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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

NHPUC AUG27'09 AM11:13

August 13, 2009 - 10:14 a.m.
Concord, New Hampshire

RE: DT 09-113
FAIRPOINT COMMUNICATIONS, INC.:
Petition for Northern New England
for Waiver of Certain Requirements
under the Performance Assurance Plan
and Carrier to Carrier Guidelines.
(Prehearing conference)

PRESENT: F. Anne Ross, Esq.
(Presiding as Hearings Examiner)

Sandy Deno, Clerk

APPEARANCES: Reptg. FairPoint Communications, Inc.:
Harry Malone, Esq. (Devine, Millimet...)

Reptg. BayRing Communications:
Alan M. Shoer, Esq.

Reptg. CRC Communications of Maine:
Trina M. Bragdon, Esq.

Reptg. One Communications:
Paula Foley, Esq.

Reptg. Comcast Phone of New Hampshire:
Christopher K. Hodgdon

Court Reporter: Steven E. Patnaude, LCR No. 52

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APPEARANCES: (C o n t i n u e d)

Reptg. segTEL, Inc.:
Jeremy Katz

Reptg. PUC Staff:
Robert Hunt, Esq.

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P R O C E E D I N G

MS. ROSS: Good morning. I'm Anne Ross. The Commission has appointed me as Hearings Examiner to preside over the prehearing conference this morning. This is docket DT 09-113. On June 10th, Northern New England Telephone Operations, LLC, d/b/a FairPoint Communications, filed with the Commission a petition for waiver of the incentive payment requirements of the Performance Assurance Plan, or modification thereto, which was made applicable to FairPoint pursuant to Verizon New England Order Number 24,823, in docket number DT 07-011, on February 25th, 2008, approving Verizon New England's transfer of assets to FairPoint.

Furthermore, FairPoint asked to modify the PAP as necessary to remove the need to make any payments pursuant to Section II, Paragraphs I and K, of the PAP. FairPoint's petition requested relief from the PAP filed by Verizon on November 21st, 2006, in docket DT 06-168. The proceeding in DT 06-168 were suspended by secretarial letter dated February 22nd, 2008, and the filing was not approved. Consequently, the operative PAP approved by Order 24,504, in DT 05-096 is dated February 1st, 2006.

On June 26, 2009, Freedom Ring

{DT 09-113} [Prehearing conference] {08-13-09}

1 Communications, LLC, d/b/a BayRing Communications, filed a
2 letter requesting an order from the Commission requiring
3 FairPoint to continue to make all required payments and/or
4 bill credits under the PAP pending final resolution of
5 FairPoint's request to modify the PAP in docket DT 09-059
6 and the instant proceeding.

7 On August 7th, 2009, FairPoint filed a
8 supplement to its petition requesting the Commission to
9 approve a reduction in the total dollars at risk under the
10 PAP by 65 percent, to 2. -- to 29.96 million, or, in New
11 Hampshire, to 14.7 million.

12 With that, I will begin by taking
13 appearances. And, when we finish that, we'll go to the
14 substantive issues before us.

15 MR. MALONE: Thank you, your Honor. I'm
16 Harry Malone, of Devine, Millimet & Branch, representing
17 FairPoint Communications.

18 MR. HODGDON: Good morning. Chris
19 Hodgdon, with Comcast.

20 MS. FOLEY: Good morning. Paula Foley,
21 for One Communications.

22 MS. BRAGDON: Trina Bragdon, with CRC
23 Communications.

24 MR. SHOER: Alan Shoer, representing

1 BayRing Communications.

2 MR. KATZ: Jeremy Katz, with segTEL.

3 MR. HUNT: Rob Hunt, for Staff. And,
4 with me is Kate Bailey, the Director of
5 Telecommunications, Josie Gage, Policy Analyst, and
6 Michael Ladam, Policy Analyst.

7 MS. ROSS: Thank you. There are, in
8 addition to the two filings by FairPoint, some arguments
9 made by other parties. I would like the parties to
10 address your initial position in the docket, as well as
11 your response to any contrary arguments or positions that
12 are taken by other parties. And, I would like to begin
13 with FairPoint, but I will allow FairPoint to respond to
14 points that are raised by other parties at the end of this
15 portion.

16 And, also, just so you understand the
17 process, as Hearings Examiner, I will hear these
18 arguments, and I will review the transcript, and make a
19 recommendation to the Commission. The Commission will
20 make a decision with regard to any threshold issues. And,
21 we will allow the parties, after the close of the
22 prehearing conference, to meet in a technical session to
23 develop a procedural schedule that they would recommend to
24 the Commission.

