

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DT 11-061
FairPoint Communications, Inc. Petition for
Approval of Simplified Metrics Plan and Wholesale Performance**

REPLY BRIEF OF THE CLECS

The CLECs (CTC Communications Corp., Choice One of New Hampshire Inc., Lightship Telecom, LLC and Conversent Communications of New Hampshire LLC, all d/b/a EarthLink Business, Freedom Ring Communications LLC d/b/a BayRing Communications; Biddeford Internet Corporation, d/b/a Great Works Internet; CRC Communications LLC d/b/a/ OTT Communications; and National Mobile Communications Corporation d/b/a Sovernet Communications) submit this Reply Brief in support of the arguments made in their Initial Brief filed on November 8, 2013, and in opposition to the Initial Brief filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”).

I. INTRODUCTION

The objective of the Wholesale Performance Plan (“WPP or Plan”) is to ensure that the telecommunications market remains open to robust competition. The WPP accomplishes that objective through the measurement and reporting of FairPoint’s performance in providing access, interconnection, and other services to telecommunications carriers that are critical to competition. To serve its fundamental purpose, the Plan must include all carriers and qualifying services, provide for the orderly modification of the Plan upon a change in law, and incent FairPoint to timely and accurately report its performance results. The CLECs’ Initial Brief set forth sound, reasonable proposals for ensuring that each of these objectives is met. FairPoint, in contrast, used its Initial Brief to argue in support of proposals that undermine the incentives built

into the WPP, relieve FairPoint of the most basic of responsibilities associated with a performance plan, and assume for itself roles and duties which properly rest with the Commission.

The CLECs respectfully request that the Commission reject the arguments and proposals made by FairPoint and, instead:

- (a) determine that the WPP must provide appropriate incentives to FairPoint and protect the interests of all CLECs in the marketplace and, therefore, cannot be subject to waiver;
- (b) adopt and incorporate the change in law clause proposed by the CLECs which appropriately accounts for potential changes in applicable law and establishes an orderly process for their implementation, including Commission oversight; and
- (c) adopt and incorporate the accuracy and timeliness of reporting terms proposed by the CLECs to properly incent FairPoint to collect and report accurate results on a timely basis.

II. THE WPP SHOULD INCLUDE LANGUAGE PRECLUDING ENFORCEMENT OF PAP/WPP BILL CREDITS WAIVERS

FairPoint devoted less than two pages of its brief to arguments concerning the waiver of WPP credits; it summarily dismissed the issue by claiming that contracts requiring the WPP waivers are beyond the scope of this proceeding, beyond the Commission's jurisdiction, and irrelevant to this proceeding. Nothing could be further from the truth. Requiring CLECs to waive performance standards and penalties which are required by orders of state and federal regulatory bodies fundamentally undermines both the purposes and execution of the WPP. Approving the proposed WPP without having addressed this crucial issue leaves the door open for FairPoint to once again, as it has in the past, avoid the payment of properly imposed penalties

and, more importantly, allows FairPoint to provide poor, discriminatory service to CLECs – thereby undermining the balance of the competitive market.

As noted in the CLECs’ Initial Brief, one of the most significant changes resulting from the conversion of the existing Performance Assurance Plan (“PAP”) to the WPP is the reduction of dollars at risk for New England from \$86.72 million to \$12 million annually. In addition, the metrics and penalty calculations agreed to in the WPP make it likely that actual annual penalty payments will be much lower than the total dollars at risk under any set of reasonably assumed performance levels. The reduced cap and lower potential penalties reflects a careful negotiation designed to balance the need for sufficient financial incentives against the potential harm from excessive financial penalties. Thus, as the CLECs have already explained, if FairPoint is permitted to use commercial agreements as leverage to require CLECs to waive WPP bill credits, that careful balance is threatened. Clearly the issue of WPP waivers is relevant.

