

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DT 11-061**

**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS, LLC d/b/a  
FAIRPOINT COMMUNICATIONS – NNE**

**Petition for Approval of Simplified  
Metrics Plan and Wholesale Performance Plan**

**Order Granting in Part and Denying in Part  
Reconsideration and Clarification of Order No. 25,623**

**O R D E R   N O.   25,662**

**May 6, 2014**

In this Order, the Commission grants in part and denies in part FairPoint's Motion for Rehearing, Reconsideration or Clarification of Order No. 25,623, as well as its separate Motion to Alter that same Order, which approved the proposed FairPoint Wholesale Performance Plan as the successor to its existing Performance Assurance Plan. This Order also extends the date by which FairPoint and the other parties must file a revised version of the complete Wholesale Performance Plan, as modified pursuant to orders of the Commission.

**I.      PROCEDURAL HISTORY**

On January 24, 2014, the Commission issued Order No. 25,623 (WPP Approval Order) with respect to the Joint Motion for Approval of Wholesale Performance Plan Stipulation and Settlement Agreement (Joint Motion) filed on October 11, 2013, by,

- Northern New England Telephone Operations, LLC d/b/a FairPoint Communications NNE (FairPoint);
- Comcast Phone of New Hampshire LLC (Comcast); and
- the following carriers, referred to as the Competitive Carriers:

- 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;
- 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.

FairPoint, Comcast, and the Competitive Carriers are referred to collectively as the Settling Parties.

The WPP Approval Order approved a new FairPoint Wholesale Performance Plan (WPP) to replace the existing Performance Assurance Plan (PAP), and its underlying carrier-to-carrier guidelines, as originally developed by Verizon and adopted by FairPoint in connection with its acquisition of certain telecommunications assets in Northern New England. In addition, the WPP Approval Order addressed three outstanding issues which had not been resolved by the Settling Parties through their negotiations: (i) the terms and penalties for late or inaccurate monthly reports, (ii) change in law provisions, and (iii) commercial contract provisions that waive WPP bill credits. The WPP Approval Order directed the Settling Parties to file within 30 days a revised version of the complete WPP, modified based on the conditions of the WPP Approval Order and specifying the effective date of the WPP.

On February 19, 2014, FairPoint filed a Motion for Rehearing, Reconsideration or Clarification (Reconsideration Motion) with respect to the provisions of the WPP Approval Order regarding late and inaccurate reporting penalties and related issues and commercial contract waivers of WPP bill credits. On the same day, FairPoint filed a Motion to Alter the WPP Approval Order to extend the time for filing of the complete WPP (Motion to Alter).

By secretarial letter dated February 21, 2014, the Commission suspended the WPP Approval Order pursuant to RSA 541:5 pending further review of the Reconsideration Motion and any objections thereto. On February 26, 2014, the Competitive Carriers filed a Motion for Extension of Time requesting that the Commission extend until March 4, 2014, the deadline for replying to the Reconsideration Motion. The Commission granted the requested extension of time by secretarial letter dated February 27, 2014. On March 4, 2014, the Competitive Carriers filed an Opposition to Motion for Reconsideration (Objection). On March 4, 2014, counsel for Comcast filed a letter indicating Comcast's support for the position stated in Section II of the Objection regarding late and inaccurate reports, as described below.

## **II. POSITIONS OF PARTIES**

### **A. FairPoint**

#### **1. Reconsideration Motion**

In the Reconsideration Motion, FairPoint asked the Commission to either reconsider or clarify its decisions in the WPP Approval Order regarding terms and penalties for late or inaccurate monthly reports and regarding commercial contract provisions that waive WPP bill credits.

With respect to late reports, FairPoint questioned the Commission's determination that FairPoint should pay a penalty of \$250 per day in each state, or \$750 per day in total, for late-filed reports, provided that, if either Maine or Vermont did not require a penalty of at least \$250 per day, then the penalty would be increased in New Hampshire so that FairPoint's total exposure in the three states would not be less than \$750 per day for late filed reports. FairPoint noted that the WPP Approval Order required WPP bill credits for late-filed reports to be allocated in the same manner as provided for "per measure" metrics, so the credits effectively

would be paid to the competitive local exchange carriers (CLECs)<sup>1</sup> rather than to the State.

