

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 11-061

FairPoint Communications, Inc. Petition for

Approval of Simplified Metrics Plan and Wholesale Performance Plan

REPLY BRIEF OF COMCAST PHONE OF NEW HAMPSHIRE, LLC

Comcast Phone of New Hampshire, LLC (“Comcast”) files this Reply Brief in response to the Initial Briefs filed in the above-referenced matter by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and Competitive Local Exchange Carriers CTC Communications Corp., Choice One Communications, Lightship Telecom, LLC and Conversent Communications, all d/b/a EarthLink Business; Freedom Ring Communications LLC d/b/a BayRing Communications; Biddeford Internet Corporation, d/b/a/ Great Works Internet; CRC Communications LLC and Mid-Maine TelPlus LLC d/b/a/ OTT Communications, and National Mobile Communications Corporation d/b/a Sovernet Communications (collectively, the “CLECs”).

Comcast respectfully requests that the Commission adopt and incorporate into the forthcoming FairPoint Wholesale Performance Plan (“Plan”) terms proposed in the Initial Brief

filed by the CLECs that (a) appropriately account for any changes in law and establish an orderly process for their implementation, with proper Commission oversight, and (b) promote the timely and accurate collection and reporting of performance results and posting of bill credits.¹

I. THE PLAN TERMS MUST PROVIDE AN ORDERLY PROCESS TO ACCOUNT FOR ANY CHANGES IN LAW AND INCLUDE AN APPROPRIATE ROLE FOR THE COMMISSION

Comcast supports the change in law terms proposed in the Initial Brief filed by the CLECs, as those terms appropriately account for any changes in applicable law and establish an orderly process for the implementation of such developments in a bilateral manner – with proper Commission oversight. The FairPoint proposed language would, on the other hand, improperly permit FairPoint to unilaterally modify the Plan terms and is thus inconsistent with both the stipulated Plan and the Commission’s ongoing role ensuring competition in the local telecommunications market. The Commission is thus respectfully requested to incorporate terms into the Plan that require the negotiation of amendments to reflect any and all applicable changes in law and Commission approval of modifications to the Plan.

Notably, the Competitive Carrier proposal simply suggests that the Commission maintain its existing level of oversight. The proposal thus does not propose additional oversight, but rather supports continuation of the process already in existence today, under which modifications to the performance assurance plan must be considered and approved by the Commission.

¹ As the terms proposed in the Initial Brief filed by the CLECs relating to change of law and late and inaccurate reports were developed jointly by Comcast and the CLECs (collectively, the “Competitive Carriers”) the terms as proposed may be referred to herein as either the CLECs’ or Competitive Carriers’ proposal.

FairPoint's Unilateral Action Proposal

At the outset, it is important to identify what FairPoint is actually proposing, as the effect that FairPoint's proposed language would have, in practice, is somewhat obscured by FairPoint in its Initial Brief. In the first paragraph of the FairPoint-proposed language, the FairPoint terms are substantially consistent with the CLEC-proposed terms, reflective of the agreement in principle on such terms. Those terms generally establish a logical process under which amendments to the Plan would be negotiated in good faith, to reflect certain changes in law.

The second paragraph of the FairPoint-proposed language, however, then eliminates the logical, negotiated process any time FairPoint believes there has been a favorable action that affects any service or product encompassed within the Plan. This language, which decisively begins with "[n]otwithstanding anything in the preceding paragraph to the contrary," would improperly set up an independent option that FairPoint may exercise unilaterally any time it believes that any (very broadly encompassing) "decision, order, determination or action, or any change in applicable law" limits FairPoint's obligation to provide a service or product that FairPoint already agreed to include within the Plan.² Upon such an ostensible occurrence, FairPoint would immediately remove all metrics and bill credits associated with that service or product.³

Critically, this FairPoint-proposed unilateral option excludes both the negotiation of an amendment and any Commission review or involvement. Rather, FairPoint proposes that it simply "will no longer be subject to any metrics or bill credits" related to services or products that FairPoint believes it need no longer provide. This proposal is entirely inconsistent with the

² FairPoint Brief on Outstanding Issues Related to Wholesale Performance Plan, dated November 8, 2013 ("FairPoint Brief"), at 12

³ *Id.*

change of law process outlined and largely agreed upon in the first paragraphs of both the Competitive Carrier and FairPoint proposals.⁴

It is perhaps for this reason that the FairPoint Initial Brief and the FairPoint proposed language are fundamentally inconsistent with one another in important respects. This discrepancy helps to demonstrate the lack of any reasonable basis for the FairPoint proposal. Indeed, the FairPoint brief highlights the impropriety of the FairPoint-proposed language, with regard to both substance and process.

