

STATE OF NEW HAMPSHIRE
Before The
PUBLIC UTILITIES COMMISSION

NORTHERN NEW ENGLAND TELEPHONE
OPERATIONS LLC D/B/A FAIRPOINT
COMMUNICATIONS – NNE

Docket No. DT 09-113

Petition for Waiver of Certain Requirements
Under the Performance Assurance Plan and
Carrier-to-Carrier Guidelines

MOTION TO DISMISS, OR ALTERNATELY, TO STAY PROCEEDING

Choice One of New Hampshire Inc., CTC Communications Corp., Conversent

Communications of New Hampshire, LLC, and Lightship Telecom, LLC (collectively, One Communications), hereby move to dismiss the 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 (“PAP”) and Carrier to Carrier (“C2C”) Guidelines dated August 7, 2009 (“FairPoint Supplemental Petition”). Alternatively, One Communications moves to stay this proceeding pending consideration of the issues raised by FairPoint’s Supplemental Petition as part of the ongoing PAP collaborative.

INTRODUCTION

Following FairPoint’s request in March 2009 for both temporary and permanent changes to the current PAP (filed in Docket No. DT 09-059), FairPoint filed a further Petition on June 10, 2009, seeking a four month waiver of all penalty payment requirements of the PAP. On August 7, 2009, FairPoint filed a Supplemental Petition, effectively withdrawing its June 10, 2009 Petition, and requesting instead that the Commission approve a permanent modification to the PAP under which the total dollars at risk under the PAP would be reduced by 65%. FairPoint also requests

that this change be retroactive to January 1, 2009, such that competitive local exchange carriers (“CLECs”) who received bill credits since January 1 would be required to repay FairPoint any amounts that exceed a 65% reduction in the total “at risk” amount. Numerous CLECs oppose FairPoint’s Supplemental Petition. See Transcript of Prehearing Conference, Docket No. DT 09-113, at 10-17 (August 13, 2009) (“Prehearing Conference Tr.”). FairPoint also requested that the Commission rule on its Supplemental Petition within 30 days, urging the Commission that a streamlined review was warranted. See id. at 9; Supplemental Petition at 9-10.

In addition, on May 29, 2009, FairPoint initiated a collaborative with CLECs who operate in the three northern New England states to evaluate and discuss revisions to the current PAPs in effect in New Hampshire, Maine and Vermont. At the first meeting of the collaborative held on June 19, 2009, FairPoint committed to providing a proposed red-lined, three-state PAP for discussion at the next meeting of the collaborative. On September 14, 2009, FairPoint distributed a proposed revised PAP which includes the reduced total dollars at risk FairPoint is seeking in this docket. Therefore, FairPoint’s request in this docket is currently before the collaborative for its consideration.

ARGUMENT

As discussed below, the Commission should dismiss FairPoint’s Supplemental Petition for several reasons. First, FairPoint’s proposed modification violates the Commission’s order approving the sale of Verizon’s assets to FairPoint in Docket No. 07-011 (the “Approval Order”). Second, the terms of the PAP do not permit retroactive permanent modifications to its provisions in the manner that FairPoint is requesting in its Supplemental Petition. Third, given FairPoint’s interpretation of its Wholesale Advantage Agreements as precluding *all* PAP penalties to those CLECs who have entered into commercial agreements, FairPoint has already

implemented the reduction in PAP penalty payments that it seeks. For all these reasons, FairPoint's Supplemental Petition alleges an insufficient basis under which FairPoint would plausibly be entitled to the relief it seeks and dismissal is appropriate.¹ However, if the Commission determines that dismissal is not warranted at this time, this proceeding should be stayed until the ongoing PAP collaborative determines the overall future direction of the PAP.

