

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Joint Petition of FairPoint Communications,
Inc., Berkshire Telephone Corporation d/b/a
FairPoint Communications, Chautauqua and
Erie Telephone Corporation d/b/a
FairPoint Communications, Taconic Telephone
Corporation d/b/a FairPoint Communications,
FairPoint Business Services LLC, Consolidated
Communications, Inc. and Consolidated
Communications Holdings, Inc. for Approval of
Proposed Transactions Pursuant to Sections 99,
100 and 101 of the New York State Public Services Law.

Case 17-C-0050

**PETITION FOR REHEARING AND CLARIFICATION OF THE
COMMISSION'S ORDER OF JUNE 15, 2017 APPROVING MERGER TRANSACTION**

Village of East Nassau
Mayor Mitch Levinn
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Hillsdale Broadband Committee
Chair, Todd Wohlfarth
Member, Andrew Dash
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Dated: July 17, 2017

INTRODUCTION

The Columbia County Town of Hillsdale New York Broadband Committee and the Rensselaer County Village of East Nassau (collectively, the “Community Petitioners”) respectfully submit this petition for rehearing and clarification of the Commission’s Order Approving Joint Petition Subject to Conditions (the “Order”), issued and effective June 15, 2017, pursuant to Section 22 of the Public Service Law and 16 NYCRR Section 3.7. The Community Petitioners are representatives of thousands of citizens of Columbia and Rensselaer County who are without access to the modern internet. For the reasons set forth herein, the Community Petitioners respectfully request that the Commission grant rehearing and modify the Order to ensure that the Commission’s clear goal of aggressively expanding broadband access in the State of New York is met.

The need is clear. More than 200,000 households in Columbia and Rensselaer Counties lack high-speed broadband access according to recent data provided by the New York State Broadband Program Office. Rural counties in this State are losing population and struggling economically. Lack of access to 21st Century broadband services is one of the significant causes of these problems according to the Federal and New York State governments.

While the State's *Broadband for All* program and the conditions imposed on the Charter-Time Warner Cable merger will make significant headway in closing the devastating rural broadband gap in our Counties, there is a palpable risk that residents

of some areas in the State will be left behind and not benefit from these efforts. In the cases of Columbia and Rensselaer Counties, the households likely to be left behind are primarily in the FairPoint Communications service area.

The Community Petitioners recognize and applaud the Commission's determination to condition its June 15 Order approving Consolidated's acquisition of FairPoint Communications with valid and appropriate requirements that direct the merged entity to provide broadband access to unserved customers in our Counties. However, a number of provisions in the Order can -- and should -- be clarified to ensure that the Commission's intent to foster broadband development in the FairPoint service footprint following the closing of the merger transaction is served. To that end, the Community Petitioners respectfully seek rehearing and clarification of the Order.

ARGUMENT

The Order should be clarified to ensure that the Commission's directions and intentions -- and the public interest -- are served. The Community Petitioners do not seek modification of the substantive determinations of the Commission in imposing the conditions set forth in its Order. However, as presently articulated, several of the conditions imposed by the Commission in its Order approving the Merger are ambiguous and subject to manipulation by the merged entity in a way that would be inconsistent with the goals underlying the Commission's merger-approval determination. As a consequence, the Community Petitioners ask that the Order be clarified and modified as follows:

Service Quality and Network Investments

In its Order, this Commission found that “based on the public record in this case, many customers are without any internet service in the [t]hree NY ILEC territories, but more so in the Taconic exchanges. Accordingly, as a condition of the Commission’s approval, Consolidated is required to invest a minimum of \$4 million in incremental network reliability and service improvements over the three years following the close of the [merger] transaction.” Order at 21-22 (footnote omitted); *id.* at 30. The Order specifies that, “[t]o the extent possible, repairs and upgrade work should also facilitate service enhancements, such as additional internet deployment to customers.” Order at 22.

The Commission further directed in its Order that the \$4 million investment be “incremental to FairPoint’s 2016 actual capital expenditure.” Order at 21, fn. 17. The Commission also specified that, “[a]s part of that investment, Consolidated will be required to provide internet access service to at least 300 unserved locations within its New York footprint, with particular focus in the Taconic service area” Order at 22. In addition, the Commission specified that the condition in the Order requiring 300 additional New York internet locations is “exclusive of any locations included as part of any [New York Broadband Program Office (“BPO”)] project awards.” Order at 22, fn. 18.

