STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 09-113

Supplement to Petition of Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE for Waiver of Certain Requirements Under the Performance Assurance Plan and Carrier to Carrier Guidelines

Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint") hereby Supplements the Petition for Waiver that was filed June 10, 2009 in the above captioned docket. Rather than the relief requested in the original Petition, FairPoint instead requests that the Commission join other state commissions and approve, within thirty days, a modification to the PAP to reduce the total dollars at risk in the Performance Assurance Plan ("PAP") by approximately 65%, to $29.96 million across the Northern New England ("NNE") states, effective as of January 1, 2009. This reduction conforms with that approved in 2006 by the New York PSC, and since adopted and implemented in almost all of the states that have implemented the New York PAP,[1] with the exception of Maryland and the NNE states.

I. INTRODUCTION

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

[1] *See* Connecticut, Docket No. 97-01-23; Delaware, Docket No. 02-001; District of Columbia, Formal Case No. 990; Maryland, Case No. 8916; Massachusetts, DTE 03-50; New York, Case No. 99-C-0949; Pennsylvania, Docket No. M-00011468; Rhode Island, Docket No. 3256; Virginia, Case No. PUC-2001-00226; West Virginia, Case No. 06-1834-T-P.

a PAP modeled on the one originally developed in cooperation with the New York Carrier Working Group ("NYCWG")[2] and approved in New York. The PAP approved by the Commission in DT 01-006 contemplated (in Section K and in the NH PAP Order) that any future revisions approved by the NY PSC would likewise be filed for approval with the Commission (and those of other legacy Verizon/Bell Atlantic states).[3] Indeed, there have been a number of revisions since that time which, with very slight modifications in some cases, have been adopted by New Hampshire and other states.

II. THIS REQUEST IS CONSISTENT WITH THE CURRENT PAP AS ADOPTED THROUGHOUT MOST OF THE VERIZON REGION.

The latest iteration of PAP amendments was introduced beginning in late 2006, when Verizon filed amended PAPs in all of the relevant states.[4] The changes to these amended PAPs (generally referred to as "Version 4") were comprehensive and significant. They eliminated several sections of the PAP, changed how some of the metrics were scored and reformulated the calculation of the penalties.

One notable revision was a reduction – by approximately 65% – in the total dollars at risk as billing credits. Verizon's reasons for proposing this reduction were mainly two-fold. First, as a result of the FCC's decisions in the Triennial Review proceeding, Verizon was no longer required to provide a number of services, including UNE-P, line splitting and line sharing. This,

[2] The NYCWG is a group representing various segments of the industry, primarily Verizon and the CLECs.

[3] *See* DT 01-006, *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan*, Order Regarding Metrics and Plan, Order No. 23,940 at 26-27 (Mar, 29, 2002) ("The on-going amendment process occurs, via NYPSC approval of amendments to the NYPSC-approved metrics, after Verizon-New York files a compliance filing with the NYPSC reflecting the final order of the NYPSC.") ("NH PAP Order").

[4] *See, e.g.* DT 06-168, Letter from V. del Vecchio, Verizon, to D. Howland, Commission (Nov. 21, 2006).

in addition to changes in the marketplace, resulted in significantly fewer lines for which measurement and performance reporting were applicable under the current PAP.[5]

Second, Verizon explained that changes in the marketplace have replaced competition, rather than regulation, as the major driver of wholesale service quality and that these competitive forces further justified a reduction in the dollars at risk under the PAP. Competition from all modes of providers is increasing, particularly from cable voice offerings and wireless,[6] and this market pressure alone provides sufficient incentives for the ILEC to provide good service to its CLEC customers. As the FCC has recognized, there are "very high levels of retail competition that do not rely on the [ILEC's] facilities – and for which [the ILEC] receives little to no revenue," thus giving an ILEC "the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than [the ILEC]."[7] FairPoint concurs, and is on record in its support of CLECs' ability to compete.[8] It would much prefer to receive wholesale revenues from its CLEC customers than to receive no revenue at all when end-user customers leave its network entirely.

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[5] FairPoint is also not required to provide UNE-P as a UNE, per the Triennial Review proceeding. This service is now provided pursuant to "Wholesale Advantage" commercial agreements. However, approval to remove UNE-P from the PAP has not been granted by the Commission, although it has granted approval to remove UNE-P from the C2C guidelines. In the meantime, retaining the UNE-P measurements in the PAP results in the current high level of dollars at risk.

