

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8337

Petition of Telephone Operating Company of Vermont,)	Hearing at
LLC, d/b/a FairPoint Communications, for approval of a)	Montpelier, Vermont
Successor Incentive Regulation Plan)	November 10, 2014

Order entered: 3/18/2016

PRESENT: James Volz, Chairman
John D. Burke, Board Member
Margaret Cheney, Board Member

APPEARANCES: Peter H. Zamore, Esq.
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I. INTRODUCTION

In this Order, the Vermont Public Service Board (“Board”) approves, pursuant to 30 V.S.A. § 226b, the 2015-2019 Vermont Incentive Regulation Plan (“Proposed Plan”) that will govern the operations of Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications (“FairPoint” or the “Company”), through December 31, 2019. The Proposed Plan is the result of our approval of an agreement between FairPoint and the Vermont Department of Public Service (“Department”), which is embodied in a Memorandum of Understanding (“Alt. Reg. Plan MOU”) between these parties. No party opposed approval of the Proposed Plan.

The Proposed Plan is substantially similar to the alternative regulation plan that has been in effect since 2012 (“Current Plan”) and provides the Company with an increased ability to compete in the telecommunications marketplace. The greater flexibility for FairPoint provided in this agreement is appropriate considering the number of alternatives offered in much of FairPoint’s service territory, including cable and wireless services that provide similar functionality to landline telephone service. At the same time, the Proposed Plan preserves protections for consumers, such as limiting the degree to which FairPoint may increase basic local exchange service (“BLES”) rates. In areas where residents, particularly rural customers, may have no effective competitive alternative to FairPoint, the BLES rate caps will ensure that rates in those areas remain reasonable.

Approval of the Proposed Plan will help place FairPoint on a relatively even playing field with its competitors regarding price flexibility, while preserving protections for consumers in areas where competition may be limited or not present. For these reasons, the Board approves the Alt. Reg. Plan MOU between FairPoint and the Department.

II. PROCEDURAL HISTORY

On August 4, 2014, FairPoint filed a petition for approval of the Proposed Plan together with an Alt. Reg. Plan MOU between FairPoint and the Department requesting approval of the Proposed Plan.

On August 13, 2014, FairPoint filed testimony and exhibits in support of the Proposed Plan.

On September 24, 2014, the Board held a prehearing conference to establish a schedule for consideration of the Proposed Plan. Appearances were entered on behalf of FairPoint and the Department (collectively, the “parties”).

On October 3, 2014, the Board issued a prehearing conference memorandum, which established the schedule.

On October 16, 2014, the Department filed testimony supporting the Proposed Plan.

On November 10, 2014, an evidentiary hearing was held.

On November 21, 2014, FairPoint filed its brief and proposal for decision, and the Department notified the Board of its intention not to file a brief.

On December 1, 2014, the Department filed a petition with the Board pursuant to 30 V.S.A. § 2 to open an investigation into the quality of customer service provided by FairPoint. The Board opened the investigation in Docket No. 8390 on December 9, 2014. On December 15, 2014, the Board stayed this proceeding until such time as it made a final determination in Docket No. 8390. The Board also issued an Order on December 30, 2014, extending the Current Plan until 30 days after a final decision in Docket 8390.

In Docket 8390, the parties entered into a Memorandum of Understanding (“Docket 8390 MOU”) on August 10, 2015, which the Board approved in its December 18, 2015, Order in Docket 8390. The Docket 8390 MOU provided in part that:

The Department will support a FairPoint petition to the Board to open a proceeding (1) requesting that service quality reporting requirements apply only to FairPoint customers without access to an alternative telecommunications provider (to be defined in that proceeding), (2) seeking an evaluation of the continued appropriateness of, and possible alternatives to, the existing Docket 5903 “% cleared in 24 hours” metric, and (3), to the extent necessary, also incorporate the results of the proceeding as an amendment to FairPoint’s Incentive Regulation Plan.¹

1. Docket 8390 MOU at 4.

On January 11, 2016, FairPoint filed a joint motion with the Department for an extension of the Current Plan until the Board issues orders in Docket 8337 and in the future proceeding to be initiated pursuant to the Docket 8390 MOU and Order.

On February 5, the Board issued an Order in this Docket extending the Current Plan until April 5, 2016, and scheduling a status conference.

At the February 10, 2016, status conference, the Department and FairPoint agreed that the Proposed Plan filed in this Docket could be approved and implemented immediately, as long as the Order approving it contained language to allow the Parties to amend the Proposed Plan, to the extent necessary, to incorporate the results of the new service quality reporting metrics docket to be opened pursuant to the Docket 8390 MOU and Order.