FairPoint maintains the WPP Approval Order leaves unanswered numerous questions regarding the interpretation and implementation of these provisions, such as the following three questions:

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?

Reconsideration Motion at 3. FairPoint requested that the Commission reconsider its order regarding the \$750 minimum penalty amount for the three states, 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." Reconsideration Motion at 4. In the alternative, FairPoint requested clarification as to how this provision of the WPP Approval Order should be administered, and the authority under which the Commission purports to do so.

FairPoint raised two additional points it claims were not addressed in the WPP Approval Order: (1) the proposal that CLECs be required to provide notification of late reports within three days, and (2) the proposal that late reporting penalties be tolled during *force majeure* events.

FairPoint requested clarification of the Commission's decision on these proposed provisions.

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<sup>1</sup> The term "competitive local exchange carrier" is no longer a primary designation under state law, having been replaced by the term "excepted local exchange carrier," as defined in RSA 362:7, I (c). The term remains widely used in the federal regulatory context, however, such as with respect to the intercarrier obligations that are the subject of the PAP and the WPP. In this Order, the term "CLEC" is used to refer to competitive local exchange carriers to which the WPP applies.

With respect to inaccurate reporting penalties, FairPoint noted that the WPP Approval Order "adopt[ed] the Competitive Carriers' proposal for inaccurate reporting penalties in order to assure the reported data is accurate," with two specific exceptions. WPP Approval Order at 24. The two exceptions were (1) there would be no penalties if FairPoint identified and corrected an inaccuracy within 30 days of issuance of the first report in which an inaccuracy appeared, and (2) bill credits would be reciprocal and could inure to FairPoint's benefit. *Id.* FairPoint maintained, however, that it was unclear whether the Commission intended to adopt all components of the Competitive Carriers' proposal with the two noted exceptions. The WPP Approval Order referred to "inaccurate reporting penalties," but the Competitive Carriers' proposal covered more than just penalties and included additional audit provisions and imposition of the full amount of the monthly dollars-at-risk under certain circumstances. FairPoint argued that these additional provisions of the Competitive Carriers' proposal "are unreasonable in light of any harm the CLECs may suffer and is far out of proportion to any failure by FairPoint." Reconsideration Motion at 5.

FairPoint requested clarification as to whether the Commission in the WPP Approval Order intended to approve and adopt the Competitive Carriers' proposal in all respects other than the two noted exceptions, or to approve and adopt only the daily penalty provisions of their proposal. FairPoint urged the Commission to clarify that it had only adopted the Competitive Carriers' proposal with regard to the \$500 daily penalty. If the Commission in fact intended to adopt the complete proposal of the Competitive Carriers, FairPoint requested that the Commission reconsider its decision and find that it would impose "an unreasonably punitive remedy." *Id.*

With regard to the effect of bill credit waivers in commercial agreements with CLECs, FairPoint reiterated its position that the Commission does not have jurisdiction to take action that affects the rights of FairPoint or its CLEC counterparties to freely negotiate and enter into contracts that are not subject to the Commission's regulatory authority. FairPoint maintained that the WPP Approval Order erred in requiring that an amount equal to any bill credits subject to waiver in such commercial contracts be paid into the New Hampshire Planning and Development Fund established under RSA 12-A:45-a. According to FairPoint, this provision of the WPP Approval Order exceeds the Commission's jurisdiction, and the Commission has stated no statutory basis for its action. While conceding that, through a number of agreements and concessions, it has "yielded jurisdiction to the Commission" over the PAP, FairPoint argued that 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. FairPoint argued there is no lawful reason to impose restrictions on any party's contractual rights outside of the WPP and, therefore, the Commission should reconsider its decision on this issue, find that it is without jurisdiction to take action affecting such contractual rights, and vacate the portion of the WPP Approval Order requiring payments into the Telecommunications Planning and Development Fund. Reconsideration Motion at 8.