[6] Indeed, wireless subscribers now outnumber wireline subscribers services nationwide by a 2 to 1 margin and account for more single service households than wireline service. In NNE, wireless subscribers now outnumber all local exchange carrier lines by 35%. *See* FCC Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2008 (rel. July 23, 2009) (available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292193A1.doc>). Furthermore, wireline carriers are losing subscribers to VoIP services (over-the-top and via cable "digital phone" services) that were only on the horizon when the PAPs were established eight years ago.

[7] *Petition of Qwest Corporation for Forbearance,* WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 para. 67 (2005).

[8] *See* DT 09-059, Prehearing Conference, Tr. 26:7-13 (July 8, 2009).

Another aspect, which was not raised in the other state proceedings but is still pertinent, is that the reduction in the number of UNEs, coupled with competitive changes in the market, has produced the effect of decreasing the number of CLECs over which the PAP penalties are spread. This is particularly true with UNE-P, since that service was typically an exclusive mode of entry for the CLECs who used it. To the extent that these providers moved to commercial agreements, they no longer participate in the PAP and have left the "pool." (To a lesser extent, the same can be said for line-sharing customers.) Consequently, the remaining CLECs are eligible for larger maximum payments on a per-CLEC basis. Moreover, when the considerable CLEC consolidation/dissolution over the last eight years is taken into account, the pool of CLECs has become even smaller -- but the total dollars at risk remains at the same level. Thus, the current PAP makes individual CLECs eligible for much larger maximum payments than were originally contemplated and found sufficient.

Almost all of the respective states agreed with Verizon's primary reasoning and approved the proposed reduction.[9] In approving the reduction in New York, the New York commission stated:

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[9] *Application of New York Telephone Co.*, Ct. DPUC Docket No. 97-01-23, Decision (Apr. 11, 2001); *Verizon Delaware LLC Compliance with the Conditions Set Forth in 47 U.S.C. § 271*, De. PSC Docket No. 02-001, Order No. 7595 (July 7, 2009); Development of Local Exchange Carrier Quality of Service Standards for the District, D.C. Formal Case No. 990, Order No. 14199 (Feb. 2, 2007); *Verizon Revised Performance Assurance Plan*, Ma. D.T.E. 03-50, Order (Mar. 29, 2007); *Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan*, NY PSC Case 99-C-0949; Order Amending Performance Assurance Plan (Sep. 25, 2006); *Performance Metrics and Remedies - November 2006 Changes*, Pa. Docket No. M-00011468, Order (Jan. 26, 2007); RI *Verizon Rhode Island's Performance Assurance Plan,* RI Docket No. 3256, Order (Jan. 11, 2007); *Establishment of a Performance Assurance Plan for Verizon Virginia Inc.*, Va. PUC Case No. PUC-2001-00226, Order Approving the Proposed Revisions (Apr. 20, 2007) (approving 55% reduction in dollars at risk); *Verizon's Submission of New York Performance Assurance Plan Revisions*, W.Va. PSC Case No. 06-1834-T-P, Commission Order (May 23, 2007). *See also Consideration Of The Maryland Carrier To Carrier Guidelines, Performance Standards And Reports Of The Performance Assurance Plan*

> The overall at risk dollars represents the amount necessary to reasonably ensure that Verizon continues to offer nondiscriminatory wholesale service to competitors. The current amount was established over six years ago and does not reflect the telecommunications market in New York today. With the incorporation of the TRO/TRRO changes and the emergence of intermodal competition, the number of lines covered by the PAP has been substantially reduced and the amount of overall bill credits should likewise be adjusted downward. . . . .
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> [W]e do not agree with the CLECs who argue that a reduction in overall at risk dollars will lead to backsliding. The Proposal attempts to allocate at risk dollars consistent with the penalties under the current Plan for the remaining products. The net effect of those penalties should be roughly the same. . . . .
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> Accordingly, we find that the Proposal to decrease the overall at risk amount is justified by the decrease in the number of lines covered by the PAP and Verizon's decrease in UNE revenue as well as the emergence of intermodal competition.[10]