On February 16, 2016, FairPoint filed a petition to open a new service quality reporting metrics docket pursuant to the Docket 8390 MOU and 8390 Order.

On February 24, 2016, FairPoint filed a revised Proposed Decision that supported immediate implementation of the Proposed Plan and updated certain aspects to reflect the passage of time since the initial Proposed Decision was filed.

III. LEGAL FRAMEWORK

The present docket is governed by 30 V.S.A. § 226b, which was enacted by the Vermont Legislature in 1993 and amended in 1996. That section authorizes alternative forms of regulation and allows local exchange carriers (or the Board or Department) to propose alternatives to traditional rate-of-return regulation.

Section 226b(c) contains eleven criteria that an alternative regulation proposal must meet. The Board may approve such a proposal only if it finds, after notice and hearing, that such regulation, in its entirety:

- (1) promotes the general good of the state;
- (2) is consistent with state telecommunications purposes established under Section 202c of Title 30;
- (3) is consistent with the state telecommunications plan adopted by the Department of Public Service under section 202d of this title, or there exists good cause to approve alternative forms of regulation notwithstanding this inconsistency;

- (4) is consistent with the public's interest relating to appropriate quality telecommunications services;
- (5) is consistent with the goal of protecting or promoting universal service to residential users of telecommunications;
- (6) provides reasonable incentives for the creation of a modern telecommunications infrastructure and the appropriate implementation of new cost-effective technologies;
- (7) reasonably supports economic development in the affected service territory;
- (8) adequately protects consumer privacy interests;
- (9) supports reasonable competition;
- (10) includes adequate safeguards to ensure that charges for non-competitive services do not subsidize competitive services; and
- (11) is just and reasonable and would not produce unjust discrimination between users of the public switched network in the pricing, quality or availability of the network functions or services offered.²

In reviewing a Section 226b(e) petition to approve an alternative regulation plan, the Board must follow procedures substantially similar to those contained in 30 V.S.A. §§ 225, 226, and 227.

Subsection (f) empowers the Board to reject proposals for alternative regulation or to issue an order of conditional approval, if it determines the proposal does not satisfy the requirements of Section 226b.³ If the Board issues an order of conditional approval, the parties may request further hearings on the modified plan; the Board must issue its final determination within 90 days of the original order. Any Board order approving or modifying an alternative regulation plan may not take effect sooner than 30 days from its issuance.⁴

An order establishing an alternative form of regulation may include the following: exemption from or reduction of the requirements of 30 V.S.A. §§ 218a, 225, 226, or 227; terms and conditions for establishing new services, withdrawing services, price changes to services,

2. 30 V.S.A. §§ 226b(c)(1)-(11).

3. 30 V.S.A. § 226b(f).

4. 30 V.S.A. § 226b(g).

and contracted services; and other rates, terms, and conditions that the Board finds to be consistent with the general considerations and standards under this section.⁵

Section 226b(i) allows the Board and the Department to conduct investigations into the effectiveness of an approved alternative regulation plan already in effect. During the course of its predicted term, the statute also allows the Board, after notice and hearing, to terminate or modify an approved plan.⁶

IV. FINDINGS

A. Background

1. The Board initially approved an incentive regulation plan and retail service quality plan for Verizon New England, Inc. (“Verizon”) in 2000. *Investigation into Alternative Regulation Plan*, Docket Nos. 6167 & 6189, Order of 3/24/2000.

2. In 2005, the Board approved successor plans. *Petition of Verizon New England Communications Inc., etc.*, Docket No. 6959, Order of 9/26/2005.

3. In 2006, the Board approved amended successor plans for Verizon, consisting of a 2005-2010 Amended Vermont Incentive Regulation Plan and a 2005-2010 Amended Retail Service Quality Plan. *Investigation into Successor Incentive Regulation Plan*, Docket Nos. 6959 & 7142, Order of 4/27/2006.

4. FairPoint became subject to the 2005-2010 Amended Vermont Incentive Regulation Plan and the 2005-2010 Amended Retail Service Quality Plan when the Board approved FairPoint’s acquisition of Verizon’s regulated telecommunications operations in Vermont. *Joint Petition of Verizon New England Inc.*, Docket No. 7270, Order of 2/15/2008 at 41.

5. The Board approved the Current Plan and Retail Service Quality Plan (“RSQP”) on January 18, 2012. *Petition of Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications*, Docket No. 7724, Order of 1/18/2012 (“Docket 7724 Order”).