Historically, FairPoint has avoided payment of roughly *half* of the credits due under the PAP. If that trend carries forward and the Commission does not address the issue, FairPoint will not be properly incented under the WPP. If waivers are enforced, FairPoint would be able to incur \$24 million dollars’ worth of penalties before hitting the \$12 million cap. This clearly provides the wrong incentive to FairPoint. As the Federal Communications Commission (“FCC”) found when it considered the dollars at risk in Bell Atlantic/Verizon’s 271 application for New York:

We agree that it is important to assess whether liability under an enforcement mechanism such as the APAP would actually accrue at meaningful and significant levels when performance standards are missed. *Indeed, an overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure.*

Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953 at ¶ 436 (New York 271 Order) (emphasis added).

In that same New York 271 Order, the FCC acknowledged the existence of other remedies available to CLECs for poor performance by Verizon, including liquidated damages clauses in interconnection agreements. Importantly, however, the FCC considered those other remedies to be adjuncts to, but not replacements of, the PAP penalties:

We also believe that it is important to evaluate the benefits of these reporting and enforcement mechanisms in the context of other regulatory and legal processes that provide *additional* positive incentives to Bell Atlantic.

Id. at 430 (emphasis added). Thus, contrary to FairPoint's argument that a CLEC must choose either commercial service level agreements or PAP penalties, the FCC envisioned that CLECs would have access to service level agreements **and** PAP penalties.

FairPoint contends that the reversion of WPP penalties to FairPoint does not alter the WPP, yet provides no argument or evidence to support its claim. As explained in the CLECs' Initial Brief, by extracting waiver agreements from individual carriers, FairPoint reduces its financial incentive for maintaining or improving its performance to the detriment of all carriers and the overall competitive marketplace. Regardless of the reasons why an individual carrier consents to a waiver, the resultant harm is suffered by all and the efficacy of the marketplace is jeopardized. Thus, contrary to FairPoint's assertions, reversion of individual CLEC's penalties to FairPoint does alter the functioning of the WPP.

FairPoint's argument that state commissions do not have jurisdiction over waivers of WPP penalties also fails - the proper functioning of the WPP is most certainly within this

Commission's jurisdiction. As FairPoint itself notes on page 1 of its Brief, PAPs were developed at the *state level* as a way to meet the public interest requirement of section 271 and obtain FCC approval. Indeed, in its filings with the FCC, FairPoint's predecessor Verizon specifically acknowledged that state commissions have a critical role to play in ensuring that market remains open after the FCC approves a 271 application: "The [NY] Public Service Commission would retain the first line of authority for enforcing these [performance assurance] provisions."¹ The FCC confirmed this view in its Order granting Verizon's 271 application for New York:

Our examination of the New York performance monitoring and enforcement mechanisms is solely for the purpose of determining whether the risk of post-approval non-compliance is sufficiently great that approval of its section 271 application would not be in the public interest. Our analysis has no bearing on the separate question of how the Commission would view and respond to any particular conduct by Bell Atlantic in the *federal* enforcement context.

NY 271 Order at fn 1326 (emphasis in original). Thus, contrary to FairPoint's assertion, performance plans are, primarily, a creature of state jurisdiction. This point was reinforced by the FCC in its approval of Verizon's 271 application for Maine:

In addition, we take comfort in the Maine Commission's expressed intent to continue to examine issues related to the PAP and to update or change the PAP as needed. No commenter has raised any issues relating to the PAP in the record before us.

Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-

¹ Pre-Filing Statement of Bell Atlantic-New York, *Petition of New York Telephone for Approval of SGAT and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Case 97-C-0271 (New York Public Service Commission), April 6, 1998, at p. 42.

Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Order, 17 FCC Rcd 11676 at ¶ 63 (June 19, 2002) (Maine 271 Order).

Clearly, FairPoint (through its predecessor Verizon), the FCC, the MPUC, and the CLECs all understood that state commissions have authority over the implementation, operation, and enforcement of PAPs. This Commission, by finding that the WPP must include provisions disallowing the waiver of WPP penalties, properly exercises its authority under both federal and state law to ensure that all CLECs receive impartial treatment under the WPP and that FairPoint does not backslide in its provision of services under the TelAct.