Maine, New Hampshire and Vermont did not act on the proposed PAP amendments because the filings coincided with the Verizon–FairPoint asset transfer proceedings. Instead, the Commission held the matter in abeyance pending the completion of the transfer proceedings. As the transfer proceedings progressed, the PAP amendment filing was obviated by FairPoint's agreement to adopt the then-current PAP while it collaborated with the CLECs on a simplified three-state NNE PAP.[11] Even though FairPoint agreed to abide by the current PAP, however, it always assumed that Version 4 would serve as the basis for the collaborative discussions.[12]

Of Verizon Maryland, Inc., Md. PSC Case No. 8916, Response of the Staff (May 1, 2007) (recommending approval).

[10] *Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan*, NY PSC Case 99-C-0949; Order Amending Performance Assurance Plan at 13-16 (Sep. 25, 2006) (footnotes omitted) ("NY PAP Order").

[11] The Company has begun efforts to develop a simplified PAP for its NNE operations.

[12] FairPoint does not suggest, however, that reduction in dollars at risk should be deferred to the PAP simplification effort. That proceeding is broader, as it is devoted to reconsidering the number of metrics and the redistribution of penalties to those metrics. This filing is intended to address the urgent need for reduction in the PAP dollars at risk to a reasonable level and is best considered in the context of the existing PAP waiver proceeding.

III. PUBLIC POLICY AND THE UNDERLYING INTENT OF THE PAP SUPPORT THIS REQUEST.

Over and above the fact that this request is fully consistent with Version 4 of the PAP as adopted by the other states, there are strong policy reasons, related to FairPoint's earnings, that support this request. If the formula originally used to establish total dollars at risk in 2001 was applied today, the amount at risk would be significantly less than the current PAP. In the New York 271 Order, the FCC found that an appropriate benchmark for the amount at risk was the potential retail profits that Verizon could seek to protect from competition.[13] The FCC compared the amount at risk under the NY 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,[14] Maine,[15] and Vermont,[16] Verizon used this percentage of ARMIS to calculate the amounts that should be at risk under the respective PAPs.

If this test were applied today on a consolidated NNE basis, substantially fewer dollars would be at risk under the revised PAP. Attachment 1 to this filing shows the unseparated ARMIS net return for the NNE region, based on ARMIS 43-01 reports. (The summary page of

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[13] *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").

[14] The Commission found this methodology appropriate for the original NH PAP. *See* NH PAP Order at 79.

[15] *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).

[16] *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).

the Attachment provides data for the year 2000 and the period 2005 through 2007. This page is followed by detailed reports for the years 2000 through 2007. NNE 2008 ARMIS data is not included in this analysis, as it was not filed with the FCC and is not publicly available.)[17] 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 base year for the Version 4 PAP), the ARMIS net return in the NNE states had fallen drastically to $73 million. If the NNE commissions had approved the Version 4 PAP, as most other states did, only $29.96 million would now be at risk across all three states.

Further, Verizon's 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 corresponding level of reduction in the PAP dollars at risk across the three states.

What is all the more stunning is that the net return for the most recent years is *less* than the current total dollars at risk of $86.7 million! While the dollars at risk penalties 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. This is not a mere academic concern. Recent monthly PAP penalties have been in excess of $3 million per month for NNE. At that rate on an annualized basis, this will exceed 50% of the NNE's unseparated net return for 2005, 2006 and 2007 – obviously far beyond the 39% maximum that this Commission originally found sufficient in 2002. To put this is a different perspective, FairPoint's performance, as

[17] Based on ARMIS filing requirements, per Part 43 of the FCC rules, ARMIS data is not required to be collected until the calendar year after notice that the carrier has exceeded the revenue threshold, with corresponding reports filed the year after that. FairPoint anticipates the first year it will file financial ARMIS reports will be in 2011, for the 2010 year of operations.

unsatisfactory as it was in the first half of this year, 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 of $14.7 million, as proposed in the Amended PAP filed on November 21, 2006 in DT 06-168.[18] (FairPoint is requesting a reduction to $9.99 million in Maine and $5.18 million in Vermont, for a NNE total of $29.96 million. It should be noted that this figure is comparable to the amount that would result if the average net income for the years 2005-2007, *i.e.* $71.7 million, was used as the new basis for calculating the total dollars at risk. Applying the factor of 39% to this figure results in a revised amount of $28 million for total dollars at risk.)