6. The Current Plan was scheduled to terminate on December 31, 2014, but was extended by the Board by Orders dated December 30, 2014, and February 5, 2016. *In Re: Petition of*

5. 30 V.S.A. § 226b(h).

6. 30 V.S.A. § 226b(i).

Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, for approval of a Successor Incentive Regulation Plan, Docket No. 8337, Orders of 12/30/2014 and 2/5/2016.

7. The RSQP approved in Docket No. 7724 terminated on March 31, 2013. Michael T. Skrivan, FairPoint ("Skrivan") pf. at 8.

B. Current State of Competition

8. When the Board approved the Current Plan, it found that FairPoint faces competition both from intermodal competitors, such as cellular and cable facilities-based providers, and from intramodel competitors, such as competitive local exchange carriers ("CLECs"). Docket 7724 Order at 5.

9. In particular, the Board concluded:

There is little question that FairPoint faces increased competition from many sources; cable, wireless, CLECs, and satellite services now provide some opportunities for customers that were certainly not as robust as when the Board last approved an incentive regulation plan for FairPoint's predecessor. The evidence demonstrates that most consumers in FairPoint's service territory have multiple options for telephony services other than FairPoint.

Skrivan pf. at 3; Docket 7724 Order at 17.

10. At that time, the Board found that 10% to 17% of customers in rural exchanges had no access to cellular service at their homes, and 22% of FairPoint customers did not have access to cable as a competitor. Skrivan pf. at 4; Docket 7724 Order at 17-18.

11. During the period of June 2010 to June 2013, market conditions became more competitive for all telecommunications providers in Vermont. In Vermont, wireless service connections increased by 91,000 to 522,000 (+21.1%), interconnected voice over internet protocol ("VoIP") increased by 31,000 to 91,000 (+51.7%), and retail switched access lines decreased by 62,000 to 252,000 (-19.7%). In other words, a large part of the retail local telephone service connections consist of wireless or interconnected VoIP, representing a technology shift where many customers are choosing wireless only or preferring to purchase bundles of services in the residential and business market from cable companies like Comcast that offer fixed VoIP. Skrivan pf. at 4.

12. Also during the period of June 2010 to June 2013, FairPoint's Vermont retail switched access lines, in particular, decreased by 48,145 to 173,033 (-21.8%). These factors reflect the competitive growth encouraged by the Telecommunications Act of 1996, a shift in customer preference to mobile technology, and the unbundling requirements imposed on the former Bell Operating Companies through Federal Communications Commission ("FCC") rulings implementing the Telecommunications Act of 1996. Skrivan pf. at 4-5.

13. FairPoint faces increased competition in Vermont from facilities-based CLECs. In 2010, as a part of the American Reinvestment and Recovery Act, two federal grants were awarded to Vermont CLECs to build "middle-mile" projects in FairPoint's incumbent local exchange carrier ("ILEC") service territory. The Vermont Telecommunications Authority, in partnership with Sovernet, was awarded a grant of \$33,393,402 to help Vermont Fiber Link build an additional 800 miles of fiber, and Vermont Telephone was awarded a grant of \$12,256,492 to help the Vermont Broadband Enhanced Learning Link build an additional 257 miles of fiber. The Vermont Fiber Link network is owned and operated by Sovernet. Skrivan pf. at 5.

14. Unlike its competitors, FairPoint continues to be the only carrier in its serving area with ubiquitous infrastructure and service requirements. FairPoint's ability to successfully compete for customers and invest in its network will be enhanced by a regulatory environment that affords the necessary flexibility to compete in the retail marketplace. Skrivan pf. at 5.

C. Proposed Plan

15. The Proposed Plan's terms are substantially similar to the terms of the Current Plan. The scope of the Proposed Plan is identical to the Current Plan, because it applies to services that were contained in FairPoint's Tariff No. 20 at the time the Current Plan was adopted. Under the Proposed Plan, FairPoint's rates for BLES are still subject to the currently applicable rate ceiling, which is consistent with the ceiling contained in 30 V.S.A. § 227d for smaller telephone companies. In addition, the Proposed Plan permits FairPoint to increase BLES rates to ensure the maximum level of federal high-cost support, based on the FCC rate floor benchmark mandates. Skrivan pf. at 5-7; Proposed Plan Section II.A.

16. The Current Plan's prohibition against "deaveraging" BLES rates between exchanges is unchanged. Skrivan pf. at 5-7; Proposed Plan Section II.C.