The Community Petitioners ask that the Order be clarified in this regard to ensure appropriate oversight and transparency to the public regarding the required incremental investment. To that end, the Commission should clarify the Order to:

- (i) require that the merged entity meet with representatives of the Community Petitioners and other interested parties – including interested local officials -- prior to finalization and public filing the “initial plan” with respect to this investment (see Order at 22);
- (ii) specify minimum service quality standards for the 300 additional internet locations, including download speeds of at least 100 Mbps;
- (iii) establish a 30-day public review and comment period after the filing of the required “initial plan” so that the Community Petitioners and/or other entities representing the public interest can present to the Commission any objections or comments thereto;
- (iv) make it clear that the “updates” regarding progress in merged entity’s compliance with the “service quality improvements” (Order at 22) must include the detailed information regarding the status of the required expansion of internet service – including the number of added internet accounts and their precise locations;
- (v) specify that such “updates” are to be public filed;
- (vi) establish a 30-day public review and comment period after the filing of the required “updates” so that the Community Petitioners and/or other entities representing the public interest can present to the Commission any objections or comments thereto; and

- (vii) specify that the required \$4 million investment is exclusive of (i.e., in addition to) the \$9.3 million in matching funds from FairPoint under the Phase 2 BPO award or any award or matching funds in connection with any further award to the merged entities (or any of them) by the BPO. (The Order, as noted, already specifies that the 300 additional internet locations to be added as part of the required \$4 million investment are exclusive of locations added as part of any BPO award. See Order at 22, 30.) Simply put, the Order should be clarified to ensure that that the merged entity does not “double count” additional internet locations to the detriment of the Commission’s intent with respect to the critically needed and long-overdue expansion of broadband internet in Columbia and Rensselaer Counties.

BPO Phase 2 and Phase 3 Commitments

As noted in the Order, Petitioner FairPoint was awarded \$36.7 million by the New York Broadband Program Office. See Order at 22. In order to assist the Community Petitioners and other public representatives in testing the Petitioners’ compliance with the service expansion requirement addressed above, and ensure the maximum expansion of desperately needed broadband service in Columbia and Rensselaer Counties, the Order should be clarified to require the merged entity to provide publicly filed reports to the Commission on a quarterly basis setting forth in reasonable detail the progress of the company in using those funds to expand broadband service in New York State.

For the same reason, the Order should be clarified to require that, with respect to the condition imposed by the Commission that the Petitioners' be required to bid for the BPO's Phase 3 awards (Order at 23, 30), the merged entity similarly should be required to file publicly with the Commission, again on a quarterly basis, reports setting forth in reasonable detail the progress of the company in using any Phase 3 award to expand broadband service in New York State.

Most Favored State Clause

In the Order, the Commission directed that, within 60 days of the close of the merger, the Petitioners submit to the Secretary of the Commission, "copies of any and all final orders, settlement and/or stipulations from any federal or state jurisdiction that have imposed conditions on the Petitioners." Order at 26; see id. at 30. The Community Petitioners respectfully request that the Order be clarified to specify that such orders, stipulations, and settlements be publicly filed so that the Community Petitioners and other interest representatives of the public can (i) review such orders, stipulations, and settlements and (ii) submit to the Commission (by formal filing or other mechanism established by the Commission) any objections or concerns regarding the Petitioner's compliance with the Most Favored State provision in the Order.

Enforcement – Letter of Credit

As part of its determination to approve the proposed merger with conditions, the Commission required the Petitioners to post a \$2 million letter of credit “to secure performance in accordance with the conditions for approval in this Order.” Order at 26-27; see id. at 30. To ensure that the Commission’s intent in this regard is met -- and the public interest is served -- the Order should be clarified to establish a procedure to require a publicly filed application from the merged entities seeking release of that letter of credit. Such application should be required to specify precisely how the merged entities met the conditions imposed in the Order -- including the required service expansion investment and the addition of 300 new, presently unserved internet locations. The Order should further be clarified to establish a 30-day public objection period following any petition for release of the letter of credit prior to any release thereof.

CONCLUSION

It is the policy of this State to foster the expansion of broadband internet service into previously unserved areas. No area of the State is as unserved by broadband as Columbia and Rensselaer Counties. The Community Representatives respectfully submit that the requested clarifications and modifications to the Order would be entirely consistent with -- and advance -- that policy.

Dated: July 17, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Todd Wohlfarth, certify that, on July 17, 2017, the foregoing Petition for Rehearing and Clarification of the Commission's Order of June 15, 2017 Approving Merger Transaction was served by electronic mail on the following:

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Signed,

A handwritten signature in black ink, reading "Todd Wohlfarth". The signature is written in a cursive, flowing style.

Todd Wohlfarth