The PAP is an incentive plan, designed to deter "backsliding."[19] It was never designed wipe out all of the ILEC's earnings. This would plainly be unfair and overly punitive. As the New York Commission noted "[t]he current amount [at risk] was established over six years ago and does not reflect the telecommunications market in New York today."[20] The same is true for the NNE states, where much has changed locally and industry-wide since the PAPs were implemented eight years ago.

[18] Verizon NH Revised PAP Guidelines, DT 06-168, Letter from V. del Vecchio, Verizon to D. Howland, Commission, Attachment: Performance Assurance Plan § II.C.

[19] NH PAP Order at 73 (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).

[20] NY PAP Order at 13.

While FairPoint recognizes that the circumstances as they apply to Verizon in New York may or may not now be directly applicable to FairPoint in New Hampshire, it has always contemplated that the New York process would apply to New Hampshire. At the very least, the New York PAP serves as an independent test of reasonableness. The fact that net return in NNE has declined more than 65% since the PAPs were originally established strongly indicates that the proposed reduction in dollars at risk is reasonable and will continue to provide the necessary ongoing motivation to FairPoint to provide services to CLECs in parity with its own customers. In spite of recent service problems, FairPoint is firmly committed to the wholesale community in New Hampshire.

IV. THE COMMISSION IS AUTHORIZED TO GRANT EXPEDITED RELIEF.

The Commission can grant this request without a lengthy deliberative process because this road has already been plowed by other commissions, most notably New York. Section II.K.2 of the current PAP in New Hampshire provides that "Verizon will file changes to the New York Plan adopted by the New York PSC with the New Hampshire Commission within 30 days of the compliance filing in New York for review and inclusion in the New Hampshire upon the Commission's approval."[21] When it approved the original PAP, the Commission established a two track approval process, depending on whether the New York changes concerned "consensus" items or "non-consensus" items. Consensus items are those amendments approved by the NYPSC that were supported by consensus agreement of the New York Carrier Working Group. Non-consensus items are amendments on which the New York Carrier Working Group did not reach consensus agreement to support.[22] Consensus items become effective in New Hampshire *immediately upon filing* in New Hampshire. For non-consensus items, the

[21] The changes at issue were filed with the Commission in November 2006 in DT 06-168.

[22] NH PAP Order at 27 n.3.

Commission has *thirty days after the filing* in New Hampshire to determine whether to adopt, reject, or modify the items that the NYPSC considered and approved.[23]

Although the New York PSC approved the reduction in dollars at risk in 2006, the reduction did not enjoy the full support of the CLEC community, making the reduction a non-consensus item.[24] Consequently, while the Commission is certainly not prohibited from granting immediate relief, it should still place this request on an expedited track for decision in at most thirty days.[25]

V. CONCLUSION

Considering the significant decrease in lines covered by the PAPs, the galloping increase in intermodal competition, the drastic decline in FairPoint's net return in the NNE states, and the potential for overpayments to CLECs, it should be clear that a reduced level of $29.96 million at risk is more than sufficient to motivate FairPoint to continue to provide CLECs with the best possible service. Accordingly, FairPoint requests that the at-risk amounts in New Hampshire be reduced from $42.8 million to $14.7 million on an annual basis. Furthermore, given that similar reductions were approved in all other respective states in early 2007, such a reduction is approximately two years behind schedule. Accordingly, FairPoint requests that the revised

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[23] *Id.*

[24] NY PAP Order at 12.

[25] FairPoint takes no position in this proceeding regarding the status of the PAP Amendments that were filed with the Commission in November 2006 in DT 06-168, and which included a substantial reduction in the total dollars at risk. According to the procedure established by the Commission, the amended PAP should have become effective in December 2006. In light of the current parallel effort to develop a simplified PAP, FairPoint sees no reason to revisit the November 2006 amendments outside the specific relief requested in this Supplement. However, FairPoint does not concede that the November 2006 amendments should not currently be effective, and reserves all rights to take this position.

dollars-at-risk amounts be approved within thirty days of this request and implemented effective as of January 1, 2009.

Respectfully submitted,

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By their Attorneys,
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Dated: August 7, 2009

By: ____________________

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