In summary, WPP penalty avoidance through waivers found in unrelated commercial agreements is inconsistent with the effective operation of a PAP, and most especially with this particular WPP. The significantly reduced penalties of the WPP will be rendered meaningless and ineffective if FairPoint is allowed to impose and enforce waiver provisions. Accordingly, the Commission should reject FairPoint's arguments and include language in the WPP which prohibits the enforcement of any PAP/WPP waivers – both past and future.

III. THE PLAN TERMS MUST PROVIDE AN ORDERLY PROCESS TO ACCOUNT FOR ANY CHANGES IN LAW AND INCLUDE AN APPROPRIATE ROLE FOR THE COMMISSION.

The change in law terms proposed in the Initial Brief filed by the CLECs appropriately account for any changes in applicable law and establish an orderly process for the implementation of such developments in a bilateral manner – with proper Commission oversight. The FairPoint proposed language would, on the other hand, improperly permit FairPoint to unilaterally modify the Plan terms and is thus inconsistent with both the stipulated Plan and the Commission's ongoing role ensuring competition in the local telecommunications market. The

Commission is thus respectfully requested to incorporate terms into the Plan that require the negotiation of amendments to reflect any and all applicable changes in law and Commission approval of modifications to the Plan.

A. FairPoint's Unilateral Action Proposal

At the outset, it is important to identify what FairPoint is actually proposing, as the effect that FairPoint's proposed language would have, in practice, is somewhat obscured by FairPoint in its Initial Brief. In the first paragraph of the FairPoint-proposed language, the FairPoint terms are substantially consistent with the CLEC-proposed terms, reflective of the agreement in principle on such terms. Those terms generally establish a logical process under which amendments to the Plan would be negotiated in good faith, to reflect certain changes in law.

The second paragraph of the FairPoint-proposed language, however, then eliminates the logical, negotiated process any time FairPoint believes there has been a favorable action that affects any service or product encompassed within the Plan. This language, which decisively begins with "[n]otwithstanding anything in the preceding paragraph to the contrary," would improperly set up an independent option that FairPoint may exercise unilaterally any time it believes that any (very broadly encompassing) "decision, order, determination or action, or any change in applicable law" limits FairPoint's obligation to provide a service or product that FairPoint already agreed to include within the Plan.² Upon such an ostensible occurrence, FairPoint would immediately remove all metrics and bill credits associated with that service or product.³

² FairPoint Brief on Outstanding Issues Related to Wholesale Performance Plan, dated November 8, 2013 ("FairPoint Brief"), at 12.

³ *Id.*

Critically, this FairPoint-proposed unilateral option excludes both the negotiation of an amendment and any Commission review or involvement. Rather, FairPoint proposes that it simply “will no longer be subject to any metrics or bill credits” related to services or products that FairPoint believes it need no longer provide. This proposal is entirely inconsistent with the change of law process outlined and largely agreed upon in the first paragraphs of both the Competitive Carrier and FairPoint proposals.⁴

It is perhaps for this reason that the FairPoint Initial Brief and the FairPoint proposed language are fundamentally inconsistent with one another in important respects. This discrepancy helps to demonstrate the lack of any reasonable basis for the FairPoint proposal. Indeed, the FairPoint brief highlights the impropriety of the FairPoint-proposed language, with regard to both substance and process.

First, the FairPoint brief notes that the substantive components of the Plan are designed to ensure that FairPoint “will provide services, access and interconnection” to CLECs in accordance with both the federal Act and “State law and regulation.”⁵ The FairPoint proposed language, however, indicates that upon any purported change in law, such as may occur at the federal level, FairPoint may unilaterally remove metrics and bill credits, regardless of whether FairPoint remains obligated to provide such service or product under State law.