First, the FairPoint brief notes that the substantive components of the Plan are designed to ensure that FairPoint “will provide services, access and interconnection” to Competitive Carriers in accordance with both the federal Act and “State law and regulation.”⁵ The FairPoint proposed language, however, indicates that upon any purported change in law, such as may occur at the federal level, FairPoint may unilaterally remove metrics and bill credits, regardless of whether FairPoint remains obligated to provide such service or product under State law.

Second, the FairPoint brief duly notes that the substance of the Plan has been agreed-upon by FairPoint and the Competitive Carriers. The services and products included in the Plan – and the metrics and penalties designed to ensure performance on those key items – were negotiated and stipulated by FairPoint.⁶ FairPoint itself notes that the Plan ensures FairPoint “will provide services, access and interconnection” to the Competitive Carriers not only as

⁴ There are, however, distinctions between the Competitive Carrier and FairPoint-proposed first paragraphs, in that the Competitive Carriers’ proposal more precisely delineates the type of action that triggers a change in law and includes all parties in the Commission’s dockets within the scope of negotiations. The Competitive Carrier proposed terms also, as noted below, include a role for the Commission (*i.e.*, approval of the proposed amendment) while the FairPoint proposed language excludes any such role.

⁵ FairPoint Brief at 11.

⁶ As noted in the CLEC Brief, at 8, such Plan terms were “painstakingly negotiated and agreed-upon” over a lengthy period of time.

required by federal law and State law and regulation, but also consistent with the requirements of “stipulations between the [Competitive Carriers] and FairPoint NNE.”⁷ As metrics and bill credits ensuring the satisfactory provision of such items were jointly included within the Plan, and jointly proposed for adoption by this Commission, that agreement and advocacy are simply incompatible with the unilateral Plan modification option now being proposed by FairPoint.

Finally, in terms of process, the FairPoint brief notes that under the current PAP, changes to the New York PAP are to be “filed with the state regulator for review and inclusion in that state’s PAP upon the Commission’s approval.”⁸ Despite that, the FairPoint-proposed change of law language contains no provision for Commission review or approval of changes, regardless of whether such changes stem from a negotiated amendment or FairPoint’s unilateral determination.

Moreover, while the FairPoint brief suggests that FairPoint’s proposed language “contemplates a reasonable opportunity for the parties to discuss any legitimate concerns,” the FairPoint unilateral action proposal allows for no discussion or process whatsoever.⁹ The FairPoint proposal, under which FairPoint would simply deem items to be “no longer subject to any metrics or bill credits,”¹⁰ is thus clearly inconsistent with what FairPoint agrees to be reasonable process.

⁷ FairPoint Brief at 11-12 (*emphasis added*).

⁸ FairPoint Brief at 11.

⁹ FairPoint Brief at 12.

¹⁰ FairPoint Brief at 12.

The Competitive Carriers' Reasonable Approach

The Competitive Carriers' proposed terms provide for a fair and orderly process to account for any changes in law. These terms encompass any change to applicable law that substantively affects any material provision of the Plan, whether legislative, regulatory, judicial or other governmental decision, order, determination or action.

