

**BEFORE THE  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

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**NORTHERN NEW ENGLAND  
TELEPHONE OPERATIONS LLC D/B/A  
FAIRPOINT COMMUNICATIONS – NNE      }  
Petition for Waiver of Certain Requirements      }  
Under the Performance Assurance Plan and      }  
Carrier-to-Carrier Guidelines      }**

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**Docket No. DT 09-113**

**CRC COMMUNICATION'S OF MAINE, INC'S  
MOTION TO DISMISS, OR ALTERNATIVELY,  
MOTION TO STAY PROCEEDINGS**

CRC Communications of Maine, Inc. (CRC) hereby moves to dismiss FairPoint Communications-NNE's (FairPoint) Supplement to Petition for Waiver of Certain Requirements under the Performance Assurance Plan ("PAP") and Carrier-to-Carrier ("C2C") Guidelines filed on August 7, 2009 ("FairPoint Supplemental Petition"). In the event that the Commission denies CRC's Motion to Dismiss FairPoint's entire filing, CRC requests that the Commission dismiss FairPoint's request to waive the PAP penalties from January 1, 2009 until present. Finally, in the alternative, if the Commission does not grant any part of CRC's Motion to Dismiss, CRC requests that the Commission stay its consideration of FairPoint's Supplemental Petition pending consideration of the issues raised by FairPoint's Petition by the Industry Collaborative tasked with revising the PAP and C2Cs.<sup>1</sup>

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<sup>1</sup> Please see the discussion of this issue in the Motion of One Communications.

## **I. BACKGROUND**

FairPoint first filed for modification of its obligations under the PAP in March 2009 in Docket No. 09-059. This first petition sought both temporary and permanent waivers of specific PAP measurements as well as a waiver of several months of PAP penalties. In June, FairPoint filed another request for waiver, this time seeking a four-month waiver of all penalty payments required under the PAP. In August, FairPoint filed this latest Supplemental Petition which supersedes the June request and asks the Commission to approve a permanent modification of the PAP retroactive to January of 2009 which FairPoint says would reduce the total dollars at risk under the PAP by 65%. Thus, while FairPoint has styled its filing as a single “modification” of the PAP, in reality FairPoint is asking the Commission to take two actions (1) grant a waiver of all PAP results from January until the present; and (2) adopt a new PAP with significantly decreased dollars at risk.

## **II. MOTION TO DISMISS**

CRC respectfully requests that the Commission dismiss FairPoint’s Supplemental Petition because it: (1) violates the terms of the Commission’s Order approving the sale of Verizon’s assets to FairPoint; and (2) asks for relief not contemplated by the PAP itself, i.e., unsubstantiated waivers and retroactive relief. In addition, CRC requests that the Commission deny FairPoint its requested relief because FairPoint already enjoys a substantial reduction in the amount of dollars at risk because of its interpretation of its Wholesale Advantage Agreements with the CLECs.

**A. FairPoint’s Supplemental Petition Violates the NH CLEC Settlement and the Commission’s Order Approving the FairPoint Merger**

CRC joins in and hereby incorporates the filings and arguments of One Communications and Bayring Communications on this issue.

**B. FairPoint’s Supplemental Petition Fails to Meet the Requirements for Waiver of Penalties From January 2009 Until Present**

Section J of the PAP outlines three generic grounds under which FairPoint may seek Exception or Waiver of its obligations under the PAP: (1) to correct for “clustering” of data and the effect such clustering has on the statistical models used in the PAP; (2) to correct any impacts on performance by unusual CLEC behavior; and (3) to correct for situations beyond FairPoint’s control that negatively impact FairPoint’s ability to satisfy absolute standards (as opposed to parity metrics related to retail performance which are not subject to Exceptions or Waiver because of uncontrollable situations).

PAP, Section II(J). Significantly, the PAP also states that “[i]nsufficient filings [for waiver] may be dismissed for failure to make a *prima facie* showing that relief is justified.” Id.

FairPoint’s Supplemental Petition does not even attempt to explain how its request fits under the PAP’s current waiver requirements. FairPoint simply states that its proposed 65% reduction in dollars at risk should be made retroactive to January 1, 2009. This absence of support or argument is particularly egregious given the discussions that have taken place among Staff and the parties concerning the earlier iterations of FairPoint’s PAP waiver requests. FairPoint has responded to the valid and appropriate criticism that its earlier filings lacked a basis in the provisions of the PAP by completely ignoring the fact that the PAP contains provisions that govern a substantial portion of its

current request. These provisions limit the circumstances in which a waiver may be granted and require FairPoint to demonstrate “clearly and convincingly . . . why [FairPoint’s] normal, reasonable preparations for difficult situations proved inadequate” – something it apparently is both unwilling and unable to do. *See* PAP, Section II(J). Undeterred by the fact that it is bound by the current PAP, FairPoint does not even attempt to make the necessary showings.

The Commission should not countenance FairPoint’s flagrant disregard of its obligations to the CLECs and the Commission. Both Verizon and FairPoint agreed to abide by the terms of the PAP to secure certain actions by this Commission, i.e. the Commission’s recommendation to the FCC in the Section 271 proceedings and the Commission’s approval of the Verizon/FairPoint transaction. The Commission has met its end of the bargain; FairPoint should not now be allowed to shirk its obligations. The Commission should dismiss that portion of FairPoint’s filing seeking to retroactively apply any modifications to the PAP for failure to make the *prima facie* showing required by section J of the PAP.