Second, the FairPoint brief duly notes that the substance of the Plan has been agreed-upon by FairPoint and the Competitive Carriers. The services and products included in the Plan

⁴ There are, however, distinctions between the Competitive Carrier and FairPoint-proposed first paragraphs, in that the Competitive Carriers’ proposal more precisely delineates the type of action that triggers a change in law and includes all parties in the Commission’s dockets within the scope of negotiations. The Competitive Carrier proposed terms also, as noted below, include a role for the Commission (*i.e.*, approval of the proposed amendment) while the FairPoint proposed language excludes any such role.

⁵ FairPoint Brief at 11.

– and the metrics and penalties designed to ensure performance on those key items – were negotiated and stipulated by FairPoint.⁶ FairPoint itself notes that the Plan ensures FairPoint “will provide services, access and interconnection” to the Competitive Carriers not only as required by federal law and State law and regulation, but also consistent with the requirements of “stipulations between the [Competitive Carriers] and FairPoint NNE.”⁷ As metrics and bill credits ensuring the satisfactory provision of such items were jointly included within the Plan, and jointly proposed for adoption by this Commission, that agreement and advocacy are simply incompatible with the unilateral Plan modification option being proposed by FairPoint.

Finally, in terms of process, the FairPoint brief notes that under the current PAP, changes to the New York PAP are to be “filed with the state regulator for review and inclusion in that state’s PAP upon the Commission’s approval.”⁸ Despite that, the FairPoint-proposed change of law language contains no provision for Commission review or approval of changes, regardless of whether such changes stem from a negotiated amendment or FairPoint’s unilateral determination. Moreover, while the FairPoint brief suggests that FairPoint’s proposed language “contemplates a reasonable opportunity for the parties to discuss any legitimate concerns,” the FairPoint unilateral action proposal allows for no discussion or process whatsoever.⁹ The FairPoint proposal, under which FairPoint would simply deem items to be “no longer subject to any metrics or bill credits,”¹⁰ is thus clearly inconsistent with what FairPoint agrees to be reasonable process.

⁶ As noted in the CLEC Brief, at 8, such Plan terms were “painstakingly negotiated and agreed-upon” over a lengthy period of time.

⁷ FairPoint Brief at 11-12 (*emphasis added*).

⁸ FairPoint Brief at 11.

⁹ FairPoint Brief at 12.

¹⁰ FairPoint Brief at 12.

B. The Competitive Carriers' Reasonable Approach

The Competitive Carriers' proposed terms provide for a fair and orderly process to account for any changes in law. These terms encompass any change to applicable law that substantively affects any material provision of the Plan, whether legislative, regulatory, judicial or other governmental decision, order, determination or action.

Procedurally, the Competitive Carrier terms entail the negotiation of an amendment to the Plan, which negotiations would be noticed to all parties to the Commission's Wholesale Performance Plan proceeding. The Commission would then review the negotiated amendment, or resolve any differences. As noted in the CLECs' Initial Brief, this procedure is consistent with the process under which FairPoint and the Competitive Carriers worked out the details of the Plan now jointly proposed for adoption by the Commission, and the instant process through which the parties are briefing the open issues.¹¹

As noted both by FairPoint and the CLECs, the WPP and its predecessor PAP were created to ensure that markets opened to competition through the Section 271 process remained open on an ongoing basis. FairPoint specifically notes that metrics are "measures of FairPoint's performance in specific interactions with CLECs," and that the performance assurance plans were "an important element of the public interest standard."¹²

Given the importance of the metrics and bill credits as self-effectuating incentives to ensure adequate provision of each service and product that FairPoint is required to provide, the Plan approved by the Commission must not allow FairPoint to unilaterally decide when it would "no longer be subject to any metrics or bill credits associated with [a] service/product." Rather,

¹¹ CLEC Brief at 8.

¹² FairPoint Brief at page 3 and page 1, respectively.

the Commission is respectfully requested to determine that the list of metrics and penalties painstakingly agreed-upon and submitted jointly for Commission approval may be modified only through an orderly process with proper Commission oversight – such as through the change in law terms proposed by the Competitive Carriers:

If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint and the parties to the respective Commission and Board dockets will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law.