I. FairPoint's Proposed Modification is in Violation of the Commission's Approval Order

As part of the Commission's February 25, 2008 Order approving the transfer of Verizon's assets in New Hampshire to FairPoint, the Commission approved a settlement agreement entered into between Verizon, FairPoint and Staff. Incorporated into that settlement agreement as Exhibit 2 was a separate agreement between FairPoint and certain CLECs (Bayring, segTEL, and Otel Telekom) which the Commission ruled was applicable in relevant part to all New Hampshire CLECs. Approval Order at 74-78. The Commission also indicated that its approval of the Verizon – FairPoint transaction was conditioned by the terms of the settlement agreement. *Id.* at 3. Section 2.e of Exhibit 2 of the settlement agreement states:

Telco will be subject to the Performance Assurance Plan (PAP) *in effect as of the Merger closing date* . . . and will not challenge the jurisdiction of the state utility regulatory commission to enforce the PAP. [Emphasis added].

Section 6.c requires:

¹ See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 560-63 (2007) (complaints must state enough facts to make it plausible that the plaintiff is entitled to relief); Langlois v. Pomerleau, 143 N.H. 456, 460 (1999) (Court must determine whether plaintiff's allegations are reasonably susceptible of a construction that would permit recovery); Public Service Company of New Hampshire, 2001 WL 1939689, *4 (N.H.P.U.C. June 28, 2001) (sufficient questions remain unanswered to provide reasonable grounds to conduct a full and formal investigation).

After the Merger closing date, *FairPoint will work cooperatively with the CLECs and state utility regulatory staff in good faith* to develop and implement a simplified, uniform PAP applicable to Telco in Maine, New Hampshire and Vermont. . . . [Emphasis added].

These provisions are not simply promises of FairPoint with which FairPoint no longer finds it convenient to comply; they are requirements for specific FairPoint behavior upon which the Commission conditioned its approval. These requirements have the force of law. FairPoint's seeking a retroactive modification of such a significant magnitude is counter to being subject to the PAP "in effect as of the Merger closing date."² And seeking to litigate permanent changes to the PAP while the same issues are pending before the ongoing PAP collaborative is the opposite of working cooperatively in good faith with CLECs and Staff to develop a new PAP.

Therefore, FairPoint's Supplemental Petition is contrary to the requirements in the Approval Order. Because FairPoint has failed in its Supplemental Petition to provide a sufficient basis to plausibly support such a violation of the Approval Order – and in fact, FairPoint does not even acknowledge in its Supplemental Petition that it is seeking an outcome contrary to the Commission's specific requirements – FairPoint's request should be dismissed as insufficient on its face.

II. The PAP Does Not Permit Retroactive Modifications

FairPoint's Supplemental Petition should be dismissed because the PAP itself does not permit the relief FairPoint seeks. There are no provisions in the PAP that allow for retroactive, as opposed to prospective, permanent modifications to the PAP. When asked upon what authority

² FairPoint's assertion that it is complying with the existing PAP because the existing PAP contemplates modifications to the PAP (see Prehearing Conference Tr. at 21) is circular and nonsensical. Such an interpretation of the PAP renders the Commission's requirements in the Approval Order meaningless and without effect, an outcome which
(continued . . .)

FairPoint based its request for a retroactive modification, FairPoint objected to responding on the basis that the question was “argumentative and not reasonably calculated to lead to the discovery of admissible evidence.” CLECs 1-2. FairPoint is wrong. The question is not argumentative, but rather goes to the heart of FairPoint’s request.

Modifications to the PAP are governed by Section K of the PAP. Section K.1 states: “Each year the Commission and [FairPoint] NH may review and/or audit the Performance Assurance Plan to determine whether any modifications or additions should be made.” Although the PAP allows that “[a]ll aspects of the Plan . . . will be subject to review,” the PAP is clear that

Any modifications to the Plan will be implemented as soon as it is reasonably practical *after Commission approval of the modifications.*

PAP, Section K.1 (emphasis added). This means that Commission approval will *precede* any modifications, not vice versa. Retroactive permanent changes are nowhere contemplated in the PAP. Importantly, the PAP does contemplate the retroactive effect of waivers (*i.e.*, temporary changes) governed by Section J of the PAP and contains language to that effect. See PAP, Section J (past daily and monthly results may be adjusted in light of successful requests for waivers or exceptions). However, FairPoint’s Supplemental Petition is brought under Section K of the PAP (modifications) and not Section J (waivers/exceptions); therefore FairPoint’s proposed retroactive change is not permissible.

