

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 11-061

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC d/b/a
FAIRPOINT COMMUNICATIONS – NNE**

**Petition for Approval of Simplified
Metrics Plan and Wholesale Performance Plan**

Order Granting Joint Motion Subject to Conditions

O R D E R N O. 25,538

June 27, 2013

I. PROCEDURAL HISTORY

On May 13, 2013, a Joint Motion for Expedited Approval of Arbitration Procedure (the Joint Motion) was filed by New England Telephone Operations LLC d/b/a FairPoint Communications NNE, Biddeford Internet Corporation d/b/a Great Works Internet, Comcast Phone of New Hampshire, LLC, CRC Communications of Maine, Inc. d/b/a OTT Communications, CTC Communications Corp., Lightship Telecom LLC, Conversent Communications of New Hampshire, Inc., all d/b/a "EarthLink Business", Freedom Ring Communications, LLC d/b/a BayRing Communications, and National Mobile Communications Corporation d/b/a Sovernet Communications (the Moving Parties). The Joint Motion seeks Commission approval of specific arbitration procedures (the Arbitration Procedures) designed to address and resolve issues associated with a simplified Performance Assurance Plan to be known as the Wholesale Performance Plan (the WPP).¹ The proposed Arbitration Procedures would involve the three states of Maine, New Hampshire and Vermont, and therefore the Moving

¹ In Order No. 25,440 (Dec. 18, 2012), the Commission approved on a *nisi* basis a settlement stipulation that resolved some but not all of the issues in this docket, contingent upon approval of the stipulation without modification by the Maine Public Utilities Commission and the Vermont Public Service Board.

Parties have sought similar approval and adoption of the Arbitration Procedures by the Maine Public Utilities Commission and the Vermont Public Service Board.² No objection to the Joint Motion was filed with the Commission within the ten-day period applicable under N.H. Code Admin. Rules Puc 203.07(e).

II. SUMMARY OF ARBITRATION PROCEDURES

As described in the Joint Motion, the proposed Arbitration Procedures would require appointment by each state commission or board of a staff representative to serve on a three-member panel of arbitrators (the Arbitration Panel). Parties other than the Moving Parties would be permitted to intervene and participate as parties in the arbitration proceedings. All parties would have an opportunity to submit position statements on issues to be arbitrated, which would be subject to informational requests from the Arbitration Panel and limited discovery from the parties. During the hearing before the Arbitration Panel, position statements would serve as pre-filed testimony, and other documents could be offered into evidence, with sponsoring witnesses subject to cross-examination and an opportunity for live rebuttal testimony.

Following the arbitration hearing, the Arbitration Panel would circulate findings of fact and conclusions of law and, after an opportunity for written comment by the parties, the Panel would adopt by majority vote a final proposed decision (the Proposed Decision). Each arbitrator would file the Proposed Decision with his or her respective state commission or board. The Commission Staff representative would file the Proposed Decision as a hearings examiner's report and recommendation. Parties could file exceptions with the state commissions or board concerning any portion of the Proposed Decision based on alleged errors of law. In addition,

² The Maine Public Utilities Commission recently approved with conditions a similar Joint Motion for Expedited Approval of Arbitration Procedure filed in Docket No. 2009-334 by order dated June 13, 2013 (the Maine Order). We are unaware of any action taken by the Vermont Public Service Board with respect to the proposed Arbitration Procedures.

parties could petition for *de novo* review of any decision reached by the Arbitration Panel on issues outside the scope of arbitration submitted by the Moving Parties.

Each state commission or board would establish a briefing schedule to address issues raised on appeal and a procedural schedule for resolution of matters outside the scope of the arbitration proceedings. Upon completion of this process, the state commission or board would issue a final decision encompassing all issues related to the establishment of the WPP.

III. POSITIONS OF MOVING PARTIES AND STAFF

A. Moving Parties

The Moving Parties maintain that the proposed Arbitration Procedures described in the Joint Motion provide for a process to resolve many outstanding issues in an efficient and expeditious manner, and are the product of extensive discussions among the Moving Parties. The issues the Moving Parties expect to be subject to arbitration pursuant to the Arbitration Procedures include: (1) whether there should be a limit or cap on the total amount of dollars placed at risk, and if so, in what amount; (2) rates for per unit bill credits; (3) whether escalators should apply for repeated instances of missed performance, and if so, by what percent; (4) change of law provisions; (5) term of the plan; (6) remedies for late or inaccurate reports; and (7) inclusion or exclusion of certain metrics within the reporting and/or bill credit portions of the plan, as identified on Attachments 3a and 3b of the Stipulation filed on October 23, 2012. The Moving Parties state they will prepare a final issues list upon completion of negotiations concerning plan terms and metric guidelines and indicate their intention to complete this process “within a month or so.” Joint Motion at 2.

According to the Moving Parties, the Commission has the authority to delegate the arbitration functions specified in the proposed Arbitration Procedures to a member of Staff under

RSA 363:17, which provides that the Commission may “appoint a qualified member of its staff as examiner to hear the parties, report the facts, and make recommendations to the commission.”

The Moving Parties also state that the proposed Arbitration Procedures preserve all procedural rights provided under the Commission’s rules because no hearing is required to modify the existing Performance Assurance Plan.

The Moving Parties request that the Commission approve the proposed Arbitration Procedures without modification on an expedited basis or, “[i]n the alternative, in the event the Commission believes that further information is required, schedule a technical session as soon as convenient, and thereafter approve the Arbitration Procedures.” Joint Motion at 4.

