

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

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

DT 11-061

MOTION TO STAY PROCEEDING

CTC Communications Corp., Lightship Telecom LLC, Choice One of New Hampshire Inc., and Conversent Communications of New Hampshire LLC (all doing business as “One Communications Solutions of New Hampshire”¹); segTEL, Inc. (“segTEL”); Freedom Ring Communications, LLC, d/b/a Bayring Communications (“Bayring”); CRC Communications of Maine, Inc. d/b/a OTT Communications (“OTT”); Biddeford Internet Corp., d/b/a Great Works Internet (“GWI”); and National Mobile Communications Corp. d/b/a Sovernet Communications (“Sovernet”) (together, the “Joint CLECs”) submit this Motion to Stay Proceedings until the New Hampshire Public Utilities Commission (“Commission”) has completed its audit of FairPoint Communications’ (“FairPoint’s”) wholesale performance assurance plan (“PAP”). As explained below, the Joint CLECs urge the Commission to stay this proceedings while the audit is taking place in the interests of avoiding overlapping and unnecessary litigation and in the interests of efficiency and conservation of the Commission’s and parties’ resources.

BACKGROUND

On November 17, 2010, December 7, 2010, and January 10, 2011, the above-named CLECs urged the Commission to undertake an audit of FairPoint’s performance under the PAP, and to do so prior to any discussions towards a successor wholesale performance plan.² The

¹ One Communications is now an operating subsidiary of Earthlink, Inc.

² These filings and FairPoint’s responses to them are available on the NH PUC website at

CLECs' requests stemmed both from FairPoint's obligations under the Commission's 2008 Order approving the sale of the Verizon property to FairPoint,³ and the CLECs' continuing concerns that FairPoint has not been implementing the existing PAP fully or accurately. On February 25, 2011, the Commission issued a Secretarial Letter in which the Commission indicated its intent to undertake an audit of the reporting and implementation of FairPoint's existing PAP. In the Secretarial Letter, the Commission also stayed the related docket in which FairPoint requested a waiver of certain PAP reporting requirements (Docket DT 09-059), and also stayed the docket in which FairPoint sought to modify the existing PAP to reduce the total dollars at risk pursuant to the PAP (Docket DT 09-113).⁴

On March 24, 2011, FairPoint filed with the Commission a petition for approval of a "simplified" wholesale performance plan to replace the existing PAP (Docket DT 11-061). It is this docket which the Joint CLECs seek to have stayed pending the outcome of the Commission's audit of FairPoint's existing PAP.

ARGUMENT

In its Secretarial Letter, the Commission held:

Docket No. DT 09-059 relates, in part, to FairPoint's request to waive certain reporting requirements under the PAP. Docket No. DT 09-113 relates to FairPoint's request to modify the PAP to reduce the total dollars at risk pursuant to the PAP. ***The resolution of both dockets depends on an understanding of the current PAP and its implementation. Because the Commission will be undertaking an audit of the PAP to develop such***

<http://www.puc.state.nh.us/Regulatory/Docketbk/2007/07-011-3.htm> and <http://www.puc.state.nh.us/Regulatory/Docketbk/2009/09-113.htm>.

³ In its Order No. 24,823 (Feb. 25, 2008), the Commission approved the terms of a settlement agreement between Commission Staff and FairPoint. In ¶ 9.4 of the settlement, FairPoint agreed to an audit of the existing PAP if no successor plan was in place by June 1, 2010.

⁴ The Secretarial Letter is included as Attachment 1. On March 24, 2011, FairPoint also filed a petition to lift the stay in Docket DT 09-113 as well as an amended petition in that docket seeking a further modification to the existing PAP. The Joint CLECs oppose both FairPoint's request to lift the stay in Docket DT 09-113 and FairPoint's request to further modify the existing PAP.

an understanding, these dockets are stayed pending the completion of the audit.

Secretarial Letter, Docket Nos. DT 09-059, 09-113 (NH Pub. Utils. Comm. Feb. 25, 2011) (emphasis added). For the reasons discussed below, the Joint CLECs urge the Commission to reach the same conclusions with regard to DT 11-061 and stay this proceeding as well.

The PAP is a key mechanism established by the Commission to ensure that a competitive telecommunications market continues to operate in New Hampshire. The integrity of the existing PAP and its underlying C2C metrics are crucial to that goal. Recognizing the importance of accurate data gathering and reporting, the New York Public Service Commission, the Massachusetts Department of Telecommunications and Energy, and many other state commissions required audits soon after initial implementation of PAPs in those states. The required audits also recognized that, at the time, Verizon's operating systems used to serve wholesale customers, which the C2C and PAP results measured, were new and untried.⁵

The integrity of the C2C and PAP reports are no less important today to the Commission's ability to monitor the functioning of competitive telecommunications markets than when Verizon was first granted Section 271 approval. However, as FairPoint has pointed out to the Commission on numerous occasions, after an interim period during which it relied on Verizon's systems, FairPoint migrated all of its operations to entirely new systems. As with Verizon's initial PAP and C2C implementation, without an audit, there is no factual basis for concluding that the results FairPoint is now reporting are accurate. Without 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.

⁵ See *Performance Assurance Plan Audit*, D.T.E. 03-50, at 4 (Mass. Dept. of Telecom. & Energy Oct. 22, 2003) (Department determined that before it would consider modifying its annual PAP audit requirement, it would
(continued . . .)

