

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

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

NHPUC AUG27'09 AM11:13

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

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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