1 With that said, we'll begin with
2 FairPoint.

3 MR. MALONE: Thank you. The Commission
4 has before it a petition for waiver that was filed by
5 FairPoint on June 10th, 2009. In that petition, FairPoint
6 requested a waiver for the months of March through June of
7 billing credits due to CLECs under the terms of the New
8 Hampshire Performance Assurance Plan. As the Commission
9 and all of FairPoint's many stakeholders know, the five
10 months from February through June of this year were very
11 challenging times for FairPoint, as the Company wrestled
12 with problems related to the cutover from Verizon's
13 operations support systems to FairPoint's in-house
14 systems. In addition to retail customers, these problems
15 also affected the ability of FairPoint's wholesale
16 customers to place, track and modify orders for service to
17 their own retail customers. As a result, FairPoint missed
18 a number of PAP metrics and has incurred financial
19 penalties totaling millions of dollars to be credited to
20 its wholesale customers in accordance with the terms of
21 the PAP.

22 On August 7th, 2009, FairPoint filed a
23 supplement to its June 10th petition, in which it
24 substantially revised its request for relief. Instead of

1 the broad waiver that it originally requested, FairPoint
2 is now asking only that the limit of the PAP penalties be
3 reduced to a level that is consistent with the scope of
4 these penalties as originally designed.

5 Specifically, FairPoint is requesting
6 that the total dollars at risk be recalculated to reflect
7 the significant decline in net return for FairPoint's
8 operations in Northern New England. The limit of the
9 total dollars at risk, currently \$87 million, was
10 calculated in 2002 as a percentage of Verizon's year 2000
11 net return, which, for its Northern New England's
12 operations, was \$222 million. In the intervening seven
13 years, the net return for those operations had declined by
14 approximately two-thirds, to 75 million. An amount that
15 is actually now less than the current amount of dollars at
16 risk.

17 Accordingly, FairPoint has requested a
18 corresponding reduction in the total dollars at risk to
19 just under \$30 million, of which \$14.7 million would be
20 designated for its New Hampshire operations. This request
21 is reasonable, first and foremost, because the potential
22 penalties, excuse me, would once again be a fraction,
23 rather than a multiple, of FairPoint's net return. And,
24 at the same time, that fraction is still significant

1 enough to motivate FairPoint to improve its performance,
2 while also providing tangible relief to its wholesale
3 customers.

4 The revised request also has the
5 advantage of reducing the administrative burden on the
6 Commission, because there is already a streamlined
7 procedural mechanism in place for the Commission to
8 consider this request. Changes of this degree were
9 approved in New York some time ago, and the New Hampshire
10 PAP provides that such changes should be submitted to this
11 Commission for a decision in no more than 30 days.

12 In conclusion, FairPoint believes that
13 this reduction strikes the proper balance of fairness
14 among all of the parties. FairPoint is held to its
15 obligations to provide remuneration for inadequate
16 performance, while, at the same time, the severity of
17 these penalties remains within the bounds of
18 reasonableness as they were originally conceived. Thank
19 you.

20 MS. ROSS: And, I would like to ask the
21 parties to respond to the issue of whether the petition --
22 the supplemental petition by FairPoint is within the scope
23 of the currently noticed proceeding here. And, FairPoint
24 will have an opportunity to respond to those arguments at

1 the end. What party is going next?

2 MS. FOLEY: Good morning. Paula Foley,
3 for One Communications. One Communications interprets
4 FairPoint's August 7th filing as a substitution of its
5 original petition, as opposed to a supplement. Therefore,
6 I think the point that was raised just now about "whether
7 it is within the scope of the currently noticed
8 proceeding" is a legitimate question. One Communications
9 opposed FairPoint's original petition for waiver and One
10 Communications opposes this substitute petition for PAP
11 waiver modification that was recently filed.

12 FairPoint does not include in its filing
13 any detail of the changes that it seeks. It is not clear
14 from the supplemental petition whether or not the
15 reduction that FairPoint is seeking is an across-the-board
16 reduction or a reduction to specific sections within the
17 PAP. Therefore, One Communications feels that FairPoint's
18 petition is insufficient.

19 Also, as we argued with regard to the
20 docket 09-059, in which FairPoint requested -- also
21 requested certain permanent modifications to the PAP, we
22 feel that any proposed permanent PAP modifications ought
23 to take place first within the ongoing PAP collaborative
24 that is currently underway. Therefore, this matter ought

1 to be deferred to that collaborative before it is
2 litigated. Thank you.

