

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 09-059

DT 09-113

DT 11-061

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC
D/B/A FAIRPOINT COMMUNICATIONS, INC.

Performance Assurance Plan and Carrier to Carrier Metrics

Order *Nisi* Approving Settlement Stipulation

ORDER NO. 25,440

December 18, 2012

I. PROCEDURAL HISTORY

As part of its settlement of various issues related to the transfer of assets from Verizon to FairPoint Communications (FairPoint), in Docket No. DT 07-011, FairPoint agreed to adopt the Verizon Performance Assurance Plan (PAP) and its underlying Carrier to Carrier Guidelines (C2C). FairPoint also agreed to work with Commission Staff and interested competitive local exchange carriers (CLECs) to ultimately develop a simplified PAP. On March 24, 2011, FairPoint filed a petition for approval of a simplified metrics plan and wholesale performance plan. The procedural history of this matter is more fully described in *Northern New England Telephone Operations LLC d/b/a FairPoint Communications, Inc.*, Order No. 25,221 (May 6, 2011).

On July 28, 2011, the Commission issued an Order of Notice regarding the conduct of the docket. In support of the attempt to coordinate efforts in New Hampshire, Maine, and Vermont to analyze the requirements of a new PAP and to narrow issues for litigation, the Commission

ordered that two technical sessions be conducted with the participation of FairPoint, intervenors, Staff, and representatives of the states of Maine and Vermont. These two technical sessions were ultimately conducted in addition to many discussions during 2011 and 2012 in which FairPoint, CLECs, and state regulatory representatives from New Hampshire, Maine, and Vermont sought to foster agreement on a PAP suitable for use in all three states.

On October 23, 2012, Northern New England Telephone Operations LLC d/b/a FairPoint Communications- NNE (FairPoint) and the following CLECs: Choice One of New Hampshire, Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp, and Lightship Telecom, LLC, all of which do business as EarthLink Business (EarthLink Business), Freedom Ring Communications LLC d/b/a BayRing Communications, Comcast Phone of New Hampshire, LLC, Biddeford Internet Corporation, d/b/a/ Great Works Internet, CRC Communications LLC d/b/a OTT Communications, National Mobile Communications Corporation d/b/a Sovernet Communications and United Systems Access Telecom, Inc. filed a joint motion seeking the expedited approval of a settlement stipulation (the Stipulation) that would resolve some, but not all of the issues in this docket. Staff and segTEL, Inc., are not signatories to the Stipulation. On December 5, 2012, Staff filed a recommendation that the Commission approve the Stipulation by order *nisi*.

The petitions and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2009/09-059.html>,

<http://www.puc.nh.gov/Regulatory/Docketbk/2009/09-113.html>, and

<http://www.puc.nh.gov/Regulatory/Docketbk/2011/11-061.html>.

II. SUMMARY OF THE SETTLEMENT STIPULATION

The Stipulation represents a partial settlement of the issues in this docket. In general, the Stipulation governs the development of a simplified metrics performance plan (the “SMP Plan”) and implementation guidelines for use in New Hampshire, Maine, and Vermont. The SMP Plan will replace, in their entirety, FairPoint’s existing Carrier to Carrier Guidelines and Performance Assurance Plans.

The Stipulation lists metrics to be reported, including 114 metrics subject to monthly per transaction performance credits and 80 metrics to be reported for diagnostic purposes only. Additionally, the Stipulation identifies 14 metrics which the parties agree must be reported, but cannot reach agreement whether the metrics are to be reported for diagnostic purposes only, or for the purpose of calculating performance credits. Lastly, the Stipulation identifies 11 metrics upon which there is no agreement at all. Of the 114 metrics subject to transaction performance credits, 10 are to be evaluated on a per measure basis and 104 are to be calculated on a per unit basis when performance is scored as a “miss”¹. No agreement is reached in the Stipulation on the per unit performance credit rates that will apply to these 104 metrics, the proration of credit

¹ Section 2 of the Stipulation indicates that a “miss” is a CLEC transaction that falls below the applicable metric standard, i.e. is worse than the benchmark value for benchmark metrics or worse than a calculated retail parity performance for parity metrics.

amounts to individual CLECS within the three state area, credit multipliers for misses of long duration, or a maximum or annual dollars at risk cap.

