

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 07-011

**Northern New England Telephone Operations LLC
d/b/a FairPoint Communications – NNE**

**STAFF RESPONSE TO FAIRPOINT'S
BROADBAND EXPANSION PROJECT PROPOSAL**

NOW COMES, the Staff of the Public Utilities Commission and offers this response to the Broadband Expansion Project Proposal provided by Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE (FairPoint) to the Commission on June 6, 2012.

I. PRELIMINARY MATTERS

Pursuant to the Commission's directives in Order No. 25,360, dated May 8, 2012, FairPoint undertook to prepare a proposal for an escrow arrangement for broadband expansion that would satisfy the conditions set out by the Commission. Consistent with that order, prior to filing its proposed escrow arrangement on June 6, 2012, FairPoint engaged in consultations with Staff and the Office of the Attorney General. Staff notes that leading up to the submission of this proposal, Staff offered input to FairPoint and the submitted proposal contains elements reflecting some input Staff provided. Staff appreciates the willingness of FairPoint to consider some of the points Staff raised. Ultimately, however, this proposal is one produced by FairPoint for the Commission's consideration, and it is on that basis that Staff offers this response. Staff makes clear that the purpose of this response is not to speak to the negotiation of specific points or to make specific recommendations. Instead, this submission is intended to highlight aspects of the filed proposal and explain Staff's understanding of their operation in light of the Commission's requirements.

As a further preliminary matter, although the Commission's order referenced the inclusion of "any other necessary agency," in the discussions leading to this proposal, Staff is not aware of any consultations involving any other state agency, other than the Office of the Attorney General, with respect to this proposal. FairPoint's cover letter, at page 3, states that the parties met, along with representatives of Department of Resources and Economic Development (DRED), on June 4, 2012, to discuss the potential for DRED's involvement as a signatory to this proposal. For clarity, Staff confirms that there was a discussion about the potential involvement of DRED. Staff, however, did not, at any point, participate in any discussions involving DRED relating to the substance of the proposal or any of its provisions. To the extent there have been such discussions with DRED, Staff is not aware of them.

Lastly, as to FairPoint's general arguments regarding economic benefits, the Commission has already concluded both in the context of this docket and this specific proposal that there is economic benefit to be derived by New Hampshire through the expansion of broadband availability. *See, e.g., Verizon New England et al.*, Order No. 25,331 (Mar. 22, 2012) at 4 ("Notwithstanding the above conclusion that the penalty amount should be paid through credits to customers as FairPoint agreed to do in the 2008 and 2010 settlements, we recognize that there may be merit in FairPoint's contention that there would be a meaningful economic benefit in using the money to expand broadband in northern New Hampshire to customers who otherwise might not be served.") and *Verizon New England et al.*, Order No. 25,360 (May 8, 2012) at 4-5 ("To simply refund the penalty amounts to customers would, in our view, grant a relatively small benefit to individual households, while missing an opportunity to provide significant improvement to areas we consistently hear are in need of modern telecommunications options."). Moreover, in Order No. 25,360 the Commission set out a specific framework for a proposal to

expand broadband with service quality penalty funds. Accordingly, Staff's opinion is that the proposal should be judged against the framework established by the Commission, and not upon general arguments about economic benefits because the Commission has already concluded that the economic benefits are sufficient to justify this submission.

II. BROADBAND EXPANSION AGREEMENT

By its May 8, 2012 Order, the Commission determined that should FairPoint provide a proposal for an escrow arrangement it must include, at a minimum:

(1) a binding escrow agreement or other financial instrument, covering the \$2,823,751 in penalties and the additional \$500,000 FairPoint stated it would provide for broadband expansion in response to record request 3, funds being held by an entity unrelated to FairPoint; (2) a binding agreement with the Commission and the State of New Hampshire guaranteeing the enforceability of a broadband deployment plan by a state agency, notwithstanding legislative developments; (3) a commitment to expand broadband in areas of New Hampshire within FairPoint's franchise and unserved by another terrestrial broadband provider, not merely within one county or discrete area; (4) a specific minimum number of broadband connections that will be made above the 95 percent already required and a meaningful penalty for failure to meet that number by December 31, 2013; and (5) a binding commitment that, should FairPoint undertake broadband expansion but subsequently abandon the effort, for whatever reason, the balance then held in escrow be credited to customers.