3 MS. ROSS: One point of clarification.
4 Is the collaborative docketed, do you know?

5 MS. FOLEY: No, it is not.

6 MS. ROSS: Okay. Thank you.

7 MS. BRAGDON: Hi. Trina Bragdon, for
8 CRC Communications. I agree with and support the comments
9 made by One Communications. CRC opposes either a waiver
10 or a modification of the PAP, for several reasons. The
11 first of which being, the PAP, as written, does not
12 contemplate retroactive modification, and that is what
13 FairPoint is asking for here. The PAP was -- FairPoint's
14 compliance with the PAP was a condition of the merger.
15 And, I view it sort of as an insurance policy against what
16 has now actually happened, which is FairPoint is providing
17 substandard wholesale services. That bargain, that
18 condition was made based on the amount at risk at that
19 time, which was the full amount, not this reduced amount
20 by 65 percent.

21 And, with regard to some of the
22 arguments made in the latest petition about what has
23 happened in New York and other places, I think the
24 situation here is different. I mean, no disrespect, but

1 FairPoint is the poster child for needing a PAP. The idea
2 of a PAP is to ensure and incent good wholesale
3 performance. It's public record that that is not the case
4 right now. For better or worse, and we can all talk about
5 Verizon's level of wholesale service, but the fact is, and
6 has been pointed out, that the penalties were -- were
7 smaller, certainly smaller than they are now, and so there
8 was a record of performance. And, so, maybe -- maybe that
9 qualifies in some world as a good reason to lower the
10 penalties. We don't have that situation here. We have a
11 record here of just the opposite, of not good wholesale
12 service. And, so, I think that that warrants continuation
13 of the current PAP until, as Ms. Foley suggested, that the
14 collaborative reaches some joint conclusion about where
15 things should go.

16 And, as to sort of some of the specific
17 points made by Mr. Malone, he cited some specific numbers
18 about Verizon's net revenues. I have no basis to comment
19 on that, I don't know where he got those numbers. And,
20 clearly, there would need to be more detail before, I
21 would think the Commission would want to understand the
22 basis for those numbers. That's all I have. Thank you.

23 MR. SHOER: Hi. Alan Shoer, again, on
24 behalf of BayRing. And, we also join the comments of One

1 Communications and CRC for the reasons articulated. We
2 also -- we also believe that or would suggest that the
3 supplemental petition is certainly not part of the notice,
4 or at least wasn't supposed to be the subject as described
5 in the notice. However, I think it's important that we do
6 -- that we do take a moment to clarify the main point
7 that, at least as I understand was suggested by
8 Mr. Malone, I want to make sure that it's absolutely
9 clear, that his intent is to essentially withdraw his
10 original request for a permanent waiver of any of the
11 applicable bill credits and performance penalties that are
12 owed and due and hasn't paid.

13 I believe that his supplemental petition
14 makes reference that, rather than his original relief, he
15 instead is requesting this particular modification. And,
16 I am interpreting that to mean that he is withdrawing his
17 original petition, in which case, you know, there won't be
18 any need for further argument and positions and statements
19 with respect to that original petition. But, just in case
20 there's any doubt about that, we do oppose and believe
21 that his original petition is flawed, it should be
22 dismissed outright, as was similarly handled in Vermont
23 recently and in Maine, for the reasons cited in two very
24 recent orders. But there's no point in going on and

1 articulating that I don't think at this point.

2 I just want to point out that I believe
3 that the representations that this supplemental approach
4 would be reasonable, would create motivations, and would
5 reduce burdens, is really just the opposite. I believe
6 that -- I would suggest that this approach it's not
7 reasonable in the context that -- as was just described,
8 that FairPoint, you know, they have gone along for months,
9 almost years now, arguing extensively that they are not
10 Verizon, and they are not the same company, and that they
11 are here to do things differently, they're here to do
12 things under their own systems and their own provisions
13 and under their own arrangements. And, we agreed that
14 that was an approach worth pursuing.

15 And, here now they're saying "well, wait
16 a minute. We actually really are like Verizon. And, we
17 want to use Verizon's numbers and Verizon's income
18 statements" and so on and so forth, so as to reduce what I
19 would consider the proper incentives, given the state of
20 the facts and the state of where we stand with our
21 relationships on a wholesale level with FairPoint.