Upon agreement, such revisions will be submitted jointly by the parties participating in the negotiations to the Commissions and Board for approval. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commissions and Board.

IV. LATE AND INACCURATE REPORTING PENALTIES SHOULD REFLECT THE SIZE AND SCOPE OF FAIRPOINT'S TARDINESS AND ERRORS

The assurance of accurate reporting of performance is essential to the effectiveness of the Wholesale Performance Plan. FairPoint notes in its brief that the performance assurance plan now being replaced was described by the Maine Commission as providing “a comprehensive, self-executing enforcement mechanism intended to deter ... the provision of substandard performance.”¹³ In the initial brief, the CLECs proposed provisions for the new Plan that would incentivize the timely and accurate reporting of performance results, in the first instance, so that the specific Plan metrics and penalty provisions can most effectively promote the satisfactory provisioning of access, interconnection and services by FairPoint.

¹³ FairPoint Brief at 2.

Without accurate reporting, the performance-inducing objective of the Plan may be nullified as penalty payments otherwise mandated by the Plan are voided; the Commission and competitive carriers would be unable to fairly evaluate FairPoint's performance, and harm to the competitiveness of the telecommunications market may go undetected. In the initial brief, the CLECs outlined these and other reasons for including strong late and inaccurate reporting provisions in the WPP.

FairPoint, on other hand, asserts that no such provisions are needed because the only northern New England state plan with such provisions (Maine) has not invoked them – but then proceeds to argue in favor of its own proposed late and inaccurate provisions based on the terms of the outgoing Maine PAP. FairPoint's advocacy, however, fails to account for a number of factors, including FairPoint's poor performance and accuracy record since the cutover from Verizon and the many compelling reasons for including strong late and inaccurate reporting provisions in the new agreed-upon Plan.

A. FairPoint's Recent History Warrants Strong Timeliness and Accuracy Provisions In The New Plan

The existence or omission of timeliness and accuracy terms in existing plans (and whether such terms have been invoked) is of little relevance, and certainly provides no comfort to the Commission that FairPoint has been incented to properly report its performance results. Indeed, recent history shows otherwise. The New Hampshire PAP Audit, for example, revealed numerous inaccuracies.

In addition, FairPoint has admitted to inaccurate reporting under the PAP – including an error worth millions of dollars for the Mode of Entry, which would not have been paid if it had not been discovered by a CLEC. The Commission is also well aware of the difficulties FairPoint has experienced in providing (and measuring) service to CLECs since the cutover from Verizon.

These and similar facts alone demonstrate the need to include strong late and inaccurate reporting provisions in the new Plan.

Perhaps in recognition of this history, FairPoint essentially concedes that the new Plan will contain provisions to address late and inaccurate reporting and proposes language for the Commission to consider. FairPoint's proposal, however, provides only minimal incentives. FairPoint begins with the Maine provision but then waters down the penalty amounts and other provisions to minimize the financial impact on FairPoint. FairPoint's proposal seeks to unreasonably place the entire burden for discovering and reporting errors on the CLECs, while at the same time taking very little, if any, responsibility for correcting inaccurate reports. FairPoint goes so far as to include a six month amnesty period in their proposal, exempting themselves from penalties for the start of the new WPP even though many of the metrics are the same as in the current PAP and the overall plan is much simpler.

As discussed more fully below, FairPoint's proposal should be rejected, in favor of the far more reasonable and effective CLEC proposal.

B. FairPoint Should Be Required to Re-issue Corrected Reports and WPP Bill Credits.

FairPoint proposes that CLECs detect and report all errors within 30 days and that WPP reports be corrected only "on a prospective basis beginning on the month in which the error is identified." In doing so, FairPoint would shift the burden of detecting errors to the CLECs and relieve itself of any responsibility for reporting accurately, revising inaccurate reports, or issuing corrective WPP penalty payments. Under FairPoint's proposal, to the extent a CLEC does not find and report an error within 30 days of a report's issuance, FairPoint would: (1) be absolved of any penalty due to the inaccuracy; (2) have no obligation to correct previous WPP reports that

contain the same error; and (3) avoid adjustments to WPP penalties owed for prior months during which FairPoint issued inaccurate reports.

