STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-113

Amended Petition and Request to Lift Stay of Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE Regarding the Performance Assurance Plan and Carrier to Carrier Guidelines

Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") hereby amends its Petition for Waiver, filed June 10, 2009 (the "Original Petition") as supplemented on August 7, 2009 (the "Supplement"), in the above captioned docket. This amendment is dictated by the passage of time, FairPoint's emergence from a bankruptcy process in which certain obligations were discharged, and the continued evolution of FairPoint's business processes that further distinguishes it from its predecessor, Verizon. Accordingly, FairPoint hereby submits this Amended Petition as a complete statement of its requested relief and in place of the relief requested in the Original Petition and Supplement. In addition, FairPoint reiterates its previous request to lift the stay of this proceeding.

Specifically, FairPoint renews its request that the Commission approve a modification to the Performance Assurance Plan (or its successor) ("PAP") to adjust the total dollars at risk. However, FairPoint amends and revises the original petition so that the adjustment would 1) be effective as of March 31, 2011, rather than retroactively to January 1, 2009 as originally requested and 2) would cap the yearly dollars at risk at 39% of the Northern New England ("NNE") combined five year rolling average of FairPoint's ARMIS (or ARMIS equivalent) net return, rather than at $14.7 million in New Hampshire and $29.96 million across the Northern

New England states.[1]

Furthermore, considering the impending prospect of a simplified metric plan unique to northern New England and the fact that FairPoint's operations are now distinct from Verizon's, developments in neighboring states are of diminished relevance. Thus, as justification for a reduced limit on dollars at risk, FairPoint now focuses only on the reasonableness of the amount of dollars at risk relative to FairPoint's financial results, rather than any comparison with Verizon's operations.[2]

I. BACKGROUND

In Docket No. DT 01-006, in conjunction with its efforts to obtain relief from the Federal Communications Commission ("FCC") under Section 271 of the Communications Act, Verizon New England Inc. ("Verizon") proposed to the Commission, and eventually obtained approval of, the PAP, modeled on the performance enforcement mechanisms previously approved by the New York and Massachusetts public utilities commissions.[3] Such a plan had been held by the FCC to be convincing evidence that the regional Bell Operating Companies would continue provisioning high quality service to Competitive Local Exchange Carriers ("CLECs") after obtaining Section 271 authority, an important element of the public interest standard. As part of its settlement of various issues related to the purchase of Verizon's assets in northern New England, FairPoint agreed to adopt the terms of the Verizon PAP.

The PAP is a self-executing enforcement plan based on metrics. "Metrics" is a term of art used to refer to numeric measurements of the quality or timeliness of FairPoint's performance of individual tasks undertaken to enable interconnection between itself and other carriers. Metrics

[1] Until FairPoint has five years of its own ARMIS returns, it will incorporate Verizon's (pre-transaction) annual returns to calculate the five-year rolling average return.

[2] However, it should be noted that virtually all remaining Verizon operations in other states have long since reduced maximum PAP dollars at risk, which should assure the Commission there is adequate and relevant precedent for this request.

[3] A very similar PAP was also approved by the Maine and Vermont commissions.

are of two types: "Parity" measures, which require parity with FairPoint's retail operations, and "Benchmark" measures, which compare actual performance to a benchmark. Together, these two types of measures are used to determine whether FairPoint is providing nondiscriminatory service to CLECs. Generally speaking, in the event that FairPoint misses a performance measure by a certain specified amount, each eligible CLEC is entitled to a bill credit as an incentive for FairPoint to meet the PAP metrics. Since these credits are intended as performance incentives, the amount of dollars at risk is capped at a specific annual amount. Then each month, one-twelfth (1/12) of the annual amount is available for billing credits.

Beginning in February 2009, FairPoint performed a cutover of its operations from the systems provided by Verizon under the terms of the Transition Services Agreement between the two parties. Despite extensive testing by FairPoint and its systems development contractor, and notwithstanding tremendous efforts on its part, FairPoint experienced severe problems in servicing its retail and wholesale customer base. These problems, which have been well documented, resulted in FairPoint missing a large number of PAP metrics. While FairPoint has significantly remedied these performance problems, and total PAP billing credits have been reduced by more than 49% from 2009 to 2010, calculated billing credits still total $23 million annually, or $1.9 million per month region wide.