Procedurally, the Competitive Carrier terms entail the negotiation of an amendment to the Plan, which negotiations would be noticed to all parties to the Commission's Wholesale Performance Plan proceeding. The Commission would then review the negotiated amendment, or resolve any differences. As noted in the CLECs' Initial Brief, this procedure is consistent with the process under which FairPoint and the Competitive Carriers worked out the details of the Plan now jointly proposed for adoption by the Commission, and the instant process through which the parties are briefing the open issues.¹¹

As noted both by FairPoint and the CLECs, the WPP and its predecessor PAP were created to ensure that markets opened to competition through the Section 271 process remained open on an ongoing basis. FairPoint specifically notes that metrics are "measures of FairPoint's performance in specific interactions with CLECs," and that the performance assurance plans were "an important element of the public interest standard."¹²

Given the importance of the metrics and bill credits as self-effectuating incentives to ensure adequate provision of each service and product that FairPoint is required to provide, the Plan approved by the Commission must not allow FairPoint to unilaterally decide when it would "no longer be subject to any metrics or bill credits associated with [a] service/product." Rather,

¹¹ CLEC Brief at 8.

¹² FairPoint Brief at page 3 and page 1, respectively.

the Commission is respectfully requested to determine that the list of metrics and penalties painstakingly agreed-upon and submitted jointly for Commission approval may be modified only through an orderly process with proper Commission oversight – such as through the change in law terms proposed by the Competitive Carriers:

If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint and the parties to the respective Commission and Board dockets will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law.

Upon agreement, such revisions will be submitted jointly by the parties participating in the negotiations to the Commissions and Board for approval. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commissions and Board.

II. THE PLAN SHOULD CONTAIN TERMS TO PROMOTE THE ACCURATE AND TIMELY REPORTING OF PERFORMANCE RESULTS AND ISSUANCE OF BILL CREDITS

Comcast fully supports Commission adoption of the terms proposed in the Initial Brief filed by the CLECs relating to late and inaccurate reports, as such terms were (as noted above) developed jointly by Comcast and the CLECs. These Competitive Carrier-proposed terms are specifically designed to incentivize FairPoint to accurately report its performance under the stipulated Plan on a timely basis.

Significant assurance provisions should be the cornerstone of the Wholesale Performance Plan, as accurate reporting of performance is essential to the effectiveness of the Plan. Without assurance that the performance being reported is reflective of FairPoint's actual performance, the

objective of the Plan to be a self-executing enforcement mechanism would be seriously undermined. The terms proposed by FairPoint in its Initial Brief are simply insufficient to achieve these goals.¹³

The Competitive Carrier-proposed provisions should properly incentivize the timely and accurate reporting of performance results, which should in turn enable the substantive Plan metric and penalty provisions to ensure satisfactory provisioning of access, interconnection and services by FairPoint. Conversely, in the absence of accurate reporting, the performance-inducing objective of the Plan may be nullified as penalty payments otherwise mandated by the Plan are voided and harm to the competitiveness of the telecommunications market goes undetected.

III. CONCLUSION

The substantive metric and penalty provisions of the proposed Wholesale Performance Plan have been stipulated by FairPoint, and thus accepted by FairPoint as reasonable and achievable measures of its performance in providing services, interconnection and access to Competitive Carriers. The change in law provisions proposed by the Competitive Carriers – unlike the terms proposed by FairPoint – would establish an orderly process for the implementation of any changes in applicable law that substantively affect the stipulated Plan terms, and provide for the continuation of the Commission’s current oversight role.

The Competitive Carriers have likewise proposed appropriate Plan provisions to properly incent FairPoint to collect and report accurate results on the stipulated Plan metrics and penalties,

¹³ Comcast is in general agreement with the analysis of the FairPoint-proposed terms expected to be contained in the Reply Brief being filed by the CLECs.

on a timely basis. The terms proposed by FairPoint are simply insufficient to achieve those same objectives.

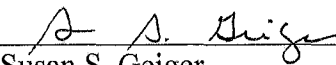
Given that the provisions proposed by the Competitive Carriers relating to changes in law and late and inaccurate reports will help to ensure the effectiveness of the Wholesale Performance Plan and the competitiveness of the telecommunications market, the Commission is respectfully requested to adopt and incorporate those provisions into the Plan.

Respectfully submitted,

Comcast Phone of New Hampshire, LLC

By its Attorneys,

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Certificate of Service

I hereby certify that on this 3rd day of December, 2013, a copy of the foregoing Reply Brief was sent via electronic mail to the service list in this docket.



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