FairPoint's proposed limitation of liability would foster a culture of tolerance for, or at the very least indifference to, inaccurate performance measurement and reporting. More importantly, it would have the inequitable and ironic result of absolving FairPoint of penalties to which FairPoint has agreed under the Plan, simply by virtue of the inaccurate reporting. Certainly, the mere passage of 31 days should not release FairPoint from having to pay WPP penalties where otherwise due and owing. Such an approach flies in the face of fairness and provides little, if any, incentive for FairPoint to devote the resources necessary to properly track and report performance under the WPP.

If FairPoint commits a material error in reporting under the WPP, it should correct the record by issuing corrected reports to both the Commission and the CLECs, and issuing corrective (and past due) WPP bill credits. The CLECs' proposal thus requires corrections, including the payment of WPP bill credits, for a period of up to 24 months, depending on the materiality of the error.¹⁴ Such an approach, which is used in other performance metric plans around the country, balances the burden on FairPoint of maintaining the records necessary to re-issue reports with the CLECs' and Commission's need for accurate performance reporting and properly-issued bill credits. Requiring restatement of prior month's reports will incent FairPoint to develop systems and procedures to report more accurately and avoid penalties.¹⁵

¹⁴ FairPoint regularly back bills its wholesale customers for services covered under the WPP plan for a similar period of time.

¹⁵ The New Hampshire PAP Audit found that FairPoint could not recalculate accurate results for older reports because it did not maintain the necessary data. While the WPP requires FairPoint to maintain data for at least 24 months, it is important to incent FairPoint to produce accurate reports in the first instance.

C. Late Reporting Penalties Should Not Be Limited As Proposed By FairPoint

FairPoint and the CLECs agree that penalties for filing late reports should be calculated on a per-day basis. This method appropriately bases the penalty on the specific performance failure and continues to accrue for the duration of that failure. FairPoint has proposed penalty of \$250 per day (half the amount under the current Maine plan), while the CLECs propose \$500 per day. FairPoint's argument that a reduced penalty is warranted given that two additional states may adopt the measure, and because the dollars at risk for bill credits have been significantly reduced, is a transparent attempt to simply reduce FairPoint's liability exposure. Further, there is no indication that Maine's penalty amount was related to the overall dollars at risk. A \$500 per day penalty appropriately incents FairPoint to allocate the resources necessary to post reports on a timely basis and should be adopted by the Commission.

FairPoint also proposes to pay penalties only to those CLECs that notify FairPoint within three days of the monthly posting date that the report is missing. Once again, FairPoint attempts to unreasonably shift the burden to the CLECs to report to FairPoint what are FairPoint's own errors. If the WPP is to truly be self-effectuating, FairPoint should be subject to late report penalties on all occasions in which it is late to report, not only those for which a CLEC reports FairPoint's omission within an unreasonably short time window.

Finally, FairPoint attempts to further limit its potential liability for late reports by adding force majeure language into its proposal, despite the existence of similar waiver provisions already in the Plan. FairPoint's proposal should be rejected, as FairPoint should not be allowed to provide itself a waiver. Instead, if circumstances arise, FairPoint should be required to seek Commission approval of any waiver of liability.

D. Penalties for Inaccurate Reporting Should Reflect the Size and Scope of FairPoint's Error(s)

While a per diem penalty is sensible for the issuance of late reports, is not reasonable for inaccurate reporting. As discussed above, the late penalty is appropriately based on the specific performance failure - number of days late. While FairPoint proposes to use a similar per diem penalty for inaccurate reporting, both the amount of the penalty and the methodology proposed by FairPoint fail to account for the significance or scope of a particular inaccuracy. The CLECs' proposal to assess a penalty of either 15% or a simple interest payment properly incents FairPoint to calculate performance accurately in the first instance by appropriately tying the incentive to the magnitude of the error.