As part of the Stipulation, FairPoint commits itself to a number of systems and process enhancements. FairPoint is required, inter alia, to complete four major systems projects scheduled as part of its 2012 Information Technology (IT) roadmap and process enhancement programs by year-end 2012. FairPoint is further required to place a total of \$600,000 at risk of payment to CLECs to ensure timely completion. Although the Stipulation does not explain the mechanism for holding the at risk monies secure, it does provide that a total of \$150,000 will be considered at risk for each of four major projects included in FairPoint's 2012 IT systems program. For each of these four projects, \$50,000 shall be payable to the CLECs if the project is not completed by the end of year 2102. An additional \$50,000 per project shall be payable if the project is not completed by the end of the first quarter 2013, and an additional \$50,000 shall be payable if the project is not completed by the end of the third quarter 2013. This process is expected to resolve 56 of 133 CLEC operational issues. An additional 66 of these 133 operational issues are moved to tracking status and will not be the subject of litigation in this docket. The 11 remaining issues will be considered by FairPoint in its 2013 IT roadmap program.

The stipulating CLECs agree not to propose or litigate metrics identified in the Stipulation while specifically reserving the right to propose and litigate others. Among the issues that these CLECs reserve are white pages listings, "no trouble found" and pole metrics, total dollars at risk, specific metric penalties, and FairPoint performance on number porting.

Finally, the Stipulation provides that if the Commission does not approve the Stipulation in all material respects and without material modification, the Stipulation will be null and void.

III. POSITIONS OF THE PARTIES AND STAFF ON THE SETTLEMENT

A. FairPoint and CLECs

The CLECs, which comprise a strong representative sampling of competitive telephone service providers, and FairPoint, characterize the Stipulation as “significant progress in reaching agreement on many major aspects of a simplified PAP” without litigation. According to these parties, the Stipulation resolves many of the key structural components of a new simplified PAP and, if approved, would provide a level of certainty conducive to further negotiation that will lead to the orderly and efficient resolution of this matter. These parties submit that the Stipulation is just and reasonable and serves the public interest.

B. Staff

Staff believes that, because the Stipulation has been approved by FairPoint and a strong representative sampling of the competitive community, approval of the Stipulation will be conducive to further negotiation and deliberations, and the orderly and efficient resolution of the issues raised by the Petition in Docket No. DT 11-061. Staff recommended approval of the Stipulation on an expedited basis and via an order *nisi*. Staff notes that this process will afford any affected carrier the opportunity to be heard by the Commission before the effective date of any order approving settlement.

IV. COMMISSION ANALYSIS

Pursuant to N.H. Code Admin. Rules Puc 203.20(b), the Commission shall approve disposition of a contested case by settlement “if it determines that the result is just and reasonable and serves the public interest.” *See also* RSA 541-A:31, V(a). In determining the public interest, the Commission serves as arbiter between the interests of customers and those of the regulated utilities. *See* RSA 363:17-a; *see also Public Service Co. of N.H.*, Order No. 24,919 (Dec. 5, 2008) at 7-8.

In general, the Commission recognizes that settlement of issues through negotiation and compromise provides “an opportunity for creative problem solving, allows the parties to reach a result more in line with their expectations, and is often a more expedient alternative to litigation.” *See National Grid USA et al.*, Order No. 25,370 (May 30, 2012) at 27; *see also EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 (May 29, 2009) at 48. Even where all parties join a settlement agreement, however, the Commission must independently determine that the result comports with applicable standards. *Unitil Corporation*, *supra* at 32. The issues must be reviewed, considered and ultimately judged according to standards that provide the public with assurance that a just and reasonable result has been reached. *Concord Electric Company*, 87 NHPUC 694, 708, Order No. 24,072 (2002), quoting from *Concord Electric Company*, 87 NHPUC 595, 605, Order No. 24,046 (2002), and orders cited therein.