II. THE CURRENT PERCENTAGE OF DOLLARS AT RISK IS UNDULY BURDENSOME AND CONTRARY TO THE INTENT OF THE PAP.

The underlying purpose of the PAP was to ensure that the Bell Operating Companies would continue to meet their Section 271 obligations after obtaining Section 271 relief.[4] Thus, in the New York 271 Order, the FCC found that an appropriate benchmark for the amount at risk

[4] See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543 para. 393 (1997) ("Ameritech Michigan Order").

was the potential retail profits that Verizon could seek to protect from competition.[5] The FCC compared the amount at risk under the New York PAP to Verizon New York's net return. The FCC determined that the amount at risk represented 36% of Verizon New York's ARMIS net return and that this was sufficient to motivate Verizon to provide good service to the CLECs. The dollars at risk under the NY PAP were subsequently increased by the NYPSC to approximately 39% of the ARMIS net return. For subsequent PAPs, including New Hampshire,[6] Maine,[7] and Vermont,[8] Verizon used this percentage of ARMIS to calculate the amounts that should be at risk under the respective PAPs. However, if the formula originally used to establish total dollars at risk in 2001 were applied today on a consolidated NNE basis, substantially fewer dollars would be at risk under the revised PAP. In 2000, the benchmark year for calculating the original PAP dollars at risk in the NNE states, the ARMIS net return for Verizon in those three states was $222 million and the PAP put approximately 39% of this amount, or $86.7 million, at risk. By 2005, the ARMIS net return in the NNE states had fallen drastically to $73 million. Further, Verizon's ARMIS net return in NNE for 2006 was $67 million and for 2007 was $75 million. With the 2005 results, these numbers represent, respectively a 67%, 70% and 66% reduction in net return from the benchmark year, clearly justifying a substantial level of reduction in the PAP dollars at risk across the three states. It is a striking fact that the ARMIS or ARMIS equivalent net return for the last five years is significantly *less* than the current total dollars at risk of $86.7 million. While the

[5] *See Application by Bell Atlantic - New York for Authorization to Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953 para. 436 (1999) ("New York 271 Order").

[6] The Commission found this methodology appropriate for the original NH PAP. *See* New Hampshire Performance Assurance Plan, DT 01-006, Order Regarding Metrics and Plan, Order No. 23,940 at 79 (Mar. 29, 2002) ("*NH PAP Order*").

[7] *Entry of Verizon-Maine into the InterLATA Telephone Market,* Me. PUC Docket 2000-849, Letter from D. Keshl, PUC Administrative Director to E. Dinan, Verizon, at 4 (Mar. 1, 2002).

[8] *Application of Verizon New England Inc. d/b/a Verizon Vermont for a Favorable Recommendation to Offer InterLATA Services Under 47 U.S.C. § 271,* Vt. PSB. Docket No. 6533, Report at 12 (Feb. 6, 2002).

dollars at risk may originally have represented only 39% of *Verizon's* regulated earnings, they now represent well over 100% of *FairPoint's* regulated earnings in the NNE states. To put this in a different perspective, FairPoint's performance, as unsatisfactory as it was in 2009, would still only have resulted in penalties amounting to 16% of net return if its net return was still at the 2000 level. However, it is not at that level now, and therefore this calculation demonstrates the urgent need to reduce the dollars-at-risk amounts of the PAP penalty structure. Accordingly, FairPoint requests that the Commission approve an amount of total dollars at risk equal to 39% of the NNE combined five year rolling average of FairPoint's ARMIS (or ARMIS equivalent) net return, recalculated annually, with one twelfth of this amount (rounded to the nearest thousand dollars) allocated to each month.[9] Should the sum of bill credits for all missed metrics for all CLECs combined for the three states exceed the monthly cap, the maximum monthly dollar amount will be distributed to each affected CLEC based on its proportion of total calculated bill credits.