17. The Proposed Plan is also identical to the Current Plan with respect to: (1) BLES and switched access tariffs and investigation of special access rates, (2) the flexibility to change prices and terms and conditions for non-BLES intrastate retail telecommunications products and services, (3) implementation of special contracts, and (4) promotional offerings. Skrivan pf. at 5-7; Proposed Plan Sections III.C-E and IV.

18. The Proposed Plan continues to provide FairPoint with the flexibility to act quickly in responding to the needs of market conditions and competitive pressures, while maintaining continued oversight of BLES. Skrivan pf. at 6.

19. The Proposed Plan also continues to allow FairPoint to manage its relationship with customers through special contracts for most services like its competitors, rather than by tariff. The Proposed Plan's rate flexibility is consistent with the rate flexibility contained in 30 V.S.A. § 227d and available to other ILECs. Skrivan pf. at 6.

20. Like the Current Plan, the Proposed Plan enables the Board to terminate the Proposed Plan if it finds that FairPoint is in material violation of any of its terms or conditions. Skrivan pf. at 7; Proposed Plan Section I.A.

21. The Proposed Plan will commence upon issuance of this Order and end on December 31, 2019. Skrivan pf. at 7; Proposed Plan Section I.A.

22. In addition to the Current Plan's permitted adjustments to BLES rates, the Proposed Plan permits an additional adjustment to the Current Plan's rate ceiling where necessary to receive the maximum available amount of federal high-cost support. The FCC has determined that certain forms of high-cost support should be reduced to the extent that any eligible telecommunications carrier's ("ETC") residential local service rates are less than a prescribed rate floor. In particular, high-cost support is reduced by an amount equal to the extent to which the ETC's rates for residential local service plus state regulated fees are below the local rate floor, multiplied by the number of lines for which it is receiving support. In Order FCC 14-54, the FCC phased in this rate floor, with a final rate of \$20.46 required by June 2018. The annual increase required to meet the FCC minimum rate floor may necessitate FairPoint to increase its

BLES rates beyond the allowable amount of 11% or \$2.00 per year, whichever is less, during the term of the Proposed Plan. The adjustment to the Current Plan's rate ceiling was added to ensure that FairPoint is able to avoid the loss of any federal support funding without the need to amend the Proposed Plan, should the rate ceiling preclude the ability to meet the FCC minimum rate floor. Skrivan pf. at 7.

23. All other changes from the Current Plan relate to provisions that are no longer in effect, including the RSQP. Skrivan pf. at 8.

24. The Proposed Plan is not accompanied by an RSQP because FairPoint's RSQP results met at least 8 of the 10 Performance Area metrics for each of the three months preceding March 31, 2013. Under the Current Plan, this performance level called for the termination of RSQP obligations on March 31, 2013, and FairPoint now operates under the Docket 5903 service quality standards, to which all other providers of local exchange service are also subject. Skrivan pf. at 8.

25. The Board's Order of December 18, 2015, in Docket 8390 modified certain Docket 5903 obligations pending completion of a follow-up proceeding in the future. *Petition of Vermont Department of Public Service for an investigation into the adequacy of Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, provision of service quality*, Docket 8390, Order of 12/18/2015 at 12-13 ("Service Quality Order").

D. FairPoint Service Quality

26. On December 9, 2014, the Board opened an investigation into the adequacy of FairPoint's provision of service quality. *See*, Service Quality Order.

27. The investigation focused on: (1) problems FairPoint was experiencing providing quality service to its customers; (2) an outage to FairPoint's Signaling System 7 ("SS7"), which resulted in service outages, including access to 911 service; (3) FairPoint's provision of Board Rule 7.609 bill credits; and (4) FairPoint's decision to accept Connect America Fund II program funding for Vermont. Service Quality Order at 6-10.

28. The Parties filed the Docket 8390 MOU on August 10, 2015, which the Board subsequently approved. Service Quality Order at 17.

29. Among other things, the Docket 8390 MOU includes the following requirements:
- a. FairPoint shall issue bill credits, pursuant to Board Rule 7.609(C), to current FairPoint customers who had service outages of more than twenty-four hours during the period April 1, 2013, through February 28, 2015;
 - b. FairPoint will train its customer service representatives to inform customers of their right to receive a bill credit and the required procedures when they call to report an outage; FairPoint will provide its customers with similar notice through a bill message within three months of the entry of this Order.
 - c. FairPoint shall confirm in writing to the Board and the Department the measures it has taken to improve its SS7 network infrastructure and maintenance pursuant to the terms of the [Docket 8390] MOU within three months of the entry of this Order.
 - d. Within 60 days of the entry of this Order, FairPoint shall file a petition, in accordance with the [Docket 8390] MOU, to open a proceeding: (1) requesting that service quality reporting requirements apply only to FairPoint customers without access to an alternative telecommunications provider (to be defined in that proceeding), (2) seeking an evaluation of the continued appropriateness of, and possible alternatives to, the existing Docket 5903 “% cleared in 24 hours” metric, and (3) to the extent necessary, also incorporate the results of the proceeding as an amendment to FairPoint's Incentive Regulation Plan.

