

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

**VERIZON NEW ENGLAND INC., BELL
ATLANTIC COMMUNICATIONS, INC.,
NYNEX LONG DISTANCE COMPANY
AND VERIZON SELECT SERVICES, INC.
TRANSFER OF ASSETS TO FAIRPOINT
COMMUNICATIONS, INC.**

Docket DT 09-___

**OBJECTION OF FREEDOM RING COMMUNICATIONS, LLC D/B/A BAYRING
COMMUNICATIONS TO PETITION OF FAIRPOINT COMMUNICATIONS
FOR WAIVER OF CERTAIN REQUIREMENTS UNDER THE PERFORMANCE
ASSURANCE PLAN AND CARRIER TO CARRIER GUIDELINES**

Freedom Ring Communications, LLC d/b/a BayRing Communications (“BayRing”) files this objection to the Petition of Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (“FairPoint”) to waive certain requirements of the Performance Assurance Plan (“PAP”) and associated Carrier to Carrier Guidelines (“C2C”) that it agreed to abide by in the CLEC settlement approved by the Commission in Order No.24,823.¹ BayRing objects to FairPoint’s Petition, urges the Commission to deny it, and states as follows:

1. FairPoint asserts that “[a]s a result of the implementation of its systems, [it] will no longer be able to report the results of certain measures” and “requests the Commission [to] permanently waive the reporting requirements and associated penalty requirements for these metrics.”²

¹ Docket DT 07-011, *Verizon New England, Inc. Bell Atlantic Communications, Inc. NYNEX Long Distance Co., Verizon Select Services, Inc. and FairPoint Communications, Inc., Petition for Authority To Transfer Assets and Franchise*, Order Approving Settlement Agreement with Conditions (February 25, 2008) (hereinafter, the *Transfer Order*).

² *Petition of FairPoint Communications for Waiver of Certain Requirements Under the Performance Assurance Plan and Carrier to Carrier Guidelines*, March 26, 2009, paragraph 2 (Such metrics include: “(1) information

2. FairPoint also requests that “the Commission grant a temporary one month waiver of the reporting requirements beyond the current one month grace period as well as any associated penalties for eleven (11) [other metrics], for which the data will not be available for the months of February and March, due to either systems issues where programming changes need to be implemented, a lack of data in the systems as a result of the manual processing of orders, or a lack of data as a result of delay in the carrier billing cycle.”³

3. FairPoint’s Petition violates the letter and spirit of the CLEC Settlement Agreement that was approved by the Commission in the *Transfer Order*. Paragraph 6(a), (b) and (d) of the CLEC Settlement Agreement state as follows:
 - a. *Telco will adhere to the applicable PAP and C2C Guidelines as implemented in each of the three states and be subject to the potential penalties and enforcement mechanisms set forth in those documents.*

 - b. Any CLEC may seek enforcement of the applicable PAP, even if such right is not expressly incorporated in the interconnection agreement, tariff or SGAT pursuant to which the CLEC purchases service.

 - d. *Reporting obligations and penalties under the PAP or C2C Guidelines will be temporarily suspended on the day of the cutover (the last business day of the month in which cutover occurs) and for the following one month (i.e., a total of one month plus one to three days). All parties to this settlement agree not to oppose a request by FairPoint for a waiver of the PAP provisions as necessary to effectuate this temporary suspension. FairPoint shall take commercially reasonable steps to ensure that adequate personnel are available to process wholesale orders during the transition period and will structure the transition so as to be able to demonstrate that parity is maintained in the processing of retail and wholesale orders (emphasis added).*

associated with the corresponding retail operations is no longer available for certain parity metrics, (2) the operations underlying other measures are no longer being performed, (3) information associated with certain metrics is no longer available under FairPoint Communications systems, and (4) the services associated with other metrics have never been requested by the CLECs.”

³ *Id.* at paragraph 3.