III. A MODIFICATION OF THE PAP IS THE APPROPRIATE MEANS FOR GRANTING THE REQUESTED RELIEF.

The last sentence of Section II.I of the PAP provides that until a replacement mechanism is developed or the Plan is rescinded, the PAP will remain in effect "as it may be modified from time to time by the Commission." Section II.K provides that the PAP is subject to an annual review by the Commission and FairPoint, "to determine whether any modifications or additions should be made." Section II.K provides that "[a]ll aspects of the Plan ... will be subject to review," including, specifically, the measures and weights, distribution of dollars at risk, modification of exceptions and bill credit methodologies. Section II.K concludes, "[a]ny modifications to the Plan will be implemented as soon as reasonably practical after Commission approval of the modifications."

[9] Rather than calculate the dollar amount based on the prior year or any particular year, a five year rolling average is requested in order to smooth out the effect of extraordinary events that impact FairPoint's financial results in any given year.

The following considerations support a determination that modification of PAP to the extent necessary to grant the relief requested should be made.

A. The PAP is Primarily an Incentive Plan to Promote Open Competition.

The PAP is an incentive plan, designed to deter "backsliding." Accordingly, the PAP is primarily motivational, as opposed to punitive. The PAP is more concerned with maintaining future performance than remedying any injuries that CLECs may have alleged in the past. The PAP was certainly not designed to wipe out all of the ILEC's earnings.

From the outset, the FCC characterized PAPs as incentive plans. "We find that these PAPs, together with our section 271(b)(6) authority and the continuing oversight of the respective state commissions, provide *reasonable assurance* that the local market will remain open after 271 authority is granted."[10] In the Maine 271 proceeding, the FCC found that "the Performance Assurance Plan (PAP) currently in place in Maine will provide assurance that the local market will remain open after Verizon receives section 271 authorization."[11] It determined that the PAP was "likely to provide *incentives* that are sufficient to foster post-entry checklist compliance."[12] The Commission itself succinctly describes PAPs as being designed "to *prevent backsliding* after Section 271approval is granted . . . ."[13]

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[10] Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware, CC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660 para. 171 ("Verizon NH 271 Order") (emphasis supplied).

[11] Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Maine, CC Docket No. 02–61, Memorandum Opinion and Order, 17 FCC Rcd 11659 para. 61 ("Verizon ME 271 Order")

[12] *Id.* para. 61 (emphasis supplied).

[13] Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan, DT 01-006, Order No. 23,940 Regarding Metrics and Plan at 73 (Mar. 29, 2002) (emphasis supplied). *See also Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02–61, Report of the Public Utilities Commission at 88 (Apr. 10, 2002) ("*Maine 271 Report*") ("The revised PAP provides a comprehensive, self-executing enforcement mechanism intended to *deter backsliding* and the provision of substandard performance.") (emphasis supplied).

When viewed in these terms, it can hardly be said that FairPoint has been "backsliding." FairPoint was operating at very high levels prior to the cutover, and fully expected to continue to do so post-cutover.[14] Any problems it has experienced since 2009 are solely related to cutover issues, not "backsliding" or systemic anti-competitive practices.

B. The PAP is not Intended to be Focused on Remedying Specific Injuries.

PAP billing credits were not intended to be considered as money damages. As discussed above, PAP billing credits are designed merely to be the force underlying the incentive nature of the PAP. This is apparent by the fact that the total yearly billing credits are capped, and are not based on any quantifiable assessment of CLEC injuries (if any.) The amount of the billing credits was designed to be only enough to deter FairPoint from anti-competitive activities, not to remedy any injuries to CLECs. As the Commission explained, a good PAP only "include[es] incentives high enough to exceed the benefits Verizon-NH might derive by inhibiting competition."[15] This is also consistent with the determination of the Maine Commission, which explained that "the Verizon PAP contains a sufficient dollar amount at risk and an acceptable mechanism for calculating the actual penalty amount to meet our goal of deterring backsliding."[16]

PAP metrics are not designed to record and remedy individual failures, but rather to paint a picture of FairPoint's overall performance. As the FCC explained, "performance monitoring establishes a benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market."[17] In that regard, the Commission has stated "the underlying truth that every plan for statistically measuring Verizon NH's wholesale performance is merely a

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[14] *See* DT 07-011, FairPoint Stabilization Plan (Apr 1, 2009).

[15] *NH PAP Order* at 67.

[16] Maine 271 Report at 110.

[17] Ameritech Michigan Order para. 393.

surrogate: a statistical assessment of competition that substitutes observations of Verizon NH's business processes for actual observations of the *impact on competitors and competition*."[18]

C. FairPoint has Performed in the Spirit of the PAPs, and Can be no Further Motivated by Making Excessive PAP billing credits.