B. Staff

On June 10, 2013, Staff filed a memorandum and recommendation regarding the Joint Motion. Staff acknowledged that the Joint Motion had been submitted following extensive consultation between parties and staff of the three state commissions, and stated its belief that adoption of the proposed unified three-state Arbitration Procedures would facilitate the rapid resolution of many of the issues associated with the revised Performance Assurance Plan.

Staff expressed concern, however, that the proposed Arbitration Procedures may effectively limit the scope of Commission review and approval of any Proposed Decision and that RSA 363:17 may not permit the recommendation of a hearings examiner to bind the Commission in matters of either fact or law. Staff recommended that the Commission first determine whether RSA 363:17 permits the Commission to be bound by the factual determinations of a hearings examiner appointed as a member of the three-state Arbitration Panel; if such statutory authority exists, Staff recommends that the proposed Arbitration Procedures be approved as submitted.

IV. COMMISSION ANALYSIS

We agree with the Moving Parties and Staff that a three-state arbitration process would represent an efficient and expeditious means of resolving many of the issues that remain outstanding under the WPP revision to the Performance Assurance Plan, and we commend the Moving Parties and Staff for their efforts to develop an alternative dispute resolution process to address these outstanding issues. We find compelling, however, the concerns expressed by Staff that the proposed Arbitration Procedures do not sufficiently clarify the scope of the Commission's review and approval of any Proposed Decision adopted by the three-state Arbitration Panel. For example, it is not clear whether the Arbitration Procedures are intended to or would have the effect of limiting the Commission's ability to hear testimony or receive record evidence that the Commission may want to consider prior to issuance of a final decision.

We do not believe that RSA 363:17 permits the Commission effectively to be bound by the findings of fact or conclusions of law incorporated in a Proposed Decision adopted under the Arbitration Procedures. Under RSA 363:17, the Commission is authorized to "appoint a qualified member of its staff as examiner to hear the parties, report the facts, and make recommendations to the commission." We do not interpret this statutory authorization for delegation of certain responsibilities to a qualified Staff member to permit the recommendation of a Staff hearings examiner to bind the Commission in matters of either fact or law.

We note that the Maine Order expresses similar concerns regarding the scope of commission review and approval authority with respect to a Proposed Decision, and approves the proposed Arbitration Procedures subject to the following conditions:

- (1) notwithstanding anything to the contrary in the Joint Motion or the Arbitration Process/Procedure contained in Exhibit 1 to the Joint Motion, the Commission may consider any evidence, testimony, or other material relevant to the determination of the issues in this proceeding including, but not limited to, evidence, testimony, or other

material presented as exceptions or comments to an Examiner's Report, in briefs by the parties, or prior to or during the arbitration proceeding before the arbitration panel; and (2) the Commission is not obligated to accept any finding or conclusion of fact or law made by the arbitration panel.³

Based on our concerns regarding the scope of our review and approval authority under the proposed Arbitration Procedures, we conclude that the Arbitration Procedures cannot be approved without modification as requested in the Joint Motion, unless conditions similar to those contained in the Maine Order are imposed on such approval. While we may not deem it necessary to receive new or additional evidence or render different factual findings in the course of our consideration of a Proposed Decision, and while we would not expect to conduct a full *de novo* review unless requested by a party in the proceeding, we do not believe we have the authority to accept limitations on our ability to do so.


Accordingly, we will grant the Joint Motion and approve the proposed Arbitration Procedures subject to the following conditions: (1) notwithstanding anything to the contrary in the Joint Motion or the Arbitration Procedure/Process contained in Exhibit 1 to the Joint Motion, the Commission may consider any evidence, testimony, or other material relevant to the determination of the issues in this proceeding, including, but not limited to, evidence, testimony, or other material presented as exceptions or comments to a Hearings Examiner's Report, in briefs by the parties, or prior to or during the arbitration proceedings before the Arbitration Panel; and (2) the Commission is not obligated to accept any finding or conclusion of fact or law made by the Arbitration Panel during or as a result of the arbitration proceedings before the Arbitration Panel or in any Proposed Decision.

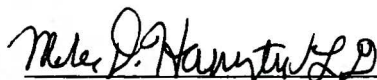
³ Maine Order, ordering paragraph 2, at p. 6.

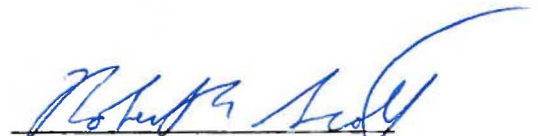
Based upon the foregoing, it is hereby

ORDERED, that the Joint Motion of the Moving Parties is hereby GRANTED, subject to the following conditions: (1) notwithstanding anything to the contrary in the Joint Motion or the Arbitration Procedure/Process contained in Exhibit 1 to the Joint Motion, the Commission may consider any evidence, testimony, or other material relevant to the determination of the issues in this proceeding, including, but not limited to, evidence, testimony, or other material presented as exceptions or comments to a Hearings Examiner's Report, in briefs by the parties, or prior to or during the arbitration proceedings before the Arbitration Panel; and (2) the Commission is not obligated to accept any finding or conclusion of fact or law made by the Arbitration Panel during or as a result of the arbitration proceedings before the Arbitration Panel or in any Proposed Decision.


By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of June, 2013.


Amy L. Ignatius
Chairman


Michael D. Harrington
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director