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 Plan

MOTION FOR REHEARING, RECONSIDERATION OR CLARIFICATION OF ORDER NO. 25,623

Pursuant to RSA 541:3 and N.H. Admin. Rules Puc 203.33, Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE ("FairPoint"), hereby moves the New Hampshire Public Utilities Commission (the "Commission") to reconsider Order No. 25,623 dated January 24, 2014 (the "WPP Approval Order") or, in the alternative, to clarify it. In support of this Motion, FairPoint states as follows:

I. INTRODUCTION AND BACKGROUND

On October 11, 2013, FairPoint and certain competitive local exchange carriers ("CLECs") filed a Joint Motion for Expedited Approval of Wholesale Performance Plan Stipulation and Settlement Agreement ("Joint Motion"). The Joint Motion requested that the Commission approve the Wholesale Performance Plan ("WPP") and resolve three outstanding issues among the parties regarding:

(i) Terms and penalties for late or inaccurate monthly reports;

(ii) Change of law provisions; and

(iii) Commercial contract provisions that waive WPP bill credits.

In the WPP Approval Order, the Commission approved the WPP and issued decisions on the

three outstanding issues. As explained below, FairPoint seeks reconsideration or clarification of the Commission's decision regarding terms and penalties for late or inaccurate monthly reports and its decision regarding commercial contract provisions that waive WPP bill credits.

II. STANDARD OF REVIEW

The standard of review for a Motion for Rehearing is well established. The governing statute states:

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.[1]

The purpose of a rehearing or reconsideration of an order is to allow for the consideration of matters either overlooked or mistakenly conceived in the underlying proceedings.[2] To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable.[3]

III. DISCUSSION

A. The Commission Should Reconsider or Clarify its Decision Regarding Late and Inaccurate Reports.

1. Late Reports

In its briefs, FairPoint disputed the need for any penalties at all for late reports, but to the extent that the Commission disagreed, FairPoint proposed that the Commission impose a penalty

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[1] RSA 541:3.

[2] *See* Dumais v. State, 118 N.H. 309, 312 (1978). *See also* Office of the Consumer Advocate, 148 N.H. 134, 136 (2002) (Supreme Court noting that the purpose of the rehearing process is to provide an opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed).

[3] See RSA 541:3; RSA 541:4; DT 07-027; Petitions for Approval of an Alternative Form of Regulation, Order No. 25,194 at 3 (Feb. 4, 2011).

of $250 per day, per state, payable into a state fund, for a three-state maximum of $750 per day. The CLECs proposed a penalty of $500 per day, per state, payable to the CLECs.

In the WPP Approval Order, the Commission did agree that FairPoint should pay $250 per day, in each state, or $750 per day in total, for late filed reports. However, it also determined that, in the event that either Maine or Vermont do not require a penalty of at least $250 per day, then the penalty be increased in New Hampshire so that the total exposure to FairPoint from the three states is not less than $750 per day for late filed reports.[4] Also, presumably accepting the CLECs' proposal, the WPP Approval Order dictates that the WPP bill credits for late-filed reports must be allocated as done with per measure metrics, by state, *i.e.* payable to the CLECs, not the state.

Unfortunately, the WPP Approval Order leaves unanswered the questions of how this provision would apply in the case in which reports are late in fewer than three states. For example:

- If reports are timely in New Hampshire but late in one or both of the other states, does the Commission intend that FairPoint pay penalties in New Hampshire up to the $750 daily cap, even though New Hampshire reports are timely?
- If, on the other hand, reports are late in New Hampshire but timely in both of the other states, does the Commission intend that FairPoint still pay the full $750 daily cap in New Hampshire?
- If the other states adopt the CLEC recommendation of $500 per day in penalties, rather than $250, and reports are late in all three states, how does this relate to the Staff recommendation that FairPoint pay $750 "in total?" Would FairPoint be exempt from any penalties in New Hampshire, or would it still be liable for New Hampshire penalties in addition to the $1000 in the other two states combined?

Tied as it is to events in other states, the Commission's decision is legally and administratively fraught, particularly in the first example in which the Commission purports to

[4] WPP Approval Order at 24.

assess penalties based on activities outside its jurisdiction. FairPoint respectfully requests that the Commission reconsider this holding, and settle on a set penalty of $250 per day for New Hampshire, trusting to the discretion of the Maine and Vermont regulators to arrive at suitable penalties for their own states. Failing that, then FairPoint requests clarification on how this provision will be administered, and the authority under which the Commission purports to do so.

Furthermore, there are two points that were not addressed in the WPP Approval Order. FairPoint proposed that CLECs provide notification of late reports within three days. It also proposed that late reporting penalties be tolled during force majeure events. FairPoint respectfully requests clarification of the Commission's decision on these proposed provisions.