FairPoint also claimed the Commission's decision in the WPP Approval Order regarding bill credit waivers was in error because it misconceived an important factual issue. According to FairPoint, the Commission made a factual finding that, with the alternative payment in lieu of waived bill credit reversions, "FairPoint's full \$4.75 million penalty exposure in New Hampshire ... will continue to remain at risk." Reconsideration Motion at 9 (quoting the WPP Approval Order at 26). FairPoint argued this finding overlooked the fact that it does "remain exposed to

the *full* \$4.75 million regardless of any bill credits that may revert to it.” Reconsideration Motion at 9. FairPoint claimed the Commission made an erroneous finding of fact, which required that the bill credit waiver portion of the WPP Approval Order be reconsidered and vacated. *Id.*

In the alternative, to the extent that the Commission declined to reconsider its decision on the bill credit waiver issue, FairPoint requested that the Commission confirm that any amounts paid into the Telecommunications Planning and Development Fund may be applied toward the cap on dollars-at-risk.

## 2. Motion to Alter

In the Motion to Alter, FairPoint noted that the Commission in the WPP Approval Order had directed the Settling Parties to "file a revised version of the complete Wholesale Performance Plan, modified based on the conditions of [the WPP Approval] Order and specifying the effective date of the Plan, within 30 days of the date hereof." WPP Approval Order at 27. This filing deadline would have been February 24, 2014.<sup>2</sup> FairPoint requested that the Commission alter the WPP Approval Order, pursuant to its authority under RSA 365:28, to require the Settling Parties to file the complete revised version of the WPP within 30 days of the last order issued with regard to the Maine and Vermont counterparts of the Joint Motion.

FairPoint claimed this request was justified because the additional time would enable the Settling Parties to “develop a single, more easily administered, document that incorporates the directives of all three state regulators, and which can be submitted to the state regulators at the same time and with a single effective date.” Motion to Alter at 2. According to FairPoint, this

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<sup>2</sup> The deadline was suspended pursuant to the Commission’s February 21, 2014, secretarial letter, which suspended the WPP Approval Order until further order of the Commission.

conformity would serve the interests of all parties and contribute to the orderly and efficient resolution of matters before the Commission.

In the alternative, FairPoint requested that the Commission grant an extension of time to file the complete revised WPP for at least some period following its decision regarding the Reconsideration Motion, if not for the requested period of time following decisions by all three states.

### **B. Competitive Carriers**

The Competitive Carriers in their Objection urged the Commission to reject, in full, FairPoint's request relating to the late and inaccurate reporting sections of the WPP, arguing that the Reconsideration Motion failed to meet the standard for reconsideration because “the issues were thoroughly briefed and considered by the Commission in a decision that appropriately balanced the interests of all parties.” Objection at 1.

With respect to the penalties for late reporting by FairPoint under the WPP, the Competitive Carriers argued that FairPoint greatly overstated any administrative difficulty in implementing the Commission’s directive that the total aggregate penalty for the three states not be less than \$750 per day. The Competitive Carriers asserted they have been and remain committed to working with FairPoint to propose specific wording to implement the Commissions' modifications to the WPP in a manner that would address the potential ambiguities and questions raised by FairPoint in the Reconsideration Motion. The Competitive Carriers maintained there is no need for the Commission to reconsider or modify the provisions of the WPP Approval Order regarding late reporting penalties. Should the Commission, however, determine that a more simplified approach is warranted, the Competitive Carriers recommended that the Commission simply adopt their proposed penalty of \$500.00, as this



would ensure the penalty is high enough to deter the filing of late reports in New Hampshire, regardless of how the other two states resolve this specific issue.

