and prospectively for May and June 2009." FairPoint Petition at 1. FairPoint also requests that CLECs be required to repay FairPoint any bill credits FairPoint has made to CLECs during this time. *Id.* at 6-7. Soon after FairPoint's Petition, BayRing, joined by One Communications, filed a request for an Order compelling FairPoint to continue to provide the required bill credits, pending resolution of FairPoint's Petition, given the uncertainty surrounding whether FairPoint would continue to honor the terms of the NH PAP and the Commission's Orders.⁴

However, without any authorization from the Commission, on June 29, 2009, FairPoint announced to New Hampshire CLECs that it unilaterally ceased issuing bill credits to CLECs, as required under the NH PAP, pending the outcome of FairPoint's Waiver Requests in Docket No. DT 09-113 and related dockets pending before the Maine Public Utilities Commission and Vermont Public Service Board. *See* FairPoint Industry Notification – Accessible Letter, Number PRC 0018-06292009 (June 29, 2009) (attached as Exhibit A). This Industry Letter confirms that FairPoint is intentionally withholding penalties owed pursuant to the provisions of the NH PAP for its substandard wholesale performance during the months of April 2009 (and

³ BayRing filed an opposition to FairPoint's previous waiver requests in Docket No. DT 09-059.

⁴ BayRing's Request for an Order compelling bill credits was filed on June 25, 2009, followed by a letter from

beyond) and that FairPoint intends to continue to withhold such amounts owed under the NH PAP for however long it takes the Commission to decide this matter.⁵

FairPoint's unilateral decision to violate the terms of the NH PAP, and discontinue compliance with its provisions, constitutes both a material breach of the NH PAP, and a complete disregard for the Order of the Commission establishing the NH PAP. FairPoint completely ignores the process established to amend the NH PAP, particularly the requirement that no changes to the NH PAP may be unilaterally implemented by FairPoint without first obtaining an Order from the Commission. This utter disregard for the express terms of the NH PAP, as well as the Commission's merger approval order requiring FairPoint to comply with the NH PAP, compels the Commission to impose appropriate penalties under New Hampshire public utility law.

FairPoint's decision to take the law into its own hands and willfully ignore its mandated obligations under the NH PAP jeopardizes the entire self-executing regulatory scheme agreed to by the parties and ordered by the Commission. By unilaterally withholding penalty payments designed to incentivize FairPoint to provide required wholesale services on a nondiscriminatory basis to the CLECs, FairPoint undermines the orderly provision of quality telephone service on a competitive basis. Therefore, the undersigned CLECs respectfully request the Commission to act with haste to end FairPoint's noncompliance through the imposition of appropriate penalties and the imposition of any other sanctions that the Commission finds appropriate.

One Communications filed on June 29, 2009 requesting an Order forbidding FairPoint from ceasing all payments.

ARGUMENT

I. Prior Commission Orders Require FairPoint to Issue NH PAP Credits When Due

As FairPoint acknowledges in its Petition, the NH PAP is a self-executing enforcement plan based on identified metrics that was made applicable to FairPoint through Order No. 24,823 in Docket No. DT 07-011 (Order Approving Settlement Agreement with Conditions) (February 25, 2008). FairPoint Petition at 2. In the CLEC Settlement Agreement in DT 07-011,⁶ FairPoint agreed to “adhere to the applicable PAP and C2C Guidelines as implemented in each of the three states and be subject to potential penalties and enforcement mechanisms set forth in those documents.” CLEC Settlement Agreement ¶ 6(a).⁷ Moreover, as BayRing pointed out in its request for an Order compelling continued payments, the CLEC Settlement Agreement only authorized a temporary suspension of NH PAP payments for one month following the cutover. CLEC Settlement Agreement ¶ 6(d).⁸ And, while FairPoint has recently petitioned the Commission to “permanently waive” (*i.e.*, revise and/or delete) sections of the NH PAP in Docket No. DT 09-059, at no point has FairPoint been granted any authority to stop making any payments for poor performance while its waiver requests are pending resolution.

In any event, FairPoint does not now dispute, nor could it dispute, that its compliance

⁵ FairPoint has since withheld all NH PAP penalty payments due and owing for May 2009.

⁶ Exhibit 2 to the Settlement Agreement is a “CLEC Settlement Agreement” entered into between FairPoint, Bayring, segTEL and Otel. See DT 07-011 Order at 73.