The Commission should keep in mind that Verizon wrote the PAP. It potentially could have, but did not, include language allowing retroactive permanent modifications. FairPoint, as successor to Verizon, is limited to the existing language in the PAP. Because there is no support in the PAP for FairPoint’s request for a retroactive modification, the Commission should reject

the Commission should not condone.

FairPoint's request on this ground. To One Communications' knowledge, no state commission has ever granted a retroactive permanent modification to a PAP, much less such a significant modification reaching back nine months in the past during a time of unprecedented poor wholesale performance. The Commission should be cautious not to set an unfortunate precedent by entertaining such a request when it is so clearly not warranted here.

III. Given FairPoint's Interpretation of its Wholesale Advantage Agreements, FairPoint Has Already Significantly Reduced PAP Penalty Payments

As FairPoint made clear, it interprets section 46 of its Wholesale Advantage Agreements as precluding the payment of *all* PAP bill credits to any CLEC that has signed a Wholesale Advantage Agreement, whether or not the bill credits pertain to FairPoint's Wholesale Advantage product (a loop and switching product replacing UNE-P). See One Comm 1-3 through 1-5; One Comm 1-15; CLECs 1-29; FairPoint Supplemental Petition at 4 (UNE-P CLECs have "moved to commercial agreements [and] . . . no longer participate in the PAP and have left the 'pool'").³

Notwithstanding whether FairPoint's interpretation is sound, FairPoint has, indeed, been withholding all PAP bill credits from those CLECs with Wholesale Advantage Agreements. This withholding has resulted in a *huge* reduction in the amounts of monthly PAP penalties that FairPoint has actually paid to CLECs in New Hampshire. For example, in March 2009, of the \$1,547, 367 FairPoint reported as the PAP penalties due to CLECs, FairPoint actually paid only \$639,738, a reduction of almost 60%. One Comm 1-5. Similarly, FairPoint reported \$1,308,414

³ One Communications does not concede that FairPoint's position is accurate and reserves all rights to assert that FairPoint's interpretation of its Wholesale Advantage Agreements is incorrect.

as the amount due to CLECs in PAP penalty payments for FairPoint's July 2009 performance, but actually paid out only \$637,441, a reduction of over 50%. Id.⁴

Therefore, FairPoint's request in its Supplemental Petition for a 65% reduction in the total dollars at risk under the PAP is highly misleading given that FairPoint already regards the dollars actually "at risk" under the PAP as significantly lower than the current Commission-mandated "at risk" amount. FairPoint does not intend to include Wholesale Advantage CLECs in its penalty payments if its Supplemental Petition is approved (One Comm 1-8), therefore FairPoint has, in effect, already implemented the reduction it seeks to the tune of 40-60% of the PAP penalty payments otherwise due. One Comm 1-5; CLECs 1-29. To allow an additional 65% reduction on top of this would result in a complete evisceration of the PAP.

Moreover, the answer to FairPoint's "cash flow issues" (see Prehearing Conference Tr. at 20) is not to reduce the dollars at risk to which FairPoint is subject under the PAP or to require CLECs to repay FairPoint any PAP penalty payments they have received. The obvious answer is for FairPoint to resolve its ongoing problems with its operations support systems ("OSS") such that FairPoint provides wholesale service at pre-cutover levels and does not incur high performance penalties in the first place. This is the only permanent modification that makes sense for all parties. Therefore, for all the reasons discussed in this section and the above sections, FairPoint's Supplemental Petition should be dismissed for failure to provide a sufficient basis

⁴ These numbers also indicate that despite FairPoint's efforts to return to pre-cutover levels of service, FairPoint's wholesale performance has not significantly improved from March to July. Moreover, the large amounts withheld by FairPoint as "Wholesale Advantage Dollars," which often has exceeded the PAP penalty amounts for all other services combined, evidences that FairPoint's problems providing this particular type of wholesale service continue to be significant.

under which FairPoint would plausibly be entitled to the relief it seeks. In the alternative, One Communications suggests a second approach, discussed in the section below.