The Competitive Carriers also addressed FairPoint's assertion that the WPP Approval Order failed to cover its specific proposals regarding notification of late reports within three days and the effect of *force majeure* events on late reporting. According to the Competitive Carriers, the Commission was well aware of FairPoint's proposal requiring CLECs to notify it of late reports within three days and chose not to impose such a requirement because of the unreasonable burden it would impose on CLECs. With respect to FairPoint's specific proposal regarding *force majeure* events, the Competitive Carriers noted that Section G of the WPP contains general provisions regarding the effect of *force majeure* events that would apply to late reporting obligations as well as other requirements of the WPP. Given that this non-contested section of the WPP was accepted and approved by the Commission in the WPP Approval Order, the Competitive Carriers asserted that "the Commission was certainly aware that *force majeure* issues were already addressed and saw no need to add redundant or potentially conflicting language in the late reporting section." *Id.* at 4-5.

With respect to the inaccurate reporting provisions of the WPP, the Competitive Carriers maintained that the Commission adopted their entire proposal regarding inaccurate reporting with only the two modifications specified in the WPP Approval Order. According to the Competitive Carriers, this approval included both (1) their proposed specific audit provisions, and (2) their proposed additional bill credits totaling up to 1/12 of the annual dollars-at-risk cap if FairPoint cannot revise a monthly report to correct a material error due to an issue within its control such as maintaining accurate source data. The Competitive Carriers urged the Commission to confirm its original determination regarding the inaccurate reporting provisions

of the WPP and direct the Settling Parties to work together to clarify the wording for the two specified modifications.

With respect to bill credit waivers in FairPoint's commercial contracts, the Competitive Carriers characterized FairPoint's argument that the Commission lacks jurisdiction over these contracts as "a red herring," because the Commission does not need jurisdiction over the contracts given its authority to oversee enforcement of the WPP. *Id.* at 9. According to the Competitive Carriers, penalties for services required by Sections 251 and 271 of the Telecommunications Act<sup>3</sup> that are measured under the WPP are not avoidable by FairPoint. In their view, 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." *Id.* The Competitive Carriers asserted that, if FairPoint wants commercial contracts covering non-regulated services to "remain free of Commission oversight, then it must stop requiring that such agreements include terms and conditions that waive or otherwise alter FairPoint's regulatory obligations with regard to regulated services, including WPP penalties." *Id.*

The Competitive Carriers also noted that Section F of the WPP provides that "[the annual bill credit] cap will encompass only those bill credits actually posted to CLEC [billing account numbers] for missed performance (including escalators)." *Id.* at 8. According to the Competitive Carriers, this provision reflects the Settling Parties' intention that any WPP credits subject to waiver through commercial agreements and not actually paid by FairPoint to any CLEC would not count towards the annual cap on WPP bill credits. The Commission's decision to require FairPoint to pay equivalent amounts to the Telecommunications Planning and Development Fund rather than to prohibit the waiver of WPP penalties in commercial contracts

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<sup>3</sup> 47 U.S.C. §§251 and 271.

does not fully address the Competitive Carriers' concerns and leaves unclear whether these payments should be counted toward the annual bill credit cap.

The Competitive Carriers requested that the Commission modify the WPP by including language expressly clarifying that bill credits cannot be avoided or waived, and that the Commission affirm the effect of WPP Section F that only bill credits actually issued to CLECs will count toward the annual cap.

### **C. Comcast**

By letter dated March 4, 2014, Comcast indicated its support for the position taken by the Competitive Carriers concerning late and inaccurate reports in Section II of their Objection.

## **III. COMMISSION ANALYSIS**

In this Order, we address the arguments raised by FairPoint in the Reconsideration Motion, by the Competitive Carriers and Comcast in Section II of the Objection, and by the Competitive Carriers, but not Comcast, in other sections of the Objection. As a preliminary matter, we note that in the Reconsideration Motion FairPoint has requested that the Commission "reconsider or, in the alternative, clarify" the WPP Approval Order. Although FairPoint quotes statutory provisions and judicial precedent regarding motions for rehearing, it has not requested that the Commission grant rehearing of the WPP Approval Order. Without deciding whether or not FairPoint has properly filed a motion for rehearing pursuant to RSA 541:3, we will proceed to review the Reconsideration Motion under the standards applicable to a motion for rehearing.

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were "overlooked or mistakenly

conceived” by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or by identifying new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977); *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14.