⁷ FairPoint’s Petition is incorrect that the NH PAP filed by Verizon on November 21, 2006 in Docket DT 06-168 is the current approved NH PAP. See FairPoint Petition at 1. The document referred to by FairPoint that was filed in November 2006 was never approved by the Commission. The NH PAP currently approved for use in New Hampshire is the NH PAP approved in Docket DT 05-096 in Order No. 24,504 (dated Aug 19, 2005) and this is reflected as the current NH PAP on the Commission’s web page. See <http://www.puc.state.nh.us/Telecom/clecs.htm>.

⁸ One Communications was not a signatory to the CLEC Settlement Agreement and argued strenuously against the imposition of a one month NH PAP “grace period” following cutover. However, in the DT 07-011 Order, the Commission mandated that most of the terms of the CLEC Settlement Agreement, including the one month NH PAP grace period, be applicable to all New Hampshire CLECs whether or not the CLEC signed the CLEC Settlement Agreement. See DT 07-011 Order at 76.

with the NH PAP is mandated by the Commission's February 25, 2008 Order in Docket DT 07-011 approving FairPoint's merger request. Furthermore, FairPoint does not now dispute, nor could it dispute, that the terms of the NH PAP were set by Order of the Commission when the PAP was approved as part of Verizon's request for Section 271 authority as approved in the Commission's Orders No. 23,940 and 23,976 in Docket DT 01-006. Finally, it is undisputed that the NH PAP requires that bill credits be applied immediately to account for the poor performance that has occurred. Specifically, the NH PAP (pg 25) establishes this requirement succinctly:

Should [FairPoint's] performance not meet the standards set forth above for the [Mode of Entry] and Critical Measure measurements, CLECs will receive bill credits for those MOE categories or Critical Measures scores that fall below the respective minimum levels.

Moreover, the NH PAP requires:

Within 28 days of the close of the month in which performance is being reviewed, ***NH PAP credits will be determined and submitted for processing for each CLEC***, in accordance with and subject to the provisions of Section II(H) below and Appendix D.

NH PAP, Section I(A)(2)(e) (emphasis added). Under no circumstances does the NH PAP authorize FairPoint to simply declare that it no longer will make any payments as required by these terms of the NH PAP or that timely applying bill credits is no longer warranted.

Rather, the NH PAP has a procedure that allows FairPoint to request modifications to, or seek waiver of, the NH PAP requirements under certain designated circumstances, but only upon Order of this Commission.⁹ There is simply no authority in the NH PAP to allow

⁹ The NH PAP has specific procedures whereby FairPoint may seek exceptions and waivers from the obligations in the NH PAP (Section II(J)) and for seeking changes or modifications as part of Commission review and/or audit (Section II(K)).

FairPoint to undertake a self-help plan to stop making penalty payments for poor performance simply because FairPoint believes it does not want to make any further payments. On the contrary, the NH PAP expressly requires that no changes may be implemented until so ordered by the Commission. The NH PAP states that “[u]ntil such time as a replacement mechanism is developed or the Plan is rescinded, the Plan will remain in effect, as it may be modified from time to time by the Commission” (NH PAP, Section I(I)), and that “[a]ny modifications to the Plan will be implemented as soon as is reasonably practical *after Commission approval of the modifications.*” (NH PAP, Section I(K) at 24)(emphasis added).

FairPoint’s requests for waivers of the applicability of the NH PAP in Docket Nos. DT 09-059 and DT 09-113 merely confirms and acknowledges the applicability and binding effect of the NH PAP’s terms upon FairPoint. FairPoint’s Petition confirms that while those requirements are in place any party may petition the Commission to change particular requirements; however, such efforts also confirm that no party has the authority to unilaterally disregard their obligations under the NH PAP while such requests for relief are pending. Such unilateral action amounts to an unjustified breach of the binding obligations established by the NH PAP itself, the contractual obligations set forth in the CLEC Settlement Agreement, and specifically contradicts direct Orders of the Commission.

In this case FairPoint’s actions are particularly injurious because the CLECs are now being penalized unfairly twice – first for the failure of FairPoint to provide just, reasonable and nondiscriminatory wholesale service as required, and second for the failure of FairPoint to provide the remedial payments to each CLEC for FairPoint’s admitted failures to provide the minimum required service quality. The NH PAP is designed to address such failures and has

been determined to be critical to the CLECs ability to compete in the New Hampshire local exchange market. See Orders No. 23,940 and 23,976 in Docket DT 01-006. The Commission recognized the importance of the continued application of the NH PAP, including the required remedial payments, as a necessary condition of its approval of the transaction in DT-07-011. See Order No. 24, 823 at pg. 76.