Indeed, FairPoint's proposed \$250 per-day penalty is just one-fourth of Maine's existing \$1,000 per day penalty. Additionally, as proposed by FairPoint, the decreased penalty would not take effect until a CLEC provides "conclusive information" that there has been a material error.¹⁶ Under FairPoint's proposal, FairPoint pays no penalties, nor provides any back credits, if it discovers errors, regardless of the significance of the error. Thus, once again, FairPoint attempts to water down its existing liability, shift the burden to the CLECs to prove FairPoint's errors, and reject any true liability for erroneous reports.

Under FairPoint's approach, for example, FairPoint could inaccurately report \$500,000 in penalty liability in a given month, when its real liability was \$1 million. If this error went undetected for a 24-month period, \$12 million in unpaid penalties would accrue. If the error was eventually discovered and reported to FairPoint by a CLEC, FairPoint's liability would be

¹⁶ FairPoint Brief at p. 6. FairPoint accepts no responsibility to expeditiously review a CLEC's claim on its own. This is particularly disturbing given that FairPoint is the only party that collects the performance data and has access to the majority of information needed to verify data and calculations.

limited to the bill credits due for **only** the month in which the CLEC reported the problem, plus just \$250 a day until FairPoint corrected the latest month's report.¹⁷

The CLECs' proposal thus properly accounts for the magnitude of the error - the penalty increases as the size of the error increases. The CLECs' proposal also requires FairPoint to pay unpaid WPP credits; if FairPoint provides poor or discriminatory service, bill credits and penalties should be paid no matter which party finds the error. The WPP must incent FairPoint to proactively review its reporting processes and results for accuracy in order to preclude FairPoint from publishing erroneous reports and avoiding the issuance of bill credits to which FairPoint has already stipulated under the new Plan.

E. Late and Inaccurate Reporting Penalties Should Not Be Subject to a Separate Cap

FairPoint proposes an annual cap of \$60,000 (just \$5,000 per month) per state for late and inaccurate penalties – itself a 50% decrease from Maine's existing \$120,000 cap. The CLECs believe that, given FairPoint's history and the findings of the New Hampshire PAP Audit, FairPoint must be given every incentive to report in a timely and accurate manner. Establishing too low of a cap for these provisions would undermine the effectiveness of the WPP. A cap on late and inaccurate reporting penalties could spur FairPoint to make inappropriate decisions regarding accurate reporting based on a cost/benefit analysis (*i.e.*, a determination that it would be cheaper to incur the late and inaccuracy penalties than to invest the resources necessary to properly calculate and report the WPP). By instead subjecting these penalties to the overall WPP cap to which FairPoint has already agreed, the CLECs' proposal ensures that even a well-

¹⁷ If FairPoint made the correction in 60 days, FairPoint would be required to pay an insignificant \$15,000 inaccuracy penalty plus the actual one month of revised bill credits (likely no more than \$500,000). Thus, FairPoint would avoid approximately \$11.5 million in bill credits – a clearly unfair result given FairPoint's very poor performance. In contrast, under the CLECs' proposal, FairPoint would be liable for \$1.8 million in penalties (the \$12 million inaccuracy amount multiplied by 15%) plus the bill credits that were improperly avoided.

performing FairPoint allocates the resources to accurately report WPP performance and issue correct penalty amounts.

F. Penalties Should Be Paid To Impacted CLECs

FairPoint argues that any payments for late and inaccurate reports should be made to a fund designated by the Commission rather than paid to CLECs. FairPoint apparently believes that “this provision [late and inaccurate penalties] is not directly related to providing ‘access and interconnection to new entrants in a nondiscriminatory manner.’”¹⁸ There is no basis for FairPoint’s faulty belief: WPP penalties are generated *because* FairPoint has provided discriminatory or poor access/interconnection services to CLECs. Indeed, timely and accurate reports are integral to assessing whether FairPoint has provided such items in a non-discriminatory manner.