IV. Proposed PAP Revisions Should be Discussed as Part of the PAP Collaborative in the First Instance

As noted above, the Northern New England PAP collaborative was initiated on May 29, 2009, and is currently considering FairPoint's proposed, red-lined three-state PAP. Also as noted above, in its Approval Order, the Commission directed FairPoint to work with CLECs and regulatory Staff cooperatively and "in good faith" to develop a new PAP. However, it is the essence of bad faith for FairPoint to litigate changes to the PAP while the very same changes are pending before the collaborative.

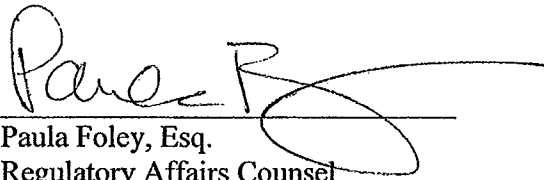
The purpose of a PAP collaborative is to avoid the very situation that FairPoint has created here. The PAP collaborative is designed to reach consensus on those proposed changes on which it can agree, and to narrow the non-consensus issues that remain for Commission deliberation. Moreover, when the PAP collaborative was initiated, FairPoint itself agreed that the total dollars at risk under the PAP would be discussed as part of the collaborative. See Letter from FairPoint to Vermont Public Service Board, Docket No. 7506 (April 27, 2009) (attached to this Motion as Attachment 1). In the Letter, FairPoint proposes to "work with the interested stakeholders to seek to achieve a consensus on the [PAP] metrics . . . *then to move on to the issues of amount and allocation of dollars at risk . . .*" (Emphasis added). By filing its Supplemental Petition now, FairPoint has leap-frogged over the whole process and rendered the collaborative a nullity. FairPoint's approach in this docket is, at best, administratively inefficient and resource intensive for both the Commission and CLECs, and at worst, an outright violation of the Commission's mandates in its Approval Order and a reversal of FairPoint's own commitments.

Therefore, in the event the Commission deems that dismissal of FairPoint's Supplemental Petition is not warranted at this time, the Commission should stay this proceeding until the PAP collaborative has had a chance to perform the role it was established to do. If at the conclusion of the collaborative, FairPoint still seeks a 65% retroactive reduction in the total dollars at risk, the Commission can address FairPoint's Supplemental Petition at that time as a non-consensus item as part of the Commission's approval of a new PAP.

CONCLUSION

For all the reasons stated above, One Communications respectfully requests that the Commission dismiss FairPoint's Supplemental Petition. In the alternative, One Communications requests that consideration of FairPoint Supplemental Petition be stayed until the ongoing PAP collaborative addresses these issues in the first instance.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paula Foley", with a large, stylized flourish extending to the right.

Paula Foley, Esq.
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September 22, 2009

Attachment 1

SHEEHEY FURLONG & BEHM

PROFESSIONAL CORPORATION

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April 27, 2009

Mrs. Susan Hudson, Clerk
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Re: Docket No. 7506

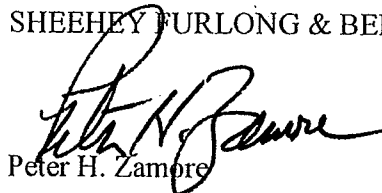
Petition of Telephone Operating Company of Vermont LLC
d/b/a FairPoint Communications, for waiver of certain
requirements under the Performance Assurance Plan and
Carrier to Carrier Guidelines

Dear Sue:

In its April 23, 2009 Prehearing Conference Memorandum, the Public Service Board ("Board") stated that FairPoint Communications proposed to file a revised Performance Assurance Plan ("PAP") by May 29, 2009. FairPoint Communications would like to make clear that it did not propose to file a complete PAP by May 29. Instead it proposed that "FairPoint be given an opportunity to develop metrics, revised metrics associated with a PAP ... and to provide those by May 29th, and then ... to work with the ... interested stakeholders to seek to achieve a consensus on the metrics [and a]ssuming we do so, then to move on to the issues of amount and allocation of dollars at risk and ultimately the penalties." Tr. 4-15-09 (Zamore) at 5. FairPoint Communications assumes that the Board intended that the May 29 filing would be consistent with this proposal.

Very truly yours,

SHEEHEY FURLONG & BEHM P.C.


Peter H. Zamore

PHZ/kmm

Enclosure

cc: Attached Service List