4. As can be seen from the language in the paragraph 6(a) of CLEC Settlement, FairPoint agreed to adhere to the PAP and C2C Guidelines in New Hampshire, including the penalties and enforcement mechanisms. If it is true, as FairPoint states, that “[a]s a result of the implementation of its systems, [it] will no longer be able to report the results of certain measures,” then FairPoint has breached the CLEC Settlement and it should mitigate such breach by complying with the PAP instead of seeking to be released from it. Under paragraph 6(b), BayRing has the right to enforce the PAP and, accordingly, it urges the Commission to deny FairPoint’s Petition.
5. According to FairPoint, Appendix C of the PAP “provides that a waiver may be requested due to situations beyond [FairPoint’s] control that negatively affect its ability to satisfy only those measures with Benchmark standards ...[where it can] demonstrate clearly and convincingly the extraordinary nature of the circumstances involved, the impact the circumstances had on [FairPoint Communications’] service quality, why [Fairpoint Communications] normal, reasonable preparation for difficult situations proved inadequate, and the specific days affected by the event.”⁴
6. However, the language from Appendix C that FairPoint has skipped over in the elliptical shown in the above quote includes the following sentence: “The performance requirements dictated by Benchmark Standards establish the quality of service under normal operating conditions, and do not necessarily establish the level of performance to be achieved during periods of emergency, catastrophe, natural

⁴ *Id.* at paragraph 4.

disaster, severe storms, or other events beyond [FairPoint's control]."⁵ This sentence certainly gives some important context to the kind of showing that is required to meet the standard for a waiver. As will be demonstrated below, none of the excuses provided in FairPoint's Petition meets the kind of showing that is required for a waiver of the PAP. Second, most of the metrics that are the subject of FairPoint's motion are Parity Standards, not Benchmark Standards, and are simply not eligible for a waiver. Further, Appendix C provides that any waiver petition must be filed within 45 days from the end of the month in which the event occurred. FairPoint has failed to meet this requirement as well.

7. According to the Petition, there are a number of reasons for the waiver request, all of which FairPoint asserts "are beyond its control" as follows:

*"The PAP reporting requirements and metrics were designed to reflect Verizon's 600+ systems. The terms of the asset acquisition arrangements required FairPoint Communications no longer use Verizon's systems, and therefore FairPoint Communications was required to build its own systems. Rather than duplicating Verizon's legacy systems, FairPoint Communications developed state-of-the-art systems designed for its needs and reflecting the recommendations of its consultant Capgemini. It would have been impractical and highly inefficient to replicate all of Verizon's systems subject to reporting requirements or metrics under the PAP, solely for the purpose of avoiding any change to those reporting requirements and metrics. As a result, FairPoint Communications submits that the need for a waiver is due to circumstances beyond its control. In addition, the PAP provisions concerning waiver requests should be extended to parity measures where, as here, the waiver is due to unavailability of retail results, rather than a failure to assure that wholesale results are in parity with retail results (emphasis added)."*⁶

8. It is simply untrue for FairPoint to assert that the "need for a waiver is due to circumstances beyond its control." First, FairPoint's excuse that the "*PAP reporting requirements and metrics were designed to reflect Verizon's 600+ systems*" was known at the outset of the transaction, far in advance of FairPoint's agreement to be

⁵ Verizon Performance Assurance Plan, Appx. C at page 39.

⁶ FairPoint's Petition, paragraph 5.

bound by the PAP. In fact, when CLECs pointed out the complexity of FairPoint's undertaking to develop its own systems and suggested in regulatory proceedings that FairPoint's plan to unilaterally cutover from Verizon's 600+ systems in May of 2008 was unrealistic, FairPoint downplayed what was in front of them as follows:

Q. Is it true that FairPoint must replace 600 Verizon systems in order to effectuate the cutover to a new FairPoint systems architecture?