Further, the process of establishing a state fund is costly and the determination of how any monies paid to the fund will be used is likely to be difficult and controversial. If penalties and/or bill credits are issued to a state universal service fund, for example, it is quite possible that FairPoint could be a recipient of its own penalty payments. FairPoint might thus not only be held harmless for its poor performance – FairPoint might even benefit from it. This type of incentive turns the underlying purposes of the WPP on its head. A self-executing penalty mechanism that issues the bill credits and penalties to the affected carriers is not susceptible to such diversion, and, no less important, directs the financial remedy to the parties harmed by the poor or discriminatory treatment.

G. Summary

The material terms of the new Plan – the metrics, definitions, and penalties – have all been agreed-upon by FairPoint. FairPoint readily acknowledges the Plan requirement that

¹⁸ FairPoint Brief at p. 2.

FairPoint report all results to the CLECs and the Commission within 28 days of the close of each month.¹⁹ As such, it is fair to assume that FairPoint will have no problem collecting the underlying data for the stipulated metrics, reporting its results on a timely basis, and issuing any resultant performance bill credits.

In addition, the new Plan contains fewer metrics and far less dollars at risk – which places greater importance on the need to properly measure performance and accurately report each result. Moreover, FairPoint is the only entity that has significant insight into and control over the processes and data that formulate the WPP’s results. Without casting aspersions, when one party controls almost all aspects of a state of affairs, both the opportunity and incentive exists for FairPoint or its employees to report inaccurate results. It is therefore fully appropriate for the WPP to ensure that FairPoint meets its responsibility to create and maintain proper controls and oversight of the WPP reporting process. Payment of significant penalties for disregarding responsibilities undertaken in the WPP should incent FairPoint to allocate the necessary resources for proper oversight and management of the WPP.

FairPoint’s proposed provisions for late and inaccurate reporting would not provide sufficient incentives for FairPoint to accurately report WPP results. The WPP is an important safeguard to protect the competitive marketplace and CLECs against discriminatory and poor performance by FairPoint. If the performance reports are not accurate and bill credits are avoided, then the WPP itself becomes meaningless and ineffective. The CLECs’ provisions for late and inaccurate reporting balance the needs of all parties: FairPoint is held accountable for bill credits for poor performance and rationally penalized for inaccurate reporting, while limiting liability to reasonable periods of time.

¹⁹ FairPoint Brief at p. 4.

IV. CONCLUSION

For the reasons explain above, the CLECs respectfully request that the Commission:

- (a) determine that the WPP must provide appropriate incentives to FairPoint and protect the interests of all CLECs in the marketplace and, therefore, cannot be subject to waiver;
- (b) adopt and incorporate the change in law clause proposed by the CLECs that appropriately accounts for potential changes in applicable law and establishes an orderly process for their implementation, with proper Commission oversight, and
- (c) adopt and incorporate the accuracy and timeliness of reporting terms proposed by the CLECs to properly incent FairPoint to collect and report accurate results on a timely basis.

FREEDOM RING COMMUNICATIONS d/b/a
BAYRING COMMUNICATIONS

CTC COMMUNICATIONS CORP.,
LIGHTSHIP TELECOM LLC, CHOICE ONE
OF NEW HAMPSHIRE INC., and
CONVERSENT COMMUNICATIONS OF NEW
HAMPSHIRE LLC , all d/b/a EARTHLINK
BUSINESS

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

Dated: December 3, 2013

By: _____

Trina Bragdon
OTT Communications
900-D Hammond Street
Bangor, ME 04401
(207) 992-9920
Trina.Bragdon@ottcommunications.com

(Authorized representative of CLEC Parties
listed on this page for purposes of signing Brief
and accompanying filing letter)

CERTIFICATE OF SERVICE

I, Trina Bragdon, hereby certify that copies of the Reply Brief of the CLECs was delivered via e-mail to the parties on the Commission's electronic service list on this 3rd day of December, 2013.

A handwritten signature in black ink, appearing to read "Trina M. Bragdon", with a long horizontal flourish extending to the right.

Trina M. Bragdon