We now address in turn the issues raised in FairPoint’s Reconsideration Motion and the Competitive Carriers Objection regarding late reporting provisions, inaccurate reporting provisions, and bill credit waivers in commercial contracts.

1. Late Reporting Provisions

In the WPP Approval Order, we approved a late reporting penalty amount of \$250 per day with respect to New Hampshire, provided that not less than \$750 per day in total is payable for all three states for any late-filed reports. We went on to state that

[i]n the event that either Maine or Vermont does not require a penalty of at least \$250 per day, such that the aggregate penalty for all three states would be less than \$750, then this penalty must be increased in New Hampshire so that the total dollars at risk to FairPoint from all three states is not less than \$750 per day for late filed reports.<sup>4</sup>

FairPoint claims that this language is ambiguous and raises a number of questions as to its interpretation and implementation. We believe that the language of the WPP Approval Order was sufficiently clear, but we will take this opportunity to address FairPoint’s questions and to clarify the intent of our determination.

Under the WPP Approval Order, the penalty for late reporting would only be greater than \$250 per day in New Hampshire if the other two states do not adopt a daily penalty amount of at least \$500 per day between them, regardless of whether such penalties were actually imposed in any particular case. The focus of our analysis is on the total amount of dollars *potentially* at risk

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<sup>4</sup> WPP Approval Order, at 23-24.

in the three states if a required report is provided late. If a report is not late in New Hampshire, then no penalty would be payable for New Hampshire. If a report is late in New Hampshire, but not in Maine or Vermont, and the total potential penalty dollars-at-risk are at least \$750 per day, then FairPoint would pay \$250 per day for New Hampshire. If the other states impose a higher daily penalty amount, such that the total late penalty dollars-at-risk are greater than \$750 in the aggregate for the three states, then the New Hampshire penalty would be \$250 per day when a report is late in New Hampshire. If, however, one state were to adopt a late reporting penalty of \$250 per day, but the other adopted a penalty of only \$100 per day, then the late reporting penalty amount applicable in New Hampshire would be \$400 per day. With these clarifications, we believe the Settling Parties should be able to develop language for inclusion in the WPP to implement our determination regarding this issue.

FairPoint raised two additional points regarding late reporting under the WPP, claiming that the WPP Approval Order did not address its proposals that (1) CLECs be required to provide notification of late reports within three days, and (2) late reporting penalties be tolled during *force majeure* events. We hereby clarify that, in connection with our decisions in the WPP Approval Order, we considered and rejected these two aspects of FairPoint's late reporting proposal. We believe that the three-day notification requirement would impose an unnecessary obligation on the CLECs, and that the effects of *force majeure* are adequately addressed in Section G.1.c of the WPP, an uncontested section that we approved in the WPP Approval Order.

Based on the foregoing, we deny reconsideration of the WPP Approval Order on the issues related to late reporting and related penalties.

## 2. Inaccurate Reporting Provisions

In the WPP Approval Order, we “adopt[ed] the Competitive Carriers’ proposal for inaccurate reporting penalties in order to assure the reported data is accurate, ... with two modifications.” *Id.* at 24. The modifications were (1) that FairPoint should incur no penalties if it identifies and corrects an inaccuracy within 30 days of issuance of the first report in which an inaccuracy appears, and (2) that bill credits should be reciprocal and may inure to FairPoint’s benefit if the inaccuracy is in its favor. In the Reconsideration Motion, FairPoint questioned whether the Commission intended to adopt all components of the Competitive Carriers’ proposal, with the two noted exceptions, or only those components related to the penalties for inaccurate reporting. The Competitive Carriers’ proposal also included additional specific audit provisions and imposition of the full amount of the WPP’s monthly dollars-at-risk under certain circumstances. If the Commission indeed intended to approve these other aspects of the Competitive Carriers’ proposal, FairPoint requested that the Commission reconsider and reverse that decision.