2. Inaccurate Reports

In its briefs, FairPoint also disputed the need for any penalties for inaccurate reports, but to the extent that the Commission disagreed, FairPoint proposed that the Commission impose a penalty of $250 per day, per state, payable into a state fund, for a three-state maximum of $750 per day. FairPoint also proposed that the CLECs assume a reasonable burden of due diligence to review these monthly reports in a timely manner, or else waive penalties and bill credit adjustments. Finally, FairPoint proposed that its exposure for late and inaccurate reports be capped at $60,000 per year per state, for a total of $180,000.

The CLECs proposal was more expansive. They proposed a daily penalty of $500 per state, payable to the CLECs, but their proposal also included unlimited and unilateral auditing rights that abrogate auditing provisions that the parties have already agreed to -- and which were presumed to be settled. Furthermore, the CLECs' proposal contains provision that would impose the full amount of the WPP monthly dollars at risk if an inaccuracy is not corrected in 60 days.

In the WPP Approval Order, the Commission decided to "adopt[] the Competitive

Carriers' proposal for inaccurate reporting penalties in order to assure the reported data is accurate,"[5] except that 1) there would be no penalties if FairPoint identifies and corrects an inaccuracy within thirty days of issuance of the first report in which an inaccuracy appears, and 2) bill credits would be reciprocal. However, it is unclear to what extent the Commission adopted the CLECs' proposal. The plain language of the Order refers to "inaccurate reporting *penalties*," but there was more to the CLECs' proposal than penalties, *i.e.* their proposal also included the additional auditing provisions and provisions that impose the full amount of the monthly dollars at risk. As FairPoint explained in its Reply, these additional provisions are unreasonable in light of any harm the CLECs may suffer and is far out of proportion to any failure by FairPoint.

FairPoint requests clarification as to what the WPP Approval Order means by "penalties," and whether the Order intends to invoke the panoply of CLEC proposals, or merely the daily penalties. The latter is arguably a matter of Commission discretion. The former, however, is orders of magnitude beyond what is lawful and reasonable. As FairPoint explained in its Reply, the CLEC proposal for audits and penalty exposure is not an incentive program, but a draconian self-enrichment arrangement for CLECs, an abdication of their duties of diligence, and an abrogation of the settled WPP regarding audit provisions. The Commission should clarify that it is only adopting the CLEC proposal in regard to the $500 daily penalty. To the extent that the Commission intended to adopt the complete CLEC proposal, FairPoint requests reconsideration of that decision as an unreasonably punitive remedy.

B. The Commission Should Reconsider or Clarify its Decision Regarding Bill Credit Waivers.

Regarding bill credit waivers in unrelated commercial agreements, FairPoint argued in its

[5] WPP Approval Order at 24.

briefs that the Commission did not have the jurisdiction to dictate the terms of commercial agreements that were freely bargained for and supported by ample consideration. FairPoint also clarified that any bill credits that reverted to FairPoint were not counted against the cap on dollars at risk, so that FairPoint was still exposed to the full amount of penalties. However, in the WPP Approval Order, the Commission issued, without any supporting analysis, the conclusory statement that "FairPoint's potential liability under the WPP [would] be effectively undermined as a result of waivers given by CLECs in contractual arrangements or otherwise."[6] As such, the Commission essentially held that there was no way in which it would permit FairPoint to defray payment of any bill credits. Accordingly, it ordered that even if a CLEC freely agrees that any of its bill credits will revert to FairPoint, those credits will not revert to FairPoint and instead will be diverted into the state Telecommunications Planning and Development Fund. The implications of this are vast. What the Commission has effectively held in the WPP Approval Order is that FairPoint is barred from hedging, insuring, offsetting, or any way defraying WPP penalties, even if a WPP beneficiary is willing to facilitate this. This is far beyond the Commission's authority to dictate, since there is no statutory authority by which the Commission can regulate the terms of service offerings it does not regulate.[7] The New Hampshire Supreme Court has held that:

> The PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute," [and its authority] is limited to that specifically delegated or fairly implied by the

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[6] *Id.* at 26.

[7] As FairPoint noted in its Initial Brief, this is particularly true as it applies to any commercially available broadband service, because FairPoint's predecessor in interest, Verizon, obtained forbearance from the application of Title II of the Communications Act to its broadband services. *See* Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect Their Broadband Services is Granted by Operation of Law, WC Docket No. 04-440, FCC News Release (rel. Mar. 20, 2006), *petition for review denied* Sprint Nextel Corp. v. FCC, 508 F.3d 1129 (D.C. Cir. 2007).

legislature and may not be derived from other generalized powers of supervision.[8]

Elaborating in an area that is remarkably pertinent to this issue, the Court further emphasized that:

> This court has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use . . . "*Stated conversely: it is not for the public good that public utilities be unreasonably restrained of liberty of action, or unreasonably denied the rights as corporations which are given to corporations not engaged in the public service*"[9]

FairPoint thus reiterates that the Commission has no jurisdiction to address this issue, and that the WPP Approval Order is substantively and procedurally in error for failing to consider this argument. In proceedings involving performance assurance plans like the WPP, the Commission has emphasized from the beginning that the first issue to be resolved is its jurisdictional authority to impose and enforce any provision of a performance plan:

> We must confront the issue of our authority before proceeding to analyze the merits of any of the proposed performance plans. As we noted in our recent Order . . . , it is a matter of long-established New Hampshire law that the Commission "is endowed with only the powers and authority which are expressly granted or fairly implied by statute." Further, our "generalized powers of supervision" over utilities are not a source of additional authority. Power and authority that is not granted is withheld.[10]

In the WPP Approval Order, however, the Commission avoided the issue of its jurisdiction, stating that "the issue is not before us,"[11] notwithstanding that FairPoint raised this issue in its briefs and that the Commission has recognized in the past that this issue is crucial to its deliberations. Yet, having disclaimed that its jurisdiction was at issue, the Commission then

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[8] Pub. Serv. Co. of N.H., 122 N.H. 1062, 1066 (1982).

[9] *Id.*, 122 NH at 1066-1067 (quoting Grafton County Elec. Light & Power Co. v. State, 77 N.H. 539, 540 (1915) (emphasis original).

[10] DT 01-006; Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan; Order Regarding Metrics and Plan; Order No. 23,940 at 69-69 (March 29, 2002) (internal citations omitted).

[11] WPP Approval Order at 26.

proceeded to exercise its jurisdiction nonetheless and render a decision.

There is a valid issue of jurisdiction before the Commission that must be resolved, without which the Order has no basis in law. The Commission has committed an error in this regard and should reconsider this part of its decision and find that it has no jurisdiction to decide this issue. As FairPoint explained in its Initial Brief, the reversion of WPP billing credits is a bargained-for benefit that in no way alters the WPP, or any carrier's right to WPP payment; it simply provides that the carrier may relinquish this right as consideration for a bargained-for benefit. Through a number of agreements and concessions,[12] the parties have yielded jurisdiction to the Commission over FairPoint's performance assurance plans. However, neither the Commission nor any other party has articulated what provision of law or contract grants the Commission authority over commercial agreements for unregulated services. There is no lawful reason to impose any restrictions on any party's contractual rights outside of the WPP. The Commission should reconsider its decision and vacate this holding.

The Commission's decision is also in error because it has misconceived an important issue of fact. Underpinning its decision regarding bill credit waivers is the Commission judgment that "FairPoint [must] be exposed to potential liability that provides a meaningful and

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[12] *See* DT 01-006, Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan, Order No. 23,940 at 69 (Mar. 29, 2002) ("Hence, the scope of our authority to, in the first instance or independently, create and enforce a plan containing self-executing penalties paid to CLECs must be found in or implied by New Hampshire statutes. On the other hand, we find no statutory obstacle to accepting a proposal from Verizon that we independently lack authority to require."); DT 07-011, Petition for Authority to Transfer Assets and Franchise, Order No. 24,823 at 30 (Feb. 25, 2008) ("FairPoint also agreed that its regulated subsidiary will be subject to the Performance Assurance Plan in effect as of the closing date."); DT 10-025, FairPoint Reorganization, Order No. 25,129 at 27 (July 7, 2010) ("FairPoint has agreed that following the Effective Date of the Plan of Reorganization, FairPoint will comply with the 2008 Order and the 2008 Settlement Agreement, including the provisions regarding broadband build-out, capital investment, the service quality index program, the Performance Assurance Plan (PAP) . . . .")

significant incentive to comply with the designated performance standards"[13] and its factual finding that, with the bar on bill credit reversions, "FairPoint's full $4.75 million penalty exposure in New Hampshire . . . will continue to remain at risk."[14] This overlooks the fact, as FairPoint explained in its Reply, that FairPoint does remain exposed to the *full* $4.75 million regardless of any bill credits that may revert to it. The Commission has made an erroneous finding of fact and for this reason also, the decision must be reconsidered and this holding vacated.

In the alternative, to the extent that the Commission declines to reconsider this decision, then it should follow its reasoning to the most logical conclusion. The Commission has held that, by diverting bill credits into a state fund, "FairPoint's potential liability under the WPP will *remain meaningful and significant*."[15] Consistent with this holding, the Commission should then confirm that funds paid into the Telecommunications Planning and Development Fund may be applied toward the cap on dollars at risk.

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[13] WPP Approval Order at 26.

[14] *Id.*.

[15] *Id.* (emphasis supplied).

IV. CONCLUSION

For the reasons described herein, FairPoint respectfully requests that the Commission reconsider or, in the alternative, clarify its Order No. 25,623.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC, D/B/A FAIRPOINT COMMUNICATIONS-NNE

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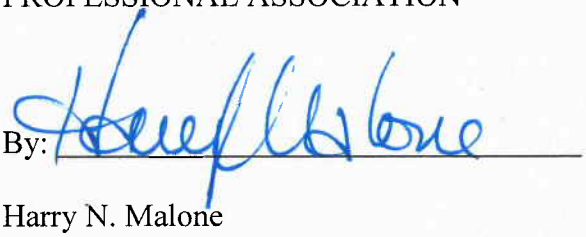
By: 

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