22 And, that gets to the second point about
23 motivation. I think that reducing the potential
24 penalties, reducing the financial exposure, potential

1 financial exposure to FairPoint, creates just the opposite
2 incentive, and would actually decrease the motivation for
3 FairPoint to get its act together to start providing
4 quality service.

5 And, the last, as far as reducing the
6 burden, I think this actually increases the burden. There
7 was a process that was agreed upon when the merger went
8 down. That process was that the existing PAP was going to
9 apply. That, moving forward, the companies were going to
10 work towards a simplified PAP. And, in that simplified
11 PAP, I would expect that the measurements would be agreed
12 upon, as well as the appropriate penalty provisions and
13 arrangements for failure to meet the measurements that
14 were going to be established.

15 I just would like to point out that I
16 haven't had the time to research it in detail yet. It's
17 characterized in this supplemental petition that, you
18 know, is that this was one way, there was only way that
19 this was going to go as far as how penalties were going to
20 be established, they throw out this percentage arrangement
21 that was set up in New York and in other places. I
22 quickly looked at some of the earlier New Hampshire
23 orders, and this was a subject of some substantial debate
24 back in 2002 when the New Hampshire Commission was

1 considering what would be an appropriate mechanism to put
2 into place, to set - really, to set the correct standard
3 and the correct penalty when there was a failure of
4 performance. And, there were a number of alternatives
5 that were proposed. AT&T proposed an alternative. The
6 Staff proposed an alternative. Again, I don't have the
7 details right in front me. But I just want to point out
8 that there were alternative approaches to how to calculate
9 penalties that New Hampshire was considering, and spent a
10 great deal of time debating. And, I don't think that
11 should go to waste. And, so, I don't think we should be
12 leaving you with the impression that there's only one way
13 to set penalty percentages. And, I think that would be
14 the subject of an ongoing collaborative approach, to
15 develop an appropriate arrangement for the New Hampshire
16 -- the New Hampshire climate and the New Hampshire
17 companies. Thank you.

18 MR. KATZ: SegTEL agrees with the
19 positions of the other CLECs. The only two things that we
20 have to add to these positions are, first, segTEL was a
21 participant in the proceeding several years ago whereby
22 Verizon sought to modify the C2C and PAP in New Hampshire.
23 That proceeding was suspended. New Hampshire, at this
24 point, is substantially different than New York, and

1 should not be following New York's lead in the PAP.
2 Specifically, because now there is completely different
3 operating companies, completely different incumbent local
4 exchange carriers, different operating and support
5 systems, and a completely different competitive atmosphere
6 between the states. And, we really don't believe that New
7 York provides the template by which New Hampshire should
8 be following for performance assurance plans anymore.

9 Additionally, the new filing by
10 FairPoint last week seems to substantially revolve around
11 the proportional relationship between the dollars at risk
12 in the PAP and the net return received by FairPoint. And,
13 as a result, in order to evaluate this, we would have to
14 understand FairPoint's net return better, and that
15 substantially is going to come from having, at the very
16 least, an audit of FairPoint's net return, so that we
17 could understand exactly where they're deriving their
18 revenue and profit, before we can really take a
19 substantial position. Thank you.

20 MR. HUNT: Staff does not believe that
21 the proposed substitute petition has been properly
22 noticed. The scope contemplated, excuse me, the scope
23 contemplated a determination of whether FairPoint is
24 entitled to a waiver under the current PAP or whether the

1 PAP should be modified pursuant to Section 2, Paragraphs I
2 and K. Paragraphs I and K do not include dollars at risk.
3 Dollars at risk are covered by the PAP in Section 1,
4 Paragraph A. Staff believes dollars at risk should be
5 included in a docket being formulated by the collaborative
6 process mentioned by the CLECs, to address the overall
7 simplification of the PAP, as FairPoint agreed to do in
8 its stipulation with Staff in docket number DT 07-011.

9 MS. ROSS: Thank you. Does FairPoint
10 wish to respond to any of the positions that have been
11 taken by the parties?

12 MR. MALONE: Yes, ma'am.

13 MS. ROSS: Okay.

14 MR. MALONE: Now, forgive me if these
15 are a little bit out of order, but I'll try to address
16 them in turn. In regard to Mr. Shoer's question, yes, you
17 can assume that this current supplement is tantamount to
18 withdrawing our original request for relief in June. And,
19 Ms. Foley said that she was uncomfortable, that she did
20 not have enough detail as to what exactly this reduction
21 would mean as far as various aspects of the Plan and the
22 metrics, and we will provide more detail as to what the
23 distribution of this reduction would be around parts of
24 the Plan.