II. FairPoint Has Unilaterally Discontinued Compliance with the NH PAP

Attached as Exhibit A is the June 29, 2009 Industry Letter issued by FairPoint confirming that FairPoint is withholding NH PAP credits intentionally and without authorization from the Commission. According to the Letter, credits will remain "in pending status," (meaning credits will be intentionally withheld until the Commission reviews the waiver requests). Thus, there does not appear to be any dispute that by refusing to issue NH PAP credits, FairPoint is unilaterally disregarding the agreement it made to comply with the NH PAP, and that FairPoint is further unilaterally disregarding the Order of the Commission in DT 07-011 applying the NH PAP to FairPoint as the NH PAP currently exists.

III. FairPoint's Unilateral Decision to Cease Compliance with an Explicit Commission Order Subjects FairPoint to Appropriate Penalties Under New Hampshire Public Utility Law

FairPoint is required to comply with every order made by the Commission so long as that order remains in force. RSA 365:40. Pursuant to RSA 365:41, a utility that

fails, omits or neglects to obey, observe or comply with any order, direction or requirement of the commission, shall be subject to a civil penalty, as determined by the commission, not to exceed \$250,000 or 2.5 percent of the annual gross revenue that the utility received from sales in the state, whichever is lower.

FairPoint has an obligation, imposed by the Commission pursuant to its Order in DT 07-011, requiring that FairPoint comply with all the terms of the NH PAP, including

providing CLECs specified payments and/or bill credits. Moreover, FairPoint has requested a waiver of these provisions of the NH PAP, thereby admitting the Commission's authority and the applicability of the terms of the NH PAP. FairPoint's statements in its Industry Letter (Exhibit A) confirm that FairPoint is intentionally withholding those credits duly owing to CLECs that have been made applicable to CLECs through the Commission's Order in DT 07-011.

Beyond the obvious financial impact this causes CLECs, and beyond the obvious impacts to the CLEC's businesses caused by continued poor wholesale service, this intentional and ongoing violation of valid Commission Orders undermines this Commission's authority as a regulatory body, and is detrimental to the viability of any self-executing enforcement plan imposed by such Commission Orders.

CONCLUSION

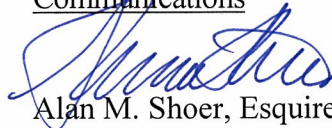
For all the reasons stated above, the CLECs respectfully request that the Commission impose the civil penalties and appropriate sanctions authorized by NH RSA 365:41 to account for FairPoint's violation of the Commission's February 25, 2008 Order No. 24,823 in Docket No. DT 07-011, the Commission Orders approving the NH PAP, and the terms of the NH PAP itself.¹⁰ Specifically, the Commission should utilize the statutory penalty authority of NH RSA 365:41 to impose an appropriate civil penalty on FairPoint until such time as FairPoint complies with the Commission's Order imposing the obligations on FairPoint to comply with the NH PAP.

¹⁰ BayRing and One Communications have already requested an Order from the Commission to compel continued bill credits pending the resolution of the FairPoint Petition.

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Respectfully submitted,

Freedom Ring Communications d/b/a BayRing
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EXHIBIT A

FAIRPOINT INDUSTRY NOTIFICATION

DATED JUNE 29, 2009



1 Davis Farm Road
Portland, ME 04103

Industry Notification – Accessible Letter

Date:	June 29, 2009	Number: PRC 0018-06292009
Effective Date	June 29, 2009	Category: PAP Credits
Subject:	PAP Credits – On Hold Until Outcome of PAP Waiver Request	
Related Letters:		
Attachments:	N/A	
Target Audience	IXC, CLEC, Wireless, UNE	
Area Impacted:	Maine, New Hampshire, and Vermont	
Wholesale Customer Response deadline:	N/A	
Contact:	Send all Questions to: wholesalebilling@FairPoint.com	
Conference Call/Meeting	N/A	

Dear FairPoint Communications Wholesale Customer:

This notice is being sent to advise FairPoint Communications Wholesale Customers that FairPoint has filed for PAP Waivers in all three states. The PAP credits will remain in pending status while the three state commissions review FairPoint's requests.

Please refer all questions to wholesalebilling@fairpoint.com



Please send all questions to WHD@FairPoint.com