Service Quality Order at 17.

V. DISCUSSION

FairPoint (or Verizon) has operated under an alternative regulation plan since April 2000. The plan, known as the incentive regulation plan, was intended to provide FairPoint with substantial flexibility to introduce new services, adjust rates and prices, and roll out new products, while achieving high service quality and protections for consumers and competitors. In January 2012, the Board approved the Current Plan, effective from March 2011 to December 31, 2014, as a well as the RSQP, which terminated under the Current Plan on March 31, 2013,

because FairPoint's RSQP results complied with at least 8 of the 10 Performance Areas for each of the three months preceding March 31, 2013.

The regulatory scope of the Proposed Plan is identical to the Current Plan, because it applies to services that were contained in FairPoint's Tariff No. 20 at the time the Current Plan was adopted. Under the Proposed Plan, FairPoint is free to price all of its services (with the exception of the rate caps related to BLES), without limitation or notice to the Board or the Department, and it may not deaverage BLES rates. The annual rate ceiling under the Proposed Plan is equal to the final year's rate ceiling under the Current Plan.

There are, however, a few notable differences between the Current Plan and the Proposed Plan. In addition to the above rate ceiling, FairPoint may increase rates as required to ensure that it receives the maximum level of federal high-cost support, based on the FCC rate-floor benchmark mandates. The adjustment to the Current Plan's rate ceiling was added to ensure that FairPoint is able to avoid losing any federal support funding without the need to amend the Proposed Plan, should the rate ceiling preclude the ability to meet the FCC minimum rate floor. The term of the Proposed Plan runs from the date of this Order's issuance through December 31, 2019. All other changes from the Current Plan relate to provisions that are no longer in effect.

Approval of the Proposed Plan would be a continuation of the Board's policy under the Current Plan of reducing certain restrictions so that the Company has a more level playing field with its primary landline competitors, while maintaining protections for consumers. According to FairPoint, competitive pressures are likely to continue as more and more telecommunications options become available to more Vermont consumers. These competitive pressures are expected to keep rates reasonable and service quality high for consumers. Along with competition, the Proposed Plan has restrictions on price increases, including upon rate deaveraging. The combined effect of competition and the Proposed Plan should serve the needs of FairPoint and protect the interests of Vermont consumers. Therefore, we approve the Alt. Reg. Plan MOU and the Proposed Plan.

We do note, however, that FairPoint's recent service quality problems are of concern to the Board. We approved the Docket 8390 MOU because we believe it represents a reasonable settlement that will facilitate FairPoint's resolution of service quality issues. We anticipate that

Docket No. 8701, regarding service quality issues, will shed light on which service quality metrics are appropriate for FairPoint going forward. In light of Docket 8390, we conclude that the approval of the Proposed Plan is in the public interest.

VI. CONCLUSION

Based upon the foregoing findings and discussion, the Board concludes that the proposed Alt. Reg. Plan MOU and incentive regulation plan meet the criteria set forth in 30 V.S.A. § 226b(c), and we approve them. Approval of these documents should provide FairPoint with a more level playing field compared to its competitors, while protecting customers who lack viable alternatives.

VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The Memorandum of Understanding between Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, and the Vermont Department of Public Service, including the 2015-2019 Vermont Incentive Regulation Plan (“IRP”), filed on August 4, 2014, is approved and shall take effect immediately.
2. Consistent with the Current Plan and Docket 7270, the IRP also continues to apply to FairPoint Vermont, Inc.
3. The IRP shall be amended, to the extent necessary, to incorporate the results of the new service quality reporting metrics docket to be opened by the Board pursuant to the Docket 8390 MOU and Order.

Dated at Montpelier, Vermont, this 18th day of March, 2016.

s/James Volz)

) PUBLIC SERVICE

s/John D. Burke)

) BOARD

s/Margaret Cheney)

) OF VERMONT

OFFICE OF THE CLERK

FILED: March 18, 2016

ATTEST: s/Judith C. Whitney
Clerk of the Board

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov).

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.