We clarify and affirm that we did intend to adopt all components of the Competitive Carriers’ proposal regarding inaccurate reporting<sup>5</sup> including the specific audit provisions and the following provision:

If FairPoint cannot revise a monthly report to correct a material error, due to an issue within FairPoint's control such as maintaining accurate source data, FairPoint will issue additional bill credits in an amount equal to one twelfth of the total annual dollars at risk (referenced in Section F) for the given State(s) less any bill credits initially paid for a previously filed monthly report.<sup>6</sup>

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<sup>5</sup> The inaccurate reporting penalties to be issued as bill credits directly to CLECs are equal to the greater of either (i) interest at the rate FairPoint charges CLECs for late payments under its wholesale tariffs, or (ii) 15% of the corrective credit amounts.

<sup>6</sup> Competitive Carriers’ Initial Brief dated November 8, 2013, at 20.

We have re-evaluated, however, our acceptance and approval of the quoted provision and believe that it may be excessively punitive under certain circumstances. We find that the record in this docket does not permit us to determine what an appropriate level of penalty would be for failures to correct monthly reports in the cited circumstances. We do, however, believe that a per measure penalty would be appropriate for this type of failure. We therefore grant reconsideration on this specific issue and will schedule a hearing at which FairPoint and the other Settling Parties may present evidence and argument regarding an appropriate penalty level for FairPoint's inability to revise a monthly report to correct a material error due to issues within FairPoint's control. We urge the Settling Parties to attempt to resolve this issue in advance of the hearing, and to submit potential alternative provisions to Commission Staff for consideration prior to the hearing.

Based on the foregoing, we deny reconsideration of the WPP Approval Order on the issues related to inaccurate reporting and related penalties, with the exception of the single issue we will set for hearing.

### 3. Commercial Contract Bill Credit Waivers

In the WPP Approval Order, we recognized that a vital component of an effective wholesale performance assurance plan, based on Federal Communications Commission (FCC) decisions and Commission precedent, is "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards."<sup>7</sup> We concluded it is critical that the WPP meet the FCC standard that FairPoint be exposed to such potential liability and that this exposure be actual and significant. *Id.* We therefore required that any WPP bill

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<sup>7</sup> WPP Approval Order, at 25-26 (citing *New England Telephone Operations LLC d/b/a FairPoint Communications NNE*, Order No. 25,221 (May 6, 2011)); see also *In the Matter of 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*, 15 FCC Rcd. 3953, 433 (1999).

credits waived by a CLEC through a commercial contract, or otherwise, be paid to the Telecommunications Planning and Development Fund established under RSA 12-A:45-a. *Id.*

As described above, in its Reconsideration Motion, FairPoint reiterated its claim that the Commission has no jurisdiction over its commercial agreements with CLECs for non-regulated services. The Competitive Carriers maintained that the Commission does not need to have general jurisdiction over FairPoint's commercial contracts in order to address the bill credit waiver effects, given the Commission's authority to oversee enforcement of the PAP and WPP. We believe the Competitive Carriers have the better argument.

It is unquestionable that the Commission has jurisdiction over the existing PAP and over the WPP as successor to the PAP. As FairPoint concedes, the parties have "yielded" jurisdiction to the Commission over FairPoint's performance assurance plans through a series of stipulations and agreements. Reconsideration Motion at 8. In 2002, the FCC found that Verizon's New Hampshire PAP, "together with [the FCC's] section 271(b)(6) authority and the continuing oversight of the ... state commission[ ], provide[s] reasonable assurance that the local market will remain open after 271 authority is granted."<sup>8</sup> In 2008, FairPoint's agreement to be subject to the PAP in effect as of the closing date, and its commitment to work cooperatively with CLECs and state regulatory authorities on a new PAP, were acknowledged and approved by the Commission in connection with FairPoint's acquisition of Verizon's New Hampshire landline business.<sup>9</sup> In 2010, in connection with FairPoint's bankruptcy reorganization, the Commission acknowledged and approved FairPoint's agreement that, "following the Effective Date of the

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<sup>8</sup> *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-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Order at ¶171 (September 25, 2002).

<sup>9</sup> *Verizon New England, Inc., et al.*, Order No. 24,823 (February 25, 2008), at 30-31.