A modification of the dollars at risk amounts due under the PAP is appropriate because, notwithstanding post-cutover performance issues, no one can argue that FairPoint's problems are in any way motivated by anticompetitive intent or even competitive disregard. On the contrary, FairPoint has been operating in good faith and has undertaken extraordinary efforts, even while operating under Chapter 11. As a result, calculated billing credits have fallen steadily, from an average of $3.5 million to $1.9 million per month.

IV. GIVEN THAT THE PAP IS DESIGNED TO ENSURE FAIR COMPETITION AND BENEFIT THE PUBLIC IN GENERAL, ANY PAP BILLING CREDITS ARE BETTER DIRECTED TO OPERATIONS.

This Petition is entirely consistent with FairPoint's recent efforts to focus efforts on improving its operations. The cutover issues required significant staff and senior management attention, diverting their focus from other revenue generating efforts. The cash made available by reducing current PAP billing credits will be available for, among other things, providing resources that will enable FairPoint to continue improving its retail and wholesale products and customer services and to meet build-out commitments.

Given the intent of the PAP, as discussed in the previous section, equitable considerations dictate that the PAP billing credits be modified as requested. PAPs are ultimately intended to benefit the public, not just CLECs, and the public interest in reliable telephone service and responsive customer service must take precedence in this extraordinary situation.

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[18] *Application by Verizon New England Inc., et al. for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, CC Docket No. 02-157, Consultative Comments of the New Hampshire Public Utilities Commission at 18 (July 17, 2002) ("NH 271 Comments") (emphasis supplied).

Moreover, all of FairPoint's customers, *including CLECs*, will actually benefit more by refocusing the PAP to achieve its original intent of being an incentive plan that will allow FairPoint to apply its resources to their greatest advantage, in operations that affect all wholesale and retail customers.

V. REQUEST TO LIFT STAY

In its Secretarial Letter of February 25, 2011 (the "Secretarial Letter") in Dockets DT 09-059 and DT 09-113, the Commissions announced, among other things, its decision to audit the current PAP and accordingly stayed this proceeding, asserting that "[t]he resolution of [DT 09-113] depends upon an understanding of the current PAP and its implementation." In its response dated March 4, 2011 ("Response"), FairPoint respectfully requested that the Commission reconsider this decision, and it hereby reiterates that request. As FairPoint explained in the Response, the Secretarial Letter contains no facts to support a determination that this docket is dependent upon an understanding of the current PAP, which has been in existence for nearly eight years.

Moreover, the issues involved in Docket DT 09-113 are separate and distinct from the issues that the PAP audit is purported to address, which is PAP performance and reporting. Docket DT 09-113 only involves the dollars at risk – a static figure that is unaffected by FairPoint's wholesale performance, its data collection and reporting, its processing of the data or its issuance of billing credits. It is simply a number to which the calculated factor is applied. There is nothing that can be revealed by the proposed audit that will have any bearing on the reasonableness of the dollars at risk.

As explained above, the current PAP dollars at risk are unjustly and unreasonably out of proportion to FairPoint's net return and whatever harm that its CLEC customers allegedly are or may be incurring. By postponing the resolution of this issue without a valid cause, the

Commission simply perpetuates this injustice. This request, which is contemplated by the plain wording of the PAP, has now been on hold for over four years, since Verizon filed it in Docket DT 06-067. FairPoint respectfully submits that it is entitled to be heard.

VI. CONCLUSION

Given the intent of the PAP, as discussed in the previous section, equitable considerations dictate that dollars at risk should be reduced effective March 31, 2011 and bill credits to impacted CLECs should be adjusted from that period. Moreover, due to the drastic decline in FairPoint's net return in the NNE states and the distorted impact of the current amount of absolute PAP dollars at risk, FairPoint requests that the at risk amounts in New Hampshire be adjusted to 39% of the NNE combined five year rolling average of FairPoint's ARMIS (or ARMIS equivalent) net return.

WHEREFORE, FairPoint requests that the adjusted PAP dollars at risk amounts be approved and implemented effective as of March 31, 2011.

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By their Attorneys,
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By: ______________________

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