As will be explained more fully below, in addition to not allowing the retroactive waiver requested by FairPoint, the PAP also does not allow for the retroactive modification proposed by FairPoint – thereby fully precluding the granting of FairPoint’s requested waiver of penalties assessed from January 2009 until now.

**C. FairPoint’s Supplemental Petition Fails to State a Claim for Relief Because the PAP Precludes Retroactive Modification**

The Commission should dismiss FairPoint’s Supplemental Petition because the PAP does not permit the relief that FairPoint requests. Section K of the PAP addresses modifications of the PAP. It clearly contemplates that only prospective

changes could be made to the PAP. Specifically, the PAP provides for an annual review and/or audit of the PAP “to determine whether any modifications or additions should be made.” It goes on to state that any modifications of the PAP would go into effect “as soon as it is reasonably practical *after Commission approval of the modifications.*” PAP, Sec. K (emphasis added). Given the detail found throughout the PAP, and in the waiver sections in particular, if the Commission, or Verizon (which drafted the PAP), had intended to allow for retroactive modifications, they would have included language explicitly allowing for it. Instead, a PAP was proposed and adopted which allowed only for temporary waivers under limited circumstances and modification only after review by the Commission.

Once again, FairPoint makes no attempt to explain how or why its modification request fits under the provisions of the governing PAP. Instead, FairPoint presents minimal argument addressing substantive reasons for its request. CRC submits that the Commission cannot, and should not, reach the merits of a request that is not contemplated by the PAP. Doing so will only encourage FairPoint to make additional baseless filings in the future, thereby further harming CLECs by forcing them to divert significant resources away from their own business to defend against FairPoint’s attempts to avoid its wholesale responsibilities.

**D. FairPoint’s Supplemental Petition Asks for Relief That FairPoint Has Already Granted Itself**

During the course of the proceedings in New Hampshire and the other New England states regarding modification or waiver of the PAP, CLECs have discovered that FairPoint already enjoys a huge reduction in the dollars at risk under the current PAPs by virtue of its interpretation of its so-called Wholesale Advantage

Agreements.<sup>2</sup> Specifically, in response to data requests in Maine and New Hampshire, FairPoint claims that a CLEC that signs a Wholesale Advantage Agreement waives all PAP penalties, whether they are related to their Wholesale Advantage product or not. Thus, FairPoint has not been paying any penalties owed to CLECs with Wholesale Advantage Agreements since it took over operations in April of 2008. According to FairPoint's own records, for January through July of this year, FairPoint did not pay over \$3.8 million dollars in penalties that should have been paid to CLECs for the substandard service provided by FairPoint.

FairPoint's representations in its Supplemental Filing seem to indicate that FairPoint has been paying the full amount of penalties due for each month's performance. On page 7, FairPoint states that "PAP penalties have been in excess of \$3 million dollars per month in NNE," giving the clear impression that it has paid \$3 million dollars each month. That simply is not true. The Commission should rebuke FairPoint for its attempt to "hide the ball" from the Commission and force FairPoint to state on the record the true nature of its request, i.e. the actual amount of dollars at risk should the Commission grant its Petition. By all accounts that amount will be far, far less than the \$14.7 million for New Hampshire that FairPoint claims in its Petition. Indeed, if the current trend continues, the true amount at risk in New Hampshire would be \$7.7 million or less – a

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<sup>2</sup> Wholesale Advantage Agreements were introduced by the RBOCs after the Federal Communications Commission eliminated section 251 access to a number of unbundled network elements in 2003. Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003)(*Triennial Review Order or TRO*). While Verizon, and now FairPoint, contend that such arrangements were voluntarily entered into by the CLECs, most CLECs, especially smaller CLECs without a national presence, were forced to sign agreements drafted by the RBOCs or risk customer-impacting terminations of services. Statements that CLECs willingly and freely gave up their PAP penalties ignore what really happened during that time period.

reduction of 82% from the original \$42.8 million at risk.<sup>3</sup> For FairPoint to ask for such a reduction in the face of its continuing poor wholesale performance stretches the limits of reasonableness to the breaking point. Now is the exact wrong time for the Commission to reward FairPoint for its past and continuing problems by relieving it of its bargained-for wholesale obligations.<sup>4</sup>

## V. CONCLUSION

For the reasons discussed above, CRC respectfully moves this Commission to dismiss FairPoint's Supplemental Petition. In the alternative, CRC requests that the Commission stay this proceeding pending consideration of FairPoint's modification by the Industry Collaborative.

Respectfully Submitted,

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September 22, 2009

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<sup>3</sup> FairPoint provided a table in its response to One Comm 1-5 setting forth the amount of PAP penalties not paid due to Wholesale Advantage for January through July. The average percent of penalties exempted each month was 48%. Application of this average to the current NH total dollars at risk (\$42.8 million) provides the actual amount at risk today, \$22.25 million. If this amount is reduced by 65%, only \$7.7 million dollars will be truly at risk per year.

<sup>4</sup> Should the Commission deny CRC's Motions and proceed to consider the merits of FairPoint's Petition, CRC will provide full argument (and perhaps testimony and evidence) on both FairPoint's substantive arguments as well as the Wholesale Advantage issues raised in this filing.