Plan of Reorganization, FairPoint will comply with the 2008 Order and the 2008 Settlement Agreement, including the provisions regarding ... the Performance Assurance Plan (PAP) ....”<sup>10</sup>

The Commission, therefore, has jurisdiction over the PAP and the WPP as its successor, and an effective wholesale performance assurance plan must expose FairPoint to potential financial penalties that are meaningful, significant, and actual rather than theoretical. These criteria will not be met, and indeed will be undermined, if FairPoint is able to avoid financial penalty exposure through bill credit waivers required in separate commercial contracts. We do not need to have jurisdiction over such commercial contracts in order to meet this critical regulatory objective, and we did not exercise such jurisdiction over commercial contracts in the WPP Approval Order, nor do we do so in this Order. FairPoint has not demonstrated that this decision was unlawful or unreasonable.

FairPoint also argues that the Commission misconceived an important issue of fact in the WPP Approval Order because it did not recognize that FairPoint would remain exposed to the *full* \$4.75 million penalty cap in New Hampshire regardless of any bill credits that may revert to it pursuant to the commercial contract waivers. Our determination in the WPP Approval Order was not based upon such a misconception, although our analysis perhaps could have been more explicit. We will clarify here that our focus was and is on the *actual* penalty exposure faced by FairPoint, not on any tenuous, theoretical exposure. If bill credits that would have been issued to CLECs in the absence of the commercial contract waivers are never paid, then the deterrent effect of the WPP penalties would be substantially diluted and the penalties would be less effective, if not wholly ineffective. This unacceptable real-world outcome would result even if FairPoint’s hypothetical penalty exposure remained unaffected by the waivers. FairPoint’s

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<sup>10</sup> *FairPoint Communications, Inc.. et al.*, Order No. 25,129 (July 7, 2010), at 27.

penalty exposure must exist in reality and not merely on paper in order for the WPP to represent an effective performance assurance plan.

Both FairPoint and the Competitive Carriers have directed our attention to Section F of the WPP, which provides that the annual cap on bill credits “will encompass only those bill credits actually posted to CLEC BANS for missed performance (including escalators).”<sup>11</sup> In the Objection, the Competitive Carriers requested that the Commission prohibit bill credit waivers in FairPoint commercial contracts so that all bill credits would be issued to CLECs and counted towards the dollars-at-risk cap under Section F. FairPoint argued that if the Commission declines to reconsider the decision to require payments into the Telecommunications Planning and Development Fund, then it would be logical and fair that these payments be applied toward the cap on dollars-at-risk under Section F of the WPP.

We will not modify the WPP Approval Order as requested by the Competitive Carriers, both on policy grounds and because their request effectively represented a request for rehearing that was not made in a motion for rehearing filed within the 30-day period applicable under RSA 541:3. We clarify, however, that amounts paid into the Telecommunications Planning and Development Fund in lieu of waived bill credits should be counted toward the applicable cap on bill credit dollars-at-risk. We will require that Section F of the WPP be modified to provide for such credits against the applicable cap.

Based on the foregoing discussion, we deny reconsideration, with one exception, of the provisions of the WPP Approval Order regarding bill credit waivers contained in FairPoint’s commercial contracts and our requirement that an amount equal to any waived bill credits be paid by FairPoint into the Telecommunications Planning and Development Fund established under RSA 12-A:45-a. The sole exception is based on our reconsideration of Section F of the

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<sup>11</sup> WPP Section F at 13.

WPP. We require that this section be modified such that any amounts paid by FairPoint into the Telecommunications Planning and Development Fund will be counted towards the annual bill credit cap on dollars-at-risk.

In summary, in this Order we deny the Reconsideration Motion, except with respect to the following three issues: (1) we provide clarification regarding the imposition of the applicable daily penalty for late reporting in New Hampshire, (2) we grant reconsideration of and set for hearing the issue regarding the appropriate level of penalty for FairPoint's failure to correct inaccurate reports under certain circumstances, and (3) we grant reconsideration of and require revision of WPP Section F to provide that any amounts paid by FairPoint into the Telecommunications Planning and Development Fund will be counted towards the annual bill credit cap on dollars-at-risk.