A. (By Mr. Kurtze) No. The definition of system is not precise. Many of the so called "600 systems" in fact really are subsystems integrated over a period of time and constitute a component of an entire system.⁷

9. FairPoint's excuse that "[t]he terms of the asset acquisition arrangements required FairPoint Communications no longer use Verizon's systems, and therefore [that] FairPoint Communications was required to build its own systems" was also known at the outset, far in advance of entering into the CLEC settlement. At the risk of stating the obvious, far from being beyond FairPoint's control, the terms of the acquisition were negotiated by FairPoint. Further, it was FairPoint's decision to develop its so called "state-of- art systems" instead of duplicating Verizon's legacy systems. In any event, FairPoint had decided to develop such state-of-the art, custom-made systems well in advance of agreeing to be bound by the PAP and testified that they would be "more efficient" than Verizon's.⁸

10. Finally, FairPoint asserts that "[i]t would have been impractical and highly inefficient to replicate all of Verizon's systems subject to reporting requirements or metrics under the PAP, solely for the purpose of avoiding any change to those reporting requirements and metrics." This is truly concerning because it appears to suggest

⁷ NH PUC Docket DT 07-11, Joint Rebuttal Testimony of Michael Haga and Arther Kurtze on Behalf of FairPoint Communications, Inc (September 10, 2007), p. 22.

⁸ NH PUC Docket DT 07-11, Day 1 Public Hearing, Tr. at p. 48.

that, notwithstanding its commitments in regulatory proceedings, FairPoint made a conscious decision that it would be impractical and inefficient to design its systems to perform the very reports that it had committed to abide by. FairPoint agreed that it would be subject to the PAP and that agreement became a condition of the merger. Further, in connection with cutover readiness, the Liberty Group submitted reports that indicated that FairPoint had passed 100 percent of the tests for wholesale reports, which included testing for the PAP.⁹ Capgemini also testified in PUC proceedings that FairPoint's systems would "capture all the relevant data [f]or PAP and similar reporting" as follows:

"FairPoint was very clear to Capgemini very early in the process that complying with all reporting requirements from a regulatory point of view and complying with all of its contractual obligations that it was inheriting from Verizon. They even asked us to be certain that our systems provided that data....*So we are confident that our systems can capture all the relevant data [f]or PAP and similar reporting and the report systems can then generate the reports* (emphasis added)."¹⁰

It is simply untenable for FairPoint to first agree to abide by the PAP as a merger condition, to subsequently testify to cutover readiness based in part on successful PAP testing, but then assert after cutover that, due to circumstances beyond its control, it cannot abide by certain metrics in the PAP.

11. As demonstrated above, FairPoint has not met and cannot meet the criteria for obtaining a waiver under Appendix C of the PAP. First, most of the metrics for which it seeks a waiver are not Benchmark Standards and not eligible for a waiver. There is simply no right to obtain a waiver from metrics that demonstrate whether it is providing parity to wholesale customers. Second, none of the excuses that FairPoint provides reflect circumstances that are beyond its control. Third,

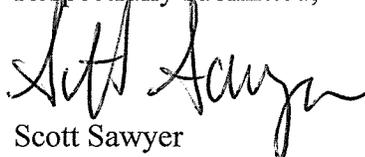
⁹ *Liberty Group Cutover Monitoring Status Report*, dated November 12, 2008, p. 7.

¹⁰ Vermont Public Service Board, Docket 7270, September 18, 2007 Transcript, p. 189.

FairPoint's petition is not timely because more than 45 days have elapsed from the month during which the alleged event occurred. All of the events that FairPoint has referred to occurred well in advance of the cutover, which was January 31, 2009. FairPoint's Petition was filed on March 26, 2009, 54 days following the cutover.

12. Accordingly, for the above reasons, BayRing objects to FairPoint's Petition and urges the Commission to deny it, at least and until an independent third party audit reveals that it will have no adverse impact of the wholesale service FairPoint provides.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott Sawyer". The signature is written in a cursive, flowing style.

Scott Sawyer
Counsel for BayRing