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STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: June 10, 2013
AT (OFFICE): NHPUC

FROM: Leszek Stachow, Analyst 

SUBJECT: DT 11-061 New England Telephone Operations LLC d/b/a FairPoint Communications-NNE Petition for Approval of Simplified Metrics Plan and Wholesale Performance Plan

TO: Commission
Debra Howland, Executive Director

On May 13, 2013, the Commission received a Joint Motion for Expedited Approval of Arbitration in the above mentioned case from the following CLEC's: Biddeford Internet Corporation; Comcast Phone of New Hampshire; CRC Communication of Maine; CTC Communication Corp; Lightship Telecom LLC; Conversent Communication of New Hampshire; Freedom Ring Communications; National Mobile Communications Corp, and FairPoint Communications NNE (the Moving Parties).

According to the terms of the Motion, a joint three state arbitration procedure would be established that would seek to address and resolve issues associated with the establishment of the Wholesale Assurance Plan, (WPP), formerly known as the Performance Assurance Plan. This process would involve the three Northern New England States, i.e. Maine, New Hampshire and Vermont, and therefore similar concurrence, approval and adoption is being sought from the Maine Public Utilities Commission and the Vermont Public Service Board.

Scope

According to the Moving Parties, such a procedure would enable resolution of many issues in an efficient and expedited manner. Issues under consideration may include limits on dollars placed at risk, rates for per unit bill credits, whether escalators should apply for repeated instances of missed performance, changes in law provisions, term of the plan, remedies for late or inaccurate reporting, and the inclusion or exclusion of certain metrics within the reporting and /or bill credit portions of the plan.

Upon completion of on-going negotiations concerning plan terms and metric guidelines, the Moving Parties have declared their intention to finalize a list of issues that would define the scope of arbitration.

Procedure

The proposed procedure anticipates that each State Commission/Board would appoint a staff representative to serve on an Arbitration Panel. Parties other than Moving Parties would be permitted to intervene and participate as a party to the arbitration. All parties would have an opportunity to submit position statements on issues to be arbitrated, which would be subject to informational requests from the Panel and limited discovery from the Parties. During the hearing, position statements would serve as pre-filed testimony, and other documents could be offered into evidence, with sponsoring witnesses subject to cross examination. The process also anticipates the opportunity for live rebuttal testimony.

Following the hearing, the Panel would circulate findings of fact and conclusions of law, and after an opportunity for written comment, would adopt a final Proposed Decision. Each Arbitrator would file the Proposed Decision with his/her respective Commission/Board. Parties could file Exceptions with the Commissions concerning any portion of the final proposed decision based on alleged errors of law; in addition Parties would have the ability to petition for *de novo* review of any decision reached by the Arbitrators on issues that were outside the scope of arbitration submitted by the Moving Parties. The Commissions/Board would then issue a final decision encompassing all issues related to the establishment of the WPP.

According to the Moving Parties, the Commission has the authority under RSA 363:17 to delegate the above-mentioned arbitration functions to members of Staff. Moving Parties have also stated that the proposed arbitration procedure preserves all procedural rights provided under the Commission's rules, since no hearing is required to modify the existing PAP.

Staff has never understood RSA 363:17 to allow a recommendation of a hearing examiner to bind the Commission in matters of either fact or law. This concern was raised at a meeting with Staff and the Parties and Staff recommended the parties file a settlement agreement based on the arbitrators' decision, to be reviewed by the Commission under NH Admin Code Puc 203.20 (b).

Staff recommendation

This Motion was submitted after extensive consultation between the Parties and Staff of the three Commissions. While the objective is to ensure a unified three state plan, the Motion does acknowledge that each state may have issues to resolve separately. Staff fully acknowledges the work that has been carried out in moving the process forward and believes that adoption of this procedure will facilitate the rapid resolution of many of the

issues associated with a revised Performance Assurance Plan. Staff recommends that the Commission first determine whether RSA 363:17 permits the Commission to be bound by the factual determinations of a hearings examiner/arbitrator and if so, Staff recommends approval.