Verizon New England, et al., Order No. 25,360 (May 8, 2012) at 8. Staff understands the purpose of the "Broadband Expansion Agreement" to be to conform to the Commission's requirements by defining the minimum requirements of the broadband expansion to be undertaken by FairPoint with the \$2,823,751 of retail service quality penalty funds as well as the additional \$500,000 that FairPoint has agreed to contribute to this broadband expansion.

As to the first issue covered in the Commission's order – that there be a binding escrow arrangement – FairPoint has segregated the relevant money in anticipation of funding an escrow arrangement with TD Bank, N.A. FairPoint has also provided a draft escrow agreement with TD Bank that would cover these funds following all relevant approvals. As such, though there is not

a “binding” escrow agreement, the broadband agreement calls for the creation of one upon obtaining the approvals and FairPoint has taken steps to fulfill that condition.

Next, as to an agreement with the Commission and the State of New Hampshire guaranteeing the enforceability of a broadband deployment plan by a state agency, notwithstanding legislative developments, section B.7 of the agreement provides that any interpretation of Senate Bill 48 (SB 48) will not prevent the implementation of any elements of the agreement or deprive any party of the benefits or obligations of the agreement. Thus, the agreement provides for its continuation following the passage of SB 48, though it is not clear how it would be enforced or whether the Commission would be required to rely upon the Office of the Attorney General to enforce the agreement in the event such action might be needed.

To the extent the Commission concludes that this provision satisfies the Commission’s requirement, there are certain elements of the agreement that relate to its enforceability that are not clear to Staff. The agreement in section A.5 on page 4 states that “If an Event of Default occurs and is continuing under the Credit Agreement, then at the written election of DRED and the Commission, this Agreement may be terminated and the balance of the Escrow shall be distributed pursuant to Section A.4 of this Agreement; provided, however, NNETO first shall be reimbursed for all costs incurred in connection with each project of the Broadband Expansion.” As written, this provision appears to make termination of the agreement in the event of default dependent upon the election of both the Commission and DRED. It is not clear to Staff how such a decision would be made or what process would govern a termination decision by two separate state agencies. It is also not clear how the matter would be resolved if the Commission and DRED are of different opinions about the process for or desirability of terminating the agreement. This lack of clarity is a particular concern in light of the Commission’s final

condition, discussed below, that if the project is terminated all remaining funds should be returned to customers. If the Commission and DRED disagree on the need to terminate the agreement it is not clear how or whether disbursements to customers might occur.

With respect to the third requirement that there be a commitment to expand broadband in areas of New Hampshire within FairPoint's franchise and unserved by another terrestrial broadband provider, the agreement provides, in section A.2, that FairPoint, Staff and DRED will collaborate on an actual build-out plan to be submitted to the Commission by November 1, 2012 consistent with Order No. 25,360. That section also provides that the plan will cover "NNETO's New Hampshire service territory within communities unserved by another terrestrial broadband provider, to the extent NNETO can determine such lack of coverage with then publicly available data." Section A.3 provides for a collaborative process, in the first instance, for necessary amendments to the plan and for resort to the Commission if the collaboration is not successful. Thus, as written, the agreement does not limit construction to a single area, though it is possible that a build-out plan, for engineering or other reasons, could be so limited, subject to the approval of the Commission.

As to the Commission's condition that the agreement must provide a specific minimum number of broadband connections that will be made above the 95 percent already required as well as a meaningful penalty for failure to meet that number by December 31, 2013, the agreement addresses one part of this condition. In section A.2 the agreement states that the expansion plan will be developed with the goal of bringing connectivity to a minimum of 1,000 to 3,000 access lines in excess of those required to be served pursuant to existing commitments.