#### 4. Motion to Alter Compliance Filing Deadline

In the Motion to Alter, FairPoint requested that the Commission modify the WPP Approval Order, pursuant to its authority under RSA 365:28, to require the Settling Parties to file the complete revised version of the WPP within 30 days of the last order issued with regard to the Maine and Vermont counterparts of the Joint Motion. We acknowledge the administrative convenience and efficiency that would result from such a deferral of the filing obligation. We believe, however, that FairPoint and the other Settling Parties should work to develop language for inclusion in the WPP that addresses the approvals and modifications we have directed in the WPP Approval Order and in this Order, and we do not wish to see this effort unduly delayed pending final action in the other two states.

We will therefore direct FairPoint and the other Settling Parties to develop specific language for inclusion in the WPP in order to effect the required modifications to the WPP and

to file this language for review by the Commission on or before the earlier of (1) 30 days following the entry of final orders by both the Maine Public Utilities Commission and the Vermont Public Service Board approving the WPP, or (2) 90 days following the date of the order issued following the evidentiary hearing scheduled by this Order.

**Based upon the foregoing, it is hereby**

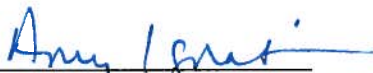
**ORDERED**, that FairPoint's Motion for Rehearing, Reconsideration or Clarification of Order No. 25,623 is granted in part and denied in part, as set forth in the body of this Order; and it is

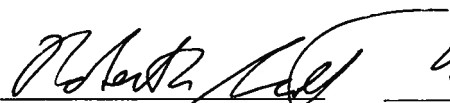
**FURTHER ORDERED**, that a hearing be held before the Commission located at 21 South Fruit Street, Suite 10, Concord, New Hampshire, on June 6, 2014, at 10:00 a.m., at which FairPoint and the other Settling Parties shall present evidence and argument with respect to an appropriate level of penalty for FairPoint's failure to revise any monthly performance report to correct a material error, due to an issue within its control such as maintaining accurate source data; and it is

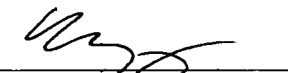
**FURTHER ORDERED**, that the Settling Parties shall file a revised version of the complete Wholesale Performance Plan, modified based on the conditions of Order No. 25,623, as further modified by this Order and by any subsequent order issued following the evidentiary hearing scheduled hereby, on or before the earlier of (1) 30 days following the entry of final orders by both the Maine Public Utilities Commission and the Vermont Public Service Board approving the WPP, or (2) 90 days following the date of the order issued following the evidentiary hearing scheduled by this Order; and it is

**FURTHER ORDERED**, that, subject to the modifications and clarifications set forth in this Order, the suspension of Order No. 25,623 is lifted.

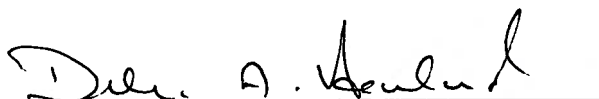
By order of the Public Utilities Commission of New Hampshire this sixth day of May,  
2014.

  
\_\_\_\_\_  
Amy L. Ignatius  
Chairman

  
\_\_\_\_\_  
Robert R. Scott  
Commissioner

  
\_\_\_\_\_  
Martin P. Honigberg  
Commissioner

Attested by:

  
\_\_\_\_\_  
Debra A. Howland  
Executive Director

## SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

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

Executive.Director@puc.nh.gov	jeremy@segtel.com
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aklein@kleinlawpllc.com	kath@segtel.com
amanda.noonan@puc.nh.gov	katherine.mudge@megapath.com
amorrison@fairpoint.com	leszek.stachow@puc.nh.gov
ashoer@apslaw.com	llackey@sover.net
bkarpinski@apslaw.com	megan.cobleigh@ottcommunications.com
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david.shulock@puc.nh.gov	sgeiger@orr-reno.com
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Docket #: 11-061-1 Printed: May 06, 2014

### FILING INSTRUCTIONS:

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