Ensuring that the existing PAP and C2C metrics are accurate and are operating as the Commission intended is an essential foundation that must be established before any meaningful progress can be made on a successor plan or other proposed changes to the existing plan. Only 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.

It 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. As the Commission knows, PAP credits skyrocketed after cutover and they remain many multiples of what they were before the acquisition – or for that matter, what they were after the March 2008 closing but before the February 2009 cutover. The most recently available results – that of FairPoint's February 2011 performance – still show New Hampshire penalties *in excess of \$500,000 for one month of performance*.⁶ This amount is surprisingly low compared to January 2011 penalties of *over \$1,000,000*.⁷ These two most recent months of reporting highlight the erratic nature of FairPoint's management of its operations and the PAP itself. The decline in FairPoint's wholesale performance has been exacerbated by FairPoint's many errors in its implementation of the requirements of the existing PAP. FairPoint's failure to

require at least one additional annual audit).

⁶ FairPoint New Hampshire's Market Adjustment Summary for February 2011 is included as Attachment 2. It is important to note however, that only a fraction of that amount will actually be credited to CLECs given FairPoint's interpretation of its Wholesale Package Agreements as precluding *any* PAP payments to those CLECs who enter into such agreements. See Motion to Dismiss of One Communications, Docket DT 09-113, at 6-8 (filed 9/22/09); Motion to Dismiss of Bayring and segTEL, Docket DT 09-113, at 13-14 (filed 9/22/09); Motion to Dismiss of CRC Communications of Maine, Docket DT 09-113, at 5-7 (filed 9/22/09).

⁷ Included as Attachment 3 is a chart highlighting the significant increase and fluctuation in FairPoint's New Hampshire PAP penalties since April 2008.

accurately calculate and report MOE doubling credits for almost every month since cutover is an obvious example.⁸

We respectfully suggest that, rather than seek to to scrap the existing PAP entirely in Docket DT 11-061, FairPoint can best address its exposure regarding the continued PAP penalty payments by improving its wholesale service performance. Verizon's incurrence of occasional, minimal PAP penalties prior to divesting its northern New England properties demonstrates that this is possible. FairPoint's approach is premature given the circumstances. As recognized in the Commission's February 25, 2011 Secretarial Letter, the proper approach is to improve wholesale service quality and restore the integrity of the data, operation and reporting of the current PAP and its processes (which will be the outcome of the audit) *prior to* any permanent changes to the PAP in New Hampshire. To be sure, a fully litigated adversarial proceeding to establish a new PAP in New Hampshire is neither desired by the Joint CLECs nor will it result in the best outcome.

FairPoint, the Joint CLECs, and the Commission all have limited resources. The efforts, time and resources necessary to litigate a new PAP in New Hampshire will be substantial. This matter involves complex issues and cannot be quickly decided. Yet the substantial commitment of resources that FairPoint seeks the CLECs and the Commission to expend will only result in unnecessary litigation. While the audit is underway, and DT 09-113 and DT 09-059 are stayed, the best approach is for the Commission to conserve resources and likewise stay *all* the PAP-related New Hampshire proceedings, including DT 11-061. When the audit is concluded, and the recommendations, if any, of the independent auditors are put in place (which will affect FairPoint's performance and reporting across the three northern New England states), then that

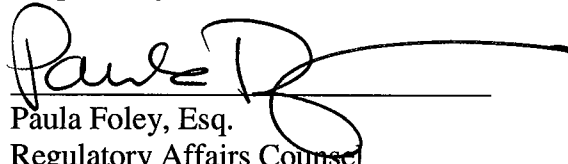
⁸ FairPoint's Accessible Letter regarding the MOE doubling issue is included as Attachment 4.

might be the time to talk about changing the existing PAP and litigate changes if agreement cannot be reached – not before.

CONCLUSION

For all the above reasons, the Joint CLECs respectfully request that the Commission stay the proceedings in Docket DT 11-061 until after the Commission has completed its audit of FairPoint's existing PAP.

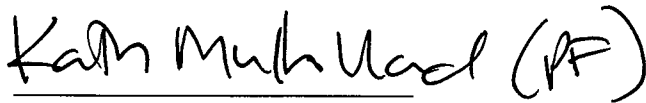
Respectfully Submitted,



Paula Foley, Esq.
Regulatory Affairs Counsel
One Communications, an Earthlink Business
company
5 Wall Street
Burlington, MA 01803
Tel 781-362-5713
pfoley@corp.earthlink.com



Lawrence F. Lackey
Director, Regulatory Affairs
Sovernet Communications
276 East Allen Street
Winoski, VT 05404
Tel 820-460-9133
llackey@sover.net



Kath Mulholland
Director of Operations
segTEL, Inc.
P.O. Box 610
Lebanon, NH 03766
Tel 603-676-8222 X103
kath@segstel.com

Trina M. Bragdon (PF)

Trina M. Bragdon, Esq.
Director of Legal Affairs
OTT Communications
900 D Hammond St.
Bangor, ME 04401
Office: (207) 992-9920
Fax: (207) 992-9992
TRINA.BRAGDON@ottcommunications.com

Frederick S. Samp (PF)

Frederick S. Samp, Esq.
General Counsel
Great Works Internet
8 Pomerleau Street
Biddeford, Maine 04005
(207) 602-1136
esamp@gwi.net

Benjamin P. Thayer (PF)

Benjamin P. Thayer
President
Bayring Communications
359 Corporate Drive
Portsmouth, NH 03801
(603) 766-3299
bthayer@bayring.com

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