There is not, however, a penalty provided for failing to achieve that goal. In its cover letter, FairPoint states that it believes the penalties in its original commitments are sufficient and

“meaningful” penalties. It, therefore, proposed no further penalties. Staff notes that the penalties relating to FairPoint’s original commitments relate only to any failure to achieve 95 percent availability, rather than failure to reach 1,000-3,000 access lines beyond 95 percent, and are not, in any way, tied to FairPoint’s achievement of any commitments under this new agreement. As such, there is no “penalty for failure to meet that number” as required by the minimum conditions set out in the Commission’s order. In that there is no penalty, it is not clear to Staff what incentive there is in the agreement for FairPoint to actually create the 1,000 to 3,000 promised new connections by December 31, 2013. Furthermore, as noted above, the agreement provides for its continuation irrespective of the passage of SB 48. It is not clear, however, what actions the Commission could take should the build-out goal not be met absent a penalty being included in the agreement itself. It is especially a concern if by December 31, 2013 there is little or no money left in the escrow and fewer than 1,000 new access lines, or even no new access lines, have received broadband availability.

As a final factor the Commission required that there be a binding commitment that, should FairPoint undertake broadband expansion but subsequently abandon the effort, for whatever reason, the balance then held in escrow would be credited to customers. Section A.4 of the agreement states that in the event the expansion is terminated for any reason the balance of the penalty funds will be refunded to customers, and the balance of the additional money supplied by FairPoint will be returned to FairPoint. Staff notes, however, that if the Commission and DRED elect to terminate the agreement in the event of a default as described in section A.5, then all costs incurred by FairPoint are reimbursed prior to any distribution to customers. It appears possible that in such a scenario there could be little or no money in the escrow to refund, as well as the possibility that no projects have been fully completed and thus, no additional

customers served. Further, Staff's understanding, based upon information from the Office of the Attorney General, is that the level of control granted to FairPoint in this circumstance makes it unclear whether the escrowed funds would be protected from creditors in the event of a default.

Apart from the degree to which the agreement conforms with the minimum requirements the Commission set out, Staff highlights one other section of the agreement to explain Staff's understanding of the way it is intended to function. In section A.5 the agreement explains how funds will be distributed. It provides that the overall broadband expansion will be tracked on a project-by-project basis and that Staff and DRED will receive monthly reports on the status of the projects and their related expenditures. Prior to FairPoint advertising the availability of broadband in a given project area it will be eligible to draw from the escrow up to fifty percent of the monthly costs expended for those projects. Upon advertising the availability of broadband, the remaining fifty percent is available.

Staff illustrates its understanding of this section with the following example: The plan calls for a project of a build out to 50 homes in Town X at a cost of \$500,000 to begin on June 1 and end on October 1 of 2013. For June, FairPoint reports that it has spent \$250,000 on this project and it would be eligible to withdraw up to \$125,000 from the escrow. For July, it reports an additional \$150,000 has been spent and it is eligible for an additional \$75,000. For August and September it reports spending \$50,000 each month and is eligible for \$25,000 in each month. As of September 30, 2013, it has spent \$500,000 and received \$250,000. On October 1, it distributes an advertisement to the 50 residences informing them that broadband is now available to them. FairPoint is then eligible to withdraw the additional \$250,000.

Staff notes that the agreement, as written, does not require the advance approval of any state entity prior to disbursements being made, but only that FairPoint notify Staff and DRED

prior to a disbursement. The disbursements are driven entirely by FairPoint's provision of documentation to the escrow agent.

III. CONCLUSION

As noted above, Staff's purpose in providing this response is to explain Staff's understanding of the proposal made by FairPoint and the ways that it addresses the conditions set by the Commission. Staff is willing to address any of these matters further in the context of a hearing or in writing as the Commission might request or require.

Respectfully submitted,

Staff of the New Hampshire Public Utilities Commission
By its attorney,

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