1 Addressing the issue of maintaining the
2 amount the way it is, FairPoint believes that there should
3 be substantial penalties for its lack of performance, and
4 it believes that these should be reasonable, and not
5 overly punitive, and that they should not be just some
6 absolute amount. In proceedings, in Section 271
7 proceedings around the old Verizon footprint, the FCC and
8 the various states decided that a reasonable penalty, a
9 reasonable maximum penalty was 39 percent of the reported
10 net return of Verizon. I can't say what was in their
11 minds, but I have to believe that they didn't believe that
12 that was reasonable only to Verizon. I think they
13 believed that 39 percent of net revenue was a significant
14 amount and represented a reasonable balance between
15 penalties and maintaining the financial health of the
16 phone company.

17 So, 39 percent of the net revenues that
18 FairPoint has or that were existing in 2005, we think, are
19 very much in the spirit of the original PAP, and that they
20 are very much reasonable by all standards, as laid out by
21 other state commissions in the Verizon footprint and by
22 the FCC time and time and time again as it was approving
23 Verizon's 271 applications.

24 As far as sending this to the

1 collaborative, I think that it's no surprise to anyone
2 that time is of the essence here for FairPoint.
3 FairPoint's cash flow issues have been discussed and are
4 on record for quite some time. We feel that, given that
5 39 percent is a reasonable amount, that there's no reason
6 why we should delay in implementing that amount for a
7 collaborative process that could be months and months down
8 the road.

9 In addition, this reduction has a long
10 history of being approved by various state commissions,
11 with the exception of New Jersey, which does not conform
12 to the New York PAP, and Maryland, which has been sitting
13 on it. And, you know, we don't believe that it's
14 necessary to do an investigation here at the Commission as
15 to the reasonableness, when the Commission also has a
16 history of concurring with the conclusions of the New York
17 Commission and others in this regard.

18 Yes, it was commented I think by
19 Mr. Shoer that we are not like Verizon, and that we should
20 not have the same kind of Performance Assurance Plan that
21 Verizon has. And, to a certain extent, I agree with that.
22 But I believe the fact that we're not like Verizon still
23 doesn't negate the fact that 39 percent of net revenue is
24 39 percent of net revenue regardless of who the company

1 is, and that we should be -- and that should be a
2 reasonable amount.

3 As to the issue of whether allowing us
4 to proceed at 39 percent, at a reduced level, \$30 million
5 a year cap is significant motivation. And, I don't
6 believe it's properly motivating to force a loss for a
7 company, which is exactly what would happen under the
8 current plan, where net revenue, at least in 2005, and I
9 can't even comment as to what it is now, was less than
10 what the maximum penalty would be.

11 One other point is that it was said
12 that, you know, we agreed to the PAP as it was, and, you
13 know, when the merger took place here, and that's
14 absolutely true. But the PAP, as it was, had a provision
15 for concurring with revisions to the PAP as approved in
16 New York. These were revisions that had been approved
17 three years ago, almost three years ago, provisions that
18 had been submitted to the Commission, and which had been
19 suspended, but are still there. So, we don't feel like
20 it's -- that we are diverging from the current PAP by
21 requesting this modification. This modification is
22 anticipated by the PAP, and it's been requested in the
23 past and it's been approved by other state commissions.

24 We believe that this supplement is

1 properly noticed. It's within the context of the waiver
2 petition, it's the same subject matter, and addresses the
3 same global issue as to the reasonableness of the
4 penalties under the circumstances. Thank you.

5 MS. ROSS: Thank you. I'm going to
6 close the prehearing conference and ask the parties to try
7 to come up with a recommended schedule to explore the
8 petition and the supplement. Since the petition is
9 withdrawn, I guess I should restate that to explore the
10 supplement. We'll have to wait for the Commission's
11 decision on whether this proceeding needs to be
12 re-noticed. But I think it's fair to say that, in some
13 context, probably the Commission will be interested in
14 developing a record on the Company's request. At least
15 for now, let's make that assumption and come up with a
16 procedural schedule that you can recommend to the
17 Commission. And, we will have to wait for the Commission
18 to sort out the procedural issues and determine how this
19 request should move forward. Thank you.

20 (Whereupon the prehearing conference
21 ended at 10:44 a.m. and a technical
22 session was held thereafter.)
23
24