In this case we are mindful of the importance to the stipulating parties of having a PAP that is uniform to the greatest extent possible in the three states where they operate, the

complexities in achieving that goal, and the amount of effort these parties have expended attempting to reach it. While the Stipulation has not produced an agreed-to PAP, it significantly narrows the issues going forward. Additionally, the Stipulation provides that some of the metrics that are currently measured by parity with FairPoint's performance of its own retail obligations will in future be measured by reference to fixed standards. This mechanism for measuring performance is more objective, more in line with the decreasing level of regulatory oversight of FairPoint's retail offerings, and ought to provide greater certainty to all affected. Accordingly, we find that the Stipulation is just and reasonable and in the public interest, and we approve it, contingent upon its approval without modification by the Maine Public Utilities Commission and the Vermont Public Service Board.

Based upon the foregoing, it is hereby

ORDERED *Nisi*, that subject to the effective date below, the Stipulation and the exhibits attached thereto are incorporated into this Order *Nisi* by reference and are approved without modification contingent upon approval of the Stipulation without modification by the Maine Public Utilities Commission and the Vermont Public Service Board; and it is

FURTHER ORDERED, that the FairPoint shall cause a copy of this Order *Nisi* to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such publication to be no later than December 28, 2012 and to be documented by affidavit filed with this office on or before January 18, 2013; and it is

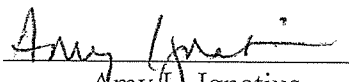
FURTHER ORDERED, that all persons interested in responding to this Order *Nisi* be notified that they may submit their comments or file a written request for a hearing which states the reason and basis for a hearing no later than January 4, 2013 for the Commission's consideration; and it is


FURTHER ORDERED, that any party interested in responding to such comments or request for hearing shall do so no later than January 11, 2013; and it is

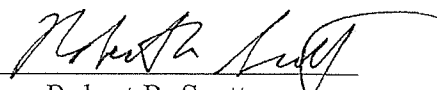
FURTHER ORDERED, that this Order *Nisi* shall be effective January 18, 2013, unless the FairPoint fails to satisfy the publication obligation set forth above or the Commission provides otherwise in a supplemental order issued prior to the effective date; and it is

FURTHER ORDERED, that FairPoint shall advise the Commission of the status of review of the Stipulation by regulators in the states of Maine and Vermont and shall make compliance filings demonstrating approval of the Stipulation without modification by the Maine Public Utilities Commission and the Vermont Public Service Board within 20 days of each such approval.


By order of the Public Utilities Commission of New Hampshire this eighteenth day of December, 2012.


Amy D. Ignatius
Chairman


Michael D. Harrington
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov

aklein@kleinlawpllc.com

amanda.noonan@puc.nh.gov

amorrison@fairpoint.com

ashoer@apslaw.com

bkarpinski@apslaw.com

bthayer@bayring.com

Christina.Martin@oca.nh.gov

counsel@segtel.com

david.goyette@puc.nh.gov

dwinslow@bayring.com

esamp@gwi.net

escarponi@fairpoint.com

f.anne.ross@puc.nh.gov

f.oneill-cunha@one.verizon.com

gent@otel.us

gmK@fhllplaw.com

hmalone@devinemillimet.com

jbtechentin@apslaw.com

jeremy@segtel.com

kate.bailey@puc.nh.gov

kath@segtel.com

knudge@covad.com

leszek.stachow@puc.nh.gov

llackey@sover.net

megan.cobleigh@ottcommunications.com

michael.ladam@puc.nh.gov

patrick@crockerlawfirm.com

pmchugh@fairpoint.com

rtaylor@fairpoint.com

sgeiger@orr-reno.com

Stacey_Parker@cable.comcast.com

susan.chamberlin@oca.nh.gov

swennerstrand@fairpoint.com

trina.bragdon@ottcommunications.com

trosenberger